Case No.17-7576

In the Supreme Court of the United States

RICK D. SALERNO, PRO SE, *PETITIONER*

v.

DEPARTMENT OF INTERIOR, ET AL., *RESPONDENT*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICK D SALERNO
PETITIONER
(pro se)

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April 20, 2018

QUESTIONS PRESENTED

Are Powers that support freedoms of the governed, as adapted by Constitution Article(s) I & II, currently engaged, under modern assault, where expiatory sin diminishes the Judiciary?

1. When implied Powers of Congressional Oversight are used to alert the President of an imminent need to appoint an Inspector General for the Department of Interior; whereas the House of Representatives Committee Chairman delivers a letter to the President stating urgency for a permanent appointment. Could an extended vacancy of the Inspector General create grave risk to safety and compromise national security?

2. Where the Director of the Office of the Chief Information Officer (OCIO) promulgates by Directive to "Interior" bureau(s), in compliance with Presidential Executive Order 13526; Could non-enforcement of OCIO Security Directive(s) create grave risk to national security?

3. Where Supervisor(s) force employees, protected as "minority's" or "technology specialists", to violate US security encryption laws. When the General Accounting Office (GAO) provides review spanning across law enforcement agencies. If recommendations are not followed or enforced with oversight, is national security and critical infrastructure safeguarded?

4. Where Due Process is denied while evidence states a need for sensitive handling regarding safety of employees and retired Supervisors; whereas if "Discovery" is also not provided to unmask State and Federal Agency cooperation, could criminal allegations become misplaced?

5. When a true last name of a "Regional Solicitor" is <u>not known</u> in Federal directories, or by the employees Union President; when the registered name in the California Bar is identically spelled to be the same last name as the Supervisor who is alleged in terrorizing employees. Should the true name of the Agency Counsel be disclosed prior to participation in litigation?

6. Where the Regional Solicitor of Interior submits an Order to the National MSPB Board to deny the Petitioner's request for a "Petition For Review"; Whereas a Motion is presented to the MSPB that identifies ethics violations, of and by the same Regional Solicitor?

7. Where the MSPB National Board is staffed with one (1) member, yet includes a review by two (2) members with public record showing conflict in MSPB appellant rules. Does judicial discretion allow conflicts to bypass MSPB Rules created prior to issuing a "Final Order"?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES CITED

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is Not Published. The opinions of the Merit System Protection Board (Pet. App 2.) is Not Published.

JURISDICTION

[X] For cases from **federal courts**:

The judgement of the Court of Appeals for the Federal Circuit was entered on November 17, 2017. No petition for rehearing was filed. The jurisdiction of this Court is invoked under U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, statutes and regulations involved in this case, set forth the original doctrine as the authority and solution, that limits the breadth of conflict by undergoing the model image of a "top-down" management hierarchy. This Court with jurisdiction, is aided historically with "learned experiences" needed to reinstate the impregnable desire and to retain the linkage to the intentions of original views used. The doctrine emphasizes enforcement using Executive Powers of Appointment and Implied Powers of Oversight as a paramount requirement. In this Case, without oversight, the attempt to redirect responsibilities into the lowest level of management creates an cumbersome path that alters priorities. Allowing distraction from critical laws to be misplaced with biased subject matter of personalities and personal character manipulation. Constitution Articles I & II, listed in the Table of Authorities, are needed to isolate and direct to the appropriate leadership authority with purpose to reduce undesired adverse actions. The Articles direct focus to Executive Office hierarchy to be enforced, giving an implied synergetic coordination to Legislative and Judiciary Branches.

STATEMENT OF THE CASE

On February 4, 2013, Mr. Salerno entered Whistle Blowing when submitting Form 11 to the Office of Special Counsel (OSC). The purpose of filing was to bring internal visibility to a COMSEC Security Office or Inspector General regarding need of an immediate actionable response and oversight. Contents in the complaint included other allegations known to be associated with security. Such as budget and contract management violations not normally allowed without oversight, by an agency of the US government. Standards used in the decision to file complaint to the OSC were derived from knowledge gained in 30 years of experience and training received from the US Department of Defense. Evidence included in the filing was not expected to be misunderstood in determining jurisdiction, based on the serious nature of Security Classifications known to be critical by the Office of Personnel Management (OPM).

