APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

VAHID ASRARI, Appellant,	DOCKET NUMBER DE-1221-15-0392-W-1
v.	
DEPARTMENT OF HOMELAND SECURITY, Agency.	DATE: August 19, 2015

Vahid Asrari, Gilbert, Arizona, pro se.

Eileen Dizon Calaguas, Esquire, San Francisco, California, for the agency.

BEFORE
David S. Brooks
Administrative Judge

INITIAL DECISION

INTRODUCTION

On May 15, 2015, the appellant timely filed this individual right of action (IRA) appeal alleging that in reprisal for making protected disclosures, the agency suspended him for five days beginning June 6, 2014, placed him on a performance improvement plan on June 19, 2014, and removed him on November 20, 2014. IAF, Tabs 1 and 18. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§

1214(a)(3), 122l(a), 122l(e). IAF, Tab 18. The hearing the appellant requested was held on August 6 and 7, 2015, and the record closed at the conclusion of the hearing. IAF, Tab 40; Hearing Compact Disc (HCD).

For the following reasons, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

A. Background

I find the following facts by preponderant evidence.[1] At all times relevant to this appeal, the appellant was a Transportation Security Officer (TSO), SV-1802-00. IAF, Tab 13 at 523.

On May 2, 2014, Barbara Ashcraft, Supervisory Transportation Security Officer (STSO), issued the appellant a notice of proposal to suspend him for 5 days for "Failure to Follow Standard Operating Procedures" ("SOPs"). IAF, Tab13 at 524. The appellant filed a written reply within a grievance on June 19, 2014. *Id.* at 59. On June 6, 2014, Monica Luke, Transportation Security Manager (TSM), issued the appellant a notice of decision on the proposal, sustaining the charge and imposing the 5-day suspension on June 7, 8, 9, 12, and 13, 2014. *Id.* at 79.

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

By memorandum dated June 19, 2014, entitled "Improvement Plan Notice (IPN)," STSO David Rouse informed the appellant that he had determined his performance was "currently unsatisfactory" and that he was placing him on a 60-day performance improvement plan, effective immediately. *Id.* at 530, 535. Rouse assigned STSO Charles Saggau to monitor and assist the appellant during the improvement plan period. *Id.* at 493-518; HCD, Saggau. By memorandum dated September 19, 2014, entitled "Notice of Failure of Improvement Plan Notice (IPN)," Rouse informed the appellant that he was found to have failed his performance improvement plan. IAF, Tab 13 at 481.

On October 3, 2014, TSM Sandra Whitehead issued the appellant a notice of proposed removal on the charge of failure to successfully complete his performance improvement plan. *Id.* at 471. The appellant filed a reply on October 17, 2014 through his union. *Id.* at 27. On November 20, 2014, Justin Bryan, Assistant Federal Security Director (AFSD), issued the appellant a notice sustaining the charge and imposing the penalty of removal, effective upon receipt, which occurred the same day, albeit with the appellant's refusal to sign receipt acknowledgment. *Id.* at 20, 26.

I found the appellant exhausted the Office of Special Counsel (OSC)'s remedies and raised nonfrivolous allegations that the agency's suspension, improvement plan, and removal were reprisal for the appellant's: (1) written disclosure on April 30, 2014 (IAF, Tab 13 at 49) to Barbara Ashcraft related to flight safety due to the circumstances under which he was assigned divestiture officer duties and (2) disclosures on or about July 20 or 21, 2014 to officials that they were engaged in non-work-related activities while on duty (Tab 13 at 246-47, Tab 15 at 6 (July 20 memorandum)); Tab 21 at 5 (reference to July 21 oral disclosure). IAF, Tab 18. I further informed the appellant of the burden to prove these claims by a preponderance of the evidence. lAF, Tabs 4, 18. Eleven witnesses testified at hearing.[2]

B. Applicable Law and Burdens of Proof

The appellant has the burden to prove, by preponderant evidence, that (1) he engaged in protected activity under 5 U.S.C. § 2302(b)(8), and (2) such disclosure was a contributing factor in the personnel action(s) at issue. 5 U.S.C.§ 1221(e)(J); Whitmore v. Department of Labor, 680 F.3d 1353, 1364 (2012); Colbert v. Department of Veterans Affairs, 121 M.S.P.R. 677, ¶ 6 (2014). If the appellant meets that burden, the Board must order corrective action unless the agency establishes by clear and convincing evidence[3] that it would have taken the same personnel action in the absence of the disclosure. 5 U.S.C. § 122l(e)(2);Whitmore, 680 F.3d at 1364. Evidence only clearly and convincingly supports a conclusion when it does so in the

---

[2] I added the appellant to his own witness list at the preheating conference because he stated he would like to reserve the right to testify personally. IAF, Tab 40. The appellant did not exercise that right at the hearing. HCD.

[3] 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. 5C.F.R. § l209.4(e).

aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion. Whitmore at 1368.

To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character;(3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence orits consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. Hillen v. Department of the Army, 35 M.S.P.R. 453, 458 (1987).[4] Credibility determinations properly made in one matter may be weighed in determining a speaker's credibility in another matter. Hawkins v. Smithsonian Institution, 73 M.S.P.R. 397, 403-04 (1997). Testimony elicited by leading questions may been titled to less weight. Sherlock v. General Services Administration, 103 M.S.P.R. 352, 360 (2006); Zeidat v. Department of Veterans Affairs, 59 M.S.P.R. 106, 109 (1993) (same); Parsons v. Department of the Air Force, 21 M.S.P.R. 438, 441-442 (1984) (same).

[4] Hearsay evidence is admissible in Board proceedings and may be accepted as preponderant evidence even without corroboration if, to a reasonable mind, the circumstances are such as to lend it credence. Social Security Administration v. Long,113 M.S.P.R. 190,126 (2010).

C. The appellant established by preponderant evidence that he made protected disclosures

A protected disclosure under 5 U.S.C. § 2302(b)(8) is a disclosure that an appellant reasonably believes to evidence a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. §2302(b)(8)(A); Chambers v. Department of the Interior, 515 F.3d 1362, 1367(Fed. Cir. 2008); Whitmore, 680 FJd at 1366-67. A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories in section 2302(b)(8)(A). Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

The Board has found that disclosures concerning alleged violations of federal personnel law and merit systems principles may be protected. McDonnell v. Department of Agriculture, 108 M.S.P.R. 443, ¶¶ 10-13 (2008) (appellant made a nonfrivolous allegation that she made a protected disclosure because her alleged disclosure concerned hiring and selection improprieties under 5 U.S.C. § 2301 that could have constituted prohibited personnel practices under 5 U.S.C. §2302(b)(6) and (b)(l2)). The Board has defined a 5 U.S.C. § 2302(b)(8)(A)(i)"rule" to include agency policy or operating instructions. Rusin v. Department of the Treasury, 92 M.S.P .R. 298, ¶¶ l4-19 (2002). The specific issue under 5 U.S.C. § 2302(b)(8) is whether the appellant reasonably believed that he was disclosing wrongdoing as described by Section 2302(b)(8); the appellant need not prove the correctness of that belief. Chavez v. Department of Veterans Affairs, 120 M.S.P.R. 285, ¶ 18 (2013).

1. April 30, 2014 Memorandum

On April 30, 2014, the appellant submitted a hand-written memorandum to Ashcraft entitled "Risk of not being able to perform job," which stated:

> I am writing this memo, requested by Barbara Ashcraft. Putting one person in a position like "DO" which requires standing, talking, divesting, informing of rules & regulation answering questions,[illegible] for anything can risk security and directing passenger[illegible] to the right way hours after hours all day long [illegible]that one may not be able to perform the job on the top level. Mouth get dried, legs get tired, eliminate focus etc. That is why TSA hasrotation on its different position, so that every half an hour TSO move from one position to another, in order to perform [illegible] job.

