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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5239 **September Term, 2022**

1:16-cv-01767-RBW

Filed On: August 24, 2023

Barry Ahuruonye,

Appellant

v.

Department of Interior,

Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Walker, and Garcia, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia; the briefs filed by the parties; and appellant's supplement, errata, and notice. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, and appellant's motion to appoint counsel, it is

ORDERED that the motion to appoint counsel be denied. In civil cases, appellants are not entitled

to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED AND ADJUDGED that the district court's May 31, 2022, order granting summary judgment for appellee be affirmed. As to appellant's claims of discrimination and retaliation, appellee provided legitimate, non-discriminatory, and non-retaliatory reasons for its employment actions, and the district court did not err in concluding that appellant failed to produce sufficient evidence for a reasonable jury to find that those reasons were pretextual. See Hernandez v. Pritzker, 741 F.3d 129, 133 (D.C. Cir. 2013); Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 493-94 (D.C. Cir. 2008). To the extent that appellant argues that the district court's judgment was void as to his claim that appellee unlawfully denied him a pay increase in 2014, appellant conflates an unrelated pay increase he received in 2013 with the one at issue in this case. Appellant has also not demonstrated that he is entitled to relief from the district court's judgment due to fraud. See Smalls v. United States, 471 F.3d 186, 191 (D.C. Cir. 2006).

In addition, to the extent appellant raises additional arguments in a supplement to his brief, the court will not consider those arguments because appellant was already denied leave to exceed the page limit for his brief, see Ahuruonye v. DOI, No. 22-5239, unpublished order (D.C. Cir. Dec. 27, 2022), and he has forfeited those arguments by failing to sufficiently

develop them in his opening brief, see, e.g., Al-Tamimi v. Adelson, 916 F.3d 1, 6 (D.C. Cir. 2019).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY AHURUONYE, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, Defendant.	Civil Action No. 16-1767 (RBW)

MEMORANDUM OPINION

(Filed May 31, 2022)

The plaintiff, pro se, brings this civil action against the defendant, the United States Department of the Interior (the "Department"), seeking judicial review of various administrative decisions regarding his employment. On May 1, 2018, the Court issued a Memorandum Opinion ("Mem. Op.") and accompanying Order, which narrowed the plaintiff's claims that remain alive to the following:

> the plaintiff's claim for judicial review of the [United States Merit Systems Protection Board's ("MSPB")] final decisions on his mixed case appeals involving [(1)] the issuance of an allegedly unlawful letter of reprimand in July 2014, [(2)] a within-grade increase denial in 2014, [(3)] unfavorable performance reviews, [(4)] an unlawful pre-termination suspension

> in March 2015, and [(5)] his unlawful termination in April 2015.

Mem. Op. at 33 (May 1, 2018), ECF No. 54; see Order at 1 (May 1, 2018), ECF No. 53; see generally Consolidated Complaints: Case No. 16-cv-1767; Case No. 16-cv-2028; Case No. 17-cv-284 ("Compl."), ECF No. 30. Currently pending before the Court is the Plaintiff's Renewed Motion for Summary Judgment ("Pl.'s Mot."), ECF No. 111, and the Defendant's Cross Motion for Summary Judgment and Opposition to the Plaintiff's Motion for Summary Judgment on All Claims ("Def.'s Mot."), ECF No. 114. Upon consideration of the parties' submissions,[1] the Court concludes for the following reasons that it must grant the Department's motion for summary judgment and deny the plaintiff's motion for summary judgment as to all five of the plaintiff's claims.

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[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the Defendant's Memorandum of Law in Support of its Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Mem."), ECF No. 114-1; (2) the Defendant's Statement of Material Facts ("Def.'s Facts"), ECF No. 114-2; (3) the Plaintiff's Combined Memorandum of Points and Authorities in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Opp'n"), ECF No. 116; and (4) the refiled Plaintiff's Combined Memorandum of Points and Authorities in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment, ECF No. 117.

I. BACKGROUND

A. Factual History

The plaintiff identifies himself as an African American male of Nigerian national origin, Pl.'s Mot. at 7, who in December 2011, was "appointed to a [General Schedule (']GS[')]-12 Grants Management Specialist position" in the United States Fish and Wildlife Service, an agency within the Department, until his termination in April 2015. Id. at 21; see Def.'s Facts ¶ 2; see also Ahuruonye v. Dep't of the Interior, No. DC-1221-15-1012-W-1, 2016 WL 526740, at *2 (M.S.P.B. Feb. 5, 2016). Throughout the course of his employment, the plaintiff filed several complaints with the Department of Interior Office of the Inspector General ("DOIOIG"), the Office of Special Counsel ("OSC"), and his supervisors, "alleg[ing] that his first-line supervisor, Penny Bartnicki, [engaged in] illegal grant awards" related to the Mississippi River Delta Management Strategic Planning Grant. Pl.'s Mot. at 22; see Def.'s Facts ¶ 10. During his employment, the Department took several personnel actions against the plaintiff, including issuing him a "letter of reprimand[,]" denying him "a within-grade increase[,]" issuing him "unfavorable performance reviews[,]" allegedly placing him on a "pre-termination suspension[,]" and "terminati[ng]" him from his employment. Pl.'s Opp'n at 2; see Def.'s Facts at 2-6.

On July 17, 2014, the plaintiff's then-supervisor, Ms. Bartnicki, issued him a letter of reprimand for "Failure to Follow Procedures and Failure to Follow

Supervisory Instructions." Def.'s Mot., Exhibit ("Ex.") 1 (Letter of Reprimand for Failure to Follow Procedures and Failure to Follow Supervisory Instructions (July 17, 2014) ("Letter of Reprimand")) at 1; see Pl.'s Mot. at 10. In the letter, Ms. Bartnicki stated that the plaintiff "did not follow [her] instructions and [] did not meet the July 16, 2014, 12:00 p.m. deadline to complete [all grant reviews and the filing of records.]" Def.'s Mot., Ex. 1 (Letter of Reprimand) at 1. Further, Ms. Bartnicki stated that in five separate emails, from April 15, 2014, to July 16, 2014, she reminded her staff, including the plaintiff, that "all filing must be completed and [] returned" by the July 16, 2014 deadline and emphasized that "these are not suggestions[;] . . . [t]hese are instructions that you must follow." Id., Ex. 1 (Letter of Reprimand) at 1; id., Ex. 1 (Letter of Reprimand) Attachments ("Atts.") at 5.[2] Ms. Bartnicki's letter concluded by cautioning the plaintiff "that any future misconduct of this nature or other misconduct may result in more severe disciplinary action, including removal from [his] position." Id., Ex. 1 (Letter of Reprimand) Atts. at 3.

In December 2014, pursuant to 5 U.S.C. § 5335(a)(1), the plaintiff was scheduled to receive a within-grade increase ("WIGI"). Pl.'s Mem. at 4; see Def.'s Facts ¶ 12; see also Ahuruonye, 2016 WL 526740, at *4. On May

[2] The seven attachments to Exhibit 1 of the Department's motion do not contain page numbers. Accordingly, for ease of reference, the Court will use the automatically generated page numbers assigned by the Court's ECF system when referring to material within all of the attachments to Exhibit 1.

23, 2014, "[the Department] informed [the plaintiff] of its decision to deny his WIGI[.]" Ahuruonye, 2016 WL 526740, at *4. According to the plaintiff, his "WIGI denial was due to his [unsatisfactory fiscal year (']FY[')] 2013 performance evaluation[.]" Pl.'s Mot. at 26. In 2016, an Administrative Law Judge at the MSPB found that the Department's decision to deny the plaintiff's WIGI was proper and "based on the fact that the [Department] demonstrated that the [plaintiff] was not performing at an acceptable level of competency" under 5 U.S.C. § 5335(a). Ahuruonye, 2016 WL 526740, at *4; see Def.'s Facts ¶ 12.

The plaintiff received and refused to sign the notification of standards for his FY 2014 employee performance appraisal plan ("EPAP"), which detailed the critical elements and performance standards for his position. See Def.'s Mot., Ex. 2 (FY2014 Performance Appraisal) at 1, 18; see also Def.'s Facts ¶¶ 15-17. "Critical elements . . . [are elements that an employee's supervisor] establishe[s] for each employee at the start of the performance year[,]" which hold employees "accountable for work assignments and responsibilities of their position." Def.'s Mot., Ex. 2 (FY2014 Performance Appraisal) at 2. For each critical element, an employee receives one of the following rating levels: Exceptional, Superior, Fully Successful, Minimally Successful, or Unsatisfactory. Id., Ex. 2 (FY2014 Performance Appraisal) at 2. "Performance standards are expressions of the performance threshold[s], requirement[s], or expectation[s] that must be met for each element at a

particular level of performance." Id., Ex. 2 (FY2014 Performance Appraisal) at 2.

On November 28, 2014, the plaintiff received his summary rating for his 2014 EPAP, and the review specified that the plaintiff received an "Unsatisfactory" rating in all three critical elements on which he was evaluated. Id., Ex. 2 (FY2014 Performance Appraisal) at 2; see also Def.'s Facts ¶ 17. In the summary rating, Ms. Bartnicki extensively outlined the plaintiff's performance failures and detailed why he received an "Unsatisfactory" rating for Critical Element #1, Critical Element #2, and Critical Element #3. Def.'s Mot., Ex. 2 (FY2014 Performance Appraisal) at 5, 8, 12. For Critical Element #1, Ms. Bartnicki stated that the plaintiff "routinely had reoccurring inaccuracies in award letters . . . and general grant review[;]" made errors in "start dates, effective dates and reporting periods, errors calculating total grant funding . . . and errors in applying appropriate conditional statements[;]" "failed to follow the [Coastal Impact Assistance Program] Standard Operating Procedures Manual[,]" despite repeated instruction to follow program procedures and policies; and "during the performance period[,] routinely failed to upload signed grant award letters." Id., Ex. 2 (FY2014 Performance Appraisal) at 2. For Critical Element #2, Ms. Bartnicki stated that the plaintiff "failed to seek additional information [for grant review under F12AF00597,]" failed to adequately review grant number F12AF70150, and made a critical error during his review of grant number F12AF70099. Id., Ex. 2 (FY2014 Performance

Appraisal) at 8. For Critical Element #3, Ms. Bartnicki stated that "[the plaintiff] has repeatedly failed to follow written and verbal instructions regarding the uploading of documents[;] "required repeated reminders to scan signed award letters and signed grant checklists into the appropriate electronic grant file of record[;] "routinely fail[ed] to follow written instructions to remedy deficiencies by specific deadlines[;] and "[failed to] consistently respond to emails in a timely fashion." Id., Ex. 2 (FY2014 Performance Appraisal) at 12.

Following the plaintiff's 2014 "Unsatisfactory" performance ratings, on January 12, 2015, Ms. Bartnicki issued the plaintiff a "60-day Performance Improvement Plan" ("PIP"), which provided the plaintiff with an "explanation of [his] Unsatisfactory performance and [] outline[d] the steps that [he] needed to take during the 60-day PIP period to raise [his] performance to at least Minimally Successful[.]" Plaintiff's Memorandum in Opposition to the Defendant's Motion to Dismiss for Lack of Jurisdiction ("Pl.'s Mot. to Dismiss Opp'n"), ECF No. 91, Ex. 1 (Proposed Removal—Unsatisfactory Performance (March 26, 2015) ("Proposed Removal")) at 42-47; see Def.'s Facts ¶ 18. Further, the PIP provided the plaintiff with "five specific assignments related to [his] critical elements[,]" which were designed to improve his performance to a minimally successful level. Pl.'s Mot. to Dismiss Opp'n, Ex. 1 (Proposed Removal) at 42; see Def.'s Facts ¶ 18.

On March 26, 2015, several weeks after the 60-day PIP period expired, Ms. Bartnicki issued a Notice of

Proposed Removal to the plaintiff informing him that she was proposing his removal from his position as a "Grants Management Specialist" for "failure to perform the duties of [his] job at an acceptable level of performance." Pl.'s Mot. to Dismiss Opp'n, Ex. 1 (Proposed Removal) at 42-47; see Def.'s Facts ¶ 19. Specifically, Ms. Bartnicki stated that the plaintiff "failed to complete the assigned tasks in [his] January 12, 2015 [PIP] at the minimally successfully level" and failed to "attend a single [required] scheduled meeting [with his supervisor] during the PIP period." Pl.'s Mot. to Dismiss Opp'n, Ex. 1 (Proposed Removal) at 42-47. The Department asserts that the plaintiff was given the opportunity to respond to the proposed removal but failed to respond. Def.'s Mot., Ex. 3 (Decision on Proposed Removal (April 25, 2015) ("Decision to Remove")) at 1. Shortly after the plaintiff received notice of his proposed removal, Ms. Bartnicki stated that she placed him on administrative leave "[p]ursuant to the recommendation of [the] Employee Relation's Specialist, Marion Campbell[.]" Pl.'s Mot. to Dismiss Opp'n, Ex. 1 (Declaration of Penny L. Bartnicki ("Bartnicki Decl.")) at 130. On April 24, 2015, Thomas Busiahn, the Department Chief of the Division of Policy & Programs, issued the decision "to remove [the plaintiff] from [his] position[.]" See Def.'s Mot., Ex. 3 (Decision to Remove) at 1. In the decision, Mr. Busiahn concluded that the plaintiff's removal was warranted because he "failed to bring his performance up to at least the Minimally Successful level [of performance] during the course of the [January 12, 2015] PIP." Id.

B. Administrative History

Following his termination, the plaintiff "filed dozens of complaints and appeals [with] the [OSC], [the] Equal Employment Opportunity Commi[ssion] [('EEOC')], and the [MSPB,]" Pl.'s Mot. at 21-22, alleging that during his employment, the Department repeatedly discriminated against him on the basis of his "[r]ace and [n]ational origin" and "retaliated against him [for] engag[ing] in whistleblowing [and EEO] activity." Id. at 5-6; see generally Def.'s Facts. Specifically, the plaintiff claims that (1) he was issued an "[u]nlawful [l]etter of [r]eprimand" in July 2014, which "[c]ontain[ed] [f]alse and [m]alicious [a]cussations[,]" Pl.'s Mot. at 42; (2) the Department "improperly denied him a [within-grade increase] that he was due to receive in December 2014" because of his race and national origin and as "retaliation for [the plaintiff] filing an EEO complaint[,]" Pl.'s Mem. at 2; (3) the Department issued him "an unsatisfactory performance rating on November 28, 2014" in "retaliation for [the plaintiff] engaging in protected [EEO and whistleblower] activity[,]" id. at 3; (4) "[he] was unlawfully placed on 30 days pre-termination [] suspension from [March 27, 2015] to [April 26, 2015,]" id. at 26; and (5) he was "unlawful[ly] terminated [from employment] in April 2015[,]" id. at 2.

When addressing the plaintiff's claims in its 2016 decision, the MSPB Administrative Law Judge concluded that: (1) "[t]he [Department] established by clear and convincing evidence that it would have issued the [plaintiff] a letter of reprimand [regardless of

his protected activity,]" Ahuruonye, 2016 WL 526740, at *12; (2) "the [Department] properly denied the [plaintiff] a [within-grade increase] [because] of his [unfavorable] 2014 performance review[s,]" id. at *3; (3) "the [Department] established by substantial evidence that [the plaintiff's unsatisfactory] performance standards [were] valid[,]" id. at *6; (4) "the [Department] established by clear and convincing evidence that it would have placed the [plaintiff] on leave restriction [regardless of his protected activity,]" id. at *14; and (5) "[the plaintiff's] proposed removal [and eventual removal] was [valid and] based on [] [his] poor performance[,] his inability to complete [his] assigned tasks[, and his] fail[ure] to properly complete . . . the PIP requirements[,]" id. at *13.

C. Procedural History

On January 12, 2021, the Court, in accordance with the parties' requests, issued a summary judgment briefing schedule, which required, inter alia, that the plaintiff file his motion for summary judgment on or before January 19, 2021, and that the Department file its combined opposition to the plaintiff's motion for summary judgment and cross-motion for summary judgment on or before February 17, 2021. Order at 1-2 (Jan. 12, 2021), ECF No. 107. On January 19, 2021, the plaintiff timely filed his motion for summary judgment, which the Court denied without prejudice because it was not in compliance with Local Civil Rule

7(e).[3] Order at 1-2 (Jan. 29, 2021), ECF No. 110. On January 29, 2021, the Court ordered the plaintiff to file his renewed motion for summary judgment on or before February 12, 2021, and further ordered the Department to file its combined opposition to the plaintiff's renewed motion for summary judgment and cross-motion for summary judgment on or before March 12, 2021. Id. The plaintiff filed his renewed motion for summary judgment on February 7, 2021, see Pl.'s Mot., the Department filed its cross-motion for summary judgment and memorandum in opposition to the plaintiff's motion for summary judgment on February 11, 2021, see Def.'s Mot., and the plaintiff filed his memorandum in opposition to the Department's motion for summary judgment on February 19, 2021, see Pl.'s Opp'n. The parties' summary judgment motions are the subject of this memorandum opinion.

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[3] As the Court explained:

> the plaintiff's [original] motion, not including attached exhibits, is 251 pages long. Under the local rules of this Court, "[a] memorandum of points and authorities in support of or in opposition to a motion shall not exceed 45 pages . . . without prior approval of the Court." LCvR 7(e). The plaintiff did not receive, nor move for, approval to file an expanded summary judgment motion. Although "the Court construes [the plaintiff's] papers liberally and holds [him] to less stringent pleading standards than those applied to lawyers, [his] pro se status does not relieve [him] of [his] obligation to comply with the Federal Rules of Civil Procedure and the local rules of this Court." Slovinec v. Am. Univ., 520 F. Supp. 2d 107, 111 (D.D.C. 2007).

