No. 17-

In The

Supreme Court of the United States

VAHID ASRARI,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN D. MASLOWSKI
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
TWO COMMERCE SQUARE
2001 MARKET STREET,
SUITE 4100
PHILADELPHIA, PA 19103
SMASLOWSKI@AKINGUMP.COM
TELEPHONE: (215) 965-1200
FACSIMILE: (215) 965-1210

RACHEL J. ELSBY
RYAN S. STRONCZER
DANIEL TASKALOS
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, DC 20036
RESLBY@AKINGUMP.COM
RSTRONCZER@AKINGUMP.COM
DTASKALOS@AKINGUMP.COM
TELEPHONE: (202) 887-4000
FACSIMILE: (202) 887-4288

Counsel for Petitioner

QUESTIONS PRESENTED

Whether the Federal Circuit's affirmation without an opinion failed to review the decision of the Merit Systems Protection Board ("MSPB" or "the Board") for substantial evidence, contrary to statutes and this Court's precedent?

PARTIES TO THE PROCEEDINGS

Petitioner Vahid Asrari was the appellant in the Merit Systems Protection Board case and the petitioner in the court of appeals.

Department of Homeland Security was the agency in the Merit Systems Protection Board case and the respondent in the court of appeals.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

In The
Supreme Court of the United States

VAHID ASRARI,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Vahid Asrari ("Mr. Asrari") was an employee of the Transportation Security Administration ("TSA") for four years with very little incident. That all changed when Mr. Asrari became a whistleblower and informed the TSA of improper activity that was going on at his workplace. After his first of two protected whistleblowing disclosure (the "First Disclosure"), he was subjected to retroactive disciplinary action for events that occurred prior to the First Disclosure, for which no disciplinary action had been previously taken. This was part of a concerted effort by his supervisors done to ultimately justify Mr. Asrari's removal from employment. The documentary evidence shows that Mr. Asrari was suspended for five days, issued an Improvement Plan Notice ("IPN"), placed in a performance improvement program, and ultimately removed from his employment after he was determined to have failed his improvement program by the very employees who were adversely affected by his whistleblowing. Despite finding that Mr. Asrari's whistleblowing contributed to *each* of these disciplinary actions, the Board found that the TSA proved by clear and convincing evidence that it would have taken each of these actions against Mr. Asrari *absent* his whistleblowing. However, the Board's findings are not supported by substantial evidence.

Regarding the five day suspension, the Board's analysis improperly failed to account for all of the evidence of record when it rendered its decision. Worse, the Board applied the wrong legal standard and simply considered whether the TSA's *could* have suspended Mr. Asrari based on his performance, instead of whether the TSA *was in fact going to* suspend Mr. Asrari prior to his protected whistleblowing disclosures. When the entirety of the evidence is viewed as a whole, there can be no conclusion but that Mr. Asrari's five day suspension was the direct result of retaliation for his First Disclosure. Because the record contains evidence that weighs directly against the Board's conclusion – evidence that apparently went unconsidered – the Board's decision is not supported by substantial evidence.

As to the IPN, the Board again erred in its analysis. The totality of the record evidence does not indicate the TSA decided to issue Mr. Asrari an IPN prior to his First Disclosure. Instead, it reveals a series of unexplained inconsistencies that tend to suggest the TSA issued the IPN out of retaliation for Mr. Asrari's First Disclosure. The Board overlooked countervailing documentary evidence and inconsistencies in the evidence, instead relying on the testimony of TSA employees that the Board found to have retaliatory motive to find that the TSA did not act in retaliation when it issued the IPN. This finding is also not supported by substantial evidence.

Finally, the Board erred when it failed to recognize that the TSA's suspension and IPN were mere pretexts to effectuate Mr. Asrari's removal. Through the suspension and the implementation of his IPN, his colleagues and supervisors created a hostile work environment that only became worse after Mr. Asrari made his Second Disclosure, which detailed deficient behavior by some of the very TSA employees tasked with conducting and supervising his IPN.