IAF, Tab 13 at 49. Ashcraft testified that leading up to the appellant's assignment as a divestiture officer, she had pulled him from his security duties due to his infractions and assigned him to replenish bins. HCD, Ashcraft. The appellant then filed a workers' compensation claim for a shoulder injury he incurred while replenishing the bins; that compensation claim resulted in him temporarily being unable to replenish the bins. *Id.* However, that injury left the appellant presumably still able to perform divestiture officer (or "DO") duties immediately outside the security gate; DO duties entail providing verbal assistance to passengers with preparing themselves and their carry-on luggage for screening. *Id.* Ashcraft and Saggau testified that these duties are considered to be not security duties, but rather customer service duties, and in fact, that the duties could be performed by non-uniformed private personnel. HCD, Ashcraft, Saggau. However, the appellant complained to Ashcraft that he was having trouble performing the speaking aspects of those duties because his mouth was susceptible to drying out due to the medication he was taking for his shoulder injury, and the appellant also told Ashcraft that he wanted to be able to do some sitting. HCD, Ashcraft. Ashcraft told the appellant that given his limitations, DO duties were the only duties he was qualified to perform, and she told the appellant he could write a memorandum about his concerns if he was unsatisfied with her answer. *Id.*

The agency argues that the appellant's disclosure was not protected because he could not reasonably believe that his assignment to divestiture officer duties under the circumstances presented a substantial and specific danger to public health and safety. HCD, Agency Closing Arguments. The appellant, in turn, elicited testimony that when he was working as a divestiture officer, if he saw a passenger was trying to get a gun through the security checkpoint, he would still need to report that observation to a supervisor. HCD, Whitehead, Saggau. Essentially, the agency's argument is that the appellant's observation of a weapon entering the screening area would have been only duplicative of the screening that was about occur and, at best, would have only improved the efficiency of that screening process by alerting the officers who were performing screening duties. Although Ashcraft testified that rotating employees every half hour is "not a requirement," she conceded that such rotation is recommended, and she testified that she has personally gone without a rotation for up to three hours- which implies that she had not gone without a rotation for entire days, as the appellant was seemingly doing. HCD, Ashcraft.

I find the appellant reasonably believed he was reporting a substantial and specific danger to public health and safety, notwithstanding the fact that there may have actually not been such a danger. Chavez, 120 M.S.P.R. 285 at ¶18 (appellant need not prove correctness of his belief). Although it is a close call to make, I find preponderant evidence that the appellant's disclosure meets 5 U.S.C.§ 2302(b)(8)'s reasonable belief standard.

2. July 20 or 21, 2014 Disclosures About Non-Work Activities

The documentation for this disclosure is a memorandum dated July 20, 2014 and addressed to Luke. IAF, Tab 13 at 246-48. In a section of the memorandum entitled "Agency officials using their work time to do non work-related things," the appellant stated:

[W]e are experiencing the same Agency officials using their work time to do out non work-related things. STSO [C] is well known for calling to his girlfriend in his car, while on schedule, for consecutive hours at a time. He also has admitted to requesting a windshield company employee come to IWA to fix his windshield during the time frame in April, has been accused of spending his time harassing female employees at IWA. STSO [M] spends her time at the checkpoint having her cell phone out on the floor updating employees about her baby. STSO Ashcraft bas ordered pizza multiple times and had it delivered at the checkpoint. STSO [M], STSO [K] and STSO Ashcraft have taken personal calls about refinancing their homes during their shifts and have even asked other employees for advice. STSO [K] also has a reputation for spending hours outside the checkpoint taking personal phone call[s] from her family members.

They also have planned and arranged birthday parties for employees who they favor, most recently, on or about 07/05/2014, [S] including buying 2 cakes served while passengers were going through security. STSO Saggau has been repeatedly seen by TSOs watching football games in the bag room and playing games or watching Netflix on his IPAD almost every shift, during football season. STS Luke has an excellent reputation for using work time to complete personal tasks. She on a routine[] basis calls

> her relatives during work hours, admitted she was expecting a call from the exterminator who had been at her house while she was working.

IAF, Tab 13 at 247.[5] I note that I originally found jurisdiction over this matter based on the appellant making "an oral disclosure on July 21, 2014." IAF, Tab18 at 2. The appellant filed a statement that he made a written disclosure on July 20, 2014 (the above disclosure) before making an "oral disclosure on July 21, 2014 (Tab 18 at 2)." IAF, Tab 21 at 5. I informed the appellant that he could present evidence and argument to that matter at hearing. IAF, Tab 40 at n.4. However, at hearing neither party testified about an oral disclosure on July 21, 2014, following the July 20, 2014 written disclosure. HCD. Regardless, I find the July 20, 2014 memorandum sufficient for establishing he made a disclosure about the above concerns in or about July 20 or 21, 2014.

Bryan, Assistant Federal Security Director, testified that as a result of the appellant's July 20, 2014 memorandum, an administrative inquiry was started on July 30, 2014, and he established changes to the airport's policies, including that food and use of

[5] I note that the appellant's memorandum also alleged a "former TSO S[]" had submitted a similar memorandum and was terminated. IAF, Tab 13 at 247. However, neither party called that former TSO as a witness for hearing and neither party adduced any evidence at hearing about this individual's termination. HCD. Under the circumstances, I find it inappropriate to give any weight to the hearsay evidence contained within this document about that individual. Long, 113 M.S.P .R. 190 at ¶26.

mobile phones would no longer be permitted at security checkpoints. HCD, Bryan.[6] Bryan emphasized that past policy did not actually prohibit the practices disclosed by the appellant and that it was only after the inquiry that the policies were changed. *Id.* Notwithstanding Bryan's claim, I find the appellant's disclosure meets 5 U.S.C. § 2302(b)(8)'s reasonable belief standard. Even if it could be said that the appellant could not reasonably believe the practices he disclosed were prohibited by existing policy, I find there is at least preponderant evidence that he reasonably believed the practices presented a substantial and specific danger to public health and safety.

D. <u>The appellant has established by the preponderant evidence that his disclosures</u> were a contributing factor in the personnel actions.

An employee may demonstrate that a disclosure was a contributing factor in a covered personnel action through circumstantial evidence, such as the acting official's knowledge of the disclosure and the timing of the personnel action. Nasuti v. Department of State, 120 M.S.P.R. 588, 97 (2014); 5 U.S.C. §1221 (e)(1). An appellant may also show that a protected

[6] The appellant showed Bryan a copy of a memorandum dated August 27, 2014 related to the administrative inquiry, although Bryan expressed uncertainty about the authenticity of the document because it was not signed. HCD, Bryan (referring to IAF,Tab 30 at 4). Nonetheless, upon further review of the document, Bryan testified with confidence that the administrative inquiry had begun on July 30, 2014, as indicated in the document. *Id.*

disclosure was a contributing factor by proving that the official taking the action had constructive knowledge of the protected disclosure, even if the official lacked actual knowledge. *Id.*

Applying the knowledge-timing test, I find the appellant's April 30, 2014 disclosure to Ashcraft was a contributing factor to the appellant's (1) June 6,2014 five-day suspension, insofar as Ashcraft herself proposed the suspension on May 2, 2014; (2) June 19, 2014 placement on a performance improvement plan, insofar as Ashcraft testified that she helped STSO Rouse write the plan; and (3)November 30, 2014 removal, insofar as the proposing official, Whitehead, acknowledged being aware of the appellant's disclosure at the time she proposed the appellant's removal. IAF, Tab 13 at 538 (proposal to suspend), 530 (placement on performance improvement plan), 471 (proposal to remove); HCD, Ashcraft, Whitehead.

Again applying the knowledge-timing test, I find the appellant's July 20, 2014 disclosure to Luke was a contributing factor to the last one of the three personnel actions challenged in this IRA appeal, namely, his November 30, 2014 removal. IAF, Tab 13 at 493-518 (Saggau's reports of appellant's performance during his improvement plan period), 481 (Rouse's finding of failure of improvement plan), 471 (Whitehead's proposal to remove appellant for failure of improvement plan), 20 (Bryan's decision to remove appellant). That is because, inter alia, Saggau, whose findings contributed to the appellant's removal, was one of the subjects of the appellant's July 20, 2014 disclosure (ld. at 247 ("Saggau has been repeatedly seen by TSOs watching football games in the bag room and playing games or watching Netflix on his IPAD almost every shift, during football season")), and although Saggau stated on direct examination by the agency that he did not see the actual written July 20, 2014 disclosure until sometime in October 2014, Saggau also generally acknowledged knowing of some of the appellant's July 20, 2014 allegations, including those related to his use of an iPad and iPhone to watch football. HCD, Saggau. The agency did not clarify with Saggau when he became aware of the allegations. *Id.* However, under cross-examination by the appellant, Saggau acknowledged that he "heard bits and pieces about" the matter. *Id.* Although the appellant, too, did not clarify when Saggau learned about the matter, I find it more likely than not that Saggau learned about the matter during the improvement plan period, which began June 19, 2014 and continued until approximately September 19, 2014. IAF, Tab 13 at 530, 481. That is because Bryan acknowledged that the agency began an inquiry into the appellant's allegations on July 30, 2014, and Saggau never suggested he had not learned of the allegations until several months later. HCD, Bryan, Saggau. Because Saggau, the STSO entrusted to administer the appellant's performance improvement plan on a day-to-day basis, was a subject and most likely was aware of the appellant's July 20, 2014 allegation, I find it proper under 5 U.S.C. § 122l(e)(l) to presume that the appellant's July 20, 2014 allegation was a contributing factor to the agency's decision to remove him on November 20, 2014.

