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APPENDIX A

Note: This disposition is nonprecedential

United States Court of Appeals
for the Federal Circuit

JASON ANTOINE BROCK,
Petitioner

v.

DEPARTMENT OF TRANSPORTATION,
Respondent

2023-1133

Petition for review of the Merit Systems Protection Board in No. AT-0752-20-0542-M-1.

Decided: September 19, 2023

FLORENCE M. JOHNSON, Johnson and Johnson, PC, Memphis, TN, for petitioner.

DANIEL BERTONI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY.

Before DYK, HUGHES, and STOLL, *Circuit*

Judges.

PER CURIAM.

Mr. Jason Brock worked for the Department of Transportation, Federal Aviation Administration (FAA) as an Airway Transportation Systems Specialist (ATSS) at the Nashville System Support Center before the FAA removed him for insubordination. Mr. Brock appealed to the Merit Systems Protection Board, disputing the charge of insubordination, alleging that the FAA's removal was retaliatory, and alleging harmful procedural error. The Board affirmed the FAA's decision. For the reasons below, we affirm.

BACKGROUND

Mr. Brock began his federal service in 2006 and most recently held the position of ATSS. As an ATSS, Mr. Brock was expected to maintain FAA buildings, roads, and grounds. Mr. Brock's disciplinary history includes a 12-day suspension for misusing a government credit card; a 5- day suspension for failing to follow instructions (specifically, failing to complete driver's training); and a 30-day[1] suspension for negligent work performance and giving inaccurate information in a government record. On April 10, 2020, the FAA issued a proposed removal letter to Mr. Brock, providing two specifications to support a charge of insubordination. *Brock v. Dep't of Transp.*, 2022

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[1] Management officials later reduced this suspension to fourteen days. J.A. 152.

MSPB LEXIS 3305, at *2 (M.S.P.B. Aug. 31, 2022) *(Decision)*.

In the first specification, the agency alleged that Mr. Wesley Ivory–Mr. Brock's first-level supervisor–had instructed Mr. Brock to purchase lights and to replace emergency lighting. Mr. Brock objected because he believed this task was outside the scope of his duties, but offered to "carry out [the] request on overtime." J.A. 382. Mr. Brock did not purchase the emergency lighting or replace the emergency lighting.

For the second specification, the agency alleged that Mr. Ivory instructed Mr. Brock to troubleshoot the lighting system on a landing runway and update the control center accordingly. J.A. 386. Mr. Brock responded that because he had not passed the theory requirement for the lighting system, he would not troubleshoot the lighting system. J.A. 387. Mr. Ivory explained that troubleshooting the lighting system was within the scope of Mr. Brock's duties in accordance with FA Order 6000.15 and again directed Mr. Brock to troubleshoot the lighting system. *Decision* at *9-10; J.A. 389-90. Mr. Brock did not comply with this instruction. Based on these two specifications, Mr. Eric Alexander, the deciding official, determined that removal was the appropriate penalty. After considering Mr. Brock's response, Mr. Alexander sustained Mr. Brock's removal, effective May 20, 2020.

Mr. Brock appealed to the Board, disputing the charge of insubordination, also arguing that the FAA retaliated against him for his protected whistleblowing disclosures and that the FA had committed harmful

procedural error.[2]

The Board sustained the insubordination charge. Regarding Mr. Brock's whistleblower defense, the Board explained the burden-shifting framework for whistleblower cases:

> To prove a prima facie case of retaliation for whistleblowing or other protected activity, the appellant must prove by preponderant evidence that: (a) he engaged in activity protected by 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (B), (C), or (D); and (b) it was a contributing factor in the personnel action being appealed. If the appellant meets this burden, the agency must prove by clear and convincing evidence that it would have taken the same action even absent the disclosure or other protected activity. In determining whether the agency has proven by clear and convincing evidence that it would have taken the same action against the appellant in the absence of this protected activity, the Board and its reviewing court have stated that they will consider all of the relevant factors, including: 1) the strength of the agency's evidence in support of its action; 2) the existence and

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[2] Mr. Brock also claimed the FAA had removed him based on his race, religion, gender, age, and previous Title VII activity. *Decision* at *24. The Board rejected this defense. *Id.* at *24-28. Mr. Brock does not challenge the Board's determination in this regard.

> strength of any motive to retaliate on the part of agency officials 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.

Decision at *13-14 (citations omitted).

The Board then found that the first of the six alleged protected disclosures was indeed protected. By email dated February 7, 2020, Mr. Brock disclosed to management that a coworker had told a contractor to "shut up." J.A. 83. For this single protected disclosure, the Board determined that Mr. Brock had proved that it was a factor contributing to the agency's decision to remove him because it occurred close in time to Mr. Alexander's decision to remove Mr. Brock. In determining whether the FAA had proved by clear and convincing evidence that it would have removed Mr. Brock in the absence of his disclosure, the Board considered the seriousness of the insubordination in light of the FAA's ability to carry out its objectives; Mr. Brock's disciplinary history; the potential for retaliatory motive; and the FAA's actions against "employees with a prior disciplinary history who were not whistleblowers." *Decision* at *16-17. The Board concluded that the FAA proved by clear and convincing evidence that it would have removed Mr. Brock in the absence of his protected disclosure. For each of the remaining five allegedly protected disclosures, the Board determined either that it was not protected or that Mr. Brock had not shown that it was a contributing factor to his removal.

The Board also considered Mr. Brock's defense that the FAA committed harmful procedural error by "misappl[ying] Executive Order 13839 in effectuating his removal," "assign[ing] him the tasks which were the subject of its insubordination charges," and "violat[ing] its procedures by charging him with insubordination instead of failure to follow instructions." *Decision* at *22-24. The Board explained that there was no evidence that the agency relied on Executive Order 13,839, that Mr. Brock failed to specify which agency procedures were allegedly violated by assigning him the particular tasks, and that no agency procedure prohibited the insubordination charge in favor of failure to follow instructions. The Board thus did not find this defense persuasive.

Turning to whether the agency's removal decision "promotes the efficiency of the service," the Board found that there was a nexus between the removal and promoting the efficiency of the FAA's service. The Board found the nexus "self-evident" because the insubordination "took place at work." *Id.* at *28.

Finally, the Board analyzed the reasonableness of removal in light of the relevant factors set forth in *Douglas v. Veterans Administration,* 5 M.S.P.B. 313 (1981). *Id.* at *28-30 (citing *Douglas,* 5 M.S.P.B. at 331-33). The Board considered and credited Mr. Alexander's testimony that Mr. Brock's insubordination was "serious, intentional, and repeated" and hindered the FAA's operation; that other insubordinate employees had been removed and

removal was in the agency's table of penalties; that Mr. Brock's repeated misconduct and lack of remorse showed his inability to be rehabilitated; and that Mr. Alexander had not considered suspension-rather than removal- due to past discipline. *Id.* at *29. The Board also noted that Mr. Alexander believed Mr. Brock's fourteen years of service was a mitigating factor, but this was outweighed by the other *Douglas* factors. The Board accordingly affirmed the FAA's action.

Mr. Brock timely appeals under 5 U.S.C. § 7703. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We review the Board's legal conclusions de novo and its fact findings for substantial evidence. *See Smith v. Gen. Servs. Admin.,* 930 F.3d 1359, 1364 (Fed. Cir. 2019). "To determine whether substantial evidence supports the Board, we must determine whether 'considering the record as a whole, the agency's evidence is sufficient to be found by a reasonable factfinder to meet the [agency's] evidentiary burden.'" *Id.* at 1367 (quoting *Leatherbury v. Dep't of the Army,* 524 F.3d 1293, 1300 (Fed. Cir. 2008)). The Board's decision must be affirmed unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "obtained without procedures required by law, rule, or regulation having been followed"; "or unsupported by substantial evidence." 5 U.S.C. § 7703(c).