The Board's decision is not supported by substantial evidence and should be reversed or, at least, vacated and remanded. By affirming the Board's Final Order without an opinion, the Federal Circuit effectively repeated the same flawed legal analysis as the MSPB and affirming a a conclusion that is not supported by substantial evidence.

OPINIONS BELOW

The Federal Circuit's opinion is reported at 710 Fed. Appx. 894 and is also reproduced at pages 58a-59a of the appendix. The Final Order of the MSPB is not reported but is reproduced at pages 30a-57a of the appendix. The Administrative Judge (AJ)'s

Initial Decision (ID) is also not reported, but is reproduced at pages 1a-29a of the appendix.

JURISDICTION

This is a petition for writ of certiorari from a decision of the Court of Appeals for the Federal Circuit decided February 8, 2018, affirming without opinion the final decision of the MSPB. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Whistleblower Protection Act (WPA), and in particular, the provisions of that Act pertaining to actions taken by supervisors against an employee who has made a protected whistleblowing disclosure:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— […]
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or

> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

5 U.S.C. § 2302(b)(8)

When an employee subject to disciplinary action has made a protected disclosure, the WPA specifies the evidentiary burden on the Agency:

> (1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described

under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

> (A) the official taking the personnel action knew of the disclosure or protected activity; and
>
> (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action

> (2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor [to the disciplinary action], the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 1221(e)

STATEMENT OF THE CASE

A. Background

The Petitioner, Vahid Asrari, worked as a Transportation Security Officer ("TSO") from September 12, 2010 until November 20, 2014. For the majority of Mr. Asrari's tenure with the TSA no discipline issues were noted in his file.

On April 11, 2014, Mr. Asrari received a mid-year evaluation prepared by Mr. Rouse, reviewing Mr. Asrari's performance from October 1, 2013 to March 31, 2014. In the mid-year review, Mr. Asrari received a score of 1 in two core competencies (indicating unacceptable performance), but scored two 3s and a 4 in the remaining core competencies, as well as all 3s in each of the individual performance goals for which he was rated. Notably, the mid-year evaluation did not make any mention of any standard operation procedure ("SOP") violations in March of 2014, or any potential suspension or disciplinary action related to Mr. Asrari's performance during the review period.

Mr. Asrari made the first of two protected disclosures under the Whistleblowing Protection Act ("WPA") on April 30, 2014. Mr. Asrari provided to Ms. Ashcraft, a supervisory officer, a written memorandum outlining issues he had experienced while working as a Divestment Officer ("DO") immediately outside of the security gates. Following his April 30 protected disclosure, Ms. Ashcraft proposed on May 2, 2014 that Mr. Asrari be suspended for 5 days. Ms. Ashcraft's alleged basis for the suspension was the occurrence of three SOP violations in March, within the review period of Mr. Asrari's mid-year evaluation. Specifically, Ms. Ashcraft recommended suspension because Mr. Asrari (1) flagged a bag for potentially containing a prohibited item, but mistakenly took the wrong bag on March 26, 2014; (2) used an improper screening procedure on a tub of cream on March 26, 2014; and (3) allowed a flagged bag to enter the sterile area on March 28, 2014. In rendering her suspension, Ms. Ashcraft recognized that Mr. Asrari had "no previous discipline in [his] file." On June 6, 2014, Ms. Luke imposed the suspension on Mr. Asrari, suspending him from work on June 7, 8, 9, 12, and 13, 2014.

Notably, Ms. Ashcraft acknowledged that her initial response to the SOP infractions was not to suspend Mr. Asrari, preferring instead to recommend remedial training and shadowing. Ms. Ashcraft testified at the MSPB hearing that after the March 28, 2014 incident and after learning of other possible infractions, she concluded that disciplinary action was appropriate. No documentary evidence was identified to further support Ms. Ashcraft's change. And again, Mr. Asrari's mid-year evaluation covering the period within which the alleged infractions occurred did not mention the SOP violations or discuss possible disciplinary action.