Merit of the filing has been known to be handled as a priority by OPM. Including specialized training of personnel engaged in security encryption programming. At the time of filing, Mr. Salerno was unaware of vacancy in the appointment of an Inspector General, or the House of Representatives Committee Oversight Report with letter to the President, declaring urgency in nominating and appointing an Inspector General to the Department of Interior. [App-4]. Mr. Salerno was unaware that there was not a CMS Custodian or COMSEC Officer within the Department. Mr. Salerno was certain of the need for compliance with radio encryption security law and was compelled to seek answers. The questions were not addressed within the chain of command and remain unanswered by the Agency today.

The need to understand how encryption programming could be managed was initially raised by Mr. Salerno on the first day of his employment through discussion with the Human Resources Officer(s). Important Note: this question was presented as interrogatory # 1 in the Discovery Request submitted. Discovery Request was denied by the Agency.

Mr. Salerno declared in a Pleading to the MSPB and Agency that he would not begin research into facts until an Opinion or Decision was reached by the MSPB. An objective review would reveal facts and limit undesired litigation by directing the focus to laws and regulations of national security critical issues. This view was interrupted because of the apparent emotionally driven actions taken by the Agency to create and embellish facts to discredit the professional integrity and character of Mr. Salerno. The Agency chose to use formal tactics to distract from the actions of Supervisor(s), who are accountable for the serious violations of security law, while aware of the unscreened conditions and without oversight.

Mr. Salerno assumed the response by the Agency would not stand if an investigation was conducted. However, an investigation would expose other violations of discrimination and harassment in the workplace that degraded professional performance, assigned by Agency Supervisors and the Telecommunications Manager, for the State of California.

Contained within the Whistle Blower file submitted, a reference was made to the OIG-GAO report that cited safety recommendations regarding radio systems used within the Department of Interior. Comments received from the MSPB Judge Opinion [APP-2] were quoted from the *redacted* OIG report as, "unsafe and unreliable radio communications environment that jeopardizes the health and safety of [agency] employees and the public". Jurisdiction denied?!

Premises of the topic, "Questions Presented", is in the citing of whether leadership by government appointment is faltering when an Executive Order specifies requirements to the agency authority, that was not previously slated for, or identified with budget needs to address time related challenges in the type, scope and mission supporting a new mandate on the Department of Interior through Executive Order.

It is reasonable to accept that differences exist between Departments in their specialty and readiness to apply the needed organizational "startup requirements" in a critical Presidential Executive Order 13526 [EO13526] Classified National Security Information. Many Agencies have used previous statutory mandates to accomplish mission goals, with decades of experience gained in managing security. The understanding and lessons learned aid in the preparation to generate accurate budget calculations and to enable compliance with changes reviewed while implementing wide reaching impact from new Executive Order policy.

The burden of adapting a <u>changed</u> security policy along with, adapting change into a <u>new organizational functional requirement</u>, exposes risk to national security that elevates concerns in other branches of government. Within the "changes" are serious questions in need of understanding that are critical and arguable for clarity. However, the need for preliminary discussion and additions to staffing levels, can initially be overwhelmed by the added decisions and questions that arise from a departmental functional changes, versus the impact from technical modification only, in security classification process and procedures. As is relevant to this Case: Where the OCIO Director of the "Interior" issues an Order by Directive for the Bureau Chiefs to establish COMSEC principles within their organizations [APP - 3]. The action may conflict with EO 13526 implementation but is understood as critical in the management of security encryption keys previously known to be safeguarded. I.E. a review of EO 13526 and the COMSEC Requirement was modified by the new policy, to the a issue that many would argue. Ending with a decision of justification based on classified knowledge and understanding of technical history involving COMSEC violations. The argument would hold standing for justification of national security and national defense based on historical data lessons learned.

It is possible that an Agency leader could maintain the "We will do it our self" approach without fully analyzing the associated detail or risk involved with incompatible security classifications arise and constraints placed on managing budget estimates.

Article I, II and III of the Constitution define components needed for three branches of government with accountability to proscribe the top tier leadership to set the organizational framework and reduce questions by the lower level tiers in government. Many arguments relate the balance of Powers with complexity through-out. Enforcement of the Laws to sustain National Defense cannot be ignored. Without oversight, framework is faltered.