On appeal, Mr. Brock argues that the Board erred by: (1) sustaining the two specifications of the

agency's insubordination charge; (2) concluding he failed to prove his affirmative defense of retaliation; (3) concluding that he failed to prove his affirmative defense of harmful procedural error; (4) finding a nexus between the insubordination charge and Mr. Brock's ability to accomplish his duties; and (5) determining that removal was a reasonable penalty. We address each argument in turn.

I

We first address Mr. Brock's argument that the Board erred in sustaining the FAA's charge of insubordination. We review the Board's decision to sustain such charges for substantial evidence. *See Bieber v. Dep't of Army*, 287 F.3d 1358, 1364 (Fed. Cir. 2002). Insubordination is "a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed." *Phillips v. Gen. Servs. Admin.*, 878 F.2d 370, 373 (Fed. Cir. 1989) (emphasis omitted). The "obey now, grieve later" rule states that "government employees may not refuse to do work merely because of disagreements with management and failure to perform their duties is done at the risk of being insubordinate." *Bigelow v. Dep't of Health & Hum. Servs.*, 750 F.2d 962, 965 (Fed. Cir. 1984) (cleaned up); *see Larson v. Dep't of Army*, 260 F.3d 1350, 1354 n.3 (Fed. Cir. 2001). The two recognized exceptions to this rule are when: (1) an order places an employee in a dangerous situation; and (2) when an order to make a disclosure would cause irreparable harm. In addition, personnel action may not be taken against an employee for "refusing to obey an order that would require the individual to violate a

law, rule, or regulation." 5 U.S.C. § 2302(b)(9)(D).

The FAA supported its charge of insubordination with two specifications. We address the Board's analysis of each specification in turn.

A

The first specification alleges that on February 19, 2020, Mr. Ivory verbally instructed Mr. Brock to purchase LED emergency lights and replace emergency lighting at the air traffic control tower. The next day, Mr. Ivory emailed this instruction to Mr. Brock with a deadline of February 27, 2020, along with the advisement that "failure or delay in completing this assignment could result in disciplinary action." *Decision* at *4. Mr. Brock did not purchase or install the lights.

As the Board correctly noted, because there was no dispute that Mr. Brock's supervisor gave him an instruction which he intentionally failed to obey, "the only question is whether the agency order was proper." *Id.* at *6. In considering the propriety of the order, the Board relied on Mr. Ivory's testimony that: following an Occupational Safety and Health Administration inspection that found some emergency lights out of service, he decided to upgrade the lights and fixtures; he instructed Mr. Brock with the assistance of a colleague to purchase and install these lights; Mr. Brock responded that such tasks were not within his job scope; Mr. Brock offered to perform these tasks if he was paid overtime; operational risk management (ORM) was only necessary where harm was likely to

result from the task; and ORM was unnecessary because the instruction would merely require turning off the power and replacing the lights, "a procedure which all environmental specialists knew to safely execute." *Id.* at *6-8. The Board considered Mr. Brock's explanations as to why he was entitled to disobey-the task was outside the scope of his duties; he was too busy; he had no assistance; and there was no ORM for the task-found that based on Mr. Ivory's testimony, the task was not dangerous and thus did not fall within that exception to the "obey now, grieve later" rule.

On appeal, Mr. Brock argues that the Board "improperly discounted" his testimony and should have discounted Mr. Ivory's testimony. Appellant Br. 11, 13-14. Mr. Brock further argues he should be protected under the Follow the Rules Act of 2017 because following Mr. Ivory's order would have required him to violate a law, rule, or regulation. Appellant Br. 9. We disagree. The Board was entitled to weigh the evidence in reaching its fact findings, which we review for substantial evidence. Here, the Board considered both Mr. Brock's and Mr. Ivory's testimony and, based on that testimony, found that the task assigned was not dangerous. The Board emphasized Mr. Brock's testimony that he did not perform the task because it was outside the scope of his duties. After reviewing the record, we conclude that substantial evidence supports the Board's finding that the task was not dangerous, and that Mr. Brock has failed to show that performing the task would have required him to violate a law, rule, or regulation. Accordingly, we affirm the Board's finding that Mr. Brock's intentional refusal to perform this task was insubordinate.

B

The second specification alleges that on March 12, 2020, Mr. Ivory directed Mr. Brock to "troubleshoot and report an update to Atlantic Operations Control Center (AOCC) on the UQU Approach Lighting System (ALS) Remote Monitoring and Logging System (RMLS) no later than 14:00 CST," but Mr. Brock "did not comply with the directive." *Decision* at *8-9.

In finding that the FAA had proven that Mr. Brock failed to carry out an instruction, the Board relied on Mr. Ivory's testimony that: an ALS on a runway helps pilots find the runway on approach for landing; "UQU" identifies the runway on which these ALS lights are located; Mr. Ivory assigned Mr. Brock the task of troubleshooting the ALS at UQU monitoring and logging system to find the cause of the malfunction, which he believed was due to "a blown light bulb or a loose battery"; Mr. Brock refused because he was not certified to work on the system; Mr. Ivory responded to Mr. Brock that Mr. Brock was certified and therefore should perform the instruction. *Id.* at *9-10. Again, the Board found, based on Mr. Brock's "statements ... expressly refusing to obey his supervisor's instruction," that Mr. Brock's failure to obey was "intentional." *Id.* at *10.

In assessing whether the instruction was improper–i. e., would have placed Mr. Brock in danger or would have required Mr. Brock to violate a law, rule, or regulation–the Board considered Mr. Brock's contention that he lacked certification on the "Airflow" system; evidence that the ALS system was a "Godfrey"

system with Airflow components, that Mr. Brock was certified to work on Godfrey systems, and that Mr. Brock had previously worked on Airflow systems; and Mr. Alexander's testimony that Mr. Brock could safely troubleshoot the system without certification, that the Godfrey system at issue having an Airflow component does not require Airflow certification, and that Mr. Brock "had previously worked on this very system in May of 2019." *Id.* at *11-12. The Board also considered the FAA rule pertaining to maintenance duties:

> Maintenance personnel without active certification authority may perform maintenance and logging duties. If these duties affect a certification parameter, an ATSS with active certification authority must follow up with the appropriate certification.

Id. at *12 (quoting FAA Order 6000.15H § 5-5(d)). The Board ultimately found that "no evidence" showed that Mr. Brock would have been in a dangerous situation, that the "obey now, grieve later" rule applied, and that Mr. Brock's intentional refusal to perform the instruction was insubordinate. *Id.* at *12-13; *see Larson,* 260 F.3d at 1354 n.3.

The above-described record evidence is sufficient to be found by a reasonable factfinder to demonstrate that the instruction was proper (i.e., not dangerous and did not require Mr. Brock to violate a law, rule, or regulation). *Smith,* 930 F.3d at 1367; 5 U.S.C. § 2302(b)(9)(D). As such, we conclude that substantial evidence supports the Board's finding that, for the

second specification, the agency proved that Mr. Brock's failure to follow instructions to troubleshoot the ALS and report an update was insubordination.

* * *

Substantial evidence therefore supports the Board's decision to sustain the F AA's charge of insubordination.

