APPENDIX :
A

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

RICK D. SALERNO,
Petitioner

v.

DEPARTMENT OF THE INTERIOR,
Respondent

2017-1145

Petition for review of the Merit Systems Protection Board in No. SF-1221-14-0756-B-1.

Decided: November 17, 2017

RICK D. SALERNO, Manassas, VA, pro se.

MICHAEL D. SNYDER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., DEBORAH A. BYNUM.

Before NEWMAN, MAYER, and O'MALLEY, *Circuit Judges.*

A

NEWMAN, *Circuit Judge.*

Rick D. Salerno appeals the Final Decision of the Merit Systems Protection Board (MSPB or Board) affirming the Department of the Interior's decision to suspend him for 30 days from his employment with the Bureau of Land Management (BLM).[1] The suspension was based on Salerno's allegedly improper use of a personal credit card for official purchases.

Mr. Salerno argues that the suspension was in retaliation for his having filed a whistleblowing disclosure to the Office of Special Counsel (OSC). He also alleged other improprieties in connection with his suspension. The administrative judge (AJ) to whom the matter was assigned denied his request for witnesses or deposition evidence regarding matters other than the issue of his credit card use. On appellate review, we conclude that the evidence before the MSPB supported the 30-day suspension; that decision is affirmed.

BACKGROUND

Mr. Salerno was employed as a Telecommunications Specialist with the BLM in Moreno Valley, California. On January 10, 2013, Mr. Salerno received a letter of reprimand, instructing that all work-related purchases must be made with his government purchase card and that he must receive prior authorization before making such purchases, which would include receipt of a fund code for each purchase. In February of 2013, Mr. Salerno submitted a disclosure to OSC describing asserted violations of law, rule, or regulation, relating primarily to the BLM's alleged non-compliance with communication security laws and regulations.

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[1] *Salerno v. Dep't of the Interior,* MSPB Docket No. SF-1221-14-0756-B-1 (Sept. 1, 2016).

On December 11, 2013, the BLM imposed a 2-day suspension on Mr. Salerno, stating that he had again violated the instructions to use only his government purchase card for official purchases. On January 9, 2014, Mr. Salerno informed his supervisor that he "chose to purchase" a radio antenna for the Ridgecrest Chief Ranger "using my personal credit card" in order to expedite the purchase and to have the antenna on hand for his scheduled return to Ridgecrest the following week. At the time of the purchase, Mr. Salerno had neither requested nor received a fund code, but this was remedied the afternoon of the purchase, and the charge was promptly transferred to the government purchase card.

On January 27, 2014, the District Fire Management Officer proposed to suspend Mr. Salerno for 30 days for failure to follow instructions relating to official purchases. Mr. Salerno provided a written reply, explaining the reason for his action. The 30-day suspension was duly imposed, and was served beginning May 5, 2014. After completion of the suspension and his return to service, Mr. Salerno resigned his position on August 20, 2014.

Mr. Salerno brought an individual right of action (IRA) appeal to the MSPB, alleging retaliation in violation of the Whistleblower Protection Act (WPA). The Board, applying 5 U.S.C. § 1221(e)(1) and the "knowledge/timing" test, held that Mr. Salerno had made a non-frivolous allegation that his 2013 disclosure to the OSC was a contributing factor to the 30-day suspension.

The AJ held a hearing, concentrating on the question of whether the agency would have taken the same action in the absence of the protected disclosure. The AJ declined to receive evidence concerning the content of Mr. Salerno's whistleblowing disclosure, and denied his requests for discovery related to the security concerns he had reported to OSC. On this appeal, Mr. Salerno does not dispute the facts concerning credit card usage, and presses the import of his OSC disclosure as well as claims of a hostile work environment.

The AJ held, after a hearing in which Mr. Salerno and agency witnesses testified, that the agency had established, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. The Board affirmed, and Mr. Salerno appeals.

DISCUSSION

We review the Board's decision to determine whether it was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *see Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1366 (Fed. Cir. 2012). "Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

The AJ received testimony from the BLM supervisors and deciding officials that they were either unaware of the OSC disclosure or unaware of its contents. There was no dispute as to the facts of the asserted lapses concerning advance authorization and use of the government card for official purchases. Mr. Salerno testified, without contradiction, that he obtained the requisite authorization later on the same day as the purchase of the antenna ($58) and promptly instructed the vendor to change the charge from his personal card to his government card. He justified his action by the need to expedite ordering the requisite antenna, in order to have it on hand for his forthcoming trip to Ridgecrest.

A protected disclosure does not shield employees from the consequences of wrongful conduct, unless the protected disclosure is a factor in the action taken. *See* 5 U.S.C. § 1221(e)(2); *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1325–26 (Fed. Cir. 1999) ("[T]he WPA is not meant to protect employees from their own misconduct"; rather, "the WPA shields an employee only to the extent the record supports a finding that he would not have been disciplined except for his status as a whistleblower") (internal citations and quotations omitted). The AJ and Board applied the factors set forth in *Carr* to determine whether the agency would have taken the same personnel action in the absence of the protected disclosure: (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 or has taken similar actions against similarly situated employees who are not whistleblowers. *See Carr*, 185 F.3d at 1323; *see also Miller v. Dep't of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016) (applying the *Carr* factors); *Fellhoelter v. Dep't of Agric.*, 568 F.3d 965, 971 (Fed. Cir. 2009) (same).

With respect to the first *Carr* factor, the parties do not dispute the facts that led to the January 10, 2013 reprimand, the December 11, 2013 two-day suspension, or those relating to the January 9, 2014 purchase of the antenna. The Associate District Manager testified that, in his view, this third violation, although able to be promptly corrected, showed that early instructions to comply with the rules had not been effective, and that the 30-day suspension was needed "to get Mr. Salerno's attention." SAppx21. The government refers to testimony that Mr. Salerno was a person of independent mind, who would do what he believed to be "morally right." Gov't Br. 16.

With respect to the second *Carr* factor, on whether there was a motive to retaliate, the AJ deemed credible the testimony of the supervisor who proposed Mr. Salerno's suspension, who testified that he was not aware of Mr. Salerno's OSC disclosure. SAppx19–20. Mr. Salerno's supervisors also testified that they were not aware that he had filed an OSC disclosure or its content, although it was not disputed that he had so informed his immediate work leader. *Id.* The AJ stated that this testimony was credible. *Id.* at 20–21. A BLM human resources specialist testified that a 30-day suspension was the lowest table penalty for a third infraction. *Id.* at 17. The AJ also received testimony concerning uneasy job-site relationships, and that Mr. Salerno's job performance had consistently been rated "fully successful." *Id.* at 19.

On the third *Carr* factor, the AJ heard from the Associate District Manager that Mr. Salerno was the only employee whose failure to follow instructions was not corrected by a 2-day suspension. *Id.* at 35.

Mr. Salerno on appeal stresses the concerns that were the subject of his whistleblowing, and mentions several other areas of concern regarding his work environment. We conclude, however, that the Board did not err in approving the AJ's decision to limit the evidence received to the 30-day suspension. The Board found that the evidence supported this penalty for a third credit card-related transgression. This finding is supported by substantial evidence, and is affirmed.[2]

AFFIRMED

No costs.

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[2] We deny Mr. Salerno's motions for temporary relief (Docket Entries 18 and 20).

APPENDIX : B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICK D. SALERNO, Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.	DOCKET NUMBER SF-1221-14-0756-B-1 DATE: September 1, 2016

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Rick D. Salerno, Citrus Heights, California, pro se.