Shortly after Mr. Asrari returned from suspension, Mr. Rouse, the same employee who completed Mr. Asrari's April 11 evaluation, issued Mr. Asrari's IPN on June 19, 2014. The IPN informed Mr. Asrari that he would be placed in a 60-day program to "demonstrate an acceptable level of performance." Mr. Rouse stated that Mr. Asrari's performance was unacceptable at that time. Specifically, Mr. Rouse stated at the time that, since Mr. Asrari signed his Transportation Officer Performance System agreement for FY2014 on December 13, 2013, there had "been several instances of unacceptable performance." Contrary to his assessment on April 11, Mr. Rouse determined that Mr. Asrari's performance as of June 19 was deficient in three core competencies and one performance goal.

In support of his revised ratings, Mr. Rouse provided examples of Mr. Asrari's allegedly deficient behavior. The first event he identified occurred on February 14, 2014, alleging Mr. Asrari allowed a passenger to pass through security without a valid boarding pass. The IPN further indicates that a supervisor discussed the event with Mr. Asrari, asked him to review a SOP, complete a checklist, and had him shadowed for two hours. This event was not reported in Mr. Asrari's 2014 mid-year evaluation, despite the alleged incident occurring within the review period covered by the April 11 evaluation.

B. Proceedings Before the MSPB

The Initial Decision of the Administrative Judge ("AJ") found that, despite Mr. Asrari's disclosures on April 30 and July 20, 2014 qualifying as protected disclosures under the WPA and were contributing factors to his dismissal, the TSA had satisfied its burden to show that it would have (1) suspended Mr. Asrari; (2) placed Mr. Asrari on the IPN; and (3) terminated Mr. Asrari's employment absent Mr. Asrari's disclosures.

The full panel of the MSPB affirmed the Initial Decision, with some modifications. Specifically, the Board found that the AJ had underestimated the degree to which Mr. Asrari's co-workers and supervisors were motivated to retaliate against him to seek his removal. The Board also disagreed with the AJ's comparator analysis, finding that Mr. DiPietro was comparable to Mr. Asrari, and that the second *Carr* factor weighed slightly against the TSA. Nevertheless, the Board affirmed the AJ's ultimate decision.

C. Proceedings Before the Federal Circuit

On appeal to the Federal Circuit, Mr. Asrari identified numerous flaws in the analysis of the AJ and the MSPB. In particular, Mr. Asrari explained why the Board's reasoning was legally deficient and why its conclusions were not supported by substantial evidence. Despite this, the Federal Circuit affirmed and entered a judgment without an opinion pursuant to Federal Circuit Rule 36.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case pursuant to Supreme Court Rule 10(a) because the

Federal Circuit's Rule 36 affirmance of the Board's Final Order fails to review the Final Order for substantial evidence.

This Court has stated, the "Federal Circuit's statutory review of the substance of [MSPB] decisions is limited to determining whether they are unsupported by substantial evidence or are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6 (2001) (citing 5 U.S.C. § 7703(c)). When the MSPB determines that an employee has met the *prima facie* burden of reprisal for whistleblowing under the WPA, the Federal Circuit reviews the Board's finding of independent causation for substantial evidence. *Miller v. Dep't of Justice*, 842 F.3d 1252, 1258 (Fed. Cir. 2016) (citing *Kewley v. Department of Health & Human Services*, 153 F.3d 1357, 1364 (Fed. Cir. 1998)).