II

We now address Mr. Brock's arguments regarding his affirmative defense of retaliation. Before the Board, Mr. Brock alleged he had made six protected disclosures to the FAA. On appeal, he challenges the Board's determinations regarding three of these disclosures. First, on February 7, 2020, Mr. Brock reported to management about a colleague, Mr. Phillips, telling a contractor to "shut up" in violation of agency policy to treat others with decorum (discourtesy disclosure). *Decision* at *15. In another disclosure, Mr. Brock alleges he disclosed the requirement of an ORM concerning the instruction in the first specification of the insubordination charge (ORM disclosure). Finally, Mr. Brock emailed Mr. Ivory on February 24, 2020, alleging that Mr. Phillips was "sabotaging" his work and gear (sabotage disclosure). *Id.* at *21.

On appeal, Mr. Brock specifically argues that (1) the Board erred when it "inexplicably" determined that the agency would have removed Mr. Brock even absent the discourtesy disclosure; (2) Mr. Brock should be "given the benefit of a ruling in his favor" as to the

ORM disclosure because all but one of the lights were operational; and (3) as to the sabotage disclosure, the Board should have reviewed the entire timeline for context as to the alleged sabotage.[3] Appellant Br. 14-17. We find these arguments unavailing.

A

We start with Mr. Brock's argument that the Board "inexplicably" determined that the agency met its burden to show it had removed Mr. Brock even in the absence of the discourtesy disclosure. Because substantial evidence supports the Board's determination that the FAA showed independent causation by clear and convincing evidence, we affirm.

The Whistleblower Protection Act prohibits retaliation against an employee for whistleblowing. *See* 5 U.S.C. § 2302(b)(8). An employee who believes he was subjected to prohibited retaliatory action must prove by a preponderance of the evidence that he made a protected disclosure that contributed to the agency's action against him. *See Smith,* 930 F.3d at 1365. "If the employee establishes this prima facie case of reprisal for whistle blowing, the burden of persuasion

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[3] Mr. Brock also challenges the Board's credibility determinations in the whistleblower analysis as violative of *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458 (1987). Appellant Br. 11-13, 18. The Board need not thoroughly and explicitly discuss *Hillen* in every decision. *See Joseph v. Dep't of Homeland Sec.,* 497 F. App'x 26, 28 (Fed. Cir. 2012) ("[W]e have not required a formalistic discussion of the *Hillen* factors in every Board decision.").

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.'" *Whitmore v. Dep't of Lab.*, 680 F.3d 1353, 1364 (Fed. Cir. 2012) (quoting 5 U.S.C. § 1221(e)).

In determining whether the FAA has met its burden of showing by clear and convincing evidence it would have taken the same action in the absence of the whistleblowing disclosure, we have instructed the Board to consider three nonexclusive factors:

> [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).

Here, the first *Carr* factor–the strength of the agency's evidence in support of its action–requires an analysis of the strength of the FAA's evidence pm ·porting to show independent cause for Mr. Brock's removal. *See Miller v. Dep't of Just.*, 842 F.3d 1252, 1259 (Fed. Cir. 2016). The Board considered the seriousness of insubordination on the FAA's ability to operate efficiently, which it characterized as "quite strong" evidence, and Mr. Brock's prior disciplinary

history. *Decision* at *16-17. Based on this record, we conclude that substantial evidence-including Mr. Brock's disciplinary history and the testimony of his supervisor Mr. Ivory and the deciding official Mr. Alexander regarding the seriousness of the offense-supports the Board's conclusion that this factor favors the FAA.

The Board also found the second *Carr* factor–the existence and strength of any retaliatory motive on the part of the FAA officials involved in the decision–to favor the FAA. The Board considered that the discourtesy disclosure did not accuse any management official involved in Mr. Brock's removal of wrongdoing and that Mr. Ivory testified that he communicated with Mr. Phillips about the unacceptable behavior. The Board also noted that although "an institutional motive to retaliate against [Mr. Brock] could arise," this discourtesy disclosure was an isolated incident that did not warrant concern. *Decision* at *16 (citing *Whitmore,* 680 F.3d at 1370). In view of the record evidence, we cannot say that the Board's fact finding was unreasonable and we therefore find that substantial evidence supports the Board's finding that this *Carr* factor favors the FAA. *See Smith,* 930 F.3d at 1365.

For the third *Carr* factor–evidence that the agency takes similar actions against similarly situated employees who are not whistleblowers–the Board found this factor to be neutral as there was no evidence presented that the FAA "did not remove insubordinate employees with a prior disciplinary history who were not whistleblowers." *Decision* at

*16-17. The Board's conclusion for the third *Carr* factor was reasonable as the FAA "need not produce evidence with regard to each of the factors, nor must each factor weigh in favor of the agency for it to carry its burden." *Rickel v. Dep't of the Navy,* 31 F.4th 1358, 1366 (Fed. Cir. 2022) (cleaned up) (quoting *Robinson v. Dep't of Veterans Affs.,* 923 F.3d 1004, 1018-19 (Fed. Cir. 2019). We disagree with Mr. Brock's assertion that the Board's thorough analysis was inexplicable. Having considered the record as a whole, we conclude that substantial evidence supports the Board's finding that the FAA would have removed Mr. Brock independent of the discourtesy disclosure.

B

We next address Mr. Brock's argument that the Board erred in its findings regarding his ORM disclosure and sabotage disclosure. Specifically, Mr. Brock argues that he should have been "given the benefit of a ruling in his favor" as to the ORM disclosure "for several reasons including that the lights ... were all operational with one exception."[4] Appellant

[4] Mr. Brock has not explained how the operation of lights entitles him to "the benefit of a ruling in his favor." We have explained that "[a]n issue that is merely alluded to and not developed as an argument in a party's brief is deemed waived." *Rodriguez v. Dep't of Veterans Affs.,* 8 F.4th 1290, 1305 (Fed. Cir. 2021) (citing cases); *see also, e.g., Monsanto Co. v. Scruggs,* 459 F.3d 1328, 1341 (Fed. Cir. 2006) ("In order for this court to reach the merits of an issue on appeal, it must be adequately developed."). In this case, Mr. Brock's undeveloped argument, "unsupported by ... citation to any authority," *Rodriguez,* 8 F.4th at 1305, is therefore waived.

Br. 16. Similarly, Mr. Brock asserts that, when considering the sabotage disclosure, Board should have reviewed the entire timeline for context and, had it done so, it would have found in his favor.[5] Our review of Mr. Brock's arguments reveals that what he really seeks is for this court to reweigh the evidence and make factual findings in his favor. But "[i]t is not for this court to reweigh evidence on appeal." *Rickel,* 31 F.4th at 1366. Because substantial evidence supports the Board's findings concerning the ORM disclosure and sabotage disclosure, we affirm.

III

We now address Mr. Brock's challenge to the Board's conclusion that he failed to prove his affirmative defense of harmful procedural error. Appellant Br. 18-20.

To prove an affirmative defense of "harmful error," Mr. Brock must show that an error was "likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error" and that the error "caused substantial harm or prejudice." 5 C.F.R. § 1201.4(r); *Ward v. U.S. Postal Serv.,* 634 F.3d 1274, 1281-82 (Fed. Cir. 2011) (citing 5 U.S.C. § 7701(c)(2)(A) and 5 C.F.R. § 1201.56(c)(1)).

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[5] Mr. Brock does not elaborate on what part of the timeline the Board neglected to consider. As previously explained, Mr. Brock thus waives this underdeveloped and unsupported argument. *See Rodriguez,* 8 F.4th at 1305.