Kevin D. Mack, Esquire, Sacramento, 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 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

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

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. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

¶2 The appellant was employed by the agency as a Telecommunications Specialist with the Bureau of Land Management (BLM) until he resigned in August 2014. *Salerno v. Department of the Interior*, MSPB Docket No. SF-1221-14-0756-W-1, Initial Appeal File (IAF), Tab 1 at 1, Tab 4 at 6. He filed a Board appeal alleging that, among other actions, the agency suspended him in retaliation for his filing a disclosure complaint with the Office of Special Counsel (OSC) on February 4, 2013, and making various alleged protected disclosures. IAF, Tabs 1, 4.

¶3 In an initial decision, the administrative judge dismissed the appellant's IRA appeal for lack of jurisdiction on the ground that he had failed to nonfrivolously allege that he had made a protected disclosure or that his filing a disclosure complaint with OSC was a contributing factor in the agency's decision to suspend him. IAF, Tab 24 at 8-13. In an Opinion and Order, the Board reversed the administrative judge's initial decision, finding that the appellant had made nonfrivolous allegations of Board jurisdiction, and remanded the appeal for further adjudication. *Salerno v. Department of the Interior*, 123 M.S.P.R. 230

(2016). The Board found that the appellant had nonfrivolously alleged that he had engaged in protected activity under 5 U.S.C. § 2302(b)(9) by filing a disclosure complaint with OSC on February 4, 2013, and that, based on the knowledge/timing test, he had nonfrivolously alleged that his protected activity was a contributing factor in the agency's decision to suspend him for 30 days, effective May 5, 2014. *Id.*, ¶¶ 12-14.

¶4 On remand, after holding a hearing, the administrative judge issued a remand initial decision denying the appellant's request for corrective action. *Salerno v. Department of the Interior*, MSPB Docket No. SF-1221-14-0756-B-1, Remand File (RF), Tab 13, Remand Initial Decision (RID). The administrative judge found that, although the appellant had proven by preponderant evidence that he engaged in protected activity by filing a disclosure complaint and that such protected activity was a contributing factor in his 30-day suspension based on the knowledge/timing test, RID at 5-6, the agency had proven by clear and convincing evidence that it would have suspended him in the absence of his protected activity, *id.* at 6-15.

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition, PFR File, Tab 4, and the appellant has filed a reply,[2] PFR File, Tab 5.[3]

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[2] We have not considered the new arguments raised by the appellant in his reply. PFR File, Tab 5 at 4-8. Although the Board's regulations allow for a reply to a response to a petition for review, such a reply must be "limited to the factual and legal issues raised by another party in the response to the petition for review." 5 C.F.R. § 1201.114(a)(4). Here, while the agency argued in its response to the appellant's petition for review that he had not met the legal standard for review, PFR File, Tab 4 at 1-2, this did not open the door to allow him to raise brand new arguments in his reply that he did not raise in his petition for review.

[3] On August 25, 2016, after the record closed on review, the appellant requested leave to file an additional pleading. PFR File, Tab 6. The Clerk of the Board previously advised the appellant that the Board's regulations do not provide for such pleadings, 5 C.F.R. § 1201.114(a)(5), and that, for the Board to consider an additional pleading, the party must describe the nature and need for it, and also must show that it was not readily available before the record closed. PFR File, Tab 3. In his submission, the

DISCUSSION OF ARGUMENTS ON REVIEW

The administrative judge properly determined that the agency proved by clear and convincing evidence that it would have suspended the appellant in the absence of his protected activity.

¶6 When, as here, an appellant exhausts his administrative remedy with OSC and establishes the Board's jurisdiction over an IRA appeal, he then must establish a prima facie case of whistleblower retaliation by proving by preponderant evidence that he made a protected disclosure or engaged in protected activity that was a contributing factor in a personnel action taken against him. 5 U.S.C. § 1221(e)(1); *Lu v. Department of Homeland Security*, 122 M.S.P.R. 335, ¶ 7 (2015). If the appellant makes this prima facie showing, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure or activity. *Lu*, 122 M.S.P.R. 335, ¶ 7. 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; it is a higher standard than the "preponderance of the evidence" standard. *Sutton v. Department of Justice*, 94 M.S.P.R. 4, ¶ 18 (2003), *aff'd*, 97 F. App'x 322 (Fed. Cir. 2004); 5 C.F.R. § 1209.4(e).

¶7 In determining whether an agency has met this burden, the Board will consider the following factors: (1) the strength of the agency's evidence in support of the 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. *Lu*, 122 M.S.P.R. 335, ¶ 7 (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)). The Board does not view these factors as discrete elements, each of

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appellant seeks to submit evidence of the "Personal impact while waiting for Case Review." PFR File, Tab 6. Because this evidence is not material to the outcome of the appeal, we deny the appellant's request.

which the agency must prove by clear and convincing evidence. Rather, the Board will weigh the factors together to determine whether the evidence is clear and convincing as a whole. *Id.*

¶8 Upon review of the record below, we agree with the administrative judge that the agency established by clear and convincing evidence that it would have suspended the appellant absent his protected activity. RID at 14. In reaching this conclusion, the administrative judge carefully balanced the *Carr* factors, and on review the appellant has presented no basis for us to disagree with his findings.

¶9 We agree with the administrative judge that the agency had sufficiently strong reasons for suspending the appellant. RID at 12-15. Effective May 5, 2014, the agency suspended the appellant for 30 days for failing to follow instructions to use his Government purchase card to make work-related purchases and not to pay for job-related materials with personal funds when he purchased a radio antenna using his personal credit card. IAF, Tab 5, Subtabs 4(c),(e). The record reflects that the appellant previously had received a letter of reprimand on January 10, 2013, prior to filing his OSC disclosure complaint on February 4, 2013, for, among other things, failing to follow supervisory instructions concerning the use of his Government purchase card. *Id.*, Subtab 4(*l*). In addition, the appellant received a 2-day suspension in December 2013, for failing to follow supervisory instructions related to his purchase card use. *Id.*, Subtabs 4(j)-(k). The appellant was specifically advised in the letter of reprimand that he was not permitted to use personal funds for work-related purchases. *Id.*, Subtab 4(*l*) at 3.

¶10 The administrative judge found that the appellant admitted that he had purchased the antenna using personal funds, despite previously having been instructed not to do so. RID at 14-15. He credited the proposing official's testimony that he proposed the 30-day suspension after the appellant refused to alter his behavior in response to prior discipline and the deciding official's testimony that he did not mitigate the 30-day suspension because he did not believe lesser discipline would get the appellant's attention. RID at 12-14. The administrative judge further found it significant that the agency only proposed a 30-day suspension for the appellant's third offense of failure to follow instructions even though the agency's table of penalties permits removal under such circumstances. RID at 15.

¶11 Regarding the second *Carr* factor, the administrative judge credited testimony of the proposing official that he was not aware of the appellant's protected activity.[4] RID at 14. The administrative judge further found that the deciding official had little motive to retaliate because he testified that he did not consider the appellant to be a whistleblower, he was not aware that the appellant had filed an OSC complaint until the appellant made reference to it in his response to the proposed 30-day suspension, he never saw the appellant's OSC complaint, and he was unaware of the specific content of it beyond the appellant's reference to it in his response to the proposed 30-day suspension. RID at 13-14.

¶12 Regarding the third *Carr* factor, the administrative judge found that there were no similarly situated employees because the deciding official testified that the appellant was the only individual whose behavior was not corrected by a 2-day suspension and required him to issue a 30-day suspension. RID at 15. In light of our consideration of the *Carr* factors, we agree with the administrative judge that the agency met its burden.