E. The agency has shown by clear and convincing evidence that it would have taken the same actions absent the whistleblowing.

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (a) the strength of the agency's evidence in support of its action; (b) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (c) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated (the "Carr factors"). Chambers v. Department of the Interior, 116 M.S.P.R. 17 at ¶29 (2011); Carr v. Social Security Administration, 185 F.3d 1318, 1323 (Fed.Cir. 1999); Whitmore, 680 F.3d at 1365. Regarding Carr factor (c), in particular, evidence that the agency takes similar actions against employees who. are not whistleblowers but who are otherwise similarly situated, the Federal Circuit has stated that establishing employees are "similarly situated" does not require a showing that they are" identically situated." Whitmore, 680 F.3d at 1373. The court stated further: "Differences in kinds and degrees of conduct between otherwise similarly situated persons within an agency can and should be accounted for to arrive at a well reasoned conclusion regarding Carr factor three." *Id.* at 1373-74.

1. The agency proved by clear and convincing evidence that Luke would havedecided on June 6. 20I4 to impose a five-day suspension on the

appellant even absent the appellant's April 30. 2014 disclosure.

Ashcraft proposed suspending the appellant for the charge of failing to follow standard operating procedures (or SOPs) based on three specifications, including: (I) on March 26, 2014, allowing a bag he had flagged to potentially contain prohibited items to roll into the passengers' area ("sterile area"), where it could have been taken by a passenger, while mistakenly taking another bag; (2) on March 26, 2014, conducting an incorrect screening procedure on a tub of cream; and (3) on March 28, 2014, again allowing a flagged bag to roll into the sterile area. IAF, Tab 13 at 524; HCD, Ashcraft. Luke sustained all three specifications and imposed the five-day suspension. IAF, Tab 13 at 79.

Regarding Carr factor (a), I find the evidence supporting the agency's reasons for the suspension are strong. First, the charges are essentially undisputed by the appellant; the appellant's reply to the proposed suspension stated, "The party recognizes the preponderance related to the charges against TSO Asrari and does not dispute the occurrence of events." IAF, Tab 13 at 59.[7]

---

[7] Additionally, Ashcraft testified that she personally witnessed the first March 26, 2014 incident because the appellant had called her over to him with a question and she heard the appellant's coworker, Laura Dziedzinski, state "that's not the bog." *Id.* Although the appellant called Dziedzinski to testify about "why she was denied" the chance to prepare a statement, at hearing, Dziedzinski neither recalled any of the details related to the matter nor testified to any fact that would

Second, although the appellant contended generally that he violated the SOPs due to rushed or otherwise inadequate training, I found only evidence to the contrary at bearing. *Id.* at 59-60. Ashcraft testified, without dispute, that although the agency changed some of its SOPs related to checkpoint processing of bags in the months leading up to March 26, 2014, the SOPs violated by the appellant on March 26 and 28, 2014, were not new SOPs. HCD, Ashcraft. Third, the suspension was a part of progressive discipline, insofar as Ashcraft testified that she was aware of, or had given the appellant, at least two verbal counselings prior to March 26, 2014 for other SOPs, including related to the ticket document checker and the X-ray machine. *Id.* Ashcraft's first response after March 26, 2014 was not to propose the appellant's suspension, but instead to send the appellant to remedial training and direct that the appellant be shadowed for two work rotations; she testified that she changed her mind when the appellant incurred another violation two days later on March 28, 2014. HCD, Ashcraft. At the same time, Ashcraft also spoke with Human Resources about the possibility of a performance improvement plan. *Id.* After the appellant committed a third violation two days later on March 28, 2014, and Ashcraft became aware of other SOP violations by the appellant, including incorrectly searching golf bags three times on March 25, 2014, Ashcraft concluded that - regardless of whether the appellant were put on a performance improvement plan - it was appropriate for her to propose some sort of

---

present a version of events contrary to Ashcraft's. IAF, Tab 28 at 57; HCD, Dziedzinski.

disciplinary action. *Id.*; IAF, Tab 13 at 533. I find the charge is well supported by the evidence and that the suspension penalty was a reasonably measured response to the charge.

Regarding Carr factor (b), agency motive to retaliate against the appellant for his April 30, 2014 memorandum, I find that Ashcraft had a slight motive to retaliate, given the fact that she appears to be responsible for the work condition about which the appellant was complaining (to the extent the condition is anything more than the limitations imposed by the appellant's physical condition at the time). However, I find preponderant evidence that Ashcraft had already decided to propose the appellant's suspension or some form of disciplinary action by March 28, 2014, which is more than a month earlier than the appellant's April 30, 2014 disclosure. IAF, Tab 13 at 49; HCD, Ashcraft. I also find that Ashcraft acted contrary to having animus against the appellant's disclosure when she affirmatively encouraged the appellant to document his complaint if he were dissatisfied with her directions. HCD, Ashcraft. Because it would have been easier for Ashcraft not to encourage the appellant to document his concern, I find Ashcraft's motive to retaliate was slight at best. Moreover, there is no indication that Ashcraft got in any sort of trouble for the appellant's disclosure. As for Luke, who imposed the suspension penalty in her June 6, 2014 decision, I find no apparent motive for her to retaliate against the appellant for his April 30, 2014 disclosure. Luke acknowledged having seen the appellant's April 30, 2014 memorandum at some point, but that she has "no idea if' she saw the memorandum before she issued her decision to suspend. HCD, Luke. Moreover, the appellant's response to Ashcraft's proposal does not mention the April 30,2014 memorandum in its list of 15 attachments, such that one would assume Luke saw the memorandum. IAF, Tab 13 at 62. I find Ashcraft had only a weak motive to retaliate and Luke had no motive to retaliate against the appellant for his April 30, 2014 disclosure.

Regarding Carr factor (c), evidence of disparate penalties for nonwhistleblowers, I find no evidence that the agency overlooked the SOP violations of any individual similarly situated to the appellant who did not blow the whistle. First, and most importantly, I find the appellant bas identified no other individual who committed three SOP violations in less than three days - whistleblower or not - who was not suspended. Second, to the contrary, the appellant's witness TSO Rick Crosby testified that he was suspended for five days[8] for a single SOP violation, and no evidence was adduced that Crosby blew the whistle. HCD, Crosby. Although Crosby testified that he believed the suspension was unjust and that he got the action overturned, Crosby was vague about the reasons it was overturned, while Bryan testified without dispute that Crosby's suspension was overturned because it was later determined to have been untimely imposed. HCD, Crosby, Bryan. Notwithstanding that turn in events for Crosby, I find the fact that the agency suspended Crosby for a single SOP violation evidences a propensity by the

---

[8] Neither party clarified who proposed or decided on Crosby’s suspension.

agency to punish SOP violations, not to overlook them. Third, although the appellant asked multiple witnesses about lead and supervisory TSO she believed had committed SOP violations but were not suspended, I find individuals occupying those positions are not similarly situated to the appellant as a TSO, but that even if they were, the appellant never proffered that any TSO other than him committed three SOP violations in less than three days' time. Considering factor (c), I find it weighs slightly in the agency's favor, because the agency pointed to evidence in the record (including in Crosby's testimony, who was called by the appellant) that it had suspended non-whistleblowers for even fewer SOP violations than the appellants, while the appellant introduced no evidence that the agency had overlooked another TSO's SOP violations that amounted to the same number and frequency as his own.

Considering all three Carr factors, I find the agency's reasons for the suspension were strong, its retaliatory motives were slight at best, and the evidence of how others with similar infractions were treated, collectively, only weighs in the agency's favor. Thus, I find the agency has proven by clear and convincing evidence that it would have suspended the appellant for five days even in the absence of his April 30, 2014 disclosure.

2. <u>The agency proved by dear and convincing evidence that Rouse would have placed the appellant on a performance improvement plan on June 19, 2014 even absent the appellant's April 30. 2014 disclosure</u>.

Rouse placed the appellant on the performance improvement plan on the basis that his performance was unacceptable in (1) core competencies No. 1, critical thinking; No. 4, oral communication; No. 5, teamwork; and (2) performance goal No. l, risk-based security. IAF, Tab 13 at 530.