The Board, in considering Mr. Brock's allegation that the FAA misapplied Executive Order 13,839[6] during his removal proceedings, found there was no evidence that the FAA relied on this executive order. *Decision* at *22; *see* Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (May 25, 2018). In addressing Mr. Brock's allegation that it was "harmful error for the agency to assign him the tasks which were the subject of its insubordination charges," the Board explained that Mr. Brock did not specify what procedures the FAA violated by assigning him these tasks. *Decision* at *23. As for Mr. Brock's allegation that the FAA violated its procedure by "charging him with insubordination instead of failure to follow instructions," the Board noted that Mr. Brock did not show which agency procedure required a charge of failure to follow instructions, instead of insubordination. *Id.* at *23-24.

Here, Mr. Brock's argument–that the Board improperly determined that the executive order was inapplicable–is not supported by the record evidence. Mr. Brock contends that Executive Order 13,839 was not rescinded by Executive Order 14,003 until January 21, 2021, and thus should have applied to his removal proceedings. Appellant Br. 19; *see* Exec. Order No. 14,003, 86 Fed. Reg. 7231 (Jan. 22, 2021). Mr. Brock

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[6] Executive Order 13,839 aimed to "promote civil servant accountability" by reducing the opportunities for an employee to demonstrate acceptable performance; not requiring "progressive discipline"; and not requiring suspension before proposing removal. 83 Fed. Reg. at 25,343.

also alleges that the FAA[7] failed to follow its policy entitled "Procedures for Disciplinary and Adverse Actions." Appellant Br. 19. We find Mr. Brock's arguments unpersuasive.

As an initial matter, we see no harmful error in the Board's analysis regarding the FAA not applying Executive Order 13,839. Mr. Brock's removal proceeding fell within the FAA's personnel management system. Executive Order 13,839 pertains to Title 5 disciplinary procedures not applicable to the FAA's personnel management system; thus, under these facts, Title 5 does not apply to Mr. Brock's removal proceeding. *See* 49 U.S.C. § 40122(g)(2) (stating that absent certain exceptions, "provisions of title 5 shall not apply to the [FAA] personnel management system"); *Roche v. Merit Sys. Prat. Bd.*, 596 F.3d 1375, 1378 (Fed. Cir. 2010) (same). Furthermore, Mr. Brock does not elaborate on what policy the FAA violated or how it violated its own policy. Substantial evidence therefore supports the Board's conclusion that Mr. Brock failed to prove an affirmative defense of harmful procedural error.

IV

We turn now to Mr. Brock's challenge to the Board's finding that there was a nexus between his

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[7] Mr. Brock's briefing states that "the ALJ did not properly ... follow established policy within FAA." Appellant Br. 19. We believe Mr. Brock misspoke as the administrative judge or Board is not governed by FAA policy and therefore interpret his argument to mean that the FAA did not follow its own policy.

conduct and his removal. Appellant Br. 20-22.

The agency must establish a nexus–"a clear and direct relationship"–between the sustained charge and the "employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest." *Decision* at *28. A nexus may be presumed when "egregious circumstances (falsification of records, theft, assault at work, insubordination)" make the connection between misconduct and the efficiency of the service "speaks for itself." *Hayes v. Dep't of the Navy,* 727 F.2d 1535, 1539 (Fed. Cir. 1984). "It is not our duty to find nexus but rather to decide ... whether the MSPB affirmance of the agency conclusion on the nexus issue meets the statutory criteria for our affirmance," i.e., whether the Board abused its discretion in affirming the FAA's conclusion. *Id.;* 5 U.S.C. § 7703(c).

The Board here found that the "nexus is self-evident because [Mr. Brock]'s misconduct took place at work." *Decision* at *28. Mr. Brock argues that the Board erred in finding a nexus existed because the insubordination "'took place at work' without further discussion." Appellant Br. 20 (quoting *Decision* at *28).

Although the Board's analysis is brief, we find no reversible error. We have "held that where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance." *Allred v. Dep't of Health & Hum. Servs.,* 786 F.2d 1128, 1131 (Fed. Cir. 1986). And as we explained in *Hayes,* insubordination at work is one of those circumstances

in which the nexus is so apparent that it may be presumed. *Hayes,* 727 F.2d at 1539. As Mr. Brock's insubordination was an impairment to the FAA's ability to carry out its objectives efficiently, the Board's nexus determination was rational and made within reasonable discretion.

V

Finally, we consider Mr. Brock's challenge to the Board's determination that the FAA acted reasonably in removing Mr. Brock. In determining the reasonableness of the penalty imposed by the FAA, the Board must consider whether the penalty represents a responsible balance of the relevant factors articulated in *Douglas.* Mr. Brock argues that Mr. Alexander's "self-serving" testimony and mitigating factors, including that this was Mr. Brock's first charge of insubordination, should have caused the Board to find the agency's penalty unreasonable. Appellant Br. 22- 23. Mr. Brock also reargues the charge of insubordination, asserting that he credibly testified that he thought the orders were dangerous. We are not persuaded that the Board erred in its review of the record and in sustaining the agency's choice of penalty.

An agency determines the appropriate penalty based on the relevant *Douglas* factors. *See Holmes v. U.S. Postal Serv.,* 987 F.3d 1042, 1047 (Fed. Cir. 2021). The Board's role is to "assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." *Norris v. Sec. & Exch. Comm'n,* 675

F.3d 1349, 1355 (Fed. Cir. 2012) (quoting *Douglas,* 5 M.S.P.B. at 329). Which *Douglas* factors are applicable lies primarily within "the agency's broad discretion to determine the appropriate penalty for a particular case." *Holmes,* 987 F.3d at 1047 (quoting *Zingg v. Dep't of the Treasury,* 388 F.3d 839, 844 (Fed. Cir. 2004)). We review a penalty determination for clear excess or an abuse of discretion. *Coleman v. U.S. Secret Serv.,* 749 F.2d 726, 729 (Fed. Cir. 1984).

Mr. Alexander, the deciding officer, testified regarding: the seriousness, intentionality, and frequency of Mr. Brock's insubordination; his loss of trust in Mr. Brock because the ATSS position requires integrity for public safety; removal of other FAA employees for insubordination; removal being in the FAA's table of penalties; his belief that Mr. Brock could not be rehabilitated due to a lack of remorse; and not considering suspension in lieu of removal because prior discipline did not change Mr. Brocks behavior. Mr. Alexander also testified that he considered Mr. Brock's fourteen years of service, but "ultimately determined this factor insufficient to outweigh the [other] aggravating factors." *Decision* at *29-30 (citing J.A. 140). Based on Mr. Alexander's testimony, which the Board was free to credit, the Board found the agency's choice of removal to be reasonable.

We cannot say, considering the record evidence and the Board's analysis, that the FAA's determination to remove Mr. Brock was outside the "tolerable limits of reasonableness." *Norris,* 675 F.3d at 1355 (quoting *Douglas,* 5 M.S.P.B. at 332-33). We therefore conclude that the Board did not err in

concluding that removal was within these limits.

CONCLUSION

We have considered Mr. Brock's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the Board's decision.

AFFIRMED

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JASON ANTOINE BROCK,
Appellant,

v.

DEPARTMENT OF
TRANSPORTATION,
Agency.

DOCKET NUMBER
AT-0752-20-0542-M-1
DATE: August 31, 2022

Jason Antoine Brock., Nashville, Tennessee, pro se.

Briana Martino., Esquire, Des Plaines, Illinois, for the agency.