Substantial evidence does "more than create a suspicion of the existence of the fact to be established … it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Universal Camera Corp. v. NLRB*, 340 US 474, 477 (1951) (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 US 292, 300 (1939)). However, such substantiality analysis "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

The WPA includes a burden shifting process. Once an employee establishes by a preponderance of the evidence (*see* 5 U.S.C. § 2302(b)(8)) that an agency took adverse action as reprisal for the employee's protected whistleblowing disclosure, the burden shifts to the agency to show that it would have taken the same actions absent the employee's whistleblowing. 5 U.S.C. § 1221(e)(1). The agency can only meet this burden, however, by clear and convincing evidence—a higher evidentiary standard than mere preponderance of the evidence. *See id.*

The Federal Circuit considers three relevant factors in determining whether an agency would have taken action notwithstanding an employee's whistleblowing:

> (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. Social Security Admin., 185 F.3d 1318, 1323 (Fed. Cir. 1999). Although the Federal Circuit does not require the agency to present evidence with respect to every *Carr* factor, the factors are "appropriate and pertinent considerations for determining whether the agency carries its burden of proving by clear and convincing evidence that the same action would have been taken absent whistleblowing." *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1366 (Fed. Cir. 2012). "Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from the conclusion." *Id.* at 1368. While there is no requirement for an agency to present evidence on every factor, an agency cannot carry its burden based on a limited review of the available evidence.

As explained below, the Board's findings that the TSA proved by clear and convincing evidence that it would have taken the same actions absent Mr. Asrari's protected disclosures are not supported by substantial evidence. The Federal Circuit's affirmation of the MSPB's Final Order without any analysis is contrary to its mandate to review a finding of independent causation for substantial evidence.

A. Both the MSPB and the Federal Circuit Applied the Wrong Legal Standard in Applying *Carr* Factor 1 to Mr. Asrari's Suspension

Carr Factor 1 requires the MSPB to evaluate "the strength of the Agency's evidence in support of its personnel action." In this case, it is not sufficient for the Agency to simply establish that it *could* have suspended Mr. Asrari. The TSA was required to established by clear and convincing evidence that it *would* have suspended Mr. Asrari absent his protected disclosures. *Carr*, 185 F.3d at 1323. However, the analysis of MSPB and, by extension, the Federal Circuit commits precisely this error. The Administrative Judge merely found that "*the charge* [against Mr. Asrari] is well supported by the evidence and that the suspension penalty was a reasonably measured response to the charge." Appx0039 (emphasis added). In other words, the Administrative Judge found sufficient evidence of three SOP violations, and concluded that the Agency *could* have suspended an employee for those violations. However, that is not the question that the Board is charged with answering when the employee has established a *prima facie* case of reprisal for whistleblowing. As this Court has explained:

> The whistleblower statute is clear that even where the charges have been sustained and the agency's chosen penalty is deemed reasonable, the agency must still prove by clear and convincing evidence that it would have imposed *the exact same penalty* in the absence of the protected disclosures.

Whitmore, 680 F.3d at 1374 (emphasis in original). Here, neither the MSPB nor the Federal Circuit made any findings the TSA demonstrated it intended to and did in fact suspend Mr. Asrari based on the three SOP violations. Indeed, the record shows that Ms. Ashcraft did not propose to suspend Mr. Asrari until after his First Disclosure. Prior to that date, Ms. Ashcraft had, at most, recommended that Mr. Asrari receive a letter of reprimand.

For this reason alone, the Federal Circuit should have found the Board's decision unsupported by substantial evidence.

B. Substantial Evidence Does Not Support the Board's Decision That Mr. Asrari's IPN Was Not The Result Of Retaliation

The Administrative Judge improperly evaluated the evidence relating to the TSA's issuance of the IPN when it found the TSA had strong evidence of independent causation. As with Mr. Asrari's suspension, the Board's fails to show that substantial evidence supports that Mr. Asrari's IPN was not the result of retaliation. Specifically, the Board failed to (1) adequately review the evidence and (2) make requisite findings regarding what prompted the TSA to prepare Mr. Asrari's IPN.

1. The Board's Decision as to *Carr* Factor 1 Cannot Stand

The Board erred when it found the TSA presented strong evidence to support its issuance of the IPN because it failed to recognize the errors and omissions in the ID. As discussed above, the Board is required to fully explain its decision, and any finding of substantial evidence must address the countervailing evidence. *Whitmore*, 680 F.3d at 1368. Neither the MSPB nor the Federal Circuit made the findings.