Order at 1 (Jan. 29, 2021), ECF No. 110 (first alteration added).

II. STANDARD OF REVIEW

The Court must grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Steele v. Schafer, 535 F.3d 689, 692 (D.C. Cir. 2008) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. See Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006) (citing Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000)). The Court must therefore draw "all justifiable inferences" in the non-moving party's favor and accept the non-moving party's evidence as true. Anderson, 477 U.S. at 255. The non-moving party, however, cannot rely on "mere allegations or denials," Burke v. Gould, 286 F.3d 513, 517 (D.C. Cir. 2002) (quoting Anderson, 477 U.S. at 248), but must instead present specific facts "such that a reasonable [factfinder] could return a verdict for the non[-]moving party[,]" Grosdidier v. Broad. Bd. of Governors, Chairman, 709 F.3d 19, 23 (D.C. Cir. 2013) (quoting Anderson, 477 U.S. at 248). Thus, "[c]onclusory allegations unsupported by factual data will not create a triable issue of fact." Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin., 185 F.3d 898, 908 (D.C. Cir. 1999)

(Garland, J., concurring) (alteration in original) (quoting Exxon Corp. v. Fed. Trade Comm'n, 663 F.2d 120, 127 (D.C. Cir. 1980)). If the Court concludes that "the non[-]moving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then the moving party is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thus, when "ruling on cross-motions for summary judgment, the [C]ourt shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." Shays v. Fed. Election Comm'n, 424 F. Supp. 2d 100, 109 (D.D.C. 2006).

In applying the above framework, the Court is mindful of the fact that the plaintiff is proceeding in this matter pro se. This appreciation is required because the pleadings of pro se parties are "to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted). Furthermore, all factual allegations by a pro se litigant, whether contained in the complaint or other filings in the matter, should be read together in considering whether to grant a dispositive motion. See Richardson v. United States, 193 F.3d 545, 548 (D.C. Cir. 1999). Nonetheless, "when faced with a motion for summary judgment," a pro se litigant "must comply with the Federal Rules of Civil Procedure and this Court's local rules . . . regarding responding to

statements of material fact and marshalling record evidence that establishes each element of his claim for relief[.]" Hedrick v. Fed. Bureau of Investigation, 216 F. Supp. 3d 84, 93 (D.D.C. 2016) (citations omitted); see McNeil v. United States, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.").

III. ANALYSIS

The plaintiff argues that he is entitled to summary judgment because the undisputed facts "[m]ake [c]lear [t]hat the [Department] discriminated and retaliated against the [him.]" Pl.'s Mem. at 31. In response, the Department opposes the plaintiff's motion and argues that it is entitled to summary judgment because the undisputed facts do not "prove that [the plaintiff] was subjected to discrimination . . . and retaliation." Def.'s Mot. at 1. More specifically, the Department asserts that the "[p]laintiff cannot overcome the [Department's] legitimate and non-discriminatory reasons for its employment decisions related to him." Id.

As noted above, the claims the Court must now evaluate are as follows: judicial review of the MSPB's final decisions on the plaintiff's mixed case appeals involving allegations of retaliation and discrimination in the issuance of an allegedly unlawful letter of reprimand in July 2014, a WIGI in 2014, unfavorable

performance reviews, an unlawful pre-termination suspension in March 2015, and the plaintiff's unlawful termination in April 2015. See Mem. Op. at 33 (May 1, 2018), ECF No. 54. In undertaking this task, the Court "must take into account the entire administrative record and review [the MSPB final decisions] de novo." Parker v. Hartogensis, Civil Action No. 17-520 (EGS/DAR), 2020 WL 10936270, at *6 (D.D.C. Mar. 23, 2020) (citing White v. Tapella, 876 F. Supp. 2d 58, 64 (D.D.C. 2012)), report and recommendation adopted, 2021 WL 3931878 (D.D.C. Sept. 2, 2021). Accordingly, the Court will first review the standards pertinent to its mixed-case discrimination and retaliation analysis before applying those standards to each of the plaintiff's remaining claims

A. Mixed-Case Standards

1. Discrimination

The Court will first recount the standards pertinent to the discrimination aspect of the Court's analysis of the plaintiffs' remaining mixed-case claims. "Title VII 'provides the exclusive judicial remedy for claims of discrimination in federal employment.'" Kittner v. Gates, 708 F.Supp.2d 47, 52 (D.D.C. 2010) (quoting Brown v. Gen. Servs. Admin., 425 U.S. 820, 834 (1976)); see also Brown, 425 U.S. at 834 (dismissing a plaintiff's claim under the Declaratory Judgment Act given the exclusive judicial remedy provided by Title VII for discrimination claims arising in federal employment). Under Title VII, it is an "unlawful

employment practice for an employer[, including the federal government,] . . . to discriminate against any [employee] with respect to [his] compensation, terms, conditions, or privileges of employment, because of [his] race, color, religion, sex, or national origin." 42 U.S.C. § 200e-2(a)(1). Title VII also requires that "[a]ll personnel actions affecting employees or applicants for employment" in the federal government "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Id. § 2000e-16(a). Although these two Title VII provisions differ in their precise language, the District of Columbia Circuit has held that "the two contain identical prohibitions." Czekalski v. Peters, 475 F.3d 360, 363 (D.C. Cir. 2007).

When a plaintiff brings discrimination claims under Title VII and relies on circumstantial evidence to establish an alleged unlawful employment action, as the plaintiff does here, see generally Pl.'s Mot., the Court analyzes the claims under the three-part burden-shifting framework of McDonnell Douglas Corp. v. Green. See Jackson v. Gonzalez, 496 F.3d 703, 706 (D.C. Cir. 2007) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)); Chappell-Johnson v. Powell, 440 F.3d 484, 487 (D.C. Cir. 2006) (noting that "the Supreme Court sets out a burden-shifting approach [in McDonnell Douglas] to employment discrimination claims in cases where the plaintiff lacks direct evidence of discrimination"). Under the McDonnell Douglas framework, the plaintiff bears the initial burden of establishing his prima facie case of discrimination. 411 U.S. at 802; see Walker v. Johnson, 798 F.3d 1085, 1091

(D.C. Cir. 2015); see also Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). To state a prima facie case of discrimination, the plaintiff must establish "that (1) he is a member of the protected class, (2) he suffered an adverse employment action, and (3) the unfavorable [adverse] action gives rise to an inference of discrimination (that is, an inference that his employer took the action because of his membership in the protected class.)" Forkkio v. Powell, 306 F.3d 1127, 1130 (D.C. Cir. 2002) (citing Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999)); see also Carroll v. England, 321 F. Supp. 2d 58, 68 (D.D.C. 2004). Once a prima facie case is established, then "[t]he burden . . . must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802; Walker, 798 F.3d at 1092; Holcomb, 433 F.3d at 896. If the employer offers a legitimate, nondiscriminatory justification for its action, the burden shifts back to the plaintiff to prove that the proffered reason was a "pretext for discrimination," McDonnell Douglas, 411 U.S. at 805, and produce "sufficient evidence for a reasonable jury to find that the employer's asserted nondiscriminatory [] reasons was not the actual reason and that the employer intentionally discriminated [] against the employee[,]" Walker, 798 F.3d at 1092 (internal quotation marks omitted).

To demonstrate that the employer's proffered reason was pretextual, the plaintiff must provide evidence from which a reasonable jury could find that the employer's reasons for acting are "unworthy of credence." Reeves, 530 U.S. at 143 (quoting Tex. Dep't of Cmty.

Affairs v. Burdine, 450 U.S. 248, 256 (1981); see Hairston v. Vance-Cooks, 733 F.3d 266, 272 (D.C. Cir. 2014) (noting that showing pretext "requires more than simply criticizing the employer's decision[-]making process"). Further, it is not sufficient for the plaintiff to "show that a reason given for a[n] action [was] not just, or fair, or sensible;" nor is it sufficient to challenge "the 'correctness or desirability' of [the] reasons offered." Fischbach v. D.C. Dep't of Corrs., 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quoting Pignato v. American Trans Air, Inc., 14 F.3d 342, 349 (7th Cir. 1994)). Rather, the plaintiff must provide evidence from which "a reasonable jury could infer that the employee's given explanation was pretextual and that this pretext shielded discriminatory motives." Jackson, 496 F.3d at 707 (citations omitted).

However, this Circuit has further clarified that in Title VII employment discrimination cases,

> where the defendant proffers legitimate, non-discriminatory reasons for the challenged action, the court need not conduct the threshold inquiry into whether the plaintiff established a [prima facie] case of discrimination[; i]nstead, the court is required to analyze whether the defendant's asserted reason is in fact a legitimate, non-discriminatory explanation or whether it is simply a pretext for discrimination.

Furley v. Mnuchin, 334 F. Supp. 2d 148, 161 (D.D.C. 2018) (citing Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) ("Lest there be any lingering

uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case under McDonnell Douglas.") (emphasis in original).

Although an employee need not have necessarily established a prima facie case of discrimination where the employer has provided a legitimate non-discriminatory reason for the alleged discriminatory action, the employee must still demonstrate that he suffered an adverse employment action. See Brady, 520 F.3d at 493. Under Title VII's anti-discrimination provision, an "adverse employment action [is an action that causes] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." Douglas v. Donovan, 559 F.3d 549, 552 (D.C. Cir. 2009) (citations omitted); see also Forkkio, 306 F.3d at 1130 (noting that Title VII's anti-discrimination provision protects individuals only from employment-related discrimination). Further, a plaintiff has suffered an adverse employment action if he experiences "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." Forkkio, 306 F.3d at 1131 (citing Brown, 199 F.3d at 457).

2. Retaliation

Having explained the pertinent discrimination standards, the Court will now recount the standards pertinent to the retaliation aspect of the Court's analysis of the plaintiffs' remaining mixed-case claims. The plaintiff has argued that he has was subjected to "retaliation for whistleblowing and [EEO] activity." E.g. Ahuruonye v. U.S. Dep't of Interior, No. DC-0432-15-0649-I-2, 2016 WL 7335421 (M.S.P.B. Dec. 7, 2016). "Like claims of discrimination, claims of retaliation are governed by the McDonnell Douglas burden-shifting scheme." Carney v. Am. Univ., 151 F.3d 1090, 1094 (D.C.Cir.1998) (citing McKenna v. Weinberger, 729 F.2d 783, 790 (D.C.Cir.1984)). Indeed, Title VII includes a retaliation provision that makes it unlawful for an employer to retaliate against any employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). Thus, similar to Title VII discrimination claims, retaliation claims brought pursuant to Title VII that are based on circumstantial evidence trigger the McDonnell Douglas burden-shifting framework. 411 U.S. at 802-05; see Walker, 798 F.3d 1085, 1091 (D.C. Cir. 2015); see also Holcomb, 433 F.3d at 895. Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of retaliation by showing "(1) that he engaged in [a] statutorily protected activity . . . ; (2) that he suffered a materially adverse action by his

employer; and (3) that a causal link connects the [protected activity and the materially adverse action]." Jones v. Bernanke, 557 F.3d 670, 677 (D.C. Cir. 2009); see also Hamilton v. Geithner, 666 F.3d 1344, 1357 (D.C. Cir. 2012). "Temporal proximity between an employer's knowledge of protected activity and an adverse personnel action may alone be sufficient to raise an inference of causation." Harris v. Dist. of Columbia Water & Sewer Auth., 791 F.3d 65, 69 (D.C. Cir. 2015). Once a prima facie case is established, the burden then shifts to the employer, who must articulate some legitimate and non-retaliatory reason for its actions. Jones, 557 F.3d at 677. If the employer meets its burden, the plaintiff must then prove that the proffered reason was a pretext for retaliation and must produce "sufficient evidence for a reasonable jury to find that the employer's asserted [] non-retaliatory reasons was not the actual reason and that the employer intentionally [] retaliated against the employee." Walker, 798 F.3d at 1092 (internal quotation marks omitted). This analysis applies both in the contexts of whistleblowing reprisal,[4] see Miller v. U.S. Dep't of Just., 842 F.3d 1252,

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[4] As the Federal Circuit has explained:

> The burden lies with the employee to show by a preponderance of the evidence that he or she made a protected disclosure that was a contributing factor to the employee's personnel action. If the employee establishes this prima facie case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure, which we sometimes refer to as a showing of independent causation.

1257 (Fed. Cir. 2016) ("[A]ppeals brought under the [Whistleblower Protection Act (']WPA[')] operate in a burden-shifting framework."), and EEO reprisal, see Youssef v. Holder, 19 F. Supp. 3d 167, 198 (D.D.C. 2014) (applying the McDonnell Douglas framework in assessing a federal agency's alleged retaliation for the filing of an EEO complaint).

Since the Department has provided legitimate, non-retaliatory reasons for taking the challenged personnel actions against the plaintiff—that is, the plaintiff's poor work performance—the Court need not conduct the threshold inquiry into whether the plaintiff established a prima facie case of retaliation, and instead must evaluate whether the plaintiff has produced sufficient evidence to enable a reasonably jury to find that the Department's asserted reasons were not the actual reasons for the adverse actions, but rather, a pretext for retaliation. See Brady, 520 F.3d at 494 ("Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a

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Miller, 842 F.3d at 1257 (cleaned up). Furthermore, the government's rebuttal must be evaluated by considering

> [1] the strength of the agency's evidence in support of its personnel action; [2] the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and [3] any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1323 (Fed. Cir. 1999).

legitimate, non-discriminatory reason for the decision, the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case under McDonnell Douglas.") (emphasis omitted).

As with Title VII discrimination allegations, although an employee need not have necessarily established a prima facie case of retaliation where the employer has provided a legitimate non-retaliatory reason for the alleged retaliatory action, the plaintiff must still demonstrate that he suffered an adverse employment action. See Brady, 520 F.3d at 493. Under Title VII's anti-retaliation provision, "adverse actions" are those that "produce an injury or harm" that is material, meaning that the action could "have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (quoting Rochon v. Gonzalez, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (other citation omitted); see also Forkkio, 306 F.3d at 1130 (noting that Title VII's anti-retaliation provision encompasses broader actions than Title VII's anti-discrimination provision and does not require the action to be employment-related).

B. The Plaintiff's Remaining Claims

As previously noted, the plaintiff's claims have been narrowed to the following events, which the Court will analyze in turn:

> the plaintiff's claim for judicial review of the [United States Merit Systems Protection

> Board's ("MSPB")] final decisions on his mixed case appeals involving [(1)] the issuance of an allegedly unlawful letter of reprimand in July 2014, [(2)] a within-grade increase denial in 2014, [(3)] unfavorable performance reviews, [(4)] an unlawful pre-termination suspension in March 2015, and [(5)] his unlawful termination in April 2015.

Mem. Op. at 33 (May 1, 2018), ECF No. 54; see Order at 1 (May 1, 2018), ECF No. 53.

1. July 2014 Letter of Reprimand

Regarding the plaintiff's first remaining claim, he argues that he was issued an "[a]busive and [u]nlawful [l]etter of reprimand [that contained] [f]alse and [m]alicious [a]ccusations[.]" Pl.'s Mot. at 42. The Department responds that it "provided numerous compelling lawful reasons for why the [letter] was issued to the [p]laintiff." Def.'s Mem. at 11.

Here, the plaintiff attempts to demonstrate that, in receiving the July 17, 2014 letter of reprimand, he suffered an adverse employment action, simply claiming that, in this letter, Ms. Bartnicki "falsely accused [him] of [] 200 d[a]ys inaction on [a grant]" and the retaliation consisted of Ms. Bartnicki including this allegedly false information in his personnel file. Pl.'s Mot. at 42. Thus, the plaintiff poses the proposition that "placing false information in [an] employee's personnel file may form the basis for a retaliation claim." Id.; see Mays v. New York City Police Dep't, 701 F. Supp. 80, 83-84 (S.D.N.Y. 1988)). However, there is

no evidence in the record that the letter of reprimand "affect[ed] the terms, conditions, or privileges of [the plaintiff's] employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." Forkkio, 306 F.3d at 1131 (citation omitted). Indeed, "even assuming that [information placed] in the file was false," the plaintiff does not provide "evidence [to establish] that [the information] was placed [in his personnel file] in retaliation for the [his] conduct." Mays, 701 F. Supp. at 84 (concluding that the plaintiff had "not shown that the material [placed] in [his] file even arguably could have been placed there in retaliation for [his previous] filing.").

Regardless, the Court agrees with the Department that "[a]n analysis of whether [the] [p]laintiff engaged in protected activity is unnecessary [because] the [d]efendant has provided numerous compelling lawful reasons for why the [letter of reprimand] was issued to the plaintiff." Def.'s Mem. at 11; see Brady, 520 F.3d at 494 ("In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory [or non-retaliatory] reason for the decision, the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case under McDonnell Douglas."). Specifically, the Department has presented evidence from which it can be readily concluded that the plaintiff was issued a letter of reprimand due to his repeated failure to follow his supervisor's instructions. See Def.'s Mot., Ex. 1

(Letter of Reprimand) Atts. at 4-18; see also Def.'s Mot., Ex. 1 (Letter of Reprimand) at 1-3. The Department correctly alleges that it can prove the charge of "failure to follow instructions" by establishing that (1) the plaintiff was given proper instructions and (2) failed to follow them, without regard to whether the failure was intentional or unintentional. Hamilton v. U.S. Postal Serv., No. PH-0752-95-0406-I-1, 1996 WL 593834, at *556 (M.S.P.B. Oct. 10, 1996); see Def.'s Mem. at 11.