Regarding Carr factor (a), strength of the agency's reasons, it bears noting that as recently as the appellant's April 11, 2014 midyear review, the appellant had been rated unacceptable in only two competencies or goals, but that Rouse's June 19, 2014 performance improvement plan added two more deficiencies for a total of four. IAF, Tab 13 at 38-41 (midyear), 530 (improvement plan). Rouse, who is no longer an agency employee, was not called to testify at the Board's hearing. However, Whitehead testified without dispute that the appellant's deficiencies in other areas came to light as they were preparing his improvement plan. HCD, Whitehead. I find Whitehead's testimony is consistent with the fact that the performance improvement plan notes that on April 25, 2014 - after the appellant's April 11, 2014 midyear evaluation - "it was discovered that [the appellant was] not giving advisements to passengers as required," and that the "appellant's response was the passengers don't listen to you anyway." IAF, Tab 13 at 532. Further, Whitehead testified without dispute that a failure of even a single core competency requires the agency to institute an improvement plan, and that if the employee cannot bring his performance up to a satisfactory level, the appellant cannot maintain certification and would have to be removed. HCD, Whitehead. Based on the above, I find the agency's evidence in support of its performance improvement plan is strong.

Regarding Carr factor (b), agency motive to retaliate, I find no evidence that Rouse had any motive to retaliate against the appellant for his April 30, 2014 disclosure to Ashcraft. However, as I previously found, Ashcraft- who helped Rouse prepare the performance improvement plan - had a slight motive to retaliate. Nonetheless, I note the undisputed evidence that before the appellant made the disclosure, on April 11, 2014, he had already been rated unsatisfactory in two core competencies or goals, and as such, he was already in danger of being placed on an improvement plan, presumably by the time of any final rating, or possibly earlier, if the agency concluded that the deficiency was too important to permit the delay of a performance improvement plan on the hope than the appellant would bring his performance up to an acceptable level by the end of the performance cycle. Cf Weirauch v. Department of the Army, 782 F.2d 1560 (Fed. Cir. 1986) (encouraging more frequent performance evaluations than merely annual appraisals). Based on the above, I find the evidence of any agency motive to retaliate is slight at best.

Regarding Carr factor (c), evidence of disparate penalties for non-whistleblowers, the appellant adduced no evidence of any other employee who was failing to perform acceptably - much less in four core competencies or goals - who was not placed on a performance improvement plan. Meanwhile, Bryan testified that he oversaw the performance improvement plan of another TSO a few months after he removed the appellant, for deficiencies in technical abilities, customer service, and screening. However, no evidence was adduced as to whether that other TSO had' or had not blown the whistle. I find neither party adduced any evidence pertinent to factor (c) for this personnel action and that this factor is therefore not relevant to my consideration of whether the agency has met its burden.

Weighing the agency's strong evidence in support of its performance improvement plan against the minimal evidence that the agency had any motive to retaliate against the appellant for his April 30, 2014 disclosure in issuing the plan on June 19, 2014, I find the agency has shown by clear and convincing evidence that it would have imposed the same performance improvement plan even in the absence of the whistleblowing.

3. <u>The agency proved by clear and convincing evidence that Bryan would have removed the appelJant on November 20. 2014. even absent the appellant's April 30. 2014 and July 20, 2014 disclosures.</u>

Whitehead's October 3, 2014 proposal to remove the appellant, sustained by Bryan on November 20, 2014, charged the appellant with failure to successful complete his performance improvement plan. IAF, Tab 13 at 471, 20. Whitehead wrote that "extraordinary efforts" were made to help the appellant improve his performance, but that he did not improve his performance "overall." *Id.* at 472.

Regarding Carr factor (a), strength of the agency's reasons, I find Whitehead's charge is supported by voluminous documentation by Saggau in the form of written weekly ratings and feedback. *Id.* at 493-518. Further, the appellant's reply to the proposal stated:

> TSO Asrari resisted his lPN because he did not have confidence in the IWA staff that he was in fact being assisted to improve his performance. This can be evidenced by his reporting of other employees engaged in similar screening deficiencies and SOP violations that seemed to be accepted by IWA staff.

Id. at 29. Notwithstanding that response, which I find amounts to a generalized allegation of disparate treatment during his PIP, I have already found above that the agency would have placed the appellant on the performance improvement plan even if he had never made the April 30, 2014 disclosure to Ashcraft. Thus, I find it appropriate to give very little weight to the appellant's generalized attack on the circumstances of his performance, or importance of obeying SOPs, during his improvement plan period. Similarly, the appellant called Dennis Piert, a union representative, to testify about alleged deficiencies in the performance improvement plan. IAF, Tab 28 at 58. However, Piert testified to little more than his unsupported opinion that (1) performance improvement plans should be as comprehensive as the training given to new employees and (2) the agency's plan for the appellant did not give him an adequate opportunity to improve because it did not notify him of his deficiencies or how to improve them.

HCD, Piert. As to Piert's first argument, I simply find no basis for his suggestion that a performance improvement period entitles the deficient employee to the equivalent of a complete restart of his employment. As to Piert's second argument, I find it is plainly refuted by the numerous and detailed notices the agency gave the appellant, both in his improvement plan notice and in the weekly reports provided to the appellant during his improvement plan period. IAF, Tab 13 at 493-518. Based on the record evidence, I find the agency's reasons for removing the appellant were strong.

Regarding Carr factor (b), agency motive to retaliate for the appellant's April 30, 2014 disclosure to Ashcraft and his July 20, 2014 disclosure to Luke, I find evidence of some motive to retaliate. As stated above, I find Ashcraft's motive to retaliate for the April 30, 2014 disclosure was very slight, and regardless, her involvement in the performance improvement plan was very limited. I also find no evidence that Luke learned about the appellant's April 30, 2014 disclosure before Whitehead proposed the appellant's removal, such that Luke could have directed others to fail the appellant, but regardless, I also find no motive for Luke to have retaliated against the appellant for his April 30, 2014 disclosure bad she known about it.[9] As for the July 20, 2014

[9] It was not clear from Whitehead's testimony whether she ever saw the appellant's April 30, 2014 memorandum before proposing his removal. HCD, Whitehead. Regardless, I find no evidence that Whitehead would have had any motive to retaliate against the appellant for the memorandum even if she had been aware of it. Bryan testified that he saw the memorandum in the

disclosure to Luke, though, insofar as Luke (i) was the recipient of the disclosure, (ii) recommended an investigation into the appellant's claims (IAF, Tab 32 at II), and (iii) was distantly involved in the agency's administering of the appellant's performance improvement plan, I find the evidence shows a minimal motive of Luke to retaliate, namely, that she might have found responding to the disclosure inconvenient. *Id.* at 9; HCD, Luke. However, I find no indication that Luke was, or felt, implicated by the appellant's July 20, 2014 disclosure, and thus, I find Luke's ostensible motive to retaliate was, like Ashcraft's, slight at most. For the same reason, I find that Bryan bad a slight motive to retaliate since he testified to his involvement in responding to the appellant's July 20, 2014 disclosure. HCD, Bryan. I find the employee with the *strongest* motive to retaliate was Saggau, who (i) I found above was most likely aware of the appellant's accusations about him during the performance improvement period, and (ii) contributed indirectly to the appellant's ultimate removal by reporting to Rouse that the appellant's performance was not improving. HCD, Saggau. In sum, I find very slight motives to retaliate by Ashcraft, Luke and Bryan, and a stronger motive by Saggau to retaliate. However, when Saggau testified that he administered the performance improvement plan with indifference to the appellant's whistleblowing, and I observed his demeanor, I found Saggau appeared calm and forthright, and that he spoke without making any exaggerated statements or movements. Although it might be natural to be

---

appellant's reply to proposed removal, but that it did not affect his decision to remove the appellant. HCD, Bryan.

bothered by an accusation, in observing Saggau, I do not believe that he was especially embarrassed or angered by the appellant's disclosure.

Regarding *Carr* factor (c), evidence of disparate penalties for non-whistleblowers, I find the appellant again adduced no evidence that a similarly situated individual who did not blow the whistle was not removed. Most specifically, the appellant identified no other TSO who, after failing a performance improvement plan, was permitted to remain employed. I recognize and have considered the fact that the appellant seeks to challenge the entire basis and implementation of the performance improvement plan, but as I found above, the agency's reasons for placing him on a performance improvement plan were strong. I have also considered the appellant's generalized assertions that others were violating SOPs just as much as he was but were not being removed or even placed on performance improvement plans, but as I found above, those concerns are too generalized to overcome the agency's specific evidence of the appellant's significant performance deficiencies.