Even though the Board found that several of the supervisors responsible for placing Mr. Asrari on his IPN and monitoring his progress had retaliatory motive based on his protected disclosures, both the Board and the Court impermissibly discount this motivation when analyzing the decision to place Mr. Asrari on an IPN. Instead, the analysis relies on events that occurred after the First Disclosure and after the IPN issued, as well as hindsight-driven testimony, when it evaluated the TSA's evidence. For example, the Board's analysis relied on three primary pieces of evidence as relevant to this decision: (1)

deficient ratings identified by Mr. Rouse in the IPN that were not identified in Mr. Asrari's mid-year review, (2) testimony from Ms. Whitehead that the failure of a single core competency could prompt the TSA to issue an IPN, and (3) Ms. Whitehead's testimony that the TSA identified previously-unreported deficiencies in the process of preparing the IPN. Appx0042. However, Ms. Whitehead's *post facto* reconstruction of events and Mr. Rouse's inconsistent report are not substantial evidence. As a result, the Board failed to carry its burden that substantial evidence supports the conclusion that the TSA legitimately possessed an independent reason for issuing the IPN.

Further, the Board erroneously failed to account for discrepancies and holes in the evidence, focusing only on aspects supportive to the TSA's position. For instance, a comparison of Mr. Asrari's mid-year review and the IPN reveals a glaring series of unexplained discrepancies. Even though Mr. Asrari's the mid-year review and his IPN were prepared by the same person, Mr. Rouse, the documents do not paint a consistent picture. Mr. Asrari's April 11, 2014 performance evaluation did not describe any specific events or any contemplated disciplinary action. However, the IPN issued to Mr. Asrari on June 19, 2014 identified multiple events that occurred *during the period covered by his midyear review* as justification for its issuance. Appx0731-737. The IPN also differed from the mid- year review in its accounting of Mr. Asrari's deficiencies. In the mid-year review, Mr. Asrari was found to be deficient in two competencies and received scores of "achieved expectations" in multiple categories and was rated as "exceeds expectations" in one competency. Appx0745-748. In contrast, the IPN found Mr. Asrari to be deficient in three competencies and one performance goal, and rated his overall performance as unsatisfactory. Appx0731.

The Board was obligated to address all evidence of record, but never reconciled these inconsistencies. On this basis alone, the Federal Circuit should have vacated the Board's decision so that the proper analysis could be performed. *Whitmore*, 680 F.3d at 1368 ("If considerable countervailing evidence is manifestly ignored or disregarding in finding a matter clearly and convincingly proven, the decision must be vacated and remanded for further consideration where all the pertinent evidence is weighed."). However, the Court also failed in this analysis.

Furthermore, the Board's evaluation of *Carr* Factor 1 incorrectly relied on new deficiencies unearthed by the TSA as it prepared Mr. Asrari's IPN. However, these issues that were only made of record after Mr. Asrari's First Disclosure alone cannot be sufficient justification in a whistleblower case because it does not establish what caused the TSA to begin preparing the IPN in the first place (*i.e.*, *before* Mr. Asrari's protected Disclosures). *See Miller*, 842 F.3d at 1263 (recognizing the government's "high burden of proof" in whistleblowing cases where the employee has shown that whistleblowing was a contributing factor.). The pertinent question addressed by *Carr* Factor 1 is whether the TSA presented sufficient evidence to justify its issuance of the IPN. Yet the Board makes no finding of why the TSA began preparing the IPN in the first instance, when the decision was made to prepare the IPN, and who was responsible. This is especially relevant here, where the Agency's justification for the IPN, created *after* the First Disclosure, contradicts Mr. Asrari's performance evaluation finalized *before* his First Disclosure, even though the performance period addressed in both evaluations overlaps in large part. Here again, the Federal Circuit's failed to properly analyze the Board's findings for substantial evidence.