BEFORE
Christopher G. Sprague
Administrative Judge

INITIAL DECISION

On May 28, 2020, the appellant timely filed this appeal to contest his removal from his position of Airway Transportation Systems Specialist (ATSS),

FV-2101-H, with the Department of Transportation, Federal Aviation Administration (FAA or agency) in Nashville, Tennessee, effective May 20, 2020. Initial Appeal File (IAF). The Board has jurisdiction over this appeal. 49 U.S.C. § 40122(g)(3); *Hart v. Department of Transportation,* 109 M.S.P.R. 280, ¶ 7 (2008) (holding the Board has jurisdiction over appeals of adverse actions taken by the FAA); *see also* 5 U.S.C. §§ 7701, 7512(2) & 7513(d). At the appellant's request, a hearing was held via Zoom for Government on July 13, 2022. *Brock v. Department of Transportation,* AT-0752-20-0542-M-1, Remand Appeal File (RAF), Tab 38. For the reasons set forth below, the agency's action is AFFIRMED.

Background

Except as noted herein, the following facts are undisputed. The appellant entered into Federal service effective March 12, 2006. IAF, Tab 1, p. 7. At the time of his May 20, 2020 removal, the appellant occupied the position of ATSS and had over 14 years of Federal service. *Id.* The role of an ATSS is to maintain FAA facilities, and the role of an Environmental Specialist, such as the appellant was to maintain the electrical, mechanical, lighting, and approach systems of FAA buildings, roads, and grounds. RAF, Tab 38.

By letter dated February 2, 2011, the agency suspended the appellant for 12 days for misuse of a government credit card. IAF, Tab 6, pp. 83-84. By letter dated November 13, 2015, the agency suspended the appellant for 5 days for failure to follow instructions, involving the appellant's failure to

complete required driver's training. *Id.* at pp. 79-81. By letter dated May 24, 2017, the agency suspended the appellant for 30 days for negligent work performance and providing inaccurate information in a government record. *Id.* at pp. 72-77.

By letter dated April 10, 2020, Mr. Eric Alexander, Technical Operations Manager and the appellant's second-level supervisor, proposed the appellant's removal for two specifications of insubordination. *Id.* at pp. 6-12. The appellant provided a written reply. IAF, Tab 5. By letter dated May 14, 2020, Mr. Alexander sustained the appellant's removal, effective May 20, 2020. IAF, Tab 4, pp. 19-26. This appeal timely followed.

ANALYSIS AND FINDINGS

Burdens of Proof

The agency bears the burden of proving its charges by preponderant evidence. 5 U.S.C. § 7701(c)(1)(B). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q). The agency must also establish a nexus between the sustained charge and the efficiency of the service. 5 U.S.C. § 7513(a). Finally, the agency must demonstrate the reasonableness of the penalty it has imposed. *Douglas v. Department of Veterans Affairs,* 5 M.S.P.R. 280, 307-08 (1981).

The agency proved both specifications of its charge by preponderant evidence.

The agency charged the appellant with insubordination. In order to prove this charge, the agency must show that: a) an order was given by the appellant's supervisor; b) the order was proper; c) the appellant failed to carry out the order; and d) the appellant's failure was deliberate, *i.e.,* intentional. *Phillips v. General Services Administration,* 878 F.2d 370, 373 (Fed. Cir. 1989). The two specifications following the charge allege are detailed below.

1) Specification One

Specification one alleges:

> On February 19, 2020, you were verbally instructed to purchase LED[1] emergency lights to replace emergency lighting at BNA[2] ATCT[3]. On February 20, 2020, you were issued a written directive via email to purchase LED emergency lights and replace emergency lighting at BNA ATCT no later than February 27, 2020. The directive advised that failure or delay in completing this assignment could result in disciplinary action. You did not

[1] LED means light emitting diode.

[2] BNA is code for the Nashville, Tennessee Airport.

[3] ATCT means air traffic control tower.

purchase the LED emergency lights nor did you replace the emergency lighting.

IAF, Tab 6, p. 8.

Mr. Wesley Ivory, an FAA employee since 2009 and the appellant's first-level supervisor in 2020, testified that, in February of 2020, he supervised between 9 and 10 ATSS employees, including the environmental team, and that this environmental team consisted of the appellant, Mr. Jason Phillips, and Mr. Don Hall. RAF, Tab 38. Mr. Ivory stated that, after an Occupational Safety and Health Administration (OSHA) inspection found certain emergency lights out of service at an ATCT, he found another inoperable light and decided to replace all lights with an updated version and upgrade the fixtures those using a lithium battery with LED lights. *Id.* Mr. Ivory testified that, on February 19, 2020, he verbally instructed the appellant to purchase and install these LED lights in the BNA ATCT with the assistance of Mr. Hall, that the appellant responded to him that such tasks were not within the scope of his duties, that he replied to the appellant that these tasks were within the scope of his duties, and that the appellant told him that he would only perform these tasks if he was paid overtime. *Id.*

By email dated February 19, 2020, Mr . Ivory repeated his instruction to the appellant to purchase the LED lights and install them with Mr. Hall's assistance. IAF, Tab 6, p. 89. The appellant responded that such tasks fell outside his position description, that these tasks should be assigned to an "802" series

employee, that he would perform the tasks if compensated with overtime, and that assigning him these tasks violates the collective bargaining agreement (CBA). *Id.* at p. 87. Mr. Ivory replied that management assigns the work, that he expected the appellant to complete the tasks by February 27, 2020, and that, if the appellant failed to do so, he could be subject to discipline. *Id.* at pp. 86-87. In response, the appellant continued to disagree with Mr. Ivory's authority to task him as he had, offered to "see if a contractor is available" to perform these tasks, and stated, "I'll wait for disciplinary action to occur and file a grievance per CBA Article 5." *Id.* at p. 86. Mr. Ivory stated that the appellant neither purchased nor installed the lights as instructed, and there is no dispute that the appellant never completed these tasks. RAF, Tab 38.

At hearing, the appellant testified that he was entitled to disobey because: 1) he did not have the time and he was too busy; 2) the employee management assigned to help him with this task was not going assist him; and 3) this tasking lacked documentation of the dangers involved in this task, an operational risk management or ORM. *Id.*

Based on the foregoing, there is no dispute that the appellant's supervisor gave the appellant an instruction and that the appellant failed to carry out that instruction. Based on the appellant's statement that he would await discipline for failing to carry out this instruction, I find that the appellant failure to obey this instruction was intentional. Thus, the only question is whether the agency order was proper.

The general rule on this issue is that an appellant must obey now, grieve later. *Pedeleose v. Department of Defense,* 110 M.S.P.R. 508, ¶ 16 (2009).

> The rule generally requires an employee to comply with an agency order, even where the employee may have substantial reason to question it, while taking steps to challenge its validity through whatever channels are appropriate. The rule reflects the fundamental management right to expect that its decisions will be obeyed and its instructions carried out.

Id. (citations omitted). The two recognized exceptions to this rule are when: 1) an order places an employee in a dangerous situation; and 2) an order to make a disclosure would cause irreparable harm. *Id.* (citations omitted).

Here, the appellant's objection central to his supervisor's instruction was that the task fell outside his position description, *i.e.,* it is someone else's job. Mr. Ivory testified, without contradiction, that all this task required was to turn off the electricity and replace the lights. RAF, Tab 38. On cross examination, the appellant questioned Mr. Ivory on the lack of an ORM identifying the safety hazards of this task. *Id.* However, Mr. Ivory persuasively testified that an ORM was only necessary when harm was likely to result from a task and that, because all this task required was to cut the power and replace the lights – a procedure which all environmental specialists knew

to safely execute, no ORM was necessary. *Id.*

Based on the foregoing, I find that the agency's instruction to the appellant to replace these lights would not have placed the appellant in a dangerous situation because the appellant knew he was required to cut the power before doing so. That the appellant offered to perform this task if the agency paid him overtime entirely supports my finding that this task was not dangerous. Therefore, I find that performing this task would not have placed the appellant in a dangerous situation, that the obey now, grieve later rule applied, and that the appellant's intentional refusal to perform this task was insubordinate.