[4] To the extent the appellant is arguing on review that the proposing official became aware of his OSC disclosure complaint during a meeting in June 2013, PFR File, Tab 1 at 6, such an argument was not raised below. Because the appellant has not explained why he could not have made this argument before the administrative judge, we need not consider it for the first time on review. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (stating that the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

The administrative judge did not abuse his discretion in his rulings on discovery, admissibility of evidence, or witnesses approved to testify at the hearing.

¶13 On review, the appellant contends generally that the administrative judge improperly denied his witnesses. PFR File, Tab 1 at 3-4, 6. An administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses when it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). Rulings regarding the exclusion of evidence are subject to review by the Board under an abuse of discretion standard. *Lopes v. Department of the Navy*, 119 M.S.P.R. 106, ¶ 11 (2012).

¶14 The record reflects that, in his prehearing submissions, the appellant requested to call (1) "Any Department of Interior employee with an active COMSEC/OPSEC Certification and active Security Clearance of Top Secret" and (2) the "District Manager of the BLM California Desert District Office to provide answers regarding BLM Security Policy, DOI Security Policy, California Radio Security Policy (CAL IFOG), Federal Radio Security Policy (NIFOG) and Configuration Management of Encryption Keys." RF, Tab 7 at 5. During the prehearing conference, the appellant identified two particular employees, one in each of these categories. RF, Tab 11 at 2. The administrative judge, however, denied both of these witnesses finding that their proffered testimony was not relevant to the issues in the appeal. *Id.*

¶15 There is no evidence in the record indicating that the appellant objected to the administrative judge's denial of these witnesses, and thus he is precluded from doing so on petition for review. *See Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988). Even if the appellant had preserved an objection, we would not disturb the initial decision based on exclusion of witnesses because the appellant has not explained how he was prejudiced by their exclusion; that is, we find such arguments do not provide a basis for reversing the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (stating that the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

¶19 The appellant also submits several documents with his petition for review, which we have not considered because we find they do not constitute new and material evidence under 5 C.F.R. § 1201.115(d). *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (stating that, under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

¶20 First, he submits copies of two directives from the agency's Office of the Chief Information Officer and contends that the agency failed to comply with these directives. PFR File, Tab 1 at 11-15. We have not considered these documents because they were available prior to the close of the record below, and thus they are not new. The appellant attempted to introduce these documents as exhibits during the hearing, but the administrative judge did not admit them because he found that the appellant failed to show good cause for submitting them after the deadline for filing prehearing submissions, and failed to show they were relevant to the issues in the appeal. RF, Tab 12, Hearing Compact Disc at 4:30-13:00. We discern no error with the administrative judge's decision not to admit the exhibits. *See Roof v. Department of the Air Force*, 53 M.S.P.R. 653, 658 (1992) (holding that an administrative judge properly exercised her discretion to exclude an appellant's medical evidence because it was not timely submitted to the Board in the prehearing submission or to the agency in discovery).

¶21 Second, he submits for the first time on review a February 21, 2013 letter from the U.S. House of Representatives Committee on Natural Resources to the President requesting that the President nominate a permanent Inspector General

(IG) for the Department of the Interior, citing mismanagement by the current Acting IG. PFR File, Tab 1 at 16-17. The appellant contends that this document shows that the agency's IG office generally mishandled whistleblower complaints. *Id.* at 8-9. We find that this document does not constitute new and material evidence under 5 C.F.R. § 1201.115(d) because the appellant has not shown that it was unavailable prior to the close of the record below or explained how it is relevant to the issue of whether the agency suspended him in reprisal for filing his disclosure complaint. *See Le v. U.S. Postal Service*, 114 M.S.P.R. 430, ¶ 6 (2010). Thus, it would not provide a basis for granting review because it is not of sufficient weight to warrant a different outcome from that of the initial decision. *See Russo*, 3 M.S.P.R. at 349.

¶22 Accordingly, we affirm the administrative judge's denial of corrective action.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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)(1)(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)(1)(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/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

APPENDIX :

C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

RICK D. SALERNO, Appellant,	DOCKET NUMBER SF-1221-14-0756-B-1
v.	
DEPARTMENT OF THE INTERIOR, Agency.	DATE: June 1, 2016

Rick D. Salerno, Magalia, California, pro se.

Kevin D. Mack, Esquire, Sacramento, California, for the agency.

BEFORE
Richard Slizeski
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed the instant individual right of action (IRA) appeal alleging the agency disciplined him in retaliation for his whistleblowing activity or other protected activity. Initial Appeal File (IAF), Tab 1. In my initial decision dated May 8, 2015, I dismissed the appeal for lack of jurisdiction. IAF, Tab 24. Following the appellant's petition for review, the Board issued an Opinion and Order finding the appellant had made nonfrivolous allegations sufficient to establish jurisdiction over some of his claims. Petition for Review File (PfRF), Tab 7. The Board remanded the appeal for further proceedings. *Id.* A hearing was then held on April 21, 2016. Hearing Compact Disc (HCD).

For the reasons set forth below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed in the evidence of record. The appellant was employed as a Telecommunications Specialist, GS-0391-11, with the Bureau of Land Management (BLM), California State Office, California Desert District, District Fire Management Staff, in Moreno Valley, California. IAF, Tab 5, Subtab 4a.

The appellant's filings with the Office of Special Counsel (OSC)

On or about February 4, 2013, the appellant submitted a disclosure to OSC's Disclosure Unit alleging gross mismanagement, an abuse of authority and a violation of law, rule or regulation by agency employees. IAF, Tab 4 at 7-18. The OSC summarized the appellant's disclosures as follows:

> You alleged your agency is not in compliance with communication security laws and regulations. You alleged that BLM does not have an accredited security program and because there is not a secure method in place to transmit encrypted information at BLM, telecommunication systems throughout all law enforcement agencies are vulnerable to compromise and abuse. You also indicated that management has not been receptive to addressing your concerns.

Id. at 19.

By letter dated December 13, 2013, OSC notified the appellant that it was taking no action regarding his allegations, stating:

> After careful review and consideration of your allegations, we have determined that the information you provided does not include sufficient details from which we can conclude with a substantial likelihood that there is a violation of law, rule, or regulation, gross mismanagement, and an abuse of authority at BLM. Other than general allegations, you have not specified how BLM law enforcement telecommunication system is not in compliance

> communication security laws and regulations. Consequently, it is unclear what actions you allege management is required to and has failed to take. While you maintain that your supervisors disregard communications security issues, without additional, specific information, we cannot conclude that they are engaged in any wrongdoing. Therefore, we will take no further action regarding these allegations.

Id. at 19-20.

The appellant filed a complaint with the OSC on May 9, 2014. IAF, Tab 11, Subtab 2f at 5-12 of 28. In its preliminary determination letter dated June 2, 2014, OSC described his allegations as follows:

> You alleged that BLM took reprisals against you because of the following: You filed a disclosure complaint with OSC because the Department of Interior did not have Certification & Accreditation for Radio System Encryption Key Management for Law Enforcement. The reprisal you suffered was that since the date you submitted evidence to OSC, three disciplinary actions have been given to you. In addition, there was an assault on your life from a BLM off-duty employee.

Id., Subtab 2i at 14 of 28. OSC advised the appellant that it had made a preliminary determination to close its file on his complaint. *Id.* The appellant responded to OSC's letter. *Id.*, Subtab 2j at 16-19 of 28. On June 16, 2014, OSC notified the appellant that it had reviewed the information he had submitted but was still closing its file. *Id.*, Subtab 2k at 20 of 28. OSC issued a second letter that same date informing the appellant of his Board appeal rights. *Id.*, Subtab 2l at 21-22 of 28. This appeal followed. IAF, Tab 1.