Lastly, I have considered the testimony of Kiernan Dipietro, who the appellant called in order to provide evidence that Dipietro reported "the very same issues" and was, like the appellant, removed. IAF, Tab 28 at 58; HCD, Dipietro. Dipietro testified that be was terminated during his probationary period on May I, 2014, on charges of 18 unscheduled attendance violations, although he disputed the charges. HCD, Dipietro. Dipietro testified that in January 2014, he had disclosed what he believed amounted to misconduct by STSOs in their eating, texting, checking sports scores, and inappropriate conversations at the checkpoint. I have considered the appellant's suggestion that the common denominator between his removal and Dietro's probationary termination was their whistleblowing, but I must weigh that comparison against the fact that they also share another common denominator: deficiencies impacting their performance, either by failure to appear at work or failure to perform adequately when at work. I must also consider the fact that DiPietro was a probationary employee while the appellant was not. Considering DiPietro's testimony in full, I do not find that he can be compared to the appellant. Once again, I find factor (c) is neutral for this action and therefore not a factor that can be weighed. Having weighed the two relevant Carr factors, which indicate that the agency's reasons for removing the appellant were very strong while its motive for retaliating against the appellant for his April 30 and July 20, 2014 disclosures was modest at best, I find the agency has proven by clear and convincing evidence that it would have taken the same action even in the absence of the appellant's disclosures. Therefore, I must deny the appellant's request for corrective action.

DECISION

The appellant's request for corrective action is **DENIED**.

FOR THE BOARD:

David S. Brooks

Administrative Judge

COVERUNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VAHID ASRARI, Appellant,	DOCKET NUMBER DE-1221-15-0392-W-1
v.	
DEPARTMENT OF HOMELAND SECURITY, Agency.	DATE: August 19, 2016

Vahid Asrari, Gilbert, Arizona, pro se.

Eileen Dizon Calaguas, Esquire, San Francisco, California, for the agency.

BEFORE
Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

[1] The appellant has filed a petition for review of the initial decision, which denied his

---

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

request for corrective action in this individual right of action (IRA) appeal. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 120 1.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order, regarding the administrative judge's analysis of the agency's affirmative defense as stated in ¶¶ 35-42 below, we AFFIRM the initial decision.

The appellant was an SV-E Transportation Security Officer (TSO) for the agency's Transportation Security Administration (TSA). Initial Appeal File (IAF), Tab 13 at 537. Beginning June 7, 2014, the agency suspended the appellant for

---

significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

5 calendar days for failure to follow standard operating procedures at the airport security checkpoint. *ld.* at 537-41. On June 19, 2014, the agency issued the appellant an Improvement Plan Notice (IPN), stating that he was performing at an unacceptable level in several areas and that he would have 60 days to demonstrate an acceptable level of performance. *Id.* at 530-36. On September 19, 2014, the agency informed the appellant that he had failed to demonstrate an acceptable level of performance, *id.* at 481-90, and on November 20, 2014, it removed him for failure to successfully complete the lPN, *id.* at 19-26, 471-80.

The appellant filed a complaint with the Office of Special Counsel (OSC), arguing that the agency's actions were in retaliation for protected whistleblowing under *5* U.S.C. § 2302(b)(8). lAP, Tab 8 at 10-13. OSC closed its file without taking corrective action, and the appellant filed the instant Board appeal. IAF, Tab 1, Tab 8 at I 0-13. After a hearing, the administrative judge denied the appellant's request for corrective action. IAF, Tab 52, Initial Decision (ID). He found that the appellant proved his case in chief, i.e., his disclosures were a contributing factor in the personnel actions taken against him. ID at 5-11. However, the administrative judge also found that the agency proved by clear and convincing evidence that it would have taken these actions regardless of the appellant's disclosures. ID at 11-21.

The appellant has filed a petition for review, disputing the administrative judge's clear and convincing evidence analysis along with some other aspects of the adjudication below. Petition for Review (PFR) File, Tab 2. The agency has filed a response. PFR File, Tab 4.

<u>The appellant's motion to compel is not properly before the Board.</u>

The appellant filed a motion to compel discovery below, asserting that the agency had not fully responded to his discovery requests. IAF, Tabs 22-23. After the agency responded to the motion, IAF, Tab 25, the administrative judge issued a notice, finding that the appellant's motion was moot, IAF, Tab 27.

On petition for review, the appellant argues that the administrative judge should have granted his motion to compel and that the agency failed to provide him the comparator evidence that he was seeking. PFR File, Tab 1 at 8-9, 11-12, 14, 16-17. However, the appellant failed to object to the administrative judge's ruling on the motion below, and therefore he has failed to preserve the issue for the Board' s review. *See Brown* v. *U.S. Postal Service,* 64 M.S.P.R. 425, 429 (1994).

<u>The appellant has not shown that the agency engaged in witness intimidation</u>.

The appellant argues that the agency contacted his proffered witnesses prior to the hearing and intimidated them into giving testimony favorable to the agency. PFR File, Tab 2 at 9-11. As an initial matter, we note that it is common practice for an agency to interview an appellant's proffered witnesses before the hearing in order to determine their expected testimony, and that there is nothing improper about this per se. Furthermore, a showing of witness intimidation requires evidence showing that an agency official threatened an employee witness with adverse consequences, such as disciplinary action, or suggested that the witness either not testify or not testify truthfully. *Bernstein* v. *Department of the Army,* 82 M.S.P.R. 375, ¶13 (1999). The appellant quotes one of his witnesses as saying that, when the agency contacted him, he "felt intimidated, concerned and was not sure about why they wanted to talk with me." PFR File, Tab 2 at 9. However, we find that such feelings of anxiety are often inherent in witness interviews and do not themselves establish that the agency engaged in any wrongdoing. We find that this statement does not satisfy the evidentiary requirements of *Bernstein.*

The appellant has not established any basis on which to disqualify the administrative judge, and he has not shown that the administrative judge was biased.

The appellant argues that, after the hearing, he learned that the administrative judge had been employed with the Department of Transportation when the TSA was under that department. PFR File, Tab 2 at 18. Even assuming that this were true, we find that this relationship is far too attenuated to raise an inference of partiality. Therefore, we find that the appellant has failed to raise facts that might reasonably cause an objective observer to question the administrative judge's impartiality. *See Shoaf* v. *Department of Agriculture,* 97 M.S.P.R. 68, ¶7 (2004), *aff'd* 158 F. App'x 267 (Fed. Cir. 2005).

The appellant also argues that the administrative judge did not treat the parties equally because he had "long hours phone conversations with the agency's representative prior to the hearing." PFR File, Tab 2 at 18. Tbe agency responds that the administrative judge had a conversation with its representative "to clarify the availability of video-conferencing equipment on the chosen hearing date." PFR File, Tab 4 at 9. The agency is correct that such ex parte communications, which do not concern the merits of the case, are permissible. *See Stec* v. *Office of Personnel Management,* 22 M.S.P.R. 213, 215 (1984); 5 C.P.R.§ 1201.102. The appellant has not shown or even alleged that the administrative judge's ex parte communication concerned the merits of the case, and we find that it raises no inference of bias.

Finally, the appellant argues that the administrative judge ordered that the parties not use electronic equipment during the hearing, but still allowed the agency representative to use her laptop the entire time. PFR File, Tab 2 at 18. The record reflects, though, that the appellant asked to use his laptop at the beginning of the hearing and that the administrative judge allowed him to do so. PFR File, Tab 4 at 11; Hearing Compact Disc (HCD). There is no indication that the administrative judge treated the parties unequally in this regard, and there is no indication of bias. In sum, we find that the appellant has not shown that any of the administrative judge's comments or actions during the course of the proceedings evidenced "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Walker-King v. Department of Veterans* Affairs, 119 M.S.P.R. 414, ¶ 14 (2013).

Evidentiary Framework

To prevail on the merits of an IRA appeal concerning *5* U.S.C. § 2302(b)(8), an appellant must prove by preponderant evidence that he engaged in whistleblowing by making a protected disclosure under that section and that such whistleblowing activity was a contributing factor in an agency personnel action; if so, the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosures. 5 U.S.C. § 1221(e); *Chavez v. Department of Veterans Affairs,* 120 M.S.P .R. 285, ¶17 (20 13). It is undisputed that the Board has jurisdiction over this appeal and that the appellant established his case in chief. The only question is whether the agency proved its affirmative defense by clear and convincing evidence. For the following reasons, we agree with the administrative judge that it d*Id.*

This appeal involves the following protected disclosures: (1) an April 30, 2014 memorandum concerning the circumstances of the appellant's duty assignment; and (2) a July 20, 2014 written complaint concerning various employees' improper use of time while on duty.[2] IAF, Tab 40 at 3, 4 n.5. It

[2] The appellant also alleged that he made an oral disclosure on July 21, 2014, concerning the same matters as his written disclosure the day before. IAF, Tab 18 at 2. The administrative judge accepted the oral disclosure as an issue for the hearing, IAF, Tab 40 at 4 & n.5, but neither party presented any evidence on it, so he declined to address it in the initial decision, ID at 8-9. The appellant has not raised the July 21, 2014 oral disclosure on review, so we likewise decline to address

also involves the following three personnel actions: (I) the June 6, 2014 5-day suspension; (2) the June 19, 2014 lPN; and (3) the November 20, 2014 removal. *Id.* at 3. There were six agency officials involved in various aspects of these personnel actions, all of whom the appellant argues had retaliatory motives. The 5-day suspension was proposed by Supervisory Transportation Security Officer (STSO) B.A., and decided by Supervisory Transportation Security Manager (STSM) M.L. IAF, Tab 13 at 79-83, 538-41. The lPN was issued by STSO D.R., who also decided that the appellant failed to complete it successfully. *Id.* at 481 -90, 530-36. STSO B.A. helped draft the lPN, STSM M.L. helped administer the lPN, and STSO C.S. monitored and assisted the appellant during the lPN period. *Id.* at 493-518; HCD (testimony of STSM M.L. and STSOs B.A. and C.S.). The removal was proposed by Transportation Security Manager (TSM) S.W., and decided by Assistant Federal Security Director (AFSD) J.B. IAF, Tab 13 at 20-26, 4 71-80.