Here, the Department established that the plaintiff was given "proper instructions" on what was expected of him on several occasions. Hamilton, 1996 WL 593834, at *556. First, on April 15, 2014, Ms. Bartnicki emailed the plaintiff "a set of instructions of how to manage files, including their storage and physical location. . . ." Def.'s Mot., Ex. 1 (Letter of Reprimand) Atts. at 4-5; see also id., Ex. 1 (Letter of Reprimand) at 1. In her email, Ms. Bartnicki explicitly stated that "these are not suggestions[; t]hese are instructions that you must follow." Id., Ex. 1 (Letter of Reprimand) Atts. at 5. Second, on May 1, 2014, Ms. Bartnicki sent the plaintiff an email reiterating her previous April 15, 2014 email. Id., Ex. 1 (Letter of Reprimand) Atts. at 6-7. Third, on July 10, 2014, Ms. Bartnicki sent the plaintiff another email reiterating that "all grant review and filing must be completed and the files return[ed] . . . by noon . . . [on] July 16, 2014." Id., Ex. 1 (Letter of Reprimand) Atts. at 12. Fourth, on July 16, 2014, Ms. Bartnicki sent an email to the plaintiff stating that "today is the day to wrap up grant processing/close-out and [return] all grant files . . . by noon." Id. at 13. Thus,

the Department has shown that it issued the plaintiff proper instructions of what was expected of him. Further, the Department established that the plaintiff "failed to follow the instructions" because he did not meet the required July 16, 2014 deadline, which then led to the issuance of the plaintiff's letter of reprimand on July 17, 2014. Def.'s Mem. at 12. Therefore, the Department has met its burden of establishing non-retaliatory and non-discriminatory reasons for issuing the plaintiff a letter of reprimand: his failure to follow his supervisor's instructions.

These proffered reasons shift the burden back to the plaintiff to demonstrate that the Department's asserted reasons are pretextual. See McDonnel Douglas, 411 U.S. at 805 (establishing that if the employer offers a legitimate justification for its personnel action, the burden shifts back to the plaintiff to prove that the proffered reason was a "pretext"). Ultimately, the plaintiff cannot overcome the Department's reason for issuing the letter of reprimand. While the plaintiff takes significant issue with the content of the letter, see, e.g., Pl.'s Mot. at 42-43, he has not produced any information, let alone evidence, from which a "reasonable jury could find" that the issuance of the letter was based on discrimination or retaliation, Mosleh v. Howard Univ., Civil Action No. 19-cv-0339 (CJN), 2022 WL 898860, at *7 (D.D.C. Mar. 28, 2022).

Accordingly, the Court must conclude that the Department is entitled to summary judgment on the plaintiff's claim regarding the July 2014 letter of reprimand.

2. Denial of 2014 WIGI

Regarding the plaintiff's second remaining claim, he argues that "the [Department] [unlawfully] denied his WIGI [based on] his race (African American) and national origin (Nigerian)[,]" in violation of Title VII's anti-discrimination provision. Pl.'s Mot. at 7. The plaintiff further argues that the denial of his WIGI was also based on retaliation for his whistleblowing activity on April 19, 2014, and for filing an EEO complaint. Pl.'s Mot. at 26. Under the McDonnell Douglas standard, 411 U.S. at 802-05, the plaintiff has met his initial burden and has successfully established a prima facie case of race and national origin discrimination under Title VII by showing that (1) he is a member of a protected class, African American and Nigerian; (2) he suffered an adverse employment action because the denial of his WIGI caused "a significant change in employment status," specifically with respect to his compensation and privileges of his employment, 42 U.S.C. § 2000e-2(a)(1) (to establish an adverse employment action, the plaintiff must show that he was discriminated against "with respect to his compensation, terms, conditions, or privileges of employment"); and (3) a reasonable fact-finder could assume that the denial of the plaintiff's WIGI could give rise to an "inference of discrimination[,]" see Forkkio, 306 F.3d at 1130 (citing Brown, 199 F.3d at 452); see also Carroll, 321 F. Supp. at 68. Likewise, the plaintiff has met his initial burden of successfully established a prima facie case of retaliation by showing that (1) he engaged in "statutorily protected activity" under 5 U.S.C.

§ 2302(b)(9) when he filed several appeals and complaints with the OSC, the DOIOIG, and Board based on allegations of 5 U.S.C. § 2302(b)(8); (2) he suffered a materially adverse action by the Department when he was denied his WIGI because it would have been "likely to dissuade[] a reasonable worker from making or supporting a charge of discrimination[,]" Burlington N., 548 U.S. at 68 (quoting Rochon, 438 F.3d at 1219) (other citation omitted) and; (3) a causal link exists between his EEO complaints and the WIGI denial because the Department knew about the EEO complaints through its receipt of emails and the close proximity in time between when those events occurred, see Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985) (noting that the plaintiff can establish the casual link element "by showing that the employer had knowledge of the employee's protected activity, and that the [retaliatory] personnel action took place shortly after that activity.").

Because the plaintiff has cleared his initial hurdle under the McDonnell Douglas standard, the burden now shifts to the Department to identify a legitimate and non-discriminatory reason for denying the plaintiff his WIGI. See McDonnell Douglas, 411 U.S. at 802; Holcomb, 433 F.3d at 896 (stating that if a plaintiff establishes a prima facie case, the burden shifts to the employer to identify a legitimate, non-discriminatory reason on which it relied in taking the complained-of action). Here, the Department has met its burden by articulating a "legitimate, nondiscriminatory reason" for denying the plaintiff his WIGI. See McDonnell

Douglas, 411 U.S. at 802; Walker, 798 F.3d at 1092. Specifically, the Department has provided proof that the plaintiff's poor work performance justified his WIGI denial, Def.'s Mem. at 14, because he was not performing at an "acceptable level of competence[.]" See 5 U.S.C. § 5335(a) (noting than an agency can deny an employee's WIGI if he is not performing at "an acceptable level of competence"). For the proof offered by the defendant to be sufficient, the Department has the burden of proving by substantial evidence that the employee was not performing at an acceptable level of competency. See Romane v. Def. Cont. Audit Agency, 760 F.2d 1286 (Fed. Cir. 1985). And, substantial evidence is "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 CFR § 1201.4(p).

The Department has shown the requisite substantial evidence through the plaintiff's 2014 performance review, which shows that the plaintiff received a rating of "Unsatisfactory" on all three Critical Elements on which he was evaluated. Def.'s Mot., Ex. 2 (FY 2014 Performance Appraisal Plan) at 2-12. Furthermore, Ms. Bartnicki extensively explained why the plaintiff received an "Unsatisfactory" rating, stating that he "had reoccurring inaccuracies in award letters . . . and general grant review[,]" id., Ex. 2 (FY 2014 Performance Appraisal Plan) at 5, routinely "failed to follow the [] Standard Operating Procedures Manual[,]" id., Ex. 2 (FY 2014 Performance Appraisal Plan) at 5,

"repeatedly failed to follow written and verbal instructions regarding the uploading of documents[,]" id., Ex. 2 (FY 2014 Performance Appraisal Plan) at 12, "routinely fail[ed] to follow written instructions to remedy deficiencies by specific deadlines[,] id., Ex. 2 (FY 2014 Performance Appraisal Plan) at 12, and "[failed to] consistently respond to emails in a timely fashion," id., Ex. 2 (FY 2014 Performance Appraisal Plan) at 12.

Having concluded that the Department has provided a legitimate reason for the plaintiff's WIGI denial, the Court must also conclude that the plaintiff has failed to satisfy his subsequent burden to establish that Department's reasons for denying his WIGI were not a "pretext for discrimination." See McDonnell Douglas, 411 U.S. at 805. The only thing approaching evidence that the plaintiff submits to support his position is that "an African American coworker, Barry Gregory, was also denied a WIGI in 2013[,] and that at least three White employees were granted their WIGI." Pl.'s Mot. at 7, 15. Even if true, this is not "sufficient evidence for a reasonable jury to find that [the Department's] non-discriminatory reason was not the actual reason and that [the Department] intentionally discriminated" against the plaintiff on the basis of his race and national origin. Brady, 520 F.3d at 494. Rather, the plaintiff's claim is based on "allegations" that "are conclusory, vague and for the most part unsubstantiated." Ginger v. District of Columbia, 527 F.3d 1340, 1347 (D.C. Cir. 2008); see also Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999) (stating that conclusory assertions and unsubstantiated allegations do not

create genuine issue of fact precluding summary judgment).

Therefore, because the plaintiff has failed to overcome the Department's well-documented basis for denying his WIGI, the Court concludes that the Department is entitled to summary judgment on the plaintiff's claim that he was denied a 2014 WIGI.

3. Unfavorable Performance Review

Regarding the plaintiff's third remaining claim, he argues that he incurred an adverse employment action by the issuance of his unfavorable November 28, 2014 performance review, which he asserts was a "[h]oax" and "[c]ontain[ed] [f]alse and [m]alicious [a]ccusations[.]" Pl.'s Mot. at 37. "[A]n employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." Forkkio, 306 F.3d at 1131. Furthermore, unfavorable performance reviews are not an adverse actions "when there is no change in benefits, or the performance rating was not tied to an employee's bonus[.]" See Dorns v. Geithner 692 F. Supp. 2d 119, 133 (D.D.C. 2010), (citing Weber v. Battista, 494 F.3d 179, 186 (D.C. Cir. 2007). Thus, "poor or downgraded performance evaluations . . . [do not constitute] actionable adverse employment actions unless they have affected the employee's grade or salary." Na'im v. Rice, 577 F. Supp. 2d 261, 381 (D.D.C. 2008)

(citing Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003); but see Russell v. Principi, 257 F.3d 815, 819 (D.C. Cir. 2001) (holding that the plaintiff demonstrated an adverse action when her performance rating cost her a higher bonus).

The plaintiff asserts that "where negative performance reviews precede an eventual termination, they may constitute adverse actions." Pl.'s Mot. at 38 (citing Winston v. Verizon Servs. Corp., 633 F.Supp.2d 42, 51 (S.D.N.Y. 2009); McBroom v. Barnes & Noble Booksellers, Inc., 747 F.Supp.2d 906, (N.D. Ohio 2010). However, an eventual termination does not necessarily convert a prior unfavorable performance review into an adverse employment action. Compare Stephens v. Yellen, Civil. Action No. 17-1252 (DLF), 2021 WL 5493024, at *5 (D.D.C. Nov. 23, 2021) ("[G]iven that [the plaintiff] received her performance review just one week before her firing, and the negative comments in the review were repeated in the notice of termination, . . . the Court assumes that the negative performance review qualifies as an adverse action.") with Davis v. Yellen, Civil Action No. 08-447 (KBJ), 2021 WL 2566763, at *26 (D.D.C. June 22, 2021) (refusing to conclude that a letter of reprimand amounted to an "actionable adverse employment action," despite the plaintiff's later termination). Here, the plaintiff fails to demonstrate that his poor performance review, at the time it was issued, affected his "salary, bonus, grade, or any other term or condition of [his] employment." Brown v. Paulson, 597 F. Supp. 2d 67, 74 (D.D.C. 2009). Instead, the plaintiff merely contends, conclusorily,

that the poor review resulted in his denial of a promotion and training. See Def.'s Mem. at 27, 38. However, as already noted, "[a] low performance review . . . 'typically constitute[s] adverse action[] only when attached to financial harms,'" Howard v. Kerry, 85 F. Supp. 3d 428, 434 (D.D.C. 2015) (quoting Baloch v. Kempthorne, 550 F.3d 1191, 1199 (D.C. Cir. 2008)), and a "bare, conclusory allegation that [the plaintiff] was denied [a] promotional . . . opportunity . . . does not discharge [his] burden to show that the" performance review was tied to "financial harms[,]" Taylor v. Solis, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (internal quotation marks omitted).

Even if the plaintiff could establish that his negative performance review was an adverse action, the Department has provided a legitimate, non-discriminatory and non-retaliatory reason for issuing the negative performance review. See Def.'s Mot., Ex. 2 (FY 2014 Performance Appraisal Plan) at 2-12. Specifically, the Department has shown that the plaintiff failed to meet a required deadline that was emphasized multiple times over several months. See Def.'s Mot., Ex. 1 (Letter of Reprimand) at 1-3. And, because the plaintiff fails to demonstrate that the Department's reason for the review is pretextual, see McDonnell Douglas, 411 U.S. at 805, he cannot carry his burden on this issue.

Accordingly, the Court must grant summary judgment for the Department on the plaintiff's claim regarding his unfavorable performance review.

4. March 2015 Pre-Termination Suspension

Regarding the plaintiff's fourth remaining claim, he argues that the Department "unlawfully plac[ed him] on [thirty] days pre-termination [ ] suspension" in March of 2015. Pl.'s Mot. at 7. Additionally, the plaintiff asserts that he did not receive pay during the period between his proposed removal on March 26, 2015, and the Department's decision to terminate his employment on April 26, 2015. Id. The Department responds that "the [alleged] pre-termination suspension . . . was the result of the confusion related to [the p]laintiff's status between his proposed removal . . . and the decision to remove him[.]" Def.'s Mem. at 14. Specifically, the Department contends that "[o]riginally, [the plaintiff] was not placed on administrative leave following his Proposed Removal[,]" but after Ms. Bartnicki spoke with an Employee Relations Specialist, she placed the plaintiff on administrative leave following his proposed removal. Id. The Department asserts that the plaintiff was, in fact, never suspended, but rather, was placed on administrative leave and "there is no evidence that indicates a pre-termination suspension [ever] occurred." Id. at 14-15. And, with regard to the plaintiff's claim that he did not receive pay for the period between the proposed removal and the decision to remove him, the Department indicates that QuickTime records show that the plaintiff's claim is false and that he was paid administrative leave beginning on March 30, 2015. Id. at 15.

Based on the existing record, the Court concludes that the plaintiff has not demonstrated that he suffered an adverse employment action by being placed on what he characterizes as a pre-termination suspension because he was, in fact, actually placed on administrative leave. See Hunter v. District of Columbia, 905 F. Supp. 2d 364, 374 (D.D.C. 2012) (holding that brief periods of administrative leave do not "constitute actionable adverse employment actions."). Indeed, the confusion regarding his status resulted from "a clerical mistake[—later corrected—]by a human resources employee who had no demonstrated retaliatory motive." Ahuruonye, 2016 WL 526740. And even if the plaintiff could establish that a pre-termination suspension that amounted to an adverse employment action did, in fact, occur, he has failed to present any evidence that shows that the Department's articulated non-discriminatory and non-retaliatory reason was a pretext. See McDonnell Douglas, 411 U.S. at 805. Accordingly, the Court muse conclude that the Department is entitled to summary judgment on this claim.

5. April 2015 Termination

Finally, the plaintiff argues that he was discriminated and retaliated against through his "unlawful employment termination [on April 14, 2015.]" Pl.'s Mot. at 21. In opposition, the Department argues that the plaintiff's termination was "not motivated by discriminatory animus, but by the [Department's] desire to assist an employee that was failing to perform at a satisfactory level, and if those efforts failed, [then] to

remove him from service under a performance[-]based action." Def.'s Mem. at 15-16.

In support of its argument, the Department has presented legitimate, non-discriminatory reasons for its decision to terminate the plaintiff, namely, that he failed "to improve [his performance] over a 60-day period" after being given "ample opportunity" to improve. Id. at 16-17. The Department's evidence shows that the plaintiff was terminated because he performed unacceptably in his position, failed to follow his supervisors' instructions, and failed to complete his tasks in a timely manner. See Def.'s Mot., Ex. 1 (Letter of Reprimand) at 1-3 (reiterating that the plaintiff failed to follow instructions and complete his work in a timely manner); Def.'s Mot., Ex. 1 Ex. 1 (Letter of Reprimand) Atts. at 4-13; Def.'s Mot., Ex. 2 (FY 2014 Performance Appraisal Plan) at 2-12 (reiterating the plaintiff's unsatisfactory performance); Pl.'s Mot. to Dismiss Opp'n, Ex. 1 (Proposed Removal) at 42-47 (proposing the plaintiff's removal from his position due to his failure to successfully complete his PIP); Def.'s Mot., Ex. 3 (Decision to Remove) at 1-2 (concluding that the plaintiff's removal was warranted based on the reasons in Ms. Bartnicki's proposed removal letter).

Additionally, the Department has satisfied the statutory requirements for terminating the plaintiff pursuant to 5 U.S.C. § 432.104. See 5 U.S.C. § 432.104 (listing the requirements for "[a]ddressing [an employee's] unacceptable performance"); see also 5 C.F.R. § 432.103(h) (defining "unacceptable" performance as "performance of an employee that fails to meet

established performance standards in one or more critical elements of [his] position"). First, the Department has "an approved performance appraisal system," which the plaintiff, as the Department correctly indicates, does not dispute. See Def.'s Mem. at 16. Second, the Department "communicated the performance standards and critical elements of his position to the [plaintiff]." Id.; see Def.'s Mot., Ex. 2 (Employee Performance Appraisal Plan). The Department first communicated the performance standards and critical elements to the plaintiff in October 2013, when it provided him with a copy of the notification standards for his 2014 Employment Performance Plan, which he refused to sign. See Def.'s Mot., Ex. 2 (Employee Performance Appraisal Plan) at 1. Additionally, in November 2014, the Department gave the plaintiff a copy of his performance standards for FY 2014 and his employee performance appraisal plan, which the plaintiff again refused to sign. See Def.'s Mot., Ex. 2 (FY2014 Performance Appraisal) at 1, 18. Third, on January 12, 2015, the plaintiff was issued a PIP, which stated that his performance was unacceptable and afforded him a reasonable opportunity to improve his performance within 60 days. See Pl.'s Mot. to Dismiss Opp'n, Ex. 1 (Proposed Removal) at 42-47. It was only after the plaintiff did not improve his performance within the time allotted when his employment was terminated. See Def.'s Mot., Ex. 3 (Decision to Remove) at 1.