REASONS FOR GRANTING THE PETITION

This Case is an ideal vehicle to resolve reoccurring jurisdiction concerns in the Whistle Blowing Protection Act (WPA) of national importance. The lower Court refusal to exercise discretion and compel the Department of Interior ["Interior"] for a Discovery Request is compounding and obstructing when the Office of Special Counsel (OSC) does not find cause for investigating subject matter that is technically complex regarding violations of national security. Further exasperated by, and to the extent that the case is of such imperative public importance as to justify deviation from normal appellate practice that may require expedited determination. 28 U. S. C. § 2101. Whereas, answers found in a Discovery Request may expose necessary evidence to identify serious lapses in policy and regulations.

Due diligence was sought by the Petitioner to describe the existence of prima facie case of whistleblower retaliation. The detail was inserted into the request for a, "Petition for Review" (PfR) set before the MSPB Board on 05 July 2016. The Final Order was returned with Decision on 01 September 2016 [App-2]. The MSPB Board Opinion did not address comments on many critical points in the PfR pertaining to Jurisdiction, Discovery Request and new evidence. This created the basis of the Appeal to the US Court of Appeals for the Federal Circuit on 02 November 2016. The Opinion was issued on 17 November 2017 [App-1]. Comments was not provided regarding the purpose for submitting a Request For Review to the Courts jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted by:

Signature ______

Date 4/20/2018

17 - 7576

In the Supreme Court of the United States

RICK D. SALERNO, - *PETITIONER*

v.

DEPARTMENT OF INTERIOR, - *RESPONDENT*

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Petitioner has previously been granted leave to proceed *in forma pauperis* in the Court of Appeals for the Federal Circuit.

Proof of the order of appointment is appended.

Rick D Salerno
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *INFORMA PAUPERIS*

I, RICK DANIEL SALERNO, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis,* I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$ N/A
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$ N/A
Interest and dividends	$ 0	$ N/A	$ 0	$ N/A
Gifts	$ 0	$ N/A	$ 0	$ N/A
Alimony	$ 0	$ N/A	$ 0	$ N/A
Child Support	$ 0	$ N/A	$ 0	$ N/A
Retirement (such as social security, pensions, Annuities, insurance)	$ 0	$ N/A	$ 0	$ N/A
Disability (such as social security, insurance payments)	$ 0	$ N/A	$ 0	$ N/A
Unemployment payments	$ 0	$ N/A	$ 0	$ N/A
Public-assistance (such as welfare)	$ 0	$ N/A	$ $160	$ N/A
Other (specify):	$ 0	$ N/A	$ 0	$ N/A
Total monthly income:	$ 0	$ N/A	$ $160	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ 0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
NFCU 25,000 debt	$ 0	$ N/A
	$	$
	$	$

5. List the assets, and their values, which you own, or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home

Value None

☐ Other real estate Value None

☒ Motor Vehicle #1
Year, make & model None
Value 0

☐ Motor Vehicle #2
Year, make & model None
Value 0

☒ Other Assets
Description None
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$ None	$ None
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
None		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐Yes ☐ No Is property insurance included? ☐Yes ☐ No	$ 0	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ N/A
Home maintenance (repairs and upkeep)	$ 0	$ N/A
Food	$ 0	$ N/A
Clothing	$ 0	$ N/A
Laundry and dry-cleaning	$ 0	$ N/A
Medical and dental expenses	$ 0	$ N/A

Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ N/A
Insurance (not deducted from wages or included in mortgage payments)	$ 0	$ 0
Homeowner's or renter's	$ 0	$ N/A
Life	$ 0	$ N/A
Health	$ 0	$ N/A
Motor Vehicle	$ 0	$ N/A
Other ______________________	$ 0	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): ______________________	$ 0	$ N/A
Installment payments		
Motor Vehicle	$ 0	$ N/A
Credit Card(s)	$ 0	$ N/A
Department stores(s)	$ 0	$ N/A
Other ______________________	$ 0	$ N/A
Alimony, maintenance, and support paid to others	$ 0	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ N/A
Other (specify): ______________________	$ 0	$ N/A
Total monthly expenses:	$ 0	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your asset or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much?__________________________

If yes, state the attorney's name, address, and telephone number:

11. Have you paid - or will you be paying -anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? ________________

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Unemployed and unable to acquire employment.

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

Executed on 20 April 2018

(Signature)

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.*

A1

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,	DOCKET NUMBER SF-