Procedural history

I issued an initial decision on May 8, 2015 dismissing the appellant's appeal for lack of jurisdiction. IAF, Tab 24. I found that the appellant had failed to nonfrivolously allege that he made a protected disclosure. *Id.* at 10. While I found the appellant's filing of a disclosure complaint with Office of Special Counsel on February 4, 2013 constituted protected activity under 5 U.S.C.

§ 2302(b)(9)(C), I found that he had failed to nonfrivolously allege that it was a contributing factor in any of the personnel actions at issue. *Id.* at 13.

On February 22, 2016, the Board issued its Opinion and Order remanding this appeal for further adjudication. Remand Appeal File (RAF), Tab 1. In its decision, the Board agreed that the appellant had failed to nonfrivolously allege that he made whistleblowing disclosures protected under 5 U.S.C. § 2302(b)(8). *Id.* at 3-8. The Board found the appellant had nonfrivolously alleged that his disclosure to the Office of Special Counsel on February 4, 2013 constituted protected activity under 5 U.S.C. § 2302(b)(9)(C). *Id.* at ¶ 12. It went on to find that, through the knowledge/timing test, the appellant had made a nonfrivolous allegation that this protected activity was a contributing factor in his 30-day suspension and that jurisdiction accordingly existed over his § 2302(b)(9) claim. *Id.* at ¶ 13. The Board remanded the appeal for further adjudication on the merits of that claim. *Id.* at ¶ 18.

I conducted a prehearing conference on April 12, 2016 wherein I defined the issues for hearing and set forth applicable law and burden of proof requirements. RAF, Tab 11. A hearing was held in Sacramento, California on April 21, 2016. HCD.

Applicable law

Under the Whistleblower Protection Enhancement Act of 2012 (WPEA), the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that (1) he engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D), and (2) the protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Kerrigan v. Department of Labor*, 122 M.S.P.R. 545, ¶ 10 n.2 (2015) (citing 5 U.S.C. §§ 1214(a)(3), 1221(e)(1)); *Yunus v. Department of*

Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001)). Once an appellant establishes jurisdiction over his IRA appeal, he must prove the merits of his claim by preponderant evidence.[1] *Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661, ¶ 9 (2015). If the appellant proves that his protected activity was a contributing factor in a personnel action taken against him, the agency is given an opportunity to prove, by clear and convincing evidence,[2] that it would have taken the same personnel action in the absence of the protected activity. 5 U.S.C. § 1221(e)(1)-(2); *Lu v. Department of Homeland Security*, 122 M.S.P.R. 335, ¶ 7 (2015); *see Carr v. Social Security Administration*, 185 F.3d 1318, 1322-23 (Fed. Cir. 1999).

Findings

The appellant established by preponderant evidence that he engaged in protected activity and that it was a contributing factor in the agency's decision to suspend him for 30 days.

It is undisputed that the appellant filed a disclosure complaint with OSC on February 3, 2013 alleging wrongdoing by agency employees. IAF, Tab 4 at 7-18. I find that this constitutes protected activity under 5 U.S.C. § 2302(b)(9)(C). *See Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), *recons denied*, 52 M.S.P.R. 375, *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992).

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

[2] Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(e). It is a higher standard than "preponderance of the evidence" as defined above.

As noted above, the Board found that the appellant had nonfrivolously alleged that his protected activity was a contributing factor in his 30-day suspension based on the undisputed record that the appellant informed the deciding official of his protected activity in his reply and the decision to suspend him occurred within 15 months of the appellant's protected activity. Opinion and Order, ¶ 14; IAF, Tab 5, Subtabs 4c, 4d. To establish the contributing-factor element by preponderant evidence, the appellant may rely on the knowledge-timing test referenced above: specifically, that the officials at issue knew of his protected disclosure and that the personnel action at issue occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1). Based on the undisputed facts I find that the appellant has established as a matter of law that his disclosure was a contributing factor in the decision to suspend him. IAF, Tab 5, Subtabs 4c, 4d, *see Mastrullo v. Department of Labor,* 123 M.S.P.R. 110, ¶¶ 21 (2015); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 20-22 (2010).

The agency established by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

Where the appellant has met his burden of proving by preponderant evidence that he made a protected disclosure that was a contributing factor in the agency's personnel action against him, the Board must order corrective action unless the agency can prove by clear and convincing evidence that it would have taken the same personnel action absent the disclosure. *Holloway v. Department of the Interior*, 95 M.S.P.R. 650, ¶ 13 (2004), *aff'd*, 131 Fed. Appx. 717 (Fed. Cir. 2005) In determining whether the agency met its clear and convincing evidence burden, the Board looks at the strength of the evidence the agency used in support of the personnel action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision(s), and any evidence that the agency takes similar actions against employees who have not engaged in other protected activity, but who are in other ways similar to the appellant with respect to his Federal employment. *See Carr*, 185 F.3d, 1322-23; *Lu*, 122 M.S.P.R. 335, ¶ 7 (citing *Carr*, 185 F.3d at 1322-23). The Board does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence. *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶ 44 (2011). Rather, the Board will weigh the factors together to determine whether the evidence is clear and convincing as a whole. *See id.* (citing *Yunus v. Department of Veterans Affairs*, 84 M.S.P.R. 78, ¶ 27 (1999), *aff'd*, 242 F.3d 1367 (Fed. Cir. 2001). The U.S. Court of Appeals for the Federal Circuit in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) held that "[e]vidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Id.* at 1368. As explained below, I find that the factors on the whole weigh in the agency's favor and that the agency met its burden of proof.

On January 27, 2014, District Fire Management Officer Robert Berger issued a proposal to suspend the appellant for 30 days for failure to follow supervisory instructions. IAF, Tab 5, Subtab 4e. *Id.* Berger stated that the appellant had previously received a letter of reprimand on January 10, 2013, for (1) failure to follow supervisory instructions, (2) failure to appropriately monitor his government credit card statements, and (3) unprofessional conduct. *Id.*, Subtabs 4e, 4l. He also noted that the appellant had served a 2-day suspension beginning December 11, 2013 based on repeated misconduct falling under the same charges. *Id.*, Subtabs 4e, 4h, 4i.

In proposing the appellant be suspended for 30 days, Berger stated that in the letter of reprimand he had specifically instructed the appellant that he was not authorized to pay for job-related materials out of his own funds and that all work-related purchases were to made with his government purchase card (GOVCC). *Id.*, Subtab 4e at 2. He directed that he obtain written approval for all purchases and make requests from the source of the fund code. *Id.* He also stated that the appellant was expected to follow all directions, orders and instructions. *Id.* Berger also noted that the November 12, 2013 decision to suspend notice had reminded the appellant he was expected to follow his directions/instructions/orders as well as the expectations set forth in the letter of reprimand. *Id.*

It is undisputed that on January 9, 2014, the appellant e-mailed his work leader, Gordon Amerson, that "I was clear when I told you yesterday that I chose to purchase an antenna immediately using my personal credit card." *Id.*, Subtab 4g. It is also undisputed that on the previous day Amerson had e-mailed the appellant a fund code to use for purchasing the antenna. *Id.*

The charge of failure to follow supervisory instructions was supported by four specifications. *Id.*, Subtab 4e at 3. Specification 1 stated the appellant failed to follow his supervisor's instructions when he purchased equipment for BLM work-related activity out of his own personal funds. *Id.* Specification 2 charged that he failed to follow his supervisor's orders when he purchased equipment for BLM but did not use his GOVCC. *Id.* The third specification stated that he failed to follow instructions by not requesting a fund code prior to making a purchase. *Id.* The final specification charged that the appellant failed to receive written approval for the purchase. *Id.*