In finding that the agency proved by clear and convincing evidence that it would have taken these three actions regardless of the appellant's disclosures, the administrative judge considered the factors set forth in *Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999), i.e., the strength of the agency's evidence in support of its actions, the existence and strength of any motive to retaliate on the part of the agency officials

---

it. In any event, given the similarities between the written and oral disclosures, we see no reason that separate consideration of the oral disclosure would affect the analysis.

who were involved, and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. ID at 11-21. We address each of the three personnel actions in turn, in light of the appellant's arguments on review.

<u>The agency proved by clear and convincing evidence that it would have imposed the 5-day suspension notwithstanding the appellant's protected disclosures.</u>

On May 2, 2014, STSO B.A. proposed the appellant's 5-day suspension based on three specifications of "Failure to Follow Standard Operating Procedures." IAF, Tab 13 at 538-39. Specifically, the agency alleged that, on March 26, 2014, the appellant identified potential prohibited items in a bag during an x-ray screen, but he pulled the wrong bag out of the x-ray machine for checking and placed the suspect bag out for passenger pick-up. *Id.* at 538. The appellant's error was caught by a passenger. *Id.* Later that day, the appellant used an incorrect screening procedure to determine the contents of a liquid container. *Id.* at 538-39. On March 28, 2014, the appellant again pulled the wrong bag from the x-ray machine and allowed the passenger to retrieve the bag with the prohibited item. *Id.* at 539. The passenger then had to be located and recalled for additional screening. *Id.* The appellant disputed the appropriateness of the suspension, but he did not dispute the factual allegations. *Id.* at 80-81. On June 9, 2014, STSM M.L. issued a decision to suspend the appellant for 5 days. *Id.* at 79-83.

Although this appeal concerns two protected disclosures, only one of them, the April 30, 2014 memorandum to STSO B.A., predated the suspension. *See Mason v. Department of Homeland Security,* 116 M.S.P.R. 135, ¶27 (2011) (explaining that a disclosure made after a personnel action could not have been a contributing factor in the action). In his memorandum, the appellant claimed that the agency assigned him with divestiture officer duties for entire days without rotating, which caused him to get tired and lose focus, and put him in danger of not performing his duties correctly[3] IAF, Tab 13 at 49.

The administrative judge found that both the proposing official, STSO B.A., and the deciding official, STSM M.L., were aware of the appellant's disclosure, but that STSO B.A. had only a slight motive to retaliate, and STSM M.L. had no motive to retaliate. ID at 13-14. He also found that the agency's evidence in support of the action was strong, ID at 12-13, and that, to the extent that there were any similarly situated non-whistleblowers, the agency treated them similarly to the appellant, ID at 14-15. Weighing these factors together, the administrative judge found that the agency proved by clear and convincing evidence that it would have imposed the 5-day suspension notwithstanding the appellant's protected disclosure.

---

[3] A divestiture officer stands immediately outside the security gate and verbally assists passengers in preparing themselves and their luggage for screening. ID at 6. He also acts as a first line of screening. ID at 7.

On review, the appellant argues that STSM M.L. must have been aware of his disclosure because she was a manager. PFR File, Tab 2 at 12. Yet, as explained above, the administrative judge did find that STSM M.L. was aware of the disclosure. ID at 14. Thus, the appellant's argument provides no basis to disturb the initial decision.

The appellant also argues that there were four other TSOs and one Lead Transportation Security Officer who violated standard operating procedures but were not suspended. PFR File, Tab 2 at 8, 12-13, 16. This may be true, but the administrative judge found that there was no employee who, like the appellant, violated standard operating procedures three times in Jess than 3 days, but was not suspended. ID at I 4. The appellant does not appear to dispute this finding, and we find that, for disciplinary purposes, there is a significant difference between isolated incidents of standard operating procedure violations and several such violations in a short span of time and we find that, for disciplinary purposes, there is a significant difference between isolated incidents of standard operating procedure violations and several such violations in a short span of time.

The appellant further argues that there is no evidence that the two bags in question reached the "sterile" area of the airport as the administrative judge found. PFR File, Tab 2 at 12; IAF, Tab 13 at *525;* ID at 12. It appears that the appellant's assertion may be correct. We have reviewed the decision letter, the documentation supporting the proposal, and the testimony of STSO B.A., and we find no basis to conclude that the bags actually reached the sterile area. IAF, Tab 13 at 68-83; HCD. Although this might make the consequences of the appellant's errors marginally less serious, we find that it does not significantly detract from the administrative judge's analysis as a whole, including his determination that the evidence supporting the appellant's suspension was strong.

The appellant also disputes the administrative judge's finding that the standard operating procedures that he violated were not new. PFR File, Tab 2 at 1 0; ID at 13. Specifically, the administrative judge found that, although the agency recently had changed some of its standard operating procedures for bag checks, none of the procedures that the appellant violated had been changed. ID at 13. Disputing this finding, the appellant cites the testimony of two witnesses whom he claims testified that the procedures at issue were, in fact, new. PFR File, Tab 2 at I 0. We have reviewed the testimony of these witnesses, and we find that they generally testified that the agency recently had instituted some procedural changes, including changes to the standard operating procedures for the x-ray machines. HCD. However, neither witness testified that the specific procedures that the appellant violated were new, and we find that their testimony is consistent with the administrative judge's conclusion.

The appellant further argues that he never had the opportunity to contest three alleged standard operating procedure violations on March 25, 2014, pertaining to improper screening of golf bags, which influenced STSO B.A. to propose his suspension for the three subsequent violations. PFR File, Tab 2 at 10; IAF, Tab 13 at 68, 70-71; ID at 13. We disagree with the appellant that he has not had the opportunity to contest these allegations; he had the opportunity to \ do so before the administrative judge and on petition for review. Moreover, it appears to us that any such challenge would be immaterial to the issues surrounding the suspension because the appellant's conduct on March 25, 2015, was not charged, and there is no indication that it influenced the deciding official's decision. For the reasons explained in the initial decision, we agree with the administrative judge that the agency proved by clear and convincing evidence that it would have suspended the appellant for 5 days notwithstanding his April 30, 2014 disclosure. ID at 12-15. For the reasons explained above, we find that the appellant's arguments on review provide no basis to disturb the administrative judge's findings.

<u>The agency proved by clear and convincing evidence that it would have issued the appellant an Improvement Plan Notice notwithstanding his protected disclosures.</u>

On June 19, 2014, STSO D.R. issued the appellant an lPN on the basis that his performance was unacceptable in three core competencies-critical thinking, oral communication, and teamwork-as well as one performance goal- risk-based security. IAF, Tab 13 at 530. The IPN explained the standard for satisfactory performance in each of these elements and listed examples of the deficiencies that the appellant demonstrated in each area within the preceding 4 months. *Id.* at 531-34. The IPN stated that the appellant would have 60 days to demonstrate acceptable performance and explained what was expected of him during this period and how the agency would assist him. *Id.* at 534-36.

Again, this action took place before the appellant's July 20, 2014 disclosure. Therefore, the only disclosure that could have been a contributing factor in the action was the appellant's April 30, 2014 memorandum to STSO B.A. regarding his work as a divestiture officer for hours on end. IAF, Tab 13 at 49; *see Mason,* 116 M.S.P.R. 135, ¶ 27. Although the administrative judge did not find that STSO D.R. was aware of the disclosure, he found that it was a contributing factor in the action to the extent that STSO B.A., who was aware of the disclosure, helped write the lPN. ID at 10.

Nevertheless, the administrative judge found that the agency's evidence in support of placing the appellant on the lPN was strong, that STSO B.A.'s retaliatory motive was only slight, and that STSO D.R. had no retaliatory motive at all. ID at 16-17. He also found that there was no comparator evidence. ID at 17. Weighing the pertinent evidence as a whole, the administrative judge found that the agency proved by clear and convincing evidence that it would have issued the lPN notwithstanding the appellant's disclosure. ID at 16-17.