The Department's explanation for the plaintiff's termination shifts the burden back to him to demonstrate that the Department's asserted reasons were

not its actual reasons for terminating him and that the Department intentionally discriminated and retaliated against him. See Brady, 520 F.3d at 494. The plaintiff has not carried this burden. Instead, the plaintiff merely contends that he "and Dr. Barry Gregorie, [who was] another African-American male employee who had engaged in protected activities against [Ms.] Bartnicki were the only two employees under [Ms.] Bartnicki's supervision [that were terminated.]" Pl.'s Mot. at 16. This assertion does not show that the Department's justification for terminating the plaintiff was merely a pretext for discrimination. Rather, the assertion—while it could provide support for a prima facie case for discrimination—is wholly insufficient for the Court to conclude that the reasons provided by the Department for the plaintiff's termination were pretextual. See McDonnell Douglas, 411 U.S. at 805. Such conclusory statements cannot, without more, "demonstrate 'both that the [employer's proffered] reason was false, and that discrimination was the real reason.'" Hunter, 905 F. Supp. 2d at 376 (quoting Weber v. Battista, 494 F.3d 179, 186 (D.C. Cir. 2007). Accordingly, the Court must grant summary judgment to the Department on this issue. Thus, the Department is granted summary judgment in full on all five of the plaintiff's remaining claims.

CONCLUSION

For the foregoing reasons, the Court must grant the Department's motion for summary judgment and deny the plaintiff's motion for summary judgment.

SO ORDERED this 31st day of May, 2022.[5]

REGGIE B. WALTON
United States District Judge

[5] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARRY AHURUONYE,
Appellant,

DOCKET NUMBER
DC-531D-14-0587-B-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: July 15, 2016

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Barry Ahuruonye, Hyattsville, Maryland, pro se.

Deborah Charette, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the remand initial decision, which found that he failed to prove his claims of discrimination and retaliation in

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

connection with the agency's action denying his within-grade increase. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review, but we expressly MODIFY the remand initial decision to change the disposition from dismissal of the appeal to finding that the appellant failed to establish his affirmative defenses, and to afford him the proper review rights. In all other respects, we AFFIRM the remand initial decision.

¶2 The appellant, a GS-12 Grants Management Specialist, filed an appeal with the Board in which he asserted that the agency failed to grant him a within-grade increase (WIGI) to step 3, effective December 1, 2013. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the evidence did not show that the agency failed to issue an initial

decision on the appellant's WIGI request or that it refused to act on a request for reconsideration that would permit the Board to assume jurisdiction. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D-14-0587-I-1, Initial Decision (July 25, 2014). On petition for review, the Board reversed the initial decision. The Board determined that, while the agency did not grant the appellant a WIGI to step 3, it failed to issue him the required notice that his performance was not at an acceptable level of competence. The Board concluded that, because the appellant's failure to seek reconsideration was based on the agency's failure to provide him with notice of the denial of his WIGI and the opportunity to seek reconsideration of that negative determination, the Board has jurisdiction over the appeal. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D14-0587-I-1, Remand Order, ¶¶ 9-10 (Dec. 29, 2014) (*Ahuruonye* Remand Order). The Board thus ordered the agency to retroactively grant the appellant's WIGI to step 3 and to pay him back pay, interest, and other benefits. In addition, the Board remanded the appeal for adjudication of the appellant's claims of discrimination and retaliation for protected activity. *Id.*, ¶ 11.

¶3 On remand, the appellant clarified that his affirmative defenses included discrimination due to race (African American) and national origin (Nigerian) based on a disparate treatment theory, and retaliation for equal employment opportunity (EEO) activity, for filing a Board appeal, and for whistleblowing. Remand File (RF), Tab 5. The parties made numerous

additional submissions. RF, Tabs 6-9, 12-15, 17-23, 26-27, 29 (the appellant); Tabs 11, 24 (the agency).

¶4 The administrative judge issued a remand initial decision based on the written record.[2] RF, Tab 30, Remand Initial Decision (RID). Addressing the appellant's race and national origin discrimination claims, she found that he failed to show any comparator employees were similarly situated to him or that either of the prohibited considerations was a motivating factor in the denial of his WIGI and that, even if he had made such a showing, the agency demonstrated by the considerable documentary evidence of the appellant's performance deficiencies that it would have taken the action anyway. RID at 4-6. Regarding the appellant's claim of retaliation for protected EEO activity, the administrative judge considered that he had filed four EEO complaints. As to the complaints the appellant filed in July 2012 and on November 30, 2012, she found that, while he showed that he engaged in protected activity of which his supervisor who denied his WIGI was aware, he failed to establish a nexus between the activity and the agency's action. RID at 7-8. As to the complaint the appellant filed on October 30, 2013, the administrative judge found that his claim was a bare assertion and insufficient to meet his burden of proof. RID at 8. And, as to the appellant's complaint filed on April 14, 2014, the administrative judge found that he showed that he engaged in protected activity of which his supervisor was aware and that, based on timing,

[2] The appellant did not request a hearing.

the agency's action could have been retaliatory such that a nexus was established. She found, however, that the agency showed by clear and convincing evidence that it would have taken the action anyway and that the appellant did not show that its reasons for doing so were pretextual. RID at 8-10. The administrative judge next considered the appellant's claim that the agency retaliated against him for having filed the initial appeal in this case on April 5, 2014. She found that the appellant's supervisor was aware of this protected activity and that the official denial of the appellant's WIGI occurred on May 23, 2014,[3] such that the action could have been retaliatory. RID at 10-11. She found, however, that the appellant failed to establish a nexus between his appeal and the official denial of his WIGI and that, in any event, the agency showed that it would have taken the action, even absent the appellant's Board appeal. RID at 11-12.

¶5 Finally, the administrative judge considered the appellant's claim that the agency action was in retaliation for his protected whistleblowing, specifically, his disclosure of information regarding improper conduct during several grant approval processes. She considered that the appellant filed a complaint with the agency's Office of Inspector General (OIG), emailed his second-level supervisor regarding these matters, and filed a complaint with the Office of Special Counsel (OSC), but she concluded that the appellant failed to

[3] The memorandum advising the appellant of the denial of his WIGI, RF, Tab 11 at 86, was not a part of the record in the initial proceeding.

establish a prima facie case of retaliation for whistleblowing regarding these disclosures. RID at 14-17. Finding that the appellant failed to establish any of his affirmative defenses, the administrative judge dismissed the appeal.[4] RID at 17.

¶6 The appellant has filed a petition for review, Petition for Review (PFR) File, Tab 2, and supplements to his petition for review, PFR File, Tabs 6-7, the agency has filed a response, PFR File, Tab 8, and the appellant has filed a reply thereto,[5] PFR File, Tab 9.

¶7 On review, the appellant first puts forth a number of arguments that center on when he was told he would be rated for fiscal year 2013, whether the rating period was sufficient, and whether there was adequate evidence to support his rating of Minimally Successful.

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[4] Because the Board already had reversed the agency's action, the administrative judge should not have dismissed the appeal upon finding that the appellant failed to establish his affirmative defenses. Rather, she should have found that the defenses were not proven.

[5] On April 18, 2016, after the record closed on review, the appellant moved for permission to submit additional evidence. PFR File, Tab 11. In a letter acknowledging the appellant's motion, the Clerk of the Board advised him that the Board's regulations do not provide for such pleadings, 5 C.F.R. § 1201.114(a)(5), and that, for the Board to consider the proffered submission, he must describe the nature and need for it, and also must show that it was not readily available before the record closed. 5 C.F.R. § 1201.114(a)(5), (k). PFR File, Tab 12. The evidence the appellant seeks to submit involves what he claims transpired at a meeting that allegedly occurred on April 30, 2014. PFR File, Tab 11. Because the meeting predates not only the close of the record on review, but also the initial decision, we deny the appellant's request to submit additional evidence concerning the meeting..

PFR File, Tab 2 at 5-14. The Board already has reversed the agency's action denying his WIGI and ordered the agency to grant it, and the appellant does not suggest that that has not occurred. The Board directed the administrative judge, on remand, only to consider and analyze the appellant's claims of discrimination and retaliation. *Ahuruonye* Remand Order, ¶ 11. As such, these claims which appear to relate to the merits of the agency's action denying the appellant's WIGI are beyond the scope of the Remand Order and will not be considered. *See Umshler v. Department of the Interior*, 55 M.S.P.R. 593, 597 (1992), *aff'd*, 6 F.3d 788 (Fed. Cir. 1993) (Table).

¶8 The appellant disputes the administrative judge's finding that he failed to establish that the denial of his WIGI was the result of race and national origin discrimination. PFR File, Tab 2 at 14-20. In considering this claim, the administrative judge followed the reasoning in *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015), wherein the Board clarified the appropriate analysis for discrimination claims and refuted, as having no application to our proceedings, the traditional burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *Savage*, 122 M.S.P.R. 612, ¶¶ 46-51. Rather, the Board found, the first inquiry is whether the appellant shows by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action and, in making that showing, the appellant may rely on direct evidence or any of three types of circumstantial evidence consisting of bits and

pieces of evidence from which an inference of discriminatory intent might be drawn, comparator evidence, and/or evidence that the agency's stated reason is a pretext for discrimination. *Savage*, 122 M.S.P.R. 612, ¶¶ 42, 51. If the appellant meets his burden, the Board will then inquire whether the agency has shown by preponderant evidence that it still would have taken the contested action in the absence of the discriminatory motive, and, if the agency makes that showing, then reversal of the action is not required. *Savage*, 122 M.S.P.R. 612, ¶ 51; RID at 4-6.

¶9 The administrative judge considered the appellant's claim that a comparator employee, B.G., an African-American male, also was denied a WIGI in 2013 and that at least three white employees were granted WIGIs, but she found that the appellant did not thereby demonstrate that his race and national origin were motivating factors in the denial of his WIGI. RID at 4-5. She found that the appellant failed to show that any of the comparators was similarly situated to him, or that they were performing the same job duties at the same level, that they reported to the same supervisor, or that they were held to the same standards. The administrative judge went on to find that, even if the appellant had demonstrated that the comparators were similarly situated, the agency showed by preponderant evidence that it would have denied the appellant's WIGI regardless of his race or national origin and that its stated reason for denying the appellant's WIGI was not a mere pretext for discrimination. RID at 5-6.

¶10 On review, the appellant argues that the administrative judge placed an unreasonable burden on him to prove disparate treatment. PFR File, Tab 2 at 15-16. In analyzing the appellant's claim, the administrative judge followed *Savage*, addressing the relevant type of circumstantial evidence that may be considered, including evidence that employees similarly situated to the appellant other than in the prohibited factor received better treatment. *Savage*, 122 M.S.P.R. 612, ¶ 42. Because the appellant's claim of disparate treatment was based on prohibited discrimination, the administrative judge properly used the definition of "similarly situated" prescribed by the Equal Employment Opportunity Commission for such cases, *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003) (observing that comparator employees must have reported to the same supervisor, been subject to the same standards, and engaged in conduct similar to the complainant's), finding that the appellant failed to make such a showing. RID at 5. Therefore, the administrative judge did not place an unreasonable burden upon the appellant to prove this claim, and the evidence to which he refers on review, PFR File, Tab 2 at 16, which concerns agency-wide grant notes, RF, Tab 12 at 46-65, Tab 13 at 10-29, is insufficient to establish his claim.

¶11 The appellant also challenges the administrative judge's alternative finding that, even if he had demonstrated that his comparators were similarly situated, the agency showed by preponderant evidence that it would have denied his WIGI, regardless of his race or national origin. PFR File, Tab 2 at 16.

The administrative judge found that the agency submitted dozens of pages of the appellant's work product from the time period in question showing that the results of his Minimally Successful performance rating were warranted, justifying the denial of his WIGI. RID at 5. While the appellant's claim that the agency's evidence is "falsified" may arguably be considered as an assertion that the agency's stated reason for the action is a pretext for discrimination, *Savage*, 122 M.S.P.R. 612, ¶ 42, he has failed to support his claim with evidence. To the extent that he is challenging the propriety of his rating, particularly the length of the rating period, PFR File, Tab 2 at 16, we agree with the administrative judge that such assertions do not establish that the denial of the appellant's WIGI was a pretext for discrimination.[6] RID at 6.

¶12 The appellant also challenges the administrative judge's finding that he failed to establish his claim that the agency's action was taken in retaliation for his whistleblowing activities.[7] PFR File, Tab 2 at 24-31.

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[6] On July 13, 2016, the appellant filed a motion for leave to submit exhibits "that recently became available," specifically evidence that comparator employee B.G. "was denied a WIGI due to his race." PFR File, Tab 14. For the reasons set forth above, including that the agency demonstrated by preponderant evidence that it would have denied the appellant's WIGI regardless of his race or national origin, we deny the appellant's motion for leave to submit additional exhibits on this issue.

[7] The appellant does not challenge on review the administrative judge's findings that he failed to establish his claim that the agency's action was in retaliation for his having filed four EEO complaints and the initial appeal in this case. We discern no basis upon which to disturb those findings.

The administrative judge first addressed the complaint the appellant filed in November 2012 with the agency's OIG in which he alleged that his supervisor committed misconduct, abuse of authority, and program mismanagement regarding grant processing. RF, Tab 5 at 122. The administrative judge found that the activity occurred more than a year before the agency's action such that there was no temporal proximity to indicate that it was retaliatory, RID at 16, and further that the appellant failed to establish that his supervisor was aware of the appellant's OIG complaint naming her. The administrative judge also addressed the email the appellant sent to his second-level supervisor (his supervisor's immediate supervisor) on April 19, 2014, in which the appellant asserted that he had concerns about his relationship with his supervisor and her alleged mismanagement of the grants program. RF, Tab 5 at 62. The administrative judge found that the activity occurred close in time to the official denial of the appellant's WIGI, but that there was no evidence showing that his supervisor was aware of the disclosure, and that, even if the appellant had satisfied this element, he did not establish that the activity was a contributing factor in the agency's denial of his WIGI. Lastly, the administrative judge addressed the complaint the appellant filed with OSC on May 1, 2014. RF, Tab 5 at 78. While the administrative judge found that the activity occurred close in time to the official denial of the appellant's WIGI, she found that he did not demonstrate that his supervisor was aware of it and that, even if she were, the agency presented strong evidence in support of its reasons for denying the

appellant's WIGI. RID at 15-16. The administrative judge concluded, therefore, that the appellant failed to establish that his protected activities were a contributing factor in the agency's denial of his WIGI and that he failed thereby to establish a prima facie case of retaliation for whistleblowing regarding that disclosure. RID at 15-17.

¶13 In disputing the administrative judge's findings that he failed to establish that any of his protected activities was a contributing factor in the agency's denial of his WIGI, the appellant focuses on his claim that his supervisor, and the agency in general, had a motive to retaliate against him because of his complaints about improper conduct during grant approval processes. PFR File, Tab 2 at 27-30. The administrative judge acknowledged that the "knowledge/timing" test is not the only way in which an appellant can establish that his protected activity was a contributing factor in the agency's action and that he may provide other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the action, whether the protected activity was personally directed at the agency official who took the action, and whether that individual had a motive to retaliate against the appellant. RID at 14; *Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 26 (2013). In each instance, the administrative judge found that the appellant did not show that his supervisor had a motive to retaliate against him and that the agency presented strong evidence demonstrating its reasoning for denying the appellant's WIGI. RID at 15-17; RF, Tab 11 at 15-37,

38-56, 58-84. However, the fact that the appellant's disclosures were directed at his supervisor may have provided her a motive to retaliate against him. Notwithstanding, we agree with the administrative judge that the agency demonstrated that it had strong reasons for denying the appellant's WIGI[8] and that therefore he did not establish that his whistleblowing was a contributing factor in the agency's decision.[9]

¶14 On review, the appellant alleges that the administrative judge failed to sanction the agency for not responding to her order reopening the record. PFR File, Tab 2 at 30-31. After the record closed below, the administrative judge reopened the record to alert the

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[8] The basis for the Board's reversal of the agency's decision denying the appellant's WIGI to step 3 was not that his actual performance warranted granting the WIGI, but rather that the agency failed to provide him notice that this performance was not at an acceptable level of competence so as to justify denying him a WIGI. *Ahuruonye* Remand Order, ¶¶ 9-10. Similarly, the reason the agency's decision denying the appellant's WIGI to step 2 was reversed was not that his performance warranted a WIGI, but rather the administrative judge's finding that the agency failed to provide him a rating of record before the end of the appraisal period, a requirement for denying a WIGI. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D-13-1273-I-1, Initial Decision (Feb. 28, 2014).