In his written reply, the appellant stated, among other things, the following:

> The reason I purchased the $58 radio antenna for the Ridgecrest Chief Ranger was because I wanted the antenna to show up in time

> before I was expected (and already scheduled) to return to Ridgecrest the following week. I was completely prepared to take the costs on myself because it was the right thing to do to fix the problem as quickly as possible. . . .
>
> Upon my return to the CDD office and minutes after I ordered the part, I did finally see Gordon and immediately requested a cost code. It was given to me by Gordon on that same date. I consequently contacted the vendor and asked them to switch the charges from my personal credit card to the government credit card (Attachment 3).
>
> . . . .
>
> I believe my actions warranted my purchasing this part as quickly as possible so that it would be in my possession when I returned to Ridgecrest the following week. . . . I have already been accused and punished for purchasing equipment without having the cost code in advance. Now I am getting in trouble because I took the initiative to purchase the part so I would have it in time for my return trip to Ridgecrest.
>
> . . . .
>
> Giving me a two days [sic] suspension for turning in my credit card statement one day late when the District Manager herself was well over a year delinquent in her own credit card statements, as well as several other Supervisors and employees within the District office staff, is disparate treatment, and continues to demonstrate that Management (including Mr. Berger, Mr. Wakefield, and Ms. Rami) are purposely targeting me and will continue to target me until I am fired. I believe that has to do with the fact that I am a Whistleblower and have provided information to the Office of Special Council regarding critical violations of security practices within the BLM radio system that affect Law Enforcement agencies (Attachment 6).

Id., Subtab 4d at 18-19.

In his May 1, 2014 decision memorandum, Associate District Manager Timothy Wakefield sustained the charge and all four specifications. *Id.*, Subtab 4c. He found the appellant had admitted to the charged misconduct in his written reply and that his arguments justifying his actions were unconvincing. *Id.* at 2-3. Wakefield also noted:

> You make further assertions:
>
> District Manager (DM) Teri Raml, as well as other supervisors and employees, are delinquent in their credit card statements, and therefore, you are experiencing disparate treatment;
>
> DFMO Berger, Associate District Manager (ADM) Wakefield, and DM Raml, are targeting you until you get fired;
>
> You claim to be subject to reprisal for being a Whistleblower, providing information to the Office of Special Counsel about how BLM violates security practices affecting Law Enforcement agencies; and
>
> You claim to be subject to a hostile work environment, especially from your Team Lead, Gordon Amerson.
>
> I am unaware of any, nor have you provided any, facts/documentation supporting your assertions. I am also unaware and have not been notified or contacted by the Office of Special Counsel (OSC) or the Office of the Inspector General (OIG), regarding your complaints. Even if you have contacted OSC or OIG with complaints, that assertion similarly fails to acknowledge that you have failed to follow your supervisor's orders/directions/instructions when you paid for job-related materials out of your own personal funds; failed to make work-related purchases with your GOVCC; failed to request a fund code prior to making a purchase; and failed to receive written approval for the purchase.

Id. at 3-4.

Wakefield found that it would promote the efficiency of the service to suspend the appellant for 30 days, noting that the appellant had not corrected his behavior after receiving his two prior disciplinary actions. *Id.* at 5. The appellant served his suspension beginning May 5, 2014. *Id.*, Subtabs 4b, 4c.

Lori Rosenstein, an employee relations specialist, testified that she provided advice to both Berger and Wakefield on the 30-day suspension action. HCD (Rosenstein testimony). She testified that the agency's table of penalties suggests a range of penalty from a 30-day suspension to removal for a third offense of failing or delaying to carry out instructions. HCD (Rosenstein testimony); IAF, Tab 5, Subtab 4m at 7. Rosenstein explained that both the proposal and decision letters are vetted by her supervisor, the human resources officer and the solicitor's office before they are issued. HCD (Rosenstein testimony). She was unaware that the appellant had filed a complaint with OSC until he mentioned it in his written reply to the 30-day suspension. *Id.* She advised Wakefield that he must address the appellant's reprisal allegation in his decision but had no discussion with Berger about it. *Id.*

The appellant testified that he was a telecommunications specialist with the agency from January, 2006 until he resigned on August 14, 2014. HCD (the appellant's testimony). He believed that he was subjected to a hostile work environment by his supervisor and two coworkers prior to February, 2013. *Id.* He stated that his two coworkers refused to assist him and had accused him of discriminating against them because of their race. *Id.* The appellant felt he received no cooperation from his immediate supervisor. *Id.* He also believed that various funding issues made it difficult for him to accomplish the agency mission. *Id.* He did not believe either the letter of reprimand or the 2-day suspension was warranted. *Id.*

The appellant explained that he used his own personal credit card to order the antenna on January 8, 2014, a $58.00 part, to make sure he would have it when he made his next scheduled trip to the remote location where he needed to install it. *Id.* He stated that once he obtained the proper government funding code he transferred the order to the GOVCC. *Id.* He believed it was a safety issue and part of good customer service to get the antenna installed as soon as possible. *Id.*

The appellant testified that he filed a disclosure complaint with OSC in February, 2013 and made the agency aware of it through his response to the proposed 30-day suspension. *Id.* He claimed that he had previously told his work leader, Amerson, about his complaint and speculated that Berger might have become aware of it because Berger used the word "infraction" when speaking to him, the same word that the appellant had used in his complaint. *Id.* The appellant admitted that he never told or otherwise verified with Berger that he had filed a complaint with OSC. *Id.* He recalled OSC notified him by letter dated December 31, 2013 that they were taking no further action on his complaint. *Id.*

Berger served as the California Desert District Fire Management Officer in Moreno Valley from May, 2012, to September, 2015. HCD (Berger testimony). He testified as follows. Among his responsibilities in his position was to supervise three telecommunications specialists, including the appellant. *Id.* He lacked technical expertise on the agency's radio systems and would direct the appellant to work with lead specialist Amerson on those issues. *Id.* He rated the appellant as fully successful but viewed their professional relationship as "frosty." *Id.* He noted that when he arrived in the position the telecommunications specialists had a history of bad relations among themselves and their superiors. *Id.* He recalled that the prior supervisor had counseled the appellant over his need to treat people with respect. *Id.*

Berger also recalled that shortly after he arrived the appellant had raised concerns that BLM was not following policy in its radio program. *Id.* Berger contacted the agency's technical expert in Boise about the issue who verified that BLM was in fact in compliance with agency policy. *Id.* Berger noted that it was impossible for BLM to have good radio coverage in all of the remote areas in which it operated. *Id.*

Berger found the appellant had a problem with authority and that he would circumvent agency direction when he felt he was justified in doing so. *Id.* He gave the appellant clear expectations in the letter of reprimand and repeated them in the proposed 2-day suspension but felt it was clear the appellant did not care what he had to say. *Id.* He proposed the 30-day suspension when he found the appellant had again defied his expectations. *Id.* He found the tone of the e-mail the appellant sent to Amerson, trying to justify his use of his own credit card, reflected a negative attitude by suggesting he would do whatever he felt he needed to do as long as he felt it was right. *Id.* He did not propose removal, which fell within the suggested discipline in the table of penalties, as he hoped the appellant's conduct would improve. *Id.*

Berger had no idea that the appellant had contacted OSC at the time he issued the notice of proposed 30-day suspension. *Id.* He denied ever being told by Amerson about the appellant's complaint. *Id.* He never spoke to the appellant about "infractions." *Id.*

Wakefield served as the appellant's second-line supervisor during the relevant time period. HCD (Wakefield testimony). He testified to the following. He believed he had a good relationship with the appellant as the appellant felt free to come to his office to discuss his concerns. *Id.* He was not aware of the appellant filing a complaint with OSC until he saw the appellant's response to the proposed 30-day suspension. *Id.* Wakefield never saw the contents of what the appellant filed with OSC and never considered the appellant to be a whistleblower. *Id.* He had taken disciplinary action against others for failing to follow instructions as either the proposing or deciding official. *Id.* The appellant was the only one to receive a 30-day suspension as the other employees had all corrected their behavior after receiving reprimands or short suspensions. *Id.* In reviewing the material relied upon and the appellant's response to the proposed 30-day suspension he believed that the appellant knew what he was doing was wrong but nevertheless persisted in it because he believed he was morally right.