On petition for review, the appellant argues that the agency placed him on an lPN, whereas the administrative judge erroneously stated that it placed him on a "performance improvement plan."

PFR File, Tab 2 at 5, 1 0; ID at 2-3, I 0, 16-18, 20. We acknowledge the inconsistency in the terminology used by the administrative judge and that used by the agency. However, the appellant has not explained how the administrative judge's terminology affected his analysis, and we find that it is a distinction without a difference. The IPN is functionally equivalent to the "reasonable opportunity to demonstrate acceptable performance" that the Board commonly refers to as a "performance improvement plan" in cases arising under 5 U.S.C. chapter 43 . *See 5* U.S.C. § 4302(b)(6); 5 C.F.R. § 432.1 04; *see also, e.g., Lee v. Environmental Protection Agency,* 115 M.S.P.R. 533, ¶ 32 {2010). This is supported by the testimony of the appellant's union official, who stated that the IPN was essentially the same as a performance improvement plan. HCD.

The appellant also argues that the agency violated *5* U.S.C. chapter 43 in initiating the lPN. PFR File, Tab 2 at 6. Without deciding whether the agency's procedures comported with the requirements of chapter 43, we find that chapter 43 does not apply to the TSA. 49 U.S.C. § 40122(g)(2); *see Hart v. Department ofTransportation,* 109 M.S.P.R. 280, ¶¶9-10 (2008).

The appellant further argues that IPNs are not supported by the agency's management directives and violate the collective bargaining agreement. PFR File, Tab 2 at 5-6. In support of his argument, he cites the testimony of his union steward. *Id.* To the extent that the appellant is arguing that the terminology "lPN" is unsupported by the governing provisions, as explained above, we find this argument immaterial. To the extent that the appellant is arguing that these procedures by whatever name are unsupported by the governing documents, we find that his union steward did not so testify, HCD, and in any event, we disagree. The procedures that the agency used are authorized under the applicable management directive and set forth in the applicable collective bargaining agreement. IAF, Tab 13 at *555;* Collective Bargaining Agreement between The American Federation of Government Employees, AFL-CIO and The Transportation Security Administration, Art. 1 § K (December 9, 20 12), *available at* *www.afgeloca/899.org/AFGE-TSA%20CBA%20Fina/%20.pd[* (last visited Aug. 17, 2016).

The appellant argues, moreover, that the agency prepared the IPN based on false information, i.e., unsatisfactory performance in four elements rather than two elements as suggested in his most recent mid-year progress review. PFR File, Tab 2 at 14; IAF, Tab 13 at 530, 544-47. The administrative judge, though, already addressed this issue, finding that the agency was already preparing an lPN for the appellant based on his progress review, when, in the process of creating the lPN, it discovered additional performance deficiencies, which brought the deficient performance elements from two to four. ID at 16. In any event, the administrative judge further found that unsatisfactory performance in even one area would trigger an IPN, so the appellant would have been placed on an lPN regardless. *Id.* The appellant's argument constitutes, at best, mere disagreement with the initial decision and therefore provides no basis to grant the petition for review. *See Weaver v.*

Department of the Navy, 2 M.S.P.R. 129, 133-34 (1980), *review denied,* 669 F.2d 613 (9th Cir. 1982) (per curiam).

Finally, the appellant argues that the agency failed to identify any comparison employees who were placed on an lPN, and that there is therefore no way to determine whether other similarly situated employees were treated differently. PFR File, Tab 2 at 8, 13-14. This argument, however, is consistent with the administrative judge's finding that there was no• comparator evidence to weigh against the other factors, ID at 17, and hence, it provides no basis to disturb the initial decision.

For the reasons explained in the initial decision, we agree with the administrative judge that the agency established by clear and convincing evidence that it would have placed the appellant on the lPN, notwithstanding his April 30, 2014 disclosure. ID at 16-17. For the reasons explained above, we find that the appellant's arguments on review provide no basis to disturb the administrative judge's findings. <u>The agency proved by clear and convincing evidence that it would have removed the appellant notwithstanding his protected disclosures</u>.

During the course of the lPN, STSO C.S. was the primary official responsible for assisting the appellant, monitoring his progress, and issuing weekly reports on his performance. IAF, Tab 13 at 493-518; HCD (testimony of STSO C.S.). The 60-day lPN period ended on or about August 18, 2014, and on September 19, 2014, STSO D.R. issued the appellant a letter informing him that he had failed to demonstrate acceptable performance. IAF, Tab 13 at 481-90. The letter documented numerous errors and deficiencies throughout the lPN period in each of the four performance areas noted as deficient at the outset of the period. *Jd.* at 481-89. On October 3, 2014, TSM S.W. proposed the appellant's removal based on one charge of "Failure to Successfully Complete a Performance Improvement Plan Notice (lPN)." *Id.* at 471-81. The proposal letter recounted the appellant's alleged performance deficiencies during the lPN period and discussed his alleged resistance to and failure to cooperate with the lPN administrators. *Id.* After the appellant responded, *id.* at 28-31, AFSD J.B. sustained the charge and removed the appellant effective November 20, 2014, *id.* at 19-26.

Unlike the other two personnel actions at issue, the appellant's removal occurred after his disclosure of July 20, 2014. This disclosure, which the appellant made in the middle of the lPN period to STSM M.L., was in response to STSO C.S. accusing him of carrying out private business while on duty.[4] *Id.* at 9. In it, the appellant cited numerous examples of other TSOs and STSOs handling personal matters and otherwise engaging in nonwork activities on Government time. *Id.* at 10-11. Among other things, the appellant alleged that STSO C.S. routinely played games and watched football and movies on his

---

[4] This "private business" consisted of the appellant attempting to deliver personal correspondence to a courier with whom he had arranged to meet at his duty station. IAF, Tab 18 at 9, Tab 13 at 506.

iPad in the "bag room" and that STSO B.A. had pizza delivered to the checkpoint multiple times and took personal calls about refinancing her home. *Id.* at 10. He also alleged that STSM M.L. herself "has an excellent reputation for using work time to complete personal tasks," including taking personal telephone calls. *Id.* As a result of this disclosure, the agency opened an investigation, which culminated in some changes in airport policy, including that employees would no longer be allowed food or the use of mobile phones at security checkpoints. ID at 9.

The administrative judge found that, under the knowledge/timing test of 5 U.S.C. § 122l(e)(l), the appellant established that both of his disclosures were contributing factors in his removal. ID at 10. Specifically the disclosures preceded the removal by only a few months, and all of the relevant officials knew about one or both of the disclosures. 10 at 10-11. Nevertheless, the administrative judge found that the agency's evidence in support of the removal was strong, and, except for STSO C.S., none of the officials involved in the removal had any more than a slight retaliatory motive. ID at 21-23. He also found that there was no comparator evidence. ID at 23-24. Weighing the pertinent evidence as a whole, the administrative judge found that the agency proved by clear and convincing evidence that it would have removed the appellant notwithstanding his disclosures. ID at 24.

Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion. ID at 3; *Whitmore v. Department of Labor,* 680 F.3d 1353, 1368 (Fed. Cir. 2012). Although we agree with the administrative judge's ultimate conclusion that the agency proved by clear and convincing evidence that it would have removed the appellant notwithstanding his protected disclosures, we disagree with his assessment of the strength of the motive to retaliate by the officials who were involved in the removal action. Specifically, the appellant argues on review that various officials had a motive to retaliate against him for his July 20, 2014 disclosure. PFR File, Tab 2 at 9. Although the administrative judge acknowledged this fact, ID at 22-23, we find that he understated the retaliatory motive that this disclosure likely caused and that it was far more likely to induce retaliatory motive than was the April 30, 2014 disclosure about the appellant's working conditions. In particular, the appellant baldly accused STSO C.S., STSO B.A., and STSM M.L. of engaging in on-duty misconduct. IAF, Tab 18 at 10. We therefore disagree with the administrative judge that STSO B.A. and STSM M.L. 's motives to retaliate were "very slight" and "minimal" respectively. ID at 19. We also find that the restrictions on food and use of mobile phones that resulted from the appellant's disclosure were likely to have been upsetting to the employees who previously had enjoyed these things, thus resulting in further retaliatory motive. We further find that, to the extent that the appellant's disclosure reflected negatively on the working culture of the security checkpoint as a whole, this alone was enough to establish a substantial possible retaliatory motive among agency managers who were aware of it. *See Whitmore,* 680

F.3d at 1370-71; *Phillips v. Department ofTransportation,* 113 M.S.P.R. 73, -J 23 (2010).