Based on the foregoing, this specification is SUSTAINED.

2) Specification

Two Specification two alleges:

> On March 12, 2020, you were verbally directed by Mr. Ivory to troubleshoot and report an update to Atlantic Operations Control Center (AOCC) on the UQU Approach Lighting System (ALS) Remote Monitoring and Logging System (RMLS) no later than 14:00 CST. As a follow up, this same date, Mr. Ivory sent you an email directing you to troubleshoot and report an update to AOCC on the UQU ALS RMLS by 14:00 local. You responded to Mr. Ivory's email, stating that since

> you did not pass the theory requirement for the Airflo Navigational Aid (NA VAID) Lighting System, you will not follow his directive in regards to troubleshooting the UQU ALS. Mr. Ivory replied to your email on March 12, 2020, and relayed to you the work you were directed to perform at UQU ALS was within your scope of duties in accordance with FAA Order 6000.15. Mr. Ivory's email again directed you to trouble shoot and repair UQU ALS by close of business that day. The directive advised that failure to do so could result in disciplinary action. You did not comply with the directive.

IAF, Tab 6, p. 8.

Mr. Ivory testified that an ALS is located on an airport runway and helps airplane pilots identify the runway on approaching for landing and that "UQU" identifies the specific runway where these ALS lights were located. RAF, Tab 38. Mr. Ivory stated that, in March of 2020, he assigned the appellant to troubleshoot the ALS at UQU monitoring and logging system and determine what was causing these systems to malfunction, that he believed the fault to be either a blown light bulb or a loose battery, that the appellant declined because he (the appellant) was not certified on that system, and that he replied to the appellant that he (the appellant) was certified on that system, reaffirming his initial instruction. *Id.*

In an email dated March 12, 2020 at 8:01 a.m., Mr. Ivory reiterated his instruction to the appellant to complete this ALS task that day 2:00 p.m. IAF, Tab 6, p. 93. In reply, the appellant asserted that he was not going to follow Mr. Ivory's directive because the lighting system at issue incorporated two systems and because he (the appellant) had failed the training requirements for one of the systems. *Id.* at pp. 95-96. There is no dispute that the appellant did not troubleshoot the UQU ALS as tasked by Mr. Ivory.

Based on the foregoing, I find that the appellant's supervisor gave the appellant an instruction and that the appellant failed to carry out that instruction. Based on the appellant's statements detailed above expressly refusing to obey his supervisor's instruction, I find that the appellant failure to obey this instruction was intentional. The only question then, is whether the agency order was improper, *i.e.,* would have placed the appellant in danger. *Pedeleose,* 110 M.S.P.R. at § 16.

At hearing, the appellant's central contention as to why he was justified in refusing to obey this order centered on his lack of certification on the "Airflow" system. RAF, Tab 38. The agency conceded that the appellant had failed the "theory" portion of the Airflow certification but countered that, in practice, the appellant had successful experience working on the Airflow system, that it is uncontroverted that the appellant was certified on the "Godfrey" system, that the ALS system at issue was a Godfrey system with Airflow components, and that the appellant was, therefore, certified to work on this system. *Id.* The

agency further argued its instruction to the appellant was to troubleshoot, not certify, this system, that, even if the appellant had not been certified, on this system, he could have troubleshot the system up to the point of certification . *Id.* Specifically, Mr. Alexander testified that, even without the actual Airflow certification, the appellant could have safely troubleshot the system, that the fact that the Godfrey system at issue had an Airflow component does not create a requirement for Airflow certification, and that the appellant had previously worked on this very system in May of 2019. *Id.;* Tab 10, pp. 83-84 (certification parameters); IAF, Tab 6, p. 109 (system maintenance log). Indeed, an agency rule covering this issue instructs:

> Maintenance personnel without active certification authority may perform maintenance and logging duties. If these duties affect a certification parameter, an ATSS with active certification authority must follow up with the appropriate certification.

RAF, Tab 10, p. 197 (FAA Order 6000.15H, § 5-S(d), "Certification Responsibilities").

Based on the foregoing, I find that, even accepting the appellant's certification objection to his supervisor's instruction as valid, there is no evidence that *troubleshooting* this ALS would have placed the appellant in any danger. Specifically, the appellant points to no situation in which his lack of Airflow certification would have caused him a safety concern. This finding is supported by the appellant's own

testimony that he had previously worked on this system, with no evidence of a safety objection, when no one else was available to do so. RAF, Tab 38. If the appellant had at least attempted to perform this troubleshooting task, determined that the system issue was beyond a blown light bulb or loose battery, and concluded that he lacked the technical expertise to adequately identify the problem, he could have reported that situation to his supervisor. Because he did not even attempt to troubleshoot this system and because there is no evidence that troubleshooting this system would have placed him in a dangerous situation, I find that the obey now, grieve later rule applied and that the appellant's intentional refusal to perform this task was insubordinate.

Based on the foregoing, this specification is SUSTAINED. Because both specifications of this charge are sustained, the charge is SUSTAINED.

The appellant's affirmative defenses fail.

Except as noted herein, the appellant bears the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(c).

Retaliation for Whistleblowing

To prove a prima facie case of retaliation for whistleblowing or other protected activity, the appellant must prove by preponderant evidence that: (a) he engaged in activity protected by 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (B), (C), or (D); and (b) it was a contributing factor in the personnel action being

appealed. If the appellant meets this burden, the agency must prove by clear and convincing evidence that it would have taken the same action even absent the disclosure or other protected activity. *See Horton v. Department of Navy,* 66 F.3d 279, 283-84 (Fed. Cir. 1995). In determining whether the agency has proven by clear and convincing evidence that it would have taken the same action against the appellant in the absence of this protected activity, the Board and its reviewing court have stated that they will consider all of the relevant factors, including: 1) the strength of the agency's evidence in support of its action; 2) the existence and strength of any motive to retaliate on the part of agency officials 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. *Mithen,* 119 M.S.P.R. 215, ¶ 17 (citing *Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Schnell,* 114 M.S.P.R. 83, ¶ 23) *("Carr* factors"). Further, the Federal Circuit has held that "[e]vidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Whitmore v. Department of Labor,* 680 F.3d 1353, 1368 (Fed. Cir. 2012). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(e).

i. Disclosure One

By email dated February 7, 2020, the appellant

disclosed to management that coworker Mr. Phillips told a contractor to "shut up" and that Mr. Phillip's behavior violated an agency requiring employees to treat others with decorum. RAF, Tab 15, pp. 5, 64 (email); IAF, Tab 6, p. 27 (agency rule requiring courtesy). In response to the appellant's email, Mr. Phillips indicated that he did not recall telling the contractor to "shut up" but admitted to telling the contractor to "stop several times". RAF, Tab 15, p. 64.

Based on the foregoing, I find that the appellant's emailed detailed above was a disclosure a violation of the agency's courtesy violation, because, at a minimum, I find it more likely than not that the way Mr. Phillips told this contractor to stop talking was rude and lacked courtesy. I further find that, because the appellant disclosed this rule violation close in time to, *inter alia,* Mr. Alexander's decision to remove the appellant, he proved contributing fac tor. However, for the reasons detailed below, I find that the agency proved by clear and convincing evidence that it would have removed the appellant in the absence of this disclosure.

First, the agency's reasons for removing the appellant are quite strong. The Board had long held that insubordination is a serious offense as it goes to the heart of the agency's ability to carry out its mission. Considering the appellant's insubordination in the context of his extensive prior disciplinary history, I find that the agency's reasons for removing him are quite compelling.