Id. Wakefield therefore decided not to mitigate the proposed 30-day suspension as he did not believe a shorter suspension would get the appellant's attention. *Id.*

I find the agency has demonstrated by clear and convincing evidence that it would have taken the same action whether or not the appellant had filed his OSC disclosure complaint. I credit Berger's testimony that he was unaware of the appellant's protected activity when he proposed the action. HCD (Berger testimony). I find the appellant's testimony that Amerson informed Berger about it to be speculative as he admitted he had no actual knowledge that this occurred. HCD (the appellant's testimony). *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (personal knowledge of the event at issue is an essential qualification of a witness). I found Berger a credible witness, deliberate in his responses to the questions asked of him. *Hillen*, 35 M.S.P.R. at 462. I credit his testimony that he never used the word infractions when speaking with the appellant. HCD (Berger testimony). I was much less impressed with the appellant's demeanor as a witness.

I find Wakefield had little motive to retaliate against the appellant as he was unaware of the specifics of what was in the appellant's OSC complaint, his knowledge being limited to what the appellant stated in his reply to the 30-day suspension. HCD (Wakefield testimony); IAF, Tab 5, Subtab 4d at 18. I credit Wakefield's testimony that he imposed the 30-day suspension only because he found that the prior discipline had failed to correct the appellant's behavior. HCD (Wakefield testimony). Both the Federal Circuit and the Board have held that an employee is not shielded from discipline for misconduct by engaging in protected activity. *See Marano v. Department of Justice*, 2 F.3d 1137, 1142, n. 5 (Fed. Cir. 1993); *Russell v. Department of Justice*, 76 M.S.P.R. 317, 325 (1997).

I find that the appellant admitted he had purchased the antenna in question using his personal credit card despite having been previously instructed in writing not to use his own credit card to buy agency materials. IAF, Tab 5, Subtab 4g at 1, Subtabs 4j-4l. I additionally find the agency presented persuasive evidence that the appellant failed to get written approval for the purchase or to request a funding code prior to ordering the antenna despite being required to do so. HCD (Berger testimony); IAF, Tab 5, Subtabs 4e-4g, 4l. I find significant that the agency only imposed a 30-day suspension for the appellant's third offense in failing to follow instructions although the agency's table of penalties permits removal under such circumstances. *Id.*, Subtab 4m at 7. I credit Wakefield's testimony that no other employee persisted in failing to follow instructions after receiving either a reprimand and/or 2-day suspension for such conduct and thus none were similarly situated. *See Sutton v. Department of Justice*, 94 M.S.P.R. 4, ¶ 19 (2003).

Given the strength of the agency's evidence in support of its action, the absence of motive to retaliate against the appellant, and the lack of evidence that non-whistleblowers are treated more favorably, I find that the agency established by clear and convincing evidence that it would have suspended the appellant for 30 days absent his protected activity.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

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Richard Slizeski
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **July 6, 2016**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

APPENDIX :
D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2016 MSPB 10

Docket No. SF-1221-14-0756-W-1

Rick D. Salerno,

Appellant,

v.

Department of the Interior,

Agency.

February 22, 2016

Rick D. Salerno, Magalia, California, pro se.

Kevin D. Mack, Esquire, Sacramento, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed this individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we agree with the administrative judge that the appellant did not make a nonfrivolous allegation that he made whistleblowing disclosures protected by 5 U.S.C. § 2302(b)(8). However, we find that the Board has jurisdiction over his nonfrivolous allegation that he was suspended for 30 days in reprisal for his disclosure of information to the Office of Special Counsel (OSC), which could be activity protected by 5 U.S.C. § 2302(b)(9), and we REMAND this claim to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On February 4, 2013, the appellant, a GS-11 Telecommunications Specialist, made a disclosure to OSC that the agency's law enforcement communication security system was inadequate and that this inadequacy constituted a violation of law, rule, or regulation, gross mismanagement, and an abuse of authority. Initial Appeal File (IAF), Tab 4 at 7-18. On December 31, 2013, OSC informed the appellant that it was closing its file because (1) he had "not specified how [the agency's] law enforcement telecommunication system [was] not in compliance [with] communication security laws and regulations," (2) it was "unclear what actions [he alleged] management is required to and has failed to take," and (3) the information that he provided "does not include sufficient details from which [it] can conclude with a substantial likelihood that there is a violation of law, rule, or regulation, gross mismanagement, and an abuse of authority." *Id.* at 19. On May 9, 2014, the appellant filed a whistleblower reprisal complaint with OSC. IAF, Tab 11 at 5-12. On June 16, 2014, OSC notified the appellant that it was closing its file on his reprisal complaint, and it informed him that he could file an IRA appeal because he had alleged that he was a victim of the prohibited personnel practices (PPPs) described in 5 U.S.C. §§ 2302(b)(8) and 2302(b)(9).[1] *Id.* at 20-22.

¶3 On August 18, 2014, the appellant filed this Board appeal alleging that he was suspended for more than 14 days and asserting that the agency took a variety of personnel actions against him in retaliation for his disclosure complaint to

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[1] Among other things, section 2302(b)(8) generally makes it a PPP to take a personnel action against an employee because of any disclosure of information that the employee reasonably believes evidences any 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. Section 2302(b)(9) makes it a PPP to take any personnel action against an employee because of, among other things, that employee's exercise of any appeal, complaint, or grievance right, or because of a disclosure to the Special Counsel "in accordance with applicable provisions of law."

OSC. IAF, Tab 1 at 1, Tab 5, Subtabs 4c, 4j, 4*l*. The administrative judge dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing. IAF, Tab 1, Tab 24, Initial Decision (ID). The administrative judge determined that the appellant exhausted his administrative remedies with OSC regarding his reprisal allegations. ID at 7. The administrative judge concluded, however, that the appellant failed to nonfrivolously allege that he reasonably believed his disclosure evidenced any category of wrongdoing listed in 5 U.S.C. § 2302(b)(8), and he noted that the appellant's allegations "lack[ed] specificity and detail." ID at 8-10. The administrative judge further found that, even if the appellant's disclosure was protected under section 2302(b)(8), he failed to "prove" that it was a contributing factor in any of the personnel actions. ID at 10-12. The administrative judge found that the appellant's activity was protected by section 2302(b)(9), but the appellant did not make a nonfrivolous allegation that his protected activity was a contributing factor in any of the personnel actions at issue. ID at 12-13.

¶4 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has not filed a response.[2]

ANALYSIS

The Board lacks jurisdiction over the appellant's claim of reprisal for protected whistleblowing under 5 U.S.C. § 2302(b)(8).