Nevertheless, we credit the administrative judge's demeanor-based finding that STSO C.S., who was chiefly responsible for the appellant•s less-than-flattering weekly IPN progress reports, was not "especially embarrassed or angered by the appellant's disclosure." ID at 20. Although the appellant disputes the administrative judge's credibility determination, PFR File, Tab 2 at 15, we find that he has not provided a sufficiently sound reason to overturn it, *see Haebe* v. *Department of Justice,* 288 F.3d 1288, 1301 (Fed. Cir. 2002) (holding that the Board must give deference to an administrative judge's demeanor-based credibiJity determinations, and may overturn such determinations only when it has "sufficiently sound" reasons for doing so). We also note that the tenor of the lPN progress reports was substantially the same throughout the lPN period, including the period predating the July 20, 2014 disclosure. IAF, Tab 13 at 493-518. STSO C.S. found consistently throughout the period that the appellant failed to complete his assigned duties in a timely and satisfactory manner and that he was argumentative and resistant to the lPN process. *Jd.* There is no indication that STSO C.S. altered his assessment of the appellant's progress after he learned of the appellant's disclosure.

As for STSO B.A. and STSM M.L., although we acknowledge their substantial possible motive to retaliate, we also acknowledge the administrative judge's findings that their involvement in the IPN process was "very limited" and "distant[]"

respectively. ID at 19, 22. It appears that STSO B.A. helped to formulate the lPN before the appellant made his July 20, 20 I 4 disclosure, HCD (testimony of STSO B.A.), and that STSM M.L. occasionally was asked to monitor the appellant when there was nobody else available, but that she provided no input into his assessment, HCD (testimony of STSM M.L.). The appellant has not explained on review how these two officials might have influenced the outcome of the lPN or the removal process. We therefore find that their retaliatory motive, however strong it might have been, carries little weight in the analysis.

As for the proposing official, TSM S.W., and the deciding official, AFSD J.B., these officials were not named in either of the appellant's disclosures, and we find that their retaliatory motive was limited to their general poor depiction of the area under their responsibility, as well as the administrative burden on AFSD J.B. in addressing the July 20, 2014 disclosure. HCD (testimony of AFSD J.B.). In addition, while it is true that the appellant's supervisors may not have made their final decisions about whether to remove the appellant until after they learned about his disclosures, the fact that they were already in the process of pursuing actions leading to his removal beforehand casts some doubt on whether the disclosures had any bearing on their decisions. Persisting in discipline after learning of a protected disclosure generally does not, by itself, suggest that the discipline was retaliatory. 57 M.S.P.R. 296, 303 (1993).

Regarding the other *Carr* factors, the appellant argues extensively on review that the agency's evidence in support of the performance-based removal was weak. He asserts that the agency failed to give him proper assistance in successfully completing his lPN, and in fact, actively obstructed his efforts to do so. PFR File, Tab 2 at 6-7. Specifically, he argues that the agency failed to set forth realistic expectations in the IPN, *id.* at 7, failed to correct his mistakes in a timely manner, *id.,* failed to consider his suggestions for improving the lPN process and his responses to the weekly IPN reports, *id.* at 7, 11, 15, and ignored the positive aspects of his performance, *id.* at 7-8, 15, 17.

We have considered the appellant's arguments, but we find that they provide no basis to disturb the administrative judge's findings. The appellant has not explained what was unrealistic about the IPN's requirements, and we find that the lPN, on its face, is clear as to what the appellant had to do to demonstrate acceptable performance and set forth reasonable, realistic, and attainable goals. IAF, Tab 13 at 530-36. Nor has the appellant explained what he means by the agency's failure to correct his mistakes in a timely manner. STSO C.S.'s notes document numerous instances in which supervisors caught the appellant's mistakes and attempted to instruct and assist him on the spot only to be met with resistance and defiance. *Jd.* at 493-518. Regarding the appellant's responses to the weekly lPN reports and his suggestions for improving the process, we find that the agency did not ignore them. Rather, STSO C.S. considered them and found them to be of no value, constituting complaints about the lPN process rather than constructive suggestions. *Jd.* at 503, 506, 512, 517. We have reviewed these documents ourselves, and we agree with STSO C.S.'s assessment of them. *Id.* at 173-76, 188-89,215-16,223,232,234,246-48,254-55,259-61, 279-85, 290, 302, 308, 316-17, 344-47. Rather than constructive suggestions or pertinent questions that may have helped the appellant complete the lPN successfully, these documents are replete with complaints, accusations, and rationalizations and excuses for identified performance deficiencies. *ld.* They are consistent with STSO C.S.'s repeated descriptions of the appellant's recalcitrance, self-alienation, and active resistance to the lPN process. IAF, Tab 13 at 494, 497, 500-01, 503, 507, 509, 512, 515, 517. The appellant's refusal even to sign the lPN or any of the nine weekly progress reports completes the picture. *Id.* at 495,498, 501, 504, 507, 510, 513, 515, 518, 536. Finally, we find that the agency did not ignore the positive aspects of the appellant's performance. While it is to be expected that the lPN meetings and memoranda would concentrate on the areas in which the appellant needed improvement, STSO C.S. 's notes were not completely negative and occasionally did comment on instances of satisfactory performance. *Id.* at 493-518. In any event, the appellant has not explained why he believes that the positive aspects of his performance outweighed the negative aspects so that his lPN should have been considered a success.

The appellant also argues that the administrative judge erred in his comparator analysis, and we agree. PFR File, Tab 2 at 1 7. The administrative judge found that another TSO, who was terminated shortly after he disclosed incidents of STSOs eating, texting, checking sports scores, and having inappropriate conversations at the checkpoint, was not comparable to the appellant. ID at 21. He reasoned that this employee also had had work deficiencies and was a probationer, whereas the appellant was not. *Id.* The U.S. Court of Appeals for the Federal Circuit has found, however, that comparison employees must be "similarly situated"-not identically situated-to the whistleblower. *Whitmore,* 680 F.3d at 1373 (quoting *Carr,* 185 F.3d at 1318, 1326. Because these employees occupied the same position at the same duty station, were involuntarily separated after making similar disclosures, and because the proffered comparator was terminated by STSM M.L., who also was involved (albeit remotely) in the appellant's removal, we find that they are comparable. Nevertheless, we agree with the administrative judge that the comparison employee's probationary status, coupled with his attendance deficiency, suggests that whistleblowing was not the reason for his termination. ID at 21. We therefore find that there is relevant comparator evidence that weighs against the agency, but it is not particularly strong.

Weighing these three factors together, we are left with the firm belief that the agency proved by clear and convincing evidence that it would have removed the appellant notwithstanding the appellant's disclosures. 5 C.P.R.§ 1209.4(e); *Rumsey v. Department of Justice,* 120 M.S.P.R. 259, ¶34 (2013) (finding that, to meet the clear and convincing standard, the evidence must produce a "firm belief as to the allegations sought to be established"). Although all of the agency officials involved in the IPN and removal processes may have had motives to retaliate, only three of them had particularly strong motives. *See* supra¶¶, 35, 3 8. Of these three, STSO B.A. and STSM M.L. had very little influence over the removal action, and the third, STSO C.S., did not exhibit a particularly heightened level of animus at the hearing. *See supra* ¶¶ 3 6-3 7. Furthermore, as discussed in ¶ 40 above, there is relevant comparator evidence, but it is not particularly strong. We find that the most substantial *Carr* factor by far is the strength of the agency's evidence supporting the removal. The agency presented overwhelming evidence that the appellant failed to complete his lPN successfully and that he did not even put in a concerted effort to do so. *See supra* ¶¶39-40; ID at 18-19. The lPN Jetter informed the appellant at the outset that he would face removal if he failed to complete it successfully. IAF, Tab 13 at 535. Therefore, considering all of the evidence, we find that the strength of the evidence in support of the agency's personnel actions outweighs any relevant comparator evidence or evidence indicating a motive to retaliate on the part of agency officials involved in the personnel actions at issue.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(l)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

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

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in title 5 of the U.S. Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the U.S. Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through the link below:

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

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

FOR THE BOARD: For Corina A. Yuie

Jennifer Everling
Acting Clerk of the Board

NOTE: This disposition is nonprecedential.

United States Court Of Appeals
For The Federal Circuit

VAHID ASRARI,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2017-1064

Petition for review of the Merit Systems Protection Board in No. DE-1221-15-0392-W-1

JUDGMENT

RACHEL J. ELSBY, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC, argued for petitioner. Also represented by RYAN STRONCZER; STEVEN D. MASLOWSKI, Philadelphia, PA.

ZACHARY JOHN SULLIVAN, Commercial Litigation Branch, Civil Division, United States

Department of Justice, Washington, DC, argued for respondent. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., ALLISON KIDD-MILLER.

THIS CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (O'MALLEY, REYNA, and HUGHES, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

February 8, 2018	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court