[9] We need not address the appellant's argument that the agency failed to show by clear and convincing evidence that it would have denied his WIGI, even absent his disclosures. PFR File, Tab 2 at 29. Because the appellant did not make his "contributing factor" showing by the requisite preponderant evidence, the burden of persuasion did not shift to the agency. *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 14 (2015). This is so despite the fact that the administrative judge made alternative findings on this issue. *See, e.g.*, RID at 14 n.1, 15 n.2.

parties to the Board's recently-issued *Savage* decision, and to allow the appellant an opportunity to submit any additional evidence or argument that may be required to meet his burden as set forth in *Savage*. The administrative judge afforded the agency 10 days from the date of the appellant's response in which to submit a reply, after which the record would again close. RF, Tab 25. The appellant did submit a response, RF, Tab 26, but the agency did not submit a reply.

¶15 The imposition of sanctions is a matter within the administrative judge's sound discretion, and, absent a showing that such discretion has been abused, the administrative judge's determination will not be found to constitute reversible error. *Smets v. Department of the Navy*, 117 M.S.P.R. 164, ¶ 11 (2011), *aff'd*, 498 F. App'x 1 (Fed. Cir. 2012). In this instance, the appellant did not request below that the agency be sanctioned for not replying to his response, and the administrative judge therefore made no determination. In any event, the basis for the reopening concerned the means by which the appellant could meet his burden of proof regarding his affirmative defenses under current case law, a matter which the agency apparently determined did not warrant any action on its part. The appellant has not shown that the agency exhibited bad faith or that sanctions were necessary to serve the ends of justice. 5 C.F.R. § 1201.43. Consequently, we find that the appellant has not shown any abuse of discretion by the administrative judge. *El v. Department of Commerce*, 123 M.S.P.R. 76, ¶ 16 (2015).

¶16 Finally, the appellant argues on review that the Board should sanction agency counsel for allegedly having committed perjury in one of the appellant's previous Board appeals. PFR File, Tab 3 at 5-6. Any such claim is beyond the scope of the Board's Remand Order in the instant case, *see Umshler*, 55 M.S.P.R. at 597, and therefore we will not consider it.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request further review of this final decision. There are several options for further review set forth in the paragraphs below. You may choose only one of these options, and once you elect to pursue one of the avenues of review set forth below, you may be precluded from pursuing any other avenue of review.

Discrimination Claims: Administrative Review[10]

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)).

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[10] The remand initial decision failed to include notice of the appellant's right to pursue his discrimination claims to the Equal Employment Opportunity Commission or an appropriate U.S. District Court. RID at 18-22. We provide those rights in this Final Order.

If you submit your request by regular U.S. mail, the address of the EEOC is:

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

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

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

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and

your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices described in 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the U.S. Court of Appeals for the Federal Circuit or by any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time.

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this

law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through the link below: http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

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

FOR THE BOARD: /s/ _____
Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARRY AHURUONYE,
Appellant,

DOCKET NUMBER
DC-531D-14-0587-C-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: December 3, 2015

THIS ORDER IS NONPRECEDENTIAL[1]

Barry Ahuruonye, Hyattsville, Maryland, pro se.

Josh C. Hildreth, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

REMAND ORDER

¶1 The appellant has filed a petition for review of the compliance initial decision, which denied his petition for enforcement of the Board's order directing the agency to cancel its action denying him a within-grade

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

increase (WIGI). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND this case to the Washington Regional Office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

¶2 The appellant, a Grants Management Specialist, filed an appeal with the Board asserting that the agency improperly denied his WIGI to GS-12, step 3, effective December 1, 2013. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D-14-0587-I-1, Initial Appeal File (IAF), Tab 1. On petition for review, the Board found that the agency action denying the appellant's WIGI must be reversed because the agency failed to issue him a notice that his performance was unacceptable, provide him an opportunity to request reconsideration of that determination, or proffer substantial evidence that his work was at an unacceptable level. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D-14-0587-I-1, Remand Order (Dec. 29, 2014) (Remand Order). As a result, the Board: (1) ordered the agency to retroactively grant the appellant's WIGI to step 3 and pay him the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations; and (2) remanded the appeal for the administrative judge to adjudicate the appellant's claims of discrimination and retaliation for engaging in protected activity. *Id.* at 6.

¶3 On February 22, 2015, the appellant filed a petition for enforcement of the Board's Remand Order. He asserted that the agency was in noncompliance with the Remand Order because it: (1) retaliated against him by denying him another WIGI;[2] (2) failed to explain to him how it arrived at its back pay calculations; (3) appeared to have underpaid him for the "pay period of 2/17/15;" (4) failed to establish that it made appropriate Thrift Savings Plan (TSP) contributions and dividend payments; (5) failed to promote him to the GS-13 level, although he had completed the time-in-grade requirement necessary to receive such a promotion and his performance was at an acceptable level; and (6) failed to provide him with training that could lead to promotion. However, no compliance matter was docketed at that time.

¶4 On May 30, 2015, the appellant filed a document indicating that he was following up on his February 22, 2015 petition for enforcement. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D-14-0587-C-1, Compliance File (CF), Tab 1. He reiterated his belief that he is entitled to promotion to GS-13, step 2, and again stated that the agency had not provided him with any documentation regarding its back pay calculations. *Id.* at 4-7. He also made a subsequent filing, received on June 3, 2015, wherein he stated that the agency had not provided any

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[2] The appellant's claim regarding the denial of his WIGI to GS-12, step 4 is the subject of a Board appeal in MSPB Docket No. DC-531D-15-0242-B-1, which is pending before the Washington Regional Office following a Board-ordered remand.

documentation indicating what it had paid him in back pay, and whether any such payment included TSP contributions, catch-up contributions, and payment of dividends and interest, or any documentation regarding the issue of his promotion. CF, Tab 3 at 1. The administrative judge issued an acknowledgement order on June 5, 2015, docketing a compliance matter. CF, Tab 4. The appellant's May 30, 2015 submission was docketed as his petition for enforcement, and the February 22, 2015 submission was not included in the compliance file. *See generally* CF.

¶5 The agency responded in opposition to the appellant's petition for enforcement. CF, Tab 5. The agency asserted that it has fully complied with the Board's order by: (1) processing the appellant's WIGI; (2) properly paying him back pay; and (3) notifying him of its full compliance with the Board's order. *Id.*

¶6 The appellant replied, asserting that the agency had not complied with the Board's order because it: (1) issued a back pay payment and thereafter initiated an action to collect the amount paid as an overpayment, such that he never received any payment;[3] and (2)

[3] This appears to be the same overpayment collection about which the appellant challenged in MSPB Docket No. DC-0752-15-0509-I-1, wherein he alleged that the agency subjected him to a suspension in excess of 14 days when it retroactively converted previously approved leave for which he had been paid to absence without leave and initiated a corresponding debt collection action. *Compare Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-0752-15-0509-I-1, Initial Appeal File, Tab 1, Exhibit 1 at 1-2, *with* CF, Tab 6 at 11-12. The Board already has found that it lacks jurisdiction over that issue because the appellant was not

failed to identify a responsible official in its response to his petition for enforcement, pursuant to 5 C.F.R. § 1201.183. CF, Tabs 6-7. He also asserted that the documentation the agency submitted in its response indicated that it did not include TSP contributions in its back pay calculations. *Id.*

¶7 The administrative judge thereafter issued a compliance initial decision denying the appellant's petition for enforcement. CF, Tab 9, Compliance Initial Decision (CID). She found that the agency fully complied with the Board's order because it: (1) retroactively effected the appellant's WIGI to GS-12, step 3; (2) paid him the appropriate amount of back pay with interest and adjusted his benefits; and (3) informed him in writing of all actions taken to comply with the Board's order and the date on which it believed it fully complied. CID at 2-3.

¶8 The appellant has filed a petition for review of the compliance initial decision. Petition for Review File, Tab 1. He again argues that the agency recovered back pay from him by reporting it as an overpayment and failed to make appropriate TSP contributions and catch-up contributions. *Id.* He also asserts that the administrative judge failed to fully address all of the arguments he raised in his petition for enforcement

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subjected to an appealable suspension. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-0752-15-0509-I-1, Final Order (June 29, 2015).

regarding the agency's noncompliance. *Id.* The agency did not respond.[4]

¶9 At the outset, we find that this case must be remanded for consideration of the appellant's February 22, 2015 submission, which was not included in the compliance file and of which the administrative judge and the agency may have been unaware. Accordingly, on remand, the administrative judge should address those arguments raised by the appellant in that submission that were not addressed in her initial decision.

¶10 As to the arguments already addressed by the administrative judge in her initial decision in response to the appellant's May 30, 2015 submission, we agree with her finding that the appellant was not entitled to a promotion to GS-13 pursuant to the Board's order. The purpose of the Board's remedial power is to place the employee, as nearly as possible, in the status quo ante; that is, the position he would have occupied had the wrong not been committed. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). The present appeal concerns a WIGI, not a promotion, so we cannot order a promotion as relief for the

[4] On September 3, 2015, the appellant submitted a pleading titled "Appeallant [sic] Pleading to Submit Evidence That Emerged After the Close of Record," and the Office of the Clerk of the Board acknowledged this pleading. PFR File, Tabs 4-5. In his pleading, the appellant alleged that the agency "garnish[ed] the BOARD ordered relief of back pay in the amount of $1,207.26 from my last pay check in the form of vacation pay out. . . ." PFR File, Tab 4. On remand, when providing the narrative explanation as set forth below by the Board, the agency shall address this assertion by the appellant.

improper WIGI denial. The administrative judge found that the agency sufficiently established, at least on paper, that it granted the appellant a WIGI to GS-12, step 3, retroactive to December 1, 2013, in compliance with the Board's order. CF, Tab 5 at 6-10. However, based on the evidence submitted below, we find that the agency's evidence concerning its back pay calculations related to the appellant's retroactive WIGI is inadequate.

¶11 The agency bears the burden of proving its compliance with the Board's order. *See Guinn v. Department of Labor*, 93 M.S.P.R. 316, ¶ 9 (2003). As the alleged noncomplying party, the agency was required to submit evidence of compliance, including a narrative explanation of the calculation of back pay and other benefits, and supporting documents. 5 C.F.R. § 1201.183(a)(1)(i). However, it failed to do so. The agency submitted several pages of documents purporting to be a "calculation worksheet," without any narrative explanation. CF, Tab 5 at 4, 12-32. It simply made a bare assertion that it properly paid the appellant back pay, supported only with a blanket citation to the aforementioned documents. *Id.* at 4. The agency did not respond specifically to any of the appellant's arguments. Many of the documents it submitted are untitled and contain numerous undefined codes and abbreviations. As such, they are of limited usefulness in determining the exact amount of back pay the agency paid the appellant and how that amount was calculated. *See Guinn*, 93 M.S.P.R. 316, ¶ 10.

¶12 From what we can understand of the agency's documentation, we question the accuracy of its

calculations. For instance, the agency appears only to have calculated back pay retroactive to pay period 26 of 2013. *See* CF, Tab 5 at 17, 19, 21-22. However, the WIGI was to be retroactive to December 1, 2013, which was the start of pay period 24. Its calculations for pay periods 1 and 2 of 2014 list the corrected rate of pay for GS-12, step 3, as $38.27 hourly. *Id.* at 22. However, the rate of pay changed to $38.65 hourly, effective the first pay period in January 2014.[5] *See* Exec. Order No. 13655, 78 Fed. Reg. 80,451 (Dec. 31, 2013). Similarly, its calculations for pay periods 1 and 2 of 2015 list the corrected hourly rate of pay as $38.65. CF, Tab 5 at 31. However, the rate of pay changed to $39.04 hourly, effective the first pay period in January 2015. *See* Exec. Order No. 13686, 79 Fed. Reg. 77,361 (Dec. 24, 2014). Thus, it would seem that the agency's corresponding calculation of TSP contributions for those pay periods also are inaccurate, given that the appellant designated a percentage of basic pay to contribute. CF, Tab 5 at 19-21; *see* 5 C.F.R. § 1605.13(b). The agency, moreover, appears to contend that the appellant was properly compensated at the GS-12, step 3 level, and thus not entitled to any back pay, for pay periods 3 through 26 of 2014 and pay periods 1 and 2 of 2015, but it appears that the agency failed to reflect the January 2014 pay increase in its calculations. CF, Tab 5 at 17, 19-20, 23-31.

¶13 Based on the foregoing, we find it necessary to remand this appeal for consideration of the arguments

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[5] The hourly rates referenced herein include the locality pay for the Washington, D.C. area.

raised in the appellant's February 22, 2015 submission and for the agency to provide a narrative explanation of its back pay calculations. This narrative explanation also shall address the appellant's assertion that the agency garnished $1,207.26 from his last paycheck. *See supra* ¶ 8 n.4.

ORDER

¶14 For the reasons discussed above, we remand this case to the Washington Regional Office for further adjudication in accordance with this Remand Order.

FOR THE BOARD: /s/ _____
William D. Spencer
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARRY AHURUONYE,
Appellant,

DOCKET NUMBER
DC-531D-15-0242-I-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: June 29, 2015

THIS ORDER IS NONPRECEDENTIAL[1]

Barry Ahuruonye, Hyattsville, Maryland, pro se.

Josh C. Hildreth, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

REMAND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his appeal of the

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

agency action denying his within-grade increase (WIGI) for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the case to the Washington Regional Office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

¶2 The appellant is a Grants Management Specialist, GS-12, step 3. Initial Appeal File (IAF), Tab 21 at 61. On November 28, 2014, the agency issued him a performance appraisal for Fiscal Year 2014, rating his overall performance as unsatisfactory. *Id.* at 22. On December 11, 2014, he filed an appeal with the Board asserting that the agency denied him a WIGI because he was due to receive a WIGI to step 4 by December 2, 2014, and he had not yet received any increase in pay. IAF, Tab 1 at 5, Tab 36 at 4. He raised an affirmative defense of whistleblower reprisal and declined a hearing. IAF, Tab 1 at 2, 5, Tab 15 at 3.

¶3 On January 8, 2015, the agency moved to dismiss the appeal on the ground that it was premature because the agency "ha[d] not yet made a determination regarding Appellant's level of competence." IAF, Tab 5 at 4-6. It asserted that it was not required to make such a determination until May 23, 2015, because its last determination that the appellant was not performing at an acceptable level of competence (ALOC) occurred on May 23, 2014. *Id.* at 4.

¶4 Then, on January 20, 2015, while the appeal was still pending below, the appellant's supervisor emailed him a letter "officially notify[ing]" him that his WIGI to step 4 was denied.[2] IAF, Tab 21 at 63. The letter advised the appellant of his right to request reconsideration of the decision within 15 days of his receipt of the notice. *Id.* The appellant responded on January 21, 2015, acknowledging receipt of the email and stating, "this matter is being appealed at MSPB." *Id.* at 64. He took no further action to request reconsideration of the WIGI denial. *See id.* at 65. Thus, in its March 5, 2015 close of record submission,[3] the agency moved to dismiss the appeal on the ground that the Board lacked jurisdiction over the appeal because the appellant failed to seek reconsideration of the January 20, 2015 denial notice. *Id.* at 4-7.

¶5 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 39, Initial Decision (ID). She found that the appeal was prematurely filed, but that it ripened while pending. ID at 1. She concluded, however, that the Board

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[2] On review, the appellant appears to assert that the administrative judge ordered the agency to issue him a WIGI denial letter. *See* Petition for Review (PFR) File, Tab 1 at 13. There is no such evidence in the record.

[3] The appellant argues that the administrative judge should not have permitted the agency to raise the issue of jurisdiction in its close of record submission because the agency failed to timely raise an objection regarding jurisdiction in response to the prehearing conference summary. PFR File, Tab 1 at 5, 10. We discern no error because the issue of jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time. *Poole v. Department of the Army*, 117 M.S.P.R. 516, ¶ 9 (2012).

lacked jurisdiction over the appeal because the appellant failed to show that he requested reconsideration of the January 20, 2015 WIGI denial notice. ID at 2-3.

¶6 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. He argues that, as of December 2, 2014, the agency had effectively denied his WIGI because he did not receive an increase in pay; and that the agency acted improperly by issuing the denial notice on January 20, 2015, rather than notifying him in advance of its decision to deny his WIGI. *Id.* at 11-13. The agency has filed a response, and the appellant has filed a reply.[4] PFR File, Tabs 3-4.

The appellant was due to receive his WIGI to step 4 on November 30, 2014.

¶7 On April 4, 2014, an initial decision in a prior Board appeal ordering the agency to grant the

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[4] The appellant also asserts that the administrative judge erred by denying his motion to compel the agency to produce the documentation, which he contends would have shown the actual date of the WIGI denial. PFR File, Tab 1 at 5. We find that this issue is now moot in light of our finding of jurisdiction. He also argues that the administrative judge erred by not sanctioning the agency for failing to submit an agency file. *Id.* at 9. He does not explain how the agency's failure to submit an agency file harmed him. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (an administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights). Moreover, we discern no harm because the agency filed a motion to dismiss, as well as a detailed close of record submission with numerous exhibits, both of which addressed the issues in this appeal and to which the appellant submitted responses. IAF, Tabs 5, 7, 21-24.

appellant a WIGI to step 2 retroactive to December 2, 2012, became the Board's final decision when neither party filed a petition for review. MSPB Docket No. DC-531D-13-1273-I-1, Initial Decision (Feb. 28, 2014); *see* 5 C.F.R. § 1201.113. The appellant therefore was due to receive his WIGI to step 3 on December 1, 2013. *See* 5 U.S.C. § 5335(a)(1). On May 23, 2014, the agency informed him of its decision to deny his WIGI to step 3. IAF, Tab 21 at 19. The appellant filed an appeal with the Board regarding the agency's denial of his WIGI to step 3 and, on December 29, 2014, the Board reversed the action and ordered the agency to retroactively grant him his WIGI to step 3. MSPB Docket No. DC-531D-14-0587-I-1, Remand Order (Dec. 29, 2014). The agency subsequently granted the step 3 WIGI retroactive to December 1, 2013. IAF, Tab 21 at 61. We therefore find that the appellant was due to receive his WIGI to step 4 52 weeks later on November 30, 2014. *See* 5 U.S.C. § 5335(a)(1).