¶5 Under the Whistleblower Protection Enhancement Act of 2012 (WPEA),[3] the Board has jurisdiction over an IRA appeal if the appellant has exhausted his

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[2] After the record closed on petition for review, the appellant filed an additional submission titled, "Request Review of Personal Impact for Compliance." PFR File, Tab 4. Although unclear, it appears that the appellant is seeking some kind of financial relief. In light of our disposition, we have not considered this request. *See* 5 C.F.R. § 1201.114(a)(5).

[3] The appellant's OSC disclosure occurred after the December 27, 2012 effective date of the WPEA. Pub. L. No. 112-199, § 202, 126 Stat. 1465, 1476.

administrative remedies before OSC and makes nonfrivolous allegations that (1) he made a protected disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D), and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Kerrigan v. Department of Labor*, 122 M.S.P.R. 545, ¶ 10 n.2 (2015) (citing 5 U.S.C. §§ 1214(a)(3), 1221(e)(1)); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001)). Once an appellant establishes jurisdiction over his IRA appeal, he is entitled to a hearing on the merits of his claim, which he must prove by preponderant evidence. *Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661, ¶ 9 (2015). If the appellant proves that his protected disclosure or activity was a contributing factor in a personnel action taken against him, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(1)-(2); *Lu v. Department of Homeland Security*, 122 M.S.P.R. 335, ¶ 7 (2015); *see Carr v. Social Security Administration*, 185 F.3d 1318, 1322-23 (Fed. Cir. 1999).

¶6 A nonfrivolous allegation of a protected whistleblowing disclosure is an allegation of facts that, if proven, would show that the appellant disclosed a matter that a reasonable person in his position would believe evidenced one of the categories of wrongdoing specified in 5 U.S.C. § 2302(b)(8). *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 8 (2013). The test to determine whether a putative whistleblower has a reasonable belief in the disclosure is an objective one: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced a violation of 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.

Lachance v. White, 174 F.3d 1378 (Fed. Cir. 1999). The disclosures must be specific and detailed, not vague allegations of wrongdoing. *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 14 (2014); *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 13 (2006); *Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, ¶ 11 (1999).[4]

¶7 We have reviewed the appellant's disclosure complaint and his subsequent correspondence with OSC, and we conclude that his disclosure is not sufficiently specific or detailed to satisfy this standard. ID at 8-10.[5] For instance, the appellant included in his OSC disclosure his correspondence with a Supervisory Law Enforcement Ranger, which he claimed demonstrated a disregard for compliance issues. IAF, Tab 4 at 11, 15-18. However, he does not explain how this correspondence evidences a disregard for compliance issues, nor does he clearly identify any violation of law, rule, or regulation in conjunction with this particular correspondence. *See, e.g., El v. Department of Commerce*, 123 M.S.P.R. 76, ¶¶ 7-8 (2015) (finding that the appellant's disclosures regarding the agency's alleged delays in processing his travel reimbursement claims "only vaguely allege wrongdoing" and do not constitute a

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[4] Effective March 30, 2015, the Board amended its regulations governing how jurisdiction is established over several different types of Board appeals. *El v. Department of Commerce*, 123 M.S.P.R. 76, ¶ 6 n.6 (2015) (citing 80 Fed. Reg. 4489 (Jan. 28, 2015)). This appeal was pending when these regulatory changes became effective, but the outcome of this appeal is not affected by these changes.

[5] The administrative judge analyzed the appellant's claim under 5 U.S.C. § 2302(b)(8)(A). ID at 8-10. Because the appellant's disclosure was made to OSC, we also considered whether it constitutes a disclosure protected by section 2302(b)(8)(B), which prohibits an agency from taking or failing to take a personnel action concerning any employee "because of . . . any disclosure to the Special Counsel" of information that the employee reasonably believes evidences, among other things, a violation of any law, rule, or regulation, gross mismanagement, or an abuse of authority. 5 U.S.C. § 2302(b)(8)(B); *see Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶ 8 (2014). Even if we considered this alternative statutory basis, we conclude that the appellant did not make a nonfrivolous allegation of a protected disclosure.

nonfrivolous allegation of a violation of law, rule, or regulation); *Luecht v. Department of the Navy*, 87 M.S.P.R. 297, ¶ 12 (2000) (concluding that the appellant's statement that he met with the agency Inspector General to report "on-going fraud in [Resource Sharing] contracts" lacked the detail necessary to constitute a nonfrivolous allegation of a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or danger to public health or safety). At most, the appellant's disclosure to OSC constitutes a general philosophical or policy disagreement with the agency regarding law enforcement communication security issues, which does not otherwise constitute a protected disclosure under the WPEA. *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 8 (2015) (citing 5 U.S.C. § 2302(a)(2)(D)); *see* IAF, Tab 4 at 11 (asserting that the appellant "continue[d] to stand alone in the support of protecting the [authorization] process" to prevent possible security violations).

¶8 We modify the initial decision to supplement the administrative judge's jurisdictional analysis because he did not specifically discuss any of the appellant's citations in his OSC correspondence, such as "National Radio Communications Security (COMSEC)," "USC Title 5, Title 6, Title 41 and Title 47," "Title 47 and CFR 47 (see Part 90)," and agency Office of Inspector General (OIG) Report "OIG C-IN-MOA-0007." ID at 8-10; IAF, Tab 4 at 10-11, Tab 10 at 26.

¶9 Although we have considered these various citations, a different outcome is not warranted. For instance, the appellant has not clarified what law, rule, or regulation he is identifying by his reference to National Radio COMSEC. The broad titles of the United States Code identified by the appellant discuss Government organization and employees, domestic security, public contracts, and telecommunications, respectively. However, these broad statutory references, coupled with his vague assertions in his OSC correspondence, do not constitute a nonfrivolous allegation of a reasonable belief of a violation of law therein. We also have considered 47 C.F.R. part 90, which discusses private land mobile radio services, and the appellant's description that this part "identifies penalties for non-compliance." IAF, Tab 10 at 26. However, he has not specified which section of part 90 he is referencing, and none of the sections in part 90 appear to discuss compliance.

¶10 We understand the appellant's reference to an OIG report to relate to the OIG's January 2007 report entitled Radio Communications Program, Office of Inspector General, U.S. Department of the Interior, *available at* https://www.doioig.gov/sites/doioig.gov/files/2007-G-00042.pdf. In this report, the OIG stated that its objective was to determine whether the agency and its bureaus effectively managed the radio communications program, and it concluded that the agency has an "unsafe and unreliable radio communications environment that jeopardizes the health and safety of [agency] employees and the public." *Id.*, Executive Summary at i. The OIG report does not constitute a law or regulation, and the appellant has not made a nonfrivolous allegation that it otherwise constitutes a rule. *Cf. Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 25 (2013) (concluding that the appellant's disclosure of another employee borrowing money from a patient was protected because a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the conduct violated an agency rule); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶¶ 14-17 (2002) (finding that the appellant made a nonfrivolous allegation that he disclosed violations of the agency's Procurement Instruction Memorandum "Don't Buy List" and the Government Commercial Credit Card Program).

¶11 For the first time on review, the appellant references 18 U.S.C. § 783. PFR File, Tab 1 at 3-4. The Board generally will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant has not made such a showing here. In any event, a different outcome is not warranted because we could not find such a statutory provision, and the appellant does not offer any explanation for why this provision might be relevant to his IRA appeal.

The Board has jurisdiction over the appellant's nonfrivolous allegation that his activity protected by 5 U.S.C. § 2302(b)(9) was a contributing factor in the agency's decision to suspend him for 30 days.