Finally, the Board downplayed the inconsistencies between Mr. Asrari's mid-year performance review and the IPN based on an understanding that the Administrative Judge found "the agency was already preparing an IPN for [Mr. Asrari] based on his progress review" when it discovered additional performance deficiencies. Appx0012. However, the Administrative Judge made no such finding. There was no finding that an IPN was being prepared based on Mr. Asrari's mid-year review. On the contrary, the Administrative Judge found only that Mr. Asrari was "*in danger of being placed on an improvement plan*, presumably by the time of any final rating, or possibly earlier…" Appx0043 (emphasis added). In other words, the Administrative Judge found that, while an IPN was a possibility, one was not already being prepared. The Board's erroneous reading of the ID highlights the deficiencies in the TSA's evidence and magnifies the need for specific evidence indicating how and when the TSA decided to prepare the IPN.

In view of the numerous errors and omissions in its decisions, the Federal Circuit's affirmance that

that the TSA presented substantial evidence for its issuance of the IPN cannot stand.

2. In the Aggregate, the Board's Finding that the TSA Did Not Issue the IPN Out of Retaliation Lacks Substantial Evidence

A complete view of the record demands a conclusion opposite to that reached by the Board – the TSA issued its IPN out of retaliation for Mr. Asrari's First Disclosure. Again, *Carr* Factor 1 does not ask whether the TSA *could* have acted to place Mr. Asrari on an IPN, but rather *whether the TSA would have* acted to place Mr. Asrari on an IPN absent his First Disclosure. *Miller* at 1261 (holding the Court's review of *Carr* Factor 1 demands an assessment of "whether a factfinder could reasonably conclude that the Government presented strong evidence of independent causation."). For this reason, it cannot be sufficient that the TSA backfilled Mr. Asrari's IPN with examples of deficient performance to support its issuance. There must be some evidence of the event that triggered or caused the TSA to begin preparing Mr. Asrari's IPN in the first instance.

As the Board agreed, Mr. Asrari's First Disclosure was a contributing factor to the issuance of the IPN. Thus, the TSA had at least some motive to retaliate against Mr. Asrari. Moreover, the Government repeatedly cites to the testimony of Ms. Whitehead's as evidence for the TSA's independent justification for placing Mr. Asrari on the IPN. However, if anything, Ms. Whitehead's testimony shows that a decision was made to place Mr. Asrari on the IPN *after* his First Disclosure. *See* Appx1765-

1769. And Ms. Whitehead admits that Mr. Asrari's First Disclosure played some role in his being placed on an IPN:

> Q The fact that Mr. Asrari submitted [the First Disclosure] on April 30th or it's dated April 30th, does this, was this considered by you in the decision to place Mr. Asrari on a performance improvement plan?
>
> A No, not at all. This, that didn't come into the consideration. I mean I guess -- well, let me clarify. The only, the only consideration there was with regard to this topic was that as a DO he is required to speak to passengers and he was not speaking to the passengers.

Appx1769.

Further, the Agency failed to adduce a single piece of comparator evidence in support of *Carr* Factor 3, which this Court has found "may well cause the agency to fail to prove its case overall." *Whitmore*, 680 F.3d at 1374.

Given the TSA's inability to show independent causation, its slight retaliatory motive, and the dearth of evidence relating to *Carr* Factor 3, the Board's decision that the IPN was not issued out of retaliation is not supported by substantial evidence.

C. THE BOARD'S DECISION THAT MR. ASRARI'S REMOVAL WAS NOT THE RESULT OF RETALIATION IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE

Just as the Board's decision lacked substantial evidence to support Mr. Asrari's suspension and the issuance of the IPN, it also lacks sufficient evidence regarding his removal. As described above, the TSA would not have removed Mr. Asrari, but for his suspension and subsequent performance during the IPN process and the Federal Circuit failed by to determine that substantial evidence does not support the Board's determination that the suspension and the issuance of the IPN would have happened regardless of Mr. Asrari's protected First and Second Disclosures.