¶8 We reject the agency's assertion that it believed the appellant was not due to receive his WIGI to step 4 until May 23, 2015, because it did not inform him until May 23, 2014, of its decision to deny his WIGI to step 3. *See* PFR File, Tab 1 at 5. The agency is not permitted to extend the appellant's due date for a WIGI simply by delaying in informing him of its decision to deny it. Notably, the agency does not claim that it properly delayed making an ALOC determination pursuant to 5 C.F.R. § 531.409(c)(1). Rather, it cites 5 C.F.R. § 531.411, which relates to granting a WIGI after it has been withheld, and involves preparing a new

rating of record and making a new ALOC determination. IAF, Tab 21 at 5. Section 531.411 does not support the agency's position, but rather makes clear that, when an agency withholds a scheduled WIGI, it "shall determine whether the employee's performance is at an acceptable level of competence after no more than 52 calendar weeks following the original eligibility date for the within-grade increase." (emphasis added).

The Board has jurisdiction over the instant appeal.

¶9 An agency is required to make an ALOC determination as of the date a WIGI is due, and a failure to comply with this requirement is tantamount to a WIGI denial. *Martinesi v. Equal Employment Opportunity Commission*, 24 M.S.P.R. 276, 280 (1984); *see* 5 U.S.C. § 5335(c). The appellant's WIGI to step 4 was scheduled for November 30, 2014. There is no dispute that the agency did not make an ALOC determination prior to that date or for nearly 2 months thereafter. *See* IAF, Tab 5 at 4. We therefore find that the agency denied the appellant's WIGI, effective November 30, 2014.

¶10 An employee ordinarily is not entitled to appeal the denial of a WIGI to the Board unless he has first timely sought and received a reconsideration decision from the agency. 5 U.S.C. § 5335(c). However, if an agency fails to comply with the statutory requirement that it inform an employee of his right to reconsideration of the WIGI denial, that failure is sufficient to allow the Board to assume jurisdiction and to adjudicate the appeal on its merits. *Martinesi*, 24 M.S.P.R. at 280.

In the instant case, the agency failed to notify the appellant of his right to request reconsideration on November 30, 2014, the date his WIGI was denied. We find that this is sufficient for us to assume jurisdiction. That the appellant failed to respond to the agency's belated notification of the right to request reconsideration does not relieve us of jurisdiction. *Cf. Hagan v. Department of the Army*, 99 M.S.P.R. 313, ¶ 6 (2005) (the Board's jurisdiction is determined by the nature of an agency's action when an appeal is filed).

¶11 Based on the foregoing, we must remand this appeal for further adjudication. Although we find that the appellant was denied a scheduled WIGI, we make no finding as to whether that denial was otherwise proper. In his petition for review, the appellant makes numerous arguments regarding the merits of his appeal and his whistleblower affirmative defense.[5] PFR File, Tab 1 at 17-29. Those issues will be addressed on remand.

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[5] The appellant contends that the administrative judge erred by rejecting evidence regarding the validity of his performance plan on the ground that it was untimely filed. PFR File, Tab 1 at 5. The appellant has not identified with specificity the evidence he attempted to introduce and proffers no argument that the allegedly rejected evidence was timely filed. The record does indicate that the administrative judge rejected evidence the appellant submitted on timeliness grounds, but does not identify the specific evidence. IAF, Tab 31 at 1. To the extent that this is the order to which the appellant is referring, we note that he filed a pleading, contained in the record, wherein he argued that his performance standards were invalid. IAF, Tab 32 at 7-8. In sum, we see no indication that evidence was improperly rejected and, in any event, the appellant has not been precluded from advancing the argument at issue.

ORDER

For the reasons discussed above, we REMAND this case to the Washington Regional Office for further adjudication in accordance with this Remand Order.

FOR THE BOARD: /s/ _____
William D. Spencer
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARRY AHURUONYE,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
DC-531D-14-0587-I-1

DATE: December 29, 2014

THIS ORDER IS NONPRECEDENTIAL[1]

Barry Ahuruonye, Hyattsville, Maryland, pro se.

Josh C. Hildreth, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed for lack of jurisdiction

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

his appeal challenging the agency's failure to grant him a scheduled within-grade increase (WIGI). For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision, GRANT the appellant's WIGI, and, as set forth below, REMAND the case to the regional office for further adjudication of the appellant's affirmative defenses.

¶2 On July 9, 2013, the agency denied the appellant's WIGI to step 2 in his position as GS-12 Grants Management Specialist, retroactive to December 2, 2012. On appeal, a Board administrative judge reversed the action, finding that the agency had failed to provide the appellant with a performance rating prior to denying his WIGI. She ordered the agency to award the appellant the WIGI. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-531D-13-1273-I-1, Initial Decision at 2, 11 (Feb. 28, 2014). That decision became the Board's final decision on April 4, 2014, when neither party filed a petition for review.

¶3 Shortly thereafter, the appellant filed a new appeal claiming that the agency had again improperly denied his WIGI, presumably to step 3. Initial Appeal File (IAF), Tab 1. He alleged that the agency's action was due to discrimination based on race and was in retaliation for his protected equal employment opportunity (EEO) activity. *Id.* at 4, 8, 36-37, 45. He declined a hearing. *Id.* at 2.

¶4 In response, the agency moved that the appeal be dismissed for lack of jurisdiction. *Id.*, Tab 4. The agency argued, and submitted evidence to show, that, on October 17, 2013, the appellant's supervisor had issued him

an Employee Performance Appraisal Plan for Fiscal Year (FY) 2013 that he refused to sign, and that, on or about May 1, 2014, she issued him a Summary Rating of "Minimally Successful" based on his having been rated "Minimally Successful" in each of his three critical elements. *Id.* at 29, 33, 35, 39. The appellant disputed the rating, acknowledging only that he had received it on May 8, 2014. *Id.* at 29. His supervisor advised him that she considered their discussion of that same day to be his informal request for reconsideration of the rating, *id.* at 62, and, on May 12, 2014, she notified him that she would not change the rating, although she informed him that he could proceed to a formal reconsideration of the rating through the Human Resources Office by submitting a written request to a named Employee Relations Specialist, *id.* at 85. The appellant did not seek formal reconsideration of his rating. The agency further argued that, because the appellant failed to formally request reconsideration of his FY 2013 rating, the Board lacked jurisdiction over his appeal. *Id.* at 4, 7. On the same basis, the administrative judge ordered the appellant to file evidence and argument establishing the Board's jurisdiction over his appeal. *Id.*, Tab 5. In response, the appellant challenged the agency's motion, arguing, inter alia, that the action at issue was taken in retaliation for his having disclosed to his first and second-line supervisors malfeasance in grant awards.[2] *Id.*, Tab 6. In a

[2] On July 22, 2014, the Board docketed the appellant's individual right of action appeal against the agency. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-1221-14-0911-W-1. That matter is pending in the Board's Washington Regional Office.

subsequent pleading, the appellant also renewed his claims of discrimination and retaliation for protected EEO activity.[3] *Id.*, Tab 9.

¶5 The administrative judge dismissed the appellant's appeal for lack of jurisdiction. *Id.*, Tab 13, Initial Decision (ID) at 1, 6. She found that the agency's initial decision to deny the appellant's WIGI and its refusal to change his performance rating do not constitute actions appealable to the Board as it is only the affirmance of an agency's decision to deny a WIGI upon a request for reconsideration that is appealable to the Board. ID at 4. She acknowledged that the Board may assert jurisdiction under circumstances where the agency acted unreasonably in failing to issue an initial decision on the appellant's WIGI or in refusing to act on a request for reconsideration of that decision, but she found that preponderant evidence did not support a finding that the agency did either.[4] ID at 5-6.

¶6 The appellant has filed a petition for review, Petition for Review (PFR) File, Tab 1; the agency has responded in opposition, *id.*, Tab 4; and the appellant has filed a reply thereto, *id.*, Tab 5.

¶7 A WIGI may be denied if an employee is not performing at an acceptable level of competence. 5 U.S.C. § 5335(a). To be rated at an acceptable level of competence, an employee's performance must be at least

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[3] The administrative judge did not provide the appellant notice of his burdens of proof as to these affirmative defenses.

[4] The administrative judge did not address the appellant's affirmative defenses.

Fully Successful or the equivalent. When a determination is made that the work of an employee is not of an acceptable level of competence to warrant a WIGI, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of that determination within his agency under uniform procedures prescribed by the Office of Personnel Management (OPM). If the determination to deny a WIGI is affirmed on reconsideration, the employee is entitled to appeal that decision to the Merit Systems Protection Board. 5 U.S.C. § 5335(c).

¶8 Under regulations promulgated by OPM to effectuate this statute, when a supervisor determines that an employee's performance is not at an acceptable level of competence, the negative determination shall be communicated to the employee in writing and shall set forth the reasons for the determination and the respects in which the employee must improve his performance in order to be granted a WIGI, and it shall inform the employee of his right to request reconsideration of the determination. 5 C.F.R. § 531.409(e)(2).

¶9 Here, the agency relied upon the Minimally Successful performance rating it provided to the appellant in 2014 to support the denial of his WIGI, and the administrative judge appeared to have no issue with such reliance. ID at 4. While it is true that a determination to withhold a WIGI shall be based on a current rating of record, 5 C.F.R. § 531.409(b), the regulations do not suggest, and we discern no support for finding, that such a rating, even if less than Fully Successful, obviates an agency's need to issue an employee a negative

determination as to his level of competence, as set forth in OPM's regulations, 5 C.F.R. § 531.409(e)(2), when it intends to deny his WIGI. Although the agency did not grant the appellant a WIGI to step 3, it failed to issue him a notice, as required, that his performance was not at an acceptable level. The agency's actions regarding the appellant's performance rating do not satisfy this requirement. The Board has jurisdiction over this appeal because the appellant's failure to seek a reconsideration decision was based on the agency's failure to provide him with notice of the denial of his WIGI and the opportunity to seek reconsideration of that negative determination. *Cf. Shaishaa v. Department of the Army*, 58 M.S.P.R. 450, 453 (1992) (the Board has jurisdiction, even absent a reconsideration decision, when an agency improperly denies an appellant an opportunity for reconsideration by failing or refusing to act on a request for reconsideration).

¶10 Additionally, the Board may not sustain an agency's withholding of an employee's WIGI unless that action is supported by substantial evidence. *Chaggaris v. General Services Administration*, 49 M.S.P.R. 249, 255 (1991). Here, the agency failed to submit any of the appellant's work products that included apparent errors. *Cf. id.* at 255-56 (the appellant's performance deficiencies were described in considerable factual detail and were corroborated by the affidavits of his supervisors, providing sufficient support for the agency's determination that he was not performing at an acceptable level); *Hudson v. Department of the Army*, 49 M.S.P.R. 202, 206-07 (1991) (the

agency submitted copies of documents prepared by the appellant that included apparent errors of the kind described in the performance standard, but, because that evidence covered only a fraction of the period at issue, the agency failed to present substantial evidence supporting its decision to withhold the appellant's WIGI). Here, the agency failed to issue the appellant a notice that his performance was not at an acceptable level of competence or provide him an opportunity to request reconsideration of that determination under OPM's procedures and, in addition, failed to submit any supporting evidence. Therefore, the action must be reversed.

¶11 Although we reverse the action on appeal, further adjudication is necessary to resolve the appellant's claims of discrimination and retaliation for protected activity. *See Schibik v. Department of Veterans Affairs*, 98 M.S.P.R. 591, ¶ 11 (2005) (an appellant has the right under 5 U.S.C. § 7702(a) to a decision on a discrimination claim even when the Board has already determined that the action appealed must be reversed on other grounds).

ORDER

We REVERSE the initial decision and direct the agency to retroactively grant the appellant's WIGI to step 3. *See Oulianova v. Pension Benefit Guaranty Corporation*, 120 M.S.P.R. 22, ¶ 11 n.6 (2013). We also REMAND this case to the regional office for adjudication

of the appellant's claims of discrimination and retaliation for protected activity.

¶12 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the

Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶15 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

FOR THE BOARD: /s/ _____
William D. Spencer
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

BARRY AHURUONYE,
Appellant,

DOCKET NUMBER
DC-531D-13-1273-I-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: February 28, 2014

Gerald L. Gilliard, Esquire, Washington, D.C., for the appellant.

Josh C. Hildreth, Washington, D.C., for the agency.

BEFORE

Melissa Mehring
Administrative Judge

INITIAL DECISION

INTRODUCTION

On July 25, 2013, the appellant filed an appeal with the Merit Systems Protection Board (Board) challenging the agency's denial of his within-grade increase (WIGI). Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. 5 U.S.C. § 5335(c); 5 C.F.R. § 531.410(d) (2011).[1] During a status conference

[1] I found the Board has jurisdiction over this appeal in my September 20, 2013 Summary of Status Conference. AF, Tab 17 at 1-2. Therein, I explained that the appellant's failure to seek and receive a reconsideration decision was based on the agency's

on December 9, 2013, the appellant withdrew his request for a hearing. AF, Tab 32 at 2. Therefore this case was decided on the written record. For the reasons set forth below, the agency's reconsideration decision is REVERSED.

ANALYSIS AND FINDINGS

Background

The appellant was appointed to a GS-12 Grants Management Specialist position with the Department of the Interior, U.S. Fish and Wildlife Service (FWS) effective December 4, 2011. *Id.*, Tab 31 at 25. On November 30, 2012, the agency notified the appellant that it was terminating his employment during his probationary period effective December 3, 2012. *Id.*, Tab 11 at 20. The appellant filed a Board appeal challenging his termination. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-0752-13-0384-I-1. The parties settled that appeal, and as part of the settlement the agency reinstated the appellant. AF, Tab 11 at 14. The agreement was silent regarding the appellant's WIGI. *Id.* at 14-17.

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admitted failure to provide the appellant with notice of the action and the opportunity to seek reconsideration. *Id.* The Board has held that it has jurisdiction even absent a reconsideration decision when an agency improperly denies an appellant an opportunity for reconsideration by failing or refusing to act on a request for reconsideration. *See Shaishaa v. Department of the Army*, 58 M.S.P.R. 450, 453 (1992). I find that the agency's failure to provide the appellant with notice of his right to seek reconsideration is tantamount to failing or refusing to act on a reconsideration decision.

The agency denied the appellant's WIGI on July 9, 2013, but made it effective retroactive to December 2, 2012. *Id.*, at 13. The agency based its denial on its September 20, 2012 determination that he was not performing at an acceptable level of competence, at or above fully successful. *Id.*, Tab 13 at 9. The appellant's supervisor at that time was Penny Bartnicki. The agency did not issue the appellant a performance appraisal or rating of record. *Id.*, Tab 11 at 11; Tab 37 at 7.

The agency contends, however, it properly denied the appellant a WIGI because his performance did not meet an acceptable level of competence. *Id.*, Tab 11 at 10. It further asserts that it was not required to issue the appellant a performance appraisal because he was removed at the time his rating was required. *Id.*, at 11.

The appellant argues that the agency's stated reason for denying his WIGI, his performance, was merely pretext. Instead, the appellant claims that the agency was motivated by race and national origin discrimination as well as retaliation for protected disclosures and protected activity in the form of equal employment opportunity (EEO) complaints and a Board appeal.

Burden of Proof

A WIGI may be denied if an employee is not performing at an acceptable level of competence. 5 U.S.C. § 5335(a). To be rated at an acceptable level of competence, an employee's performance must be at least 'Fully Successful' or equivalent. 5 C.F.R. § 531.404(a).

In addition, the denial of a WIGI shall be based on the most recent rating of record under 5 C.F.R. Part 430, Subpart B. *Id.*

To prevail, the agency must show by substantial evidence that the employee was not performing at an acceptable level of competence. *Romane v. Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985); *Affil v. Department of the Interior*, 33 M.S.P.R. 282, 285 (1987). Substantial evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1) (2011).

The statute governing WIGIs provides for the Office of Personnel Management (OPM) to prescribe uniform regulations for implementation. 5 U.S.C. § 5335. OPM promulgated such regulations, and therein explained that an acceptable level of competence is based on an employee's current rating of record and referenced 5 C.F.R. chapter 43. Under 5 C.F.R. § 430.203:

> A rating of record means the performance rating prepared at the end of an appraisal period for performance of agency-assigned duties over the entire period and the assignment of a summary level. . . .

The regulations do not provide for an alternative means of determining whether an employee has met an acceptable level of competence other than an employee's rating of record. The agency has not cited any law, rule or regulation that allows an agency to make

an acceptable level of competency determination absent a rating of record.

The agency asserts that it could not issue the appellant a performance rating because the appellant was not employed when his rating of record was due. AF, Tab 11 at 11. It, however, made the determination regarding the appellant's acceptable level of competence while the employee was employed on September 20, 2012. *Id.*, Tab 13 at 9. The Department of the Interior, Departmental Manual provides that an employee's rating of record must be "fully successful" to receive a WIGI. *Id.* at 43. The manual further provides:

> This may require a supervisor to prepare a new rating of record before the end of the appraisal period to document the appropriate level of performance at the time the [WIGI] is due. *Id.*

Accordingly, the agency had a provision for providing the appellant a rating of record before the end of the appraisal period if it wished to deny him a WIGI. *See Id.* The agency did not do this. Because the appellant had no rating of record, the agency could not properly make a determination regarding whether he maintained an acceptable level of competence. Therefore, the agency has failed to establish a necessary element for sustaining a denial of a WIGI and the action must be REVERSED.