¶12 Under 5 U.S.C. § 2302(b)(9)(C), an employee engages in protected activity when he discloses information to OSC "in accordance with applicable provisions of law." In the initial decision, the administrative judge found that the appellant's OSC disclosure constituted such protected activity. ID at 12-13.[6] Neither party has challenged this finding, and we see no reason to disturb it on review. *See Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991) (finding that section 2302(b)(9)(C) covers employee disclosures to OSC that do not meet the precise terms of the actions described in section 2302(b)(8)), *recons. denied*, 52 M.S.P.R. 375, *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992).

¶13 To satisfy the contributing factor criterion at the jurisdictional stage of an IRA appeal, the appellant only need raise a nonfrivolous allegation that the fact of, or the content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). One way to establish this criterion is the knowledge/timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official who took the personnel action knew of the disclosure and that the personnel action occurred within a

[6] We assume that the administrative judge intended to find that the appellant made a nonfrivolous allegation of such protected activity.

period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*

¶14 The administrative judge found that the appellant did not make a nonfrivolous allegation that his protected activity was a contributing factor in any of the personnel actions at issue. ID at 13. We disagree with the administrative judge's contributing factor jurisdictional analysis regarding the 30-day suspension only.[7] The record reflects that the appellant informed the deciding official on the 30-day suspension about his protected activity, and the deciding official acknowledged this information in the decision letter. IAF, Tab 5, Subtabs 4c-4d. Additionally, the decision letter on the 30-day suspension was issued approximately 15 months after the appellant's protected activity. *Id.*, Subtabs 4b-4c. The Board has held that a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the timing component of the knowledge/timing test. *Mastrullo v. Department of Labor*, 123 M.S.P.R. 110, ¶ 21 (2015); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶¶ 20-22 (2010); *see Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (finding that the appellant's disclosures were a contributing factor in her removal when they were made approximately 21 months and then slightly over a year before the agency removed her). Because we conclude that the appellant has made a nonfrivolous allegation through the knowledge/timing test that his protected activity was a contributing factor in the 30-day suspension, the Board has jurisdiction over his section 2302(b)(9) claim,

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[7] For the reasons described in the initial decision, we agree with the administrative judge that the appellant has not made a nonfrivolous allegation that his protected activity was a contributing factor in any of the other alleged personnel actions. ID at 10-11. We modify the initial decision to clarify that we only are evaluating the contributing factor element under the nonfrivolous allegation standard. *See, e.g., Rusin*, 92 M.S.P.R. 298, ¶¶ 10-11 (explaining that, in order to establish jurisdiction over an IRA appeal, an appellant is not required to prove that he made protected disclosures, but he must make a nonfrivolous allegation that the disclosures were protected).

and he is entitled to a hearing on the merits. We thus remand the appeal to the regional office for further adjudication of that claim consistent with this Opinion and Order.[8]

The Board lacks jurisdiction over the appellant's assertion that OSC committed harmful error in its investigation of his allegations.

¶15 We have considered the appellant's assertion that OSC committed harmful error by not investigating the "law violation" and by failing to forward the "technical matter to an authorized investigation authority for review." PFR File, Tab 1 at 3. The Board does not have jurisdiction to hear a claim of harmful procedural error in the context of an IRA appeal. *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 5 (2014); *Garrett v. Department of Defense*, 62 M.S.P.R. 666, 674 (1994). Moreover, the alleged inadequacy of OSC's investigation has no bearing on our jurisdictional analysis.

The appellant's arguments regarding his motions to compel do not warrant a different outcome.

¶16 We have considered the appellant's assertion that the administrative judge did not rule on his first motion to compel. PFR File, Tab 1 at 2. It appears that this "motion" is contained in the following single sentence in his September 23, 2014 submission to the administrative judge: "I respectfully request the BOARD to compel the AGENCY to provide the answers prior to closing the file." IAF, Tab 10 at 9 (capitalization in original). Although the appellant included a copy of his interrogatory requests in a separate submission filed on the same date, IAF, Tab 12 at 15-19, this motion does not comport with 5 C.F.R. § 1201.73(c)

[8] Because we are remanding this claim for further adjudication, we do not address the appellant's arguments regarding the agency's motive to retaliate, which would be a relevant consideration if he meets his burden under 5 U.S.C. § 1221(e)(1). PFR File, Tab 1 at 3-4; *see Carr*, 185 F.3d at 1323 (in determining whether, pursuant to 5 U.S.C. § 1221(e)(2), 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, among other things, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision).

because it does not include a statement that he has discussed or attempted to discuss the anticipated motion with the agency and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. We therefore deny his September 23, 2014 "motion."

¶17 We also discern no error with the administrative judge's decision to deny the appellant's April 3, 2015 motion to compel as untimely and procedurally defective. IAF, Tab 23. Regarding the appellant's assertion on review that he was not given an opportunity to reply to the agency's response to this motion to compel, PFR File, Tab 1 at 1-2, the appellant has not cited, and we are not aware of, any authority to support his position,[9] *see* 5 C.F.R. § 1201.73(c) (discussing the procedures for filing a motion to compel and a response).

ORDER

¶18 For the reasons discussed above, we remand this case to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

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[9] In light of our disposition, the administrative judge's erroneous statement that the appellant filed a reply to the agency's response to his motion to compel, IAF, Tab 23 at 1 n.1, is an adjudicatory error that is not prejudicial to the appellant's substantive rights and does not provide a basis for reversal of the decision, *see Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

APPENDIX :

F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

RICK D. SALERNO,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
SF-1221-14-0756-W-1

DATE: May 8, 2015

ORDER DENYING APPELLANT'S MOTION TO COMPEL

On April 3, 2015, the appellant filed a motion to compel discovery. Initial Appeal File (IAF), Tab 21. The agency filed its opposition on April 27, 2015.[1] IAF, Tab 22.

The appellant's motion to compel responses to his written discovery is untimely. Any motion for an order to compel discovery must be filed within 10 days of service of objections or if no response is received, within 10 days after the time limit for the response has expired. 5 C.F.R. § 1201.73(d)(3). The appellant's discovery request is dated September 20, 2014. IAF, Tab 21. The appellant did not file his motion to compel until April 27, 2015. The appellant failed to demonstrate good cause for the untimely filing of his motion.

Additionally, pursuant to 5 C.F.R. § 1201.73(c)(1), a motion to compel must include:

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[1] The appellant filed a reply to the agency's opposition on June 10, 2014. Board procedures make no provision for filing a reply to a party's opposition to a motion to compel. 5 C.F.R. § 1201.73(d)(3). Accordingly, the appellant's reply was not considered.

(i) A copy of the original request and a statement showing that the information sought is discoverable under section 1201.72;

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (See appendix IV to part 1201); and

(iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party or nonparty, and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

Other than including a copy of his original discovery request, the appellant's motion failed to comply with these requirements. Accordingly, the appellant's motion for an order compelling responses to his written discovery is **DENIED** as both untimely and procedurally defective.

FOR THE BOARD:

Richard Slizeski
Administrative Judge

PROOF OF SERVICE

I, Rick D. Salerno, do swear or declare that on this date, 23 January 2018 , as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.
The names and addresses of those served are as follows:

Solicitor General of the United States, Room 5614,
Department of Justice, 950 Pennsylvania Ave. N.W., Washington, D. C. 20530–0001

Clerk, Supreme Court of the United States
1 First Street, NE, Washington, DC 20543

Michael D, Snyder, Trial Attorney,
Department of Justice Civil Division, Washington, DC 20044

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 23 January 2018

Rick D. Salerno

(Signature)