Second, there is nothing about the appellant's

coworker discourtesy disclosure which accuses any management official involved in the appellant's removal of wrongdoing. Mr. Ivory testified, without contradiction, that he did address this situation with Mr. Phillips, telling him that it was unacceptable to act in this manner. RAF, Tab 38. While I acknowledge that an institutional motive to retaliate against the appellant could arise, I find that this isolated, minor disclosure of coworker discourtesy does not meaningfully raise such concerns. *See Whitmore v. Department of Labor,* 680 F.3d 1353, 1370 (Fed. Cir. 2012) (finding an institutional motive to retaliate where disclosures were highly critical of another agency manager's actions).

Finally, there is no evidence that the agency did not remove insubordinate employees with a prior disciplinary history who were not whistleblowers. Therefore, I find this *Carr* factor to be neutral. *Rickel v. Department of Navy,* 31 F.4th 1358, 1365 (Fed. Cir. 2022).

Based on the foregoing, I find that the agency proved by clear and convincing evidence that it would have removed the appellant in the absence of disclosure one.

ii. Disclosure Two

By email dated February 13, 2020, the appellant disclosed that there was "missing paperwork" regarding an EFDR tutorial link. RAF, Tab 15, pp. 65-66. In his prehearing submissions, the appellant alleged this issue involved missing equipment

documentation and proficiency training and that these deficiencies violated agency policy 6000.15H, § 22-2(b). *Id.* at p. 5; Tab 10, p. 117 (policy). The policy at issue requires: "You must retain the current TRDR until the system or subsystem is decommissioned." RAF, Tab 10, p. 117.

Presuming, without deciding that this was a disclosure of a violation of a rule, the appellant failed to prove that it was a contributing factor in his removal. Specifically, there is no evidence that Mr. Alexander was aware of this disclosure or that anyone influenced Mr. Alexander's decision to remove the appellant because of this disclosure. Mr. Alexander was not copied on the email at issue and credibly testified that he was unaware of the appellant's disclosure of this issue. RAF, Tab 38.[4]

iii. Disclosure Three

By email dated February 18, 2020, the appellant reported to, *inter alia,* Mr. Ivory, that coworker Mr. Phillips was performing work in an agency facility to which he was allegedly unassigned. RAF, Tab 15, p. 5; Tab 10, p. 345 (email). The appellant alleges Mr. Phillips actions violated FAA Order 1600.69C, section 4-2-8(a) which requires restricts access to FAA facilities. *Id.;* AF, Tab 10, p. 396 (agency policy).

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[4] Even if the appellant had carried his burden on this disclosure, I would have found that the agency proved by clear and convincing evidence that it would have removed him in the absence of this protected activity for the reasons detailed in disclosure one.

Presuming, without deciding that this was a disclosure of a violation of a rule, the appellant failed to prove that it was a contributing factor in his removal. Specifically, there is no evidence that Mr. Alexander was aware of this disclosure or that anyone influenced Mr. Alexander's decision to remove the appellant because of this disclosure. Mr. Alexander was not copied on the email at issue and credibly testified that he was unaware of the appellant's disclosure of this issue. RAF, Tab 38.[5]

Additionally, the appellant appears to allege that Mr. Ivory failed to comply with various reporting requirements associated with this disclosure three. RAF, Tab 15, p. 5. However, there is no evidence that the appellant *disclosed* Mr. Ivory's alleged failures in this regard to anyone.[6] Consequently, I find that this aspect of the appellant's allegations provide no basis for relief under 5 U.S.C. § 2302.

iv. Disclosure Four

The appellant alleges that, on February 19,

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[5] Even if the appellant had carried his burden on this disclosure, I would have found that the agency proved by clear and convincing evidence that it would have removed him in the absence of this protected activity for the reasons detailed in disclosure one.

[6] Even if the appellant had carried his burden on this disclosure, I would have found that the agency proved by clear and convincing evidence that it would have removed him in the absence of this protected activity for the reasons detailed in disclosure one.

2020, he alleged to agency management that the lights he was instructed to replace, which are the subject of insubordination specification one above, violated agency policy and constituted a gross mismanagement of funds. However, the appellant presented no evidence that he either made these disclosures to Mr. Alexander or that anyone to whom he made these disclosures influenced Mr. Alexander to remove him. Consequently, the appellant's allegations provide no basis for relief under 5 U.S.C. § 2302.[7]

v. Disclosure Five

The appellant alleges that he disclosed the requirement of an ORM for the tasks the agency required him to perform for insubordination specification one. RAF, Tab 15, p. 5. However, there is no evidence that the appellant disclosed this allegation as some type of safety issue. Rather, it appears the appellant raised the policy concerning ORMs to dispute whether such a task fell within his position

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[7] Even if the appellant had proved he disclosed his concerns to Mr. Alexander, I would have found that they are not disclosures protected under 5 U.S.C. § 2302 because whether the decision to replace these lights was a debatable expenditure. *Czarkowski v. Department of Navy,* 87 M.S.P.R. 107, 112, ¶ 12 (2000) (holding that a disclosure questioning management decisions that are merely debatable or just simple negligence or wrongdoing, with no element of blatancy, is not protected as a disclosure of gross mismanagement). Even if the appellant had carried his burden on this disclosure, I would have found that the agency proved by clear and convincing evidence that it would have removed him in the absence of this protected activity for the reasons detailed in disclosure one.

description. *See* IAF, Tab 5 (reply to proposed removal). As such, I find that this is not a disclosure of a safety risk.[8]

vi. Disclosure Six

By email dated February 24, 2020, the appellant disclosed to Mr. Ivory that he believed coworker Phillips was "sabotaging" his "workload' and "gear" rending it inoperable. RAF, Tab 10, p. 346. The appellant based this accusation that, each time his had an issue with his gear, he was told by others that Mr. Phillips was in the facility where his gear was located. *Id.*

The appellant did not develop this accusation with hearing testimony. Additionally, the appellant presented no evidence of anyone observing Mr. Phillips tampering with his equipment or any other evidence that might lead one to believe that Mr. Phillips was responsible for these issues. Given the appellant's lack of specificity as to what was wrong with his "gear" and given the multitude of other plausible explanations as to why his gear was inoperable or what could have caused such issues, I find that a reasonable person aware of the facts known by or ascertainable to the appellant was would not have reasonably concluded government wrongdoing, *i.e.,* that Mr. Phillips

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[8] Even if the appellant had carried his burden on this disclosure, I would have found that the agency proved by clear and convincing evidence that it would have removed him in the absence of this protected activity for the reasons detailed in disclosure one.

sabotaged his gear. *White v. Department of Air Force,* 95 M.S.P.R. 1, ¶¶ 27-28 (2003); *see also Lachance v. White,* 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied,* 528 U.S. 1153 (2000). Therefore, I find that this disclosure is not protected under 5 U .S.C. § 2302.[9] Finally, I find that the appellant failed to establish contributing factor because Mr. Alexander was not copied on the email at issue and credibly testified that he was unaware of the appellant's disclosure of this issue. RAF, Tab 38.

Harmful Procedural Error

To prove harmful procedural error, the appellant must prove that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 C.F.R. § 1201.4(r). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, *i.e.,* that it caused substantial prejudice to his rights.

The appellant appears to allege that the agency misapplied Executive Order 13839 in effectuating his removal. RAF, Tab 15, p. 8. However, there is no evidence that the agency relied on this Executive

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[9] Even if the appellant had carried his burden on this disclosure, I would have found that the agency proved by clear and convincing evidence that it would have removed him in the absence of this protected activity for the reasons detailed in disclosure one.