The appellant has failed to establish his affirmative defenses.

The appellant raised several affirmative defenses. Specifically he alleged that the agency action was based on race and national origin discrimination as well as retaliation for protected whistleblowing and protected activity.

Applicable Law

Although I reverse the agency action denying the appellant's WIGI, the agency has nonetheless articulated a facially non-retaliatory reason for its action. Accordingly, the inquiry proceeds directly to the ultimate question of whether, upon weighing all the evidence, the appellant has met his burden of proving that the agency intentionally discriminated and/or retaliated against him based on his protected activity. *See Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). The question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason and that the agency intentionally discriminated and/or retaliated against him. *Id.*, ¶ 17. The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory or retaliatory statements or attitudes on the part of the employer, or any contrary

evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc). While such evidence may include proof that the employer treated similarly-situated employees differently, an employee may also prevail by introducing evidence: (1) that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of employees who engage in protected activities; or (5) of incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C.Cir.2008). In determining whether the agency's proffered reason for its action is pretextual, the focus of the inquiry is not "the correctness or desirability of [the] reasons offered . . . [but] rather whether the employer honestly believes in the reasons it offers." *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir.1992).

Race and National Origin Discrimination

The appellant may establish a prima facie case of prohibited discrimination on the ground of disparate treatment by introducing evidence to show that: (1) he is a member of a protected group; (2) he suffered an appealable adverse employment action; and (3) the unfavorable action gives rise to the inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). As to the third element, an employee

may rely on any evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g.*, *Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010). Thus, a prima facie case of disparate treatment discrimination can be established by any proof of actions taken by the employer that show a "discriminatory animus," where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1268 (11th Cir. 1999).

Here, the appellant has failed to allege facts sufficient to make a prima facie case of prohibited discrimination. The appellant asserts that he is a member of a protected class and he suffered an appealable adverse employment action. The appellant, however, has failed to offer any evidence that the unfavorable action, the denial of his WIGI, gives rise to the inference of discrimination. As an initial matter, the appellant has failed to identify the race or national origin of those he believes were treated differently, or provide another basis for believing the agency action was based on race or national origin.

The appellant alleged that the agency did not permit African American Grant Specialists to access the Coastal Impact Assistance Program (CIAP) inbox. AF, Tab 31 at 22-23. The appellant asserted that this slowed down his ability to perform the duties of his position. *Id.* The appellant, however, has provided no specific information regarding this allegation, such as what agency official made this decision, when the

decision was made and how it was communicated. An appellant's bare allegation of discrimination, unsupported by probative and credible evidence, does not prove an affirmative defense. *See Wingate v. U.S. Postal Service*, 118 M.S.P.R.566, ¶ 5 (2012), *Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 539 (1992).

Moreover, the appellant stated that his supervisor Penny Bartnicki was a bad supervisor that had a problem with many subordinates. Specifically, he asserted that of the six employees that were in his office when Ms. Bartnicki came, two quit, one was terminated and one was reassigned. AF, Tab 16 at 11. This does not support a finding that she was discriminating against the appellant, but rather demonstrates she was generally dissatisfied with the employees in the office she was brought in to supervise. The agency has consistently stated that it denied the appellant's WIGI because of his performance, and this has not changed since the agency made its acceptable level of competence determination on September 20, 2012. *Id.*, Tab 13 at 9.

Based on the foregoing, I find the appellant has failed to establish that the agency engaged in race or national origin discrimination when it denied his WIGI.

Retaliation for Engaging in Protected Activity and Making a Protected Disclosure

The appellant filed an MSPB appeal regarding his removal on March 8, 2013, which settled on April 5, 2013, and the appeal was dismissed. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-0752-13-0384-I-1. The appellant filed a petition for enforcement on June 20, 2013. *Ahuruonye v. Department of the Interior*, MSPB Docket No. DC-0752-13-0384-C-1.

The appellant also asserts that he filed EEO complaints. The appellant submitted an EEO complaint dated February 21, 2013. AF, Tab 31 at 48-54. In that complaint, the appellant references reports of discrimination in February 2012, August 17, 2012, and September 17, 2012. The appellant did not, however, establish that these "reports of discrimination" were protected activity as it is unclear whether his reports were in the form of a complaint granted by any law, rule or regulation. See 5 U.S.C. § 2302(b)(9). The appellant also failed to produce evidence or argument that the acting agency official, his supervisor Bartnicki, had any knowledge of his "reports of discrimination." The appellant asserts his belief that his second line supervisor, Steven Burton, was aware and informed Bartnicki, but he offers no support for his speculation. The appellant also asserts he engaged in EEO activity on June 10, 2013, and Bartnicki was interviewed by an EEO counselor in late June 2013. AF, Tab 23 at 46. As with the appellant's February, August, and September activity, he did not provide any supporting evidence of his allegation that he engaged in protected EEO

activity in June 2013. Accordingly, I find that the only protected EEO activity that could form the basis of the appellant's affirmative defense for protected EEO activity is his EEO complaint dated February 21, 2013.

The appellant asserts that he disclosed allegations of violations of law to the Office Inspector General (OIG) in November 2012 when he disclosed that Bartnicki asked him to fund a grant twice. *Id.*, Tab 23 at 49, Tab 31 at 9. The OIG notified the appellant on January 31, 2013, that it was referring his allegation back to the Director of FWS for review and any action if warranted. *Id.*, Tab 23 at 50.

The agency was aware of the appellant's Board appeals and the OIG report at least as of January 31, 2013. It is unclear whether Bartnicki the acting agency official was aware of the appellant's EEO activity. Because the appellant bears the burden of proof on this issue, and he has not produced sufficient evidence to establish it, I find he has failed to establish knowledge of his protected EEO activity.

The agency took the action on July 9, 2013, but made it effective retroactive to December 2, 2012. *Id.*, Tab 11 at 13. The agency, however, decided to deny his WIGI on September 20, 2012, when it made its acceptable level of competence determination. *Id.*, Tab 13 at 9. This was well before the appellant engaged in any protected activity or made a protected disclosure.

Although the agency's determination was not based on a rating of record, and therefore the agency action could not be sustained, this does not mean that

the agency's evaluation of the appellant's performance was not supported by the record.[2] The agency submitted documentation in which it identified discussions with the appellant regarding his performance problems. *Id.* at 10-12. Moreover, it provided specific examples of his performance deficiencies. *Id.* The appellant disagrees with his supervisor's assessment of his work. *Id.*, Tab 13 at 11-12 and Tab 22 at 8-9.

In an email dated August 17, 2012, Bartinicki stated that the appellant should not have informed a grantee that he did not have a grant request and request the grantee to email it to him. *Id.*, Tab 13 at 11. The appellant stated that he properly dealt with the situation because the grant package had been lost. *Id.*, Tab 22 at 17. Although an employee may disagree with the procedures a supervisor implements, it is not evidence of retaliation for a supervisor to require an employee to follow her preferred methods of operation. The agency stated that it had informed the appellant regarding how it wanted him to handle this type of situation, and he did not comply with those instructions. *Id.*, Tab 13 at 10. The other examples cited by the agency are similar in nature, and the appellant similarly disagrees with how his supervisor wanted things done. *Id.*, 10-13. I note Bartnicki's email highlighting

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[2] The agency and the appellant submit much evidence and argument regarding the appellant's performance after September 20, 2012. Because the agency made its acceptable level of competence determination on that date, and that determination was the basis for the denial of the appellant's WIGI, I am considering the evidence the agency offered to support its determination at that time.

her concerns regarding the appellant's performance dated August 17, 2012, and the conversations with the appellant on July 5, 2013 and September 18, 2012 that she referenced, all preceded any protected activity or disclosure by the appellant. *Id.*

The appellant asserted Bartinicki changed policies and gave his work special scrutiny that she did not apply to others. *Id.*, Tab 22 at 7. However, the appellant did not indicate that the new policy was directed at him specifically or even only those who engaged in protected activity, and in fact the appellant's supervisor sent the policy change to all members of the unit. *Id.* at 34-36. Moreover, the appellant has offered nothing beyond his conclusory statement to support his position that the agency treated him differently and gave his work greater scrutiny. To establish even a nonfrivolous allegation, an appellant must offer more than a pro forma allegation. *See Ontivero v. Department of Homeland Security*, 117 M.S.P.R. 600, ¶ 15 (2012) (Conclusory, vague or unsupported allegations are insufficient to qualify as nonfrivolous allegations of Board jurisdiction); *See also Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006). In addition, as stated above, Bartnicki, according to the appellant, was generally dissatisfied with the employees in the office she was brought in to supervise, and of the six employees that were in his office when Ms. Bartnicki came, two quit, one was terminated and one was reassigned. AF, Tab 16 at 11. The appellant did not provide any information regarding these employees

and whether they had engaged in protected disclosures or protected activity.

The appellant also claims that the agency's explanation for its action is contradicted by emails regarding his opportunity for promotion and his contributions to the office. Id., Tab 23 at 36-38. The cited emails relate to the time in grade requirement for being considered for a promotion and specifically stated that promotions are based on performance. *Id.* at 37-38. The included email also relates that the appellant showed initiative in offering training and assisting in the transition prior to Bartnicki becoming his supervisor. *Id.* at 36-38. I find that the cited emails do not contradict the agency's explanation for its action. Specifically, they do not relate to Bartnicki's assessment of the appellant's performance, or the specific examples the agency proffered in support of its action. Nor has the agency disputed the statement in the email that the appellant could have been promoted to a GS-13 had his performance been acceptable.

Based on the foregoing, I find the appellant has not established that the agency's stated reason for its action, his performance, was pretext for retaliation. Therefore, I find the appellant has not established his affirmative defense based on his claim of retaliation for making a protected disclosure or engaging in protected activity.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to award the appellant a Within Grade Increase. I further **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and

Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the

agency's petition or cross petition for review on that basis.

FOR THE BOARD: _____/S/_____
Melissa Mehring
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 4, 2014**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal district court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

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

Criteria for Granting a Petition or Cross Petition for Review

The criteria for review are set out at 5 C.F.R. § 1201.115, as follows:

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

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

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

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

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

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the

Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this decision only after it becomes final, as set forth above.

Discrimination Claims: Administrative Review

You may request review of this decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

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

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

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

You, or your representative if you are represented, should send your request to EEOC no later than 30 calendar days after the date this decision becomes final. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You, or your representative if you are represented, must file your civil action with the district court no later than 30 calendar days after the date this decision becomes final. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f) and 29 U.S.C. § 794a.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5239 **September Term, 2023**

1:16-cv-01767-RBW

Filed On: October 26, 2023

Barry Ahuruonye,

Appellant

v.

Department of Interior,

Appellee

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of the corrected petition for rehearing en banc, the supplements thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

BARRY AHURUONYE, **Appellant,** **v.** **DEPARTMENT OF THE INTERIOR,** **Agency.**	**Docket No.** **DC-531D-13-1273-I-1** **Date: March 14, 2014**

MEMORANDUM IN SUPPORT FOR MOTION FOR COUNSEL FEES

I. Introduction

The facts of the case are set forth in the Initial Decision by the Administrative Judge. Essentially, the Agency violated 5 U.S.C. § 5335(a) and 5 C.F.R. Part 531 Subpart D by denying Appellant's within-grade increase (WIGI) without having first issued him a written rating of record of less than "Fully Successful." The finding that the denial of Appellant's WIGI is clear. There is no question as to prevailing party status.

II. Discussion

No question exists concerning fee entitlement. To establish entitlement to an award of attorney fees under 5 U.S.C. 7701(g0(1), an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client

relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Hurt v. Dep't of Transportation*, 115 M.S.P.R. 10, ¶ 13 (2010).

1. **The Appellant is the "prevailing party" in this action and incurred fees pursuant to an existing attorney-client relationship.**

An appellant who shows that he obtained a material alteration of the legal relationship between the parties through an enforceable final judgment on the merits or a settlement agreement entered into the record for purposes of enforcement by the Board is a "prevailing party" for the purposes of 5 U.S.C. § 7701(g)(1). *Sanchez v. Dep't of Homeland Security*, 116 M.S.P.R. 183, ¶ 10 (201) (*citing Buckhannon Board & Care Home, Inc., v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001)).

It is undisputed that Appellant received an enforceable final judgment on the merits.

It is undisputed that an attorney-client relationship existed pursuant to which counsel rendered legal services on the appellant's behalf in connection with his appeal. *Allen v. United States Postal Service*, 2 M.S.P.R. 420, 427 n.9 (1980). The Board concluded that the denial of a within-grade increase against Ahuruonye was contrary to 5 C.F.R. Part 531 Subpart D, which requires that the Agency issue the employee a rating of record showing performance of less than

"Fully Successful" before denying the employee's within-grade increase.

Based on the above, the Appellant is the prevailing party in this Appeal.

2. **Attorney fees are warranted in the interest of justice.**

In *Allen*, 2 M.S.P.R. at 434-35, the Board set out a non-exhaustive list of circumstances in which the "interest of justice" standard would be met. Those examples include: (1) where the agency engaged in a prohibited personnel practice; (2) where the agency's action was "clearly without merit," or "wholly unfounded," or where the employee is "substantially innocent of the charges brought by the agency; (3) where the agency initiated the action against the employee in bad faith; (4) where the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee; and (5) **where the agency knew or should have known that it would not prevail on the merits when it began the proceeding.**

Here, **the agency knew or should have known that it would not prevail on the merits when it began the proceeding**. As an executive cabinet agency, the Department of the Interior is wholly unauthorized to deny an employee a within-grade increase without previously issuing an official rating of record (an annual performance evaluation of the sort painstakingly described under 5 C.F.R. Part 531 Subpart D)

that establishes that the employee failed to achieve a rating of Level 3 ("Fully Successful") or above.

Because the Department of the Interior, as an executive agency **is not authorized to base its denial of an employee's WIGI on anything other than a rating of record**, neither an unseen "internal memorandum" (as explained to the Appellant by Agency counsel) nor copies of the Appellant's purported final work product (Agency Resp., Tabs 4E, 4F, 4G, 4H, 4I, 4J, 4K, *cited in* Agency's Narrative Resp. at 2) pass muster as substantial evidence of failure to achieve a "Fully Successful" performance under 5 C.F.R. §§ 531.404(a), 531.409(b) because neither sort of "evaluation" constitutes a "rating of record."

Having failed to meet the baseline procedural requirement that the Agency issue Appellant a rating of record, the Agency knew or should have known as a matter of law that it could never prevail on the merits of this adverse action. *See generally* Appellant's Statement of Affirmative Defenses; Appellant's Motion for Sanctions.

Consequently, attorney fees are warranted in the interest of justice.

3. **The Appellant can present sufficient evidence to establish the reasonableness of his entire fee request.**

In our fee petition, we request a total award of $10,611.25 in attorney fees. In support of his requests,

we provide an explanation of the requested fees via an itemized statement of legal services in connection with our representation of the appellant that reflects a total of 28.42 hours of work. We are also submitting evidence pertaining to our customary billing rate. The hours claimed are standard and all of the expenses claimed are allowable.

The Board will determine whether a fee request is reasonable by analyzing two variables – the attorney's customary hourly rate and the number of hours the attorney devoted to the case. *Kling v. Dep't of Justice*, 2 M.S.P.R. 464, 470-72 (1980). In making this determination, the Board has a statutory duty to assure that only "reasonable attorney fees" are awarded and will carefully scrutinize the hourly rate and hours claimed at that rate. *Id.*

The hourly rate claimed is principally based upon counsel's retainer rate and the rate he charges for comparable work for other clients. The factors demonstrating the reasonableness of that rate, as enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), are discussed in the accompanying affidavit: time and labor required; novelty and difficulty of questions; skill requisite to perform legal service properly; preclusion of other employment customary fee; time limitations imposed by client; awards in similar cases.

This was a case in which the agency knew or should have known that it would not prevail on the merits when it began the proceeding. The workload of

this law firm was unduly prolonged by the agency's attempts to introduce falsified "evidence" (Appellant's purported work product) to support its assertion that it issued the Appellant a rating of record, and further reliance upon statements by Agency counsel's during a status conference to the Administrative Judge to the effect that it had issued the Appellant a rating of record.

III. Conclusion

The Appellant believes, based upon the circumstances of this case, that fees must be awarded, that the fees requested are reasonable, and that this motion should be granted.

Respectfully submitted,

/s/ Gerald Gilliard
GERALD GILLIARD
THE LAW OFFICE OF
GERALD L. GILLIARD, ESQ., LLC
1629 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 827-9753 (phone)
(202) 478-1783 (facsimile)
ggilliard@employmentlegalteam.com (email)

Attorney for the Appellant

[SEAL]

U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419
Phone: 202 653 7200; Fax: 202 653 7130;
E-Mail mspb@mspb.gov

January 13, 2015

Mr. Josh C. Hildreth
Department of the Interior
Office of the Solicitor
1849 C Street, N.W., M.S. 7308
Washington, DC 20240

Re: *Barry Ahuruonye v. Department of the Interior*
MSPB Docket No. DC-5310-14-0587-I-1

Dear Mr. Hildreth:

This is in response to your request for reconsideration of the Board's order dated December 29, 2014, in the appeal named above.