Throughout the IPN process, Mr. Asrari's relationships with his co-workers, most predominantly, Ms. Aschcraft and Mr. Saggau, had deteriorated beyond the point of dysfunction, at least in part because of his Disclosures, particularly the Second Disclosure, which identified by name Mr. Saggau, the individual primarily responsible for his IPN implementation. Even the Board found Mr. Saggau to have a strong motive to retaliate against Mr. Asrari. The actions of his supervisors created a hostile work environment that made it impossible for him to successfully complete his IPN. In short, Mr. Asrari was setup to fail. The comments in Mr. Asrari's IPN meeting memos evidence as much – they plainly show that Mr. Asrari was subject to constant critique and reacted defensively. *See, e.g.*, Appx0694-719. The same memos reveal that Mr. Asrari's colleagues treated him with contempt, giving him little to no positive feedback during the IPN process. Indeed, Ms. George's testimony, that TSA supervisors were told to document all of Mr. Asrari's mistakes, but not his positive behavior, confirms that Mr. Asrari was the target of retaliation. Appx1750-1752.

The likelihood of retaliation became greater after Mr. Bryan began an inquiry on July 30, 2014 into the accusations in Mr. Asrari's Second Disclosure and implemented new procedures as a direct result of that disclosure, including prohibitions on food and cell phones in the security area. Appx0037. The fact that many of the events identified by the TSA in Mr. Asrari's Failure Notice occurred after Mr. Asrari's Second Disclosure further supports the conclusion that Mr. Asrari was subject to retaliation. Appx0682-690.

Despite the unavoidable connection between the implementation of Mr. Asrari's IPN and the two prior retaliatory actions, the Board never considered that Mr. Asrari's behavior during the IPN process, which led to his removal, might not have happened absent the suspension and issuance of the IPN. This was error. *See Whitmore*, 680 F.3d at 1376 (cautioning of the danger that "any agency could take retaliatory action against whistleblowers by creating a hostile work environment for the whistleblower until the whistleblower acts out, then lawfully remove the whistleblower under the pretext of that later conduct.").

Given the lack of evidence supporting Mr. Asrari's suspension and IPN, the Administrative Judge's determination that both his First and Second Disclosures contributed to his removal, and the Board's recognition that Carr factors 2 and 3 weighed in favor of Mr. Asrari, there can be little doubt that his removal was the inevitable result of previous retaliatory actions. Therefore, should the Court determine that the TSA's suspension or issuance of the IPN was the result of retaliation, it must follow that Mr. Asrari would not have been removed absent his whistleblowing.

CONCLUSION

For the reasons set forth herein, the Merit Systems Protection Board failed to show by substantial evidence that the Agency would have suspended, placed on an IPN, and removed Mr. Asrari absent his protected disclosures. The Court of Appeals for the Federal Circuit erred by affirming a decision of the MSPB that is not supported by substantial evidence. Therefore, Mr. Asrari respectfully requests the Court grant certiorari to correct errors made by the Court of Appeals for the Federal Circuit.

Respectfully submitted.

STEVEN D. MASLOWSKI
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
TWO COMMERCE SQUARE
2001 MARKET STREET,
SUITE 4100
PHILADELPHIA, PA 19103
SMASLOWSKI@AKINGUMP.COM
TELEPHONE: (215) 965-1200
FACSIMILE: (215) 965-1210

RACHEL J. ELSBY
RYAN S. STRONCZER
DANIEL TASKALOS
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, DC 20036-
RESLBY@AKINGUMP.COM
RSTRONCZER@AKINGUMP.COM
DTASKALOS@AKINGUMP.COM

TELEPHONE: (202) 887-4000
FACSIMILE: (202) 887-4288
COUNSEL FOR PETITIONER

May 9, 2018