Order to remove him. Rather, I find that the evidence demonstrates that the agency employed its traditional adverse action procedures.

The appellant also appears to allege that it was harmful error for the agency to assign him the tasks which were the subject of its insubordination charges. *Id.* However, it is unclear form the appellant's submission what specific procedures the agency violated by assigning these tasks to the appellant.

Finally, the appellant appears to allege that the agency violated its procedures by charging him with insubordination instead of failure to follow instructions. *Id.* However, the appellant has pointed to no agency procedure requiring that the agency charge the appellant as he contends.

In sum, I find that the appellant failed to prove this affirmative defense.

Title VII Discrimination

The appellant claims his removal was based on his race (African American), religion (Nation of Islam), his gender (male), his age (47), and his prior Title VII activity. RAF, Tab 37. Federal employees are protected against discrimination based on race by 42 U.S.C. § 2000e-16. *Savage v. Department of the Army,* 122 M.S.P.R. 612, ¶¶ 36, 37 (2015). The Board has held that a violation is established where the appellant shows that discrimination "was a motivating factor in the contested personnel action, even if it was not the only reason." *Id.,* ¶ 41.

Although the Board's case law has frequently addressed the differences between direct and circumstantial evidence in support of an affirmative defense of discrimination, and discussed the concept of a "convincing mosaic" as proof, in *Gardner v. Department of Veterans Affairs,* 123 M.S.P.R. 647 (2016), the Board clarified that under the proper analysis administrative judges should not separate "direct" from "indirect" evidence and proceed as if such evidence were subject to different legal standards, or require appellants to demonstrate a "convincing mosaic" of discrimination or retaliation. Rather, the dispositive inquiry is whether the appellant has shown by the preponderance of the evidence[10] that the prohibited consideration was a motivating factor in the contested personnel action. *Savage,* 122 M.S.P.R. 612, ¶ 51. Thus, whatever theory of discrimination the appellant pursues and whatever evidence he introduces to support it, all of the evidence must be examined as a whole to determine if the appellant has shown by a preponderance of the evidence that the prohibited consideration was a motivating factor in the contested personnel action. If he has made such a showing, the Board will find that the agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(1). If he has not made such a showing, the inquiry will end at that point.

If the appellant makes the required showing,

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[10] A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

the next issue is whether he is entitled to corrective action. A violation of 42 U .S.C. § 2000e-16 will entitle the appellant to reversal of the personnel action only if the prohibited personnel practice was its "but for" cause, meaning that the agency would not have taken the same action in the absence of the discriminatory motive. *Savage,* 122 M.S.P.R. 612, ¶¶ 48, 49. The burden of proof shifts to the agency to show, also by preponderant evidence, that it would have taken the action even if it lacked such a motive. *Gerlach v. Federal Trade Commission,* 9 M.S.P.R. 268, 273 (1981). "If we find that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action." *Savage, id.* at ¶ 51.

In support of this affirmative defense, the appellant claims that the light fixtures (subject of insubordination specification one above) were never replaced by the appellant's Caucasian coworkers and was therefore a pretext to remove him, that Mr. Hall and Mr. Phillips, that Mr. Ivory (Caucasian) failed to equally distribute the workload to replace these light fixtures between Mr. Phillips and himself, and that Mr. Ivory should have assigned the ALS UQU project (subject of insubordination specification two above) to Mr. Hall and Mr. Phillips who were certified on the Airflow system. RAF, Tab 15, p. 8. The appellant further clams that Mr. Alexander (African American) retaliated against him for March 9, 2020 Title VII protected activity when he proposed the appellant's removal on April 10, 2020 and for May 12, 2020 Title VII protected activity when Mr. Alexander removed the appellant on May 14, 2020. *Id.* For the reasons detailed below, I find that the appellant failed to prove

any aspects of this affirmative defense.

First, other than the appellant's conjecture regarding disparate treatment, there is no evidence that any of the agency decisions complained of were motivated by any protected category. Second, there is no comparator evidence of another employee with a similar disciplinary history who engaged in similar misconduct but was not removed. Finally, I find it more likely than not that Mr. Alexander became aware of the appellant's spring of 2020 Title VII activity at some point after he proposed the appellant's removal but before he issued his removal decision. RAF, Tab 38 (Alexander testimony); Tab 15, pp. 125-31 (informal EEO complaint). However, other than the closeness in time of the appellant's complaint to his removal and his naming Mr. Alexander as a responsible management official, there no evidence of retaliatory animus. Given the appellant's extensive prior disciplinary history, the seriousness of his insubordination, and his lack of remorse for his misconduct, I find that the appellant failed to establish a genuine nexus between his Title VII protected activity and his removal.

The agency action promotes the efficiency of the service.

The nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties

satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice,* 6 M.S.P.R. 585, 596 (1981), *modified by, Kruger v. Department of Justice,* 32 M.S.P.R. 71, 75 n.2 (1987). Here, I find nexus is self-evident because the appellant's misconduct took place at work.

The penalty of removal is reasonable.

The agency also bears the burden of proving its penalty selection is reasonable. *Douglas,* 5 M.S.P.R. at 307-08. When, as here, an agency's charge has been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Wentz v. U.S. Postal Service,* 91 M.S.P.R. 176, 183 (2002), citing *Stuhlmacher v. U.S. Postal Service,* 89 M.S.P.R. 272 (2001) & *Fowler v. U.S. Postal Service,* 77 M.S.P.R. 8, 12, *rev. dismissed,* 135 F.3d 773 (Fed. Cir. 1977) (Table); *Douglas,* 5 M.S.P.R. at 306. In determining whether the penalty is reasonable, the Board gives deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that management judgment has been properly exercised. *Howard v. U.S. Postal Service,* 72 M.S.P.R. 422, 425 (1996).

Here, Mr. Alexander testified that he viewed the appellant's insubordination as serious, intentional, and repeated. RAF Tab 38. He further stated that he had lost confidence and trust in the appellant because his

position requires a high degree of integrity due to its connection to public safety. *Id.* He testified that other FAA employees had been removed for insubordination and that removal was within the range of the agency's table of penalties. *Id.* Mr. Alexander considered the appellant's 14 years of service to be mitigating, but ultimately determined this factor insufficient to outweigh the outer aggravating factors. *Id.* He testified that he considered the appellant's prior misconduct detailed above to be aggravating, that he believed the appellant lacked potential for rehabilitation because the appellant lacked remorse for his misconduct, and that he did not consider a suspension instead of removal because the appellant's prior discipline failed to alter his behavior.

Based on the foregoing, I find that the deciding official properly considered the *Douglas* factors, and I find that the penalty of removal is well within the parameters of reasonableness. *See Luciano v. Department of Treasury,* 88 M.S.P.R. 335, 343-44, ¶¶ 20-23 (2001) (reiterating well-settled Board law that deliberate refusal to follow orders, *i.e.,* insubordination, is serious misconduct warranting removal).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Christopher G. Sprague
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on *October 5, 2022*, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

record. You must file it with:

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

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

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and id entity specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference

to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double

spaced and only use one side of a page. The length limitation *is* exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

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

The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.140)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not

provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully 24 follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

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

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

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

Washington, D.C. 20439

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

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you *only* if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision–*including a disposition of your discrimination claims*–by filing a civil action with an appropriate U.S. district court *(not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** *after this decision becomes final* under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board,* 582 U.S. ____, 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination

based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you *only* if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must *receive* your petition for review within **60 days** of *the date this decision becomes final* under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

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

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

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

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

Additional material from this filing is available in the Clerk's Office.