The order directed the agency to retroactively grant the appellant relief, remanded for consideration of his claims of prohibited discrimination and retaliation, but provided no further review rights. The Board's regulations do not provide for your request for reconsideration of the Board's decision. There is, therefore, no further right to review of this appeal by the Board.

Sincerely,

/s/ William D. Spencer
William D. Spencer
Clerk of the Board

cc: Barry Ahuruonye
2001 Oglethorpe Street, #202
Hyattsville, MD 20782

From: Hildreth, Josh <josh.hildreth@sol.doi.gov>
To: "barry_ahuruonye@yahoo.com"
<barry_ahuruonye@yahoo.com>
Sent: Wednesday, March 4, 2015 at 03:08:30 PM EST
Subject: Compliance with December 29, 2014 Remand Order

Mr. Ahuruonye:

The Agency has complied fully with the December 29, 2014 Remand Order. The Agency issued an SF-50 on January 20, 2015, granting you a Within Grade Increase effective December 1, 2013. The Agency has also issued you back pay and benefits associated with that correction. If you contend there is an error in the amount submitted, please let me know as soon as possible.

Thank you,

Josh Hildreth
Attorney-Advisor
Office of the Solicitor – Division of General Law
U.S. Department of the Interior
(202) 219-0362

United States Department of the Interior
FISH AND WILDLIFE SERVICE
5275 Leesburg Pike
Falls Church, VA 22041

March 26, 2015

Memorandum

TO: Barry U. Ahuruonye
Grants Management Specialist

FROM: Penny L. Bartnicki, Chief
[/s/ Penny L. Bartnicki]
Coastal Impact Assistance Program
(CIAP) Branch

SUBJECT: Administrative Leave

Effective today at close of business you will be placed on administrative leave pending your removal. You will remain on administrative leave until further notice. As such:

- Before your departure today, I will need your laptop, government credit card, government ID, and all documents, files, other work items and any other office supplies or equipment in your possession.
- During this period you are directed not to come to this office without my expressed permission.
- You are not to have any contact with employees of this office without first contacting me.
- You are not to conduct any Service business until further notice.

I acknowledge receipt of this notice.

[The employee verbally refused to sign acknowledging receipt of this memo on 3/26/15 /s/ Penny L. Bartnicki]

Employee Signature Date

* * *

Borrower Name Barry Ahuruonye
Borrower SSN [redacted]

SECTION 3: EMPLOYER INFORMATION (TO BE COMPLETED BY THE BORROWER OR EMPLOYER)

1. Employer Name:

   Dept. of the Interior

2. Federal Employer Identification Number (FEIN)

   84-1024566

3. Employer Address:

   Dept. of the Interior
   PO BOX 27030; Mail Stop D-2613
   Denver, CO 80227

4. Employer Website (if any):

   https://ibc.doi.gov/HRD/payroll-contacts

5. Employment Begin Date:

   12-02-2011

6. Employment End Date:

   04-14-2015

   OR

   ☐ Still Employed

7. Employment Status: ☑ Full-Time ☐ Part-Time

8. Hours Per Week (Average) 40

Include vacation, leave time, or any leave taken under the Family Medical Leave Act of 1993.

9. Is your employer a governmental organization?

A governmental organization is a Federal State, local, or Tribal government organization, agency, or entity, a public child or family service agency, a Tribal college or university, or the Peace Corps or AmeriCorps. Federal service includes military service.

☑ Yes – Skip to Section 4.

☐ No – Continue to Item 10.

10. Is your employer tax-exempt under Section 501(c)(3) of the Internal Revenue Code (IRC)?

If your employer is tax-exempt under another subsection of 501(c) of the IRC such as 501(c)(4) or 501(c)(6), check "No" to this question.

☐ Yes – Skip to Section 4.

☐ No – Continue to Item 11.

11. Is your employer a not-for-profit organization that is not tax-exempt under Section 501(c)(3) of the Internal Revenue Code?

☐ Yes – Continue to Item 12.

☐ No – Your employer does not qualify.

12. Is your employer a partisan political organization or a labor union?

☐ Yes – Your employer does not qualify.

☐ No – Continue to Item 13.

13. Which of the following services does your employer provide? Check all that apply and then continue to Section 4. If you check "None of the above", do not submit this form.

☐ Emergency management

☐ Military service (See Section 6)

☐ Public safety

☐ Law enforcement

☐ Public Interest legal services (See Section 6)

☐ Early childhood education (See Section 6)

☐ Public service for individuals with disabilities

☐ Public service for the elderly

☐ Public health (See Section 6)

☐ Public education

☐ Public library services

☐ School library services

☐ Other school-based services

☐ None of the above – the employer does not qualify.

SECTION 4: EMPLOYER CERTIFICATION (TO BE COMPLETED BY THE EMPLOYER)

SECTION 4: EMPLOYER CERTIFICATION (TO BE COMPLETED BY THE EMPLOYER)

By signing, I certify (1) that the information in Section 3 is true, complete, and correct to the best of my knowledge and belief, (2) that I am an authorized

official (see Section 6) of the organization named in Section 3, and (3) that the borrower named in Section 1 is or was an employee of the organization named in Section 3.

Note: If any of the information is crossed out or altered in Section 3, you must initial those changes.

Official's Name	Sydney von Vital
Official's Phone	7037871322
Official's Title	Program Support Assistant
Official's Email	sydney.vonvital@bsee.gov

Authorized Official's Signature Sydney von Vital
Date 10/21/2022

* * *

Standard Form 50
Rev. 7/91
U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) AHURUONYE, BARRY UDOH	
2. Social Security Number	3. Date of Birth
4. Effective Date 12/01/2013	
FIRST ACTION	
5-A. Code 893	5-B. Nature of Action REG WRI
5-C. Code Q7M	5-D. Legal Authority REG 531.404
5-E. Code	5-F. Legal Authority
SECOND ACTION	
6-A. Code	6-B. Nature of Action
6-C. Code	6-D. Legal Authority
6-E. Code	6-F. Legal Authority
7. FROM: Position Title and Number GRANTS MANAGEMENT SPECIALIST GRANTS MANAGEMENT SPECIALIST (CIAP) FFO9W10000 0111311	

8. Pay Plan GS	9. Occ. Code 1109	10. Grade or Level 12
11. Step or Rate 02	12. Total Salary 77368	13. Pay Basis PA
12A. Basic Pay 62283	12B. Locality Adj. 15085	
12C. Adj. Basic Pay 77368	12D. Other Pay 0	
14. Name and Location of Position's Organization DIRECTOR – U.S. FISH & WILDLIFE SERVICE ASST DIR – FED ASST PRM FOR ST WL & SPT DIV OF POL AND PROG WASHINGTON, DC		
15. TO: Position Title and Number GRANTS MANAGEMENT SPECIALIST GRANTS MANAGEMENT SPECIALIST (CIAP) FFO9W10000 0111311		
16. Pay Plan GS	17. Occ. Code 1109	18. Grade or Level 12
19. Setp or Rate 03	20. Total Salary 79864	21. Pay Basis PA
20A. Basic Pay 64292	20B. Locality Adj. 15572	
20C. Adj. Basic Pay 79864	20D. Other Pay 0	

22. Name and Location of Position's Organization DIRECTOR – U.S. FISH & WILDLIFE SERVICE ASST DIR – FED ASST PRM FOR ST WL & SPT DIV OF POL AND PROG WASHINGTON, DC			
EMPLOYEE DATA			
23. Veterans Preference			
1	1 – Name 2 – 5-Point 3 – 10-Point/Disability	4 – 10-Point/Compensable 5 – 10-Point/Other 6 – 10-Point/ Compensable/30%	
24. Tenure			
3	0 – Name 1 – Permanent	2 – Conditional 3 – Indefinite	
25. Agency Use			
26. Veterans Preference for RIF			
	YES		NO
27. FEGLI			
K0	BASIC + OPTIONAL (2X)		
28. Annuitant Indicator			
9	NOT APPLICABLE		
29. Pay Rate Determinant			
0			
30. Retirement Plan			
K	FERS & FICA		

31. Service Comp. Date (Leave) 12/04/2011			
32. Work Schedule F FULL-TIME			
33. Part-Time Hours Per Biweekly Pay Period			
POSITION DATA			
34. Position Occupied 1 1 – Competitive Service 3 – SES General 2 – Excepted Service 4 – SES Career Reserved			
35. FLSA Category E E – Exempt N – Nonexempt			
36. Appropriation Code			
37. Bargaining Unit Status 7777			
38. Duty Station Code 51-0100-013			
39. Duty Station (City – County – State or Overseas Location) ARLINGTON, ARLINGTON, VIRGINIA			
40. Agency Data FUNC CLS 00	41. VET STAT X	42. EDUC LVL 17	
43. SUPV STAT 8	44. POSITION SENSITIVITY MODERATE RISK		

45. Remarks LAST EQUIVALENT INCREASE 12/02/12. WORK PERFORMANCE IS AT AN ACCEPTABLE LEVEL OF COMPETENCE.		
46. Employing Department or Agency IN – FISH AND WILDLIFE SERV		
47. Agency Code IN15	48. Personnel Office ID 1735	49. Approval Date 01/20/2015
50. Signature/Authentication and Title at Approving Official 150361262/ ELECTRONICALLY SIGNED BY: MARION G. CAMPBELL HUMAN RESOURCES SPECIALIST		

Standard Form 50
Rev. 7/91
U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) AHURUONYE, BARRY UDOH	
2. Social Security Number	3. Date of Birth
4. Effective Date 12/01/2012	
FIRST ACTION	
5-A. Code 893	5-B. Nature of Action REG WRI
5-C. Code Q7M	5-D. Legal Authority REG 531.404
5-E. Code	5-F. Legal Authority
SECOND ACTION	
6-A. Code	6-B. Nature of Action
6-C. Code	6-D. Legal Authority
6-E. Code	6-F. Legal Authority
7. FROM: Position Title and Number GRANTS MANAGEMENT SPECIALIST GRANTS MANAGEMENT SPECIALIST (CIAP) 91400 0111311	

8. Pay Plan GS	9. Occ. Code 1109	10. Grade or Level 12
11. Step or Rate 01	12. Total Salary 74872	13. Pay Basis PA
12A. Basic Pay 60274	12B. Locality Adj. 14598	
12C. Adj. Basic Pay 74872	12D. Other Pay 0	
14. Name and Location of Position's Organization REGION 9 WASHINGTON DC DIRECTOR – U.S. FISH & WILDLIFE SERVICE ASST DIR – FED ASST PRM FOR ST WL & SPT DIVISION OF FEDERAL ASSISTANCE WASHINGTON, DC		
15. TO: Position Title and Number GRANTS MANAGEMENT SPECIALIST GRANTS MANAGEMENT SPECIALIST (CIAP) 91400 0111311		
16. Pay Plan GS	17. Occ. Code 1109	18. Grade or Level 12
19. Step or Rate 02	20. Total Salary 77368	21. Pay Basis PA
20A. Basic Pay 62283	20B. Locality Adj. 15085	
20C. Adj. Basic Pay 77368	20D. Other Pay 0	

22. Name and Location of Position's Organization DIRECTOR – U.S. FISH & WILDLIFE SERVICE ASST DIR – FED ASST PRM FOR ST WL & SPT DIVISION OF FEDERAL ASSISTANCE WASHINGTON, DC			
EMPLOYEE DATA			
23. Veterans Preference			
1	1 – Name 2 – 5-Point 3 – 10-Point/Disability	4 – 10-Point/Compensable 5 – 10-Point/Other 6 – 10-Point/ Compensable/30%	
24. Tenure			
3	0 – Name 1 – Permanent	2 – Conditional 3 – Indefinite	
25. Agency Use			
26. Veterans Preference for RIF			
	YES	X	NO
27. FEGLI			
K0	BASIC + OPTIONAL (2X)		
28. Annuitant Indicator			
9	NOT APPLICABLE		
29. Pay Rate Determinant			
0			
30. Retirement Plan			
K	FERS & FICA		

31. Service Comp. Date (Leave) 12/04/2011			
32. Work Schedule F FULL-TIME			
33. Part-Time Hours Per Biweekly Pay Period			
POSITION DATA			
34. Position Occupied 1 1 – Competitive Service 3 – SES General 2 – Excepted Service 4 – SES Career Reserved			
35. FLSA Category E E – Exempt N – Nonexempt			
36. Appropriation Code			
37. Bargaining Unit Status 7777			
38. Duty Station Code 51-0100-013			
39. Duty Station (City – County – State or Overseas Location) ARLINGTON, ARLINGTON, VIRGINIA			
40. Agency Data FUNC CLS 00	41. VET STAT X	42. EDUC LVL 17	
43. SUPV STAT 8	44. POSITION SENSITIVITY MODERATE RISK		

45. Remarks LAST EQUIVALENT INCREASE 12/04/11. WORK PERFORMANCE IS AT AN ACCEPTABLE LEVEL OF COMPETENCE. CORRECTION FROM MSPB RULING DATED 02-28-2014		
46. Employing Department or Agency IN – FISH AND WILDLIFE SERV		
47. Agency Code IN15	48. Personnel Office ID 1735	49. Approval Date 03/10/2014
50. Signature/Authentication and Title at Approving Official 140598601 / ELECTRONICALLY SIGNED BY: KELLY C. BILLOTTE HR SPECIALIST		

Standard Form 50.8
Rev. 7/91
U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

Name (Last, First, Middle) AHURUONYE, BARRY UDOH		
2. Social Security Number XXX-XX-8829	3. Date of Birth	
4. Effective Date 12/04/2011		
FIRST ACTION		
5-A. Code 108	5-B. Nature of Action TERM APPT NTE 12-03-15	
5-C. Code BWA	5-D. Legal Authority DOI-1-OR-11-ARO-01582S0	
5-E. Code	5-F. Legal Authority	
SECOND ACTION		
6-A. Code	6-B. Nature of Action	
6-C. Code	6-D. Legal Authority	
6-E. Code	6-F. Legal Authority	
7. FROM: Position Title and Number		
8. Pay Plan	9. Occ. Code	10. Grade/Level

11. Step/Rate	12. Total Salary	13. Pay Basis
12A. Basic Pay	12B. Locality Adj.	
12C. Adj. Basic Pay	12D. Other Pay	
14. Name and Location of Position's Organization		
15. TO: Position Title and Number GRANTS MANAGEMENT SPECIALIST GRANTS MANAGEMENT SPECIALIST (CIAP) 91400 0111311		
16. Pay Plan GS	17. Occ. Code 1109	18. Grade/Level 12
19. Step/Rate 01	20. Total Salary 74872	21. Pay Basis PA
20A. Basic Pay 60274	20B. Locality Adj. 14598	
20C. Adj. Basic Pay 74872	20D. Other Pay 0	
22. Name and Location of Position's Organization REGION 9 WASHINGTON DC DIRECTOR – U.S. FISH & WILDLIFE SERVICE ASST DIR – FED ASST PRM FOR ST WL & SPT DIVISION OF FEDERAL ASSISTANCE WASHINGTON, DC		
EMPLOYEE DATA		

23. Veterans Preference			
1	1 – Name 2 – 5-Point 3 – 10-Point/Disability	4 – 10-Point/Compensable 5 – 10-Point/Other 6 – 10-Point/ Compensable/30%	
24. Tenure			
3	0 – Name 1 – Permanent	2 – Conditional 3 – Indefinite	
25. Agency Use			
26. Veterans Preference for RIF			
	YES	X	NO
27. FEGLI			
C0	BASIC ONLY		
28. Annuitant Indicator			
9	NOT APPLICABLE		
29. Pay Rate Determinant			
0			
30. Retirement Plan			
K	FERS & FICA		
31. Service Comp. Date (Leave)			
12/04/11			
32. Work Schedule			
F	FULL-TIME		
33. Part-Time Hours Per			
	Biweekly Pay Period		

POSITION DATA		
34. Position Occupied 1 | 1 – Competitive Service 3 – SES General 2 – Excepted Service 4 – SES Career Reserved		
35. FLSA Category E | E – Exempt N – Nonexempt		
36. Appropriation Code		
37. Bargaining Unit Status 7777		
38. Duty Station Code 51-0100-013		
39. Duty Station (City – County – State or Overseas Location) ARLINGTON, ARLINGTON, VIRGINIA		
40. Agency Data FUNC CLS 00	41. VET STAT X	42. EDUC LVL 17
43. SUPV STAT 8	44. POSITION SENSITIVITY MODERATE RISK	

45. Remarks DATE OF LAST EQUIVALENT INCREASE 12/04/11. APPOINTMENT AFFIDAVIT EXECUTED 12/05/11. CREDITABLE MILITARY SERVICE: NONE PREVIOUS RETIREMENT COVERAGE: NEVER COVERED FROZEN SERVICE NONE EMPLOYEE IS AUTOMATICALLY COVERED UNDER FERS. FULL PERFORMANCE LEVEL OF EMPLOYEE'S POSITION IS GS-13. SELECTED FROM OR-11-ARO-01582S0 , DATED 10/24/11. WELCOME TO THE US FISH AND WILDLIFE SERVICE!
46. Employing Department or Agency IN – FISH AND WILDLIFE SERV

47. Agency Code	48. Personnel Office ID	49. Approval Date

50. Signature/Authentication and Title at Approving Official /s/ Kelly C. Billotte KELLY C. BILLOTTE HR SPECIALIST

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5239 **September Term, 2023**

1:16-cv-01767-RBW

Filed On: November 3, 2023 [2025359]

Barry Ahuruonye,

Appellant

v.

Department of Interior,

Appellee

MANDATE

In accordance with the judgment of August 24, 2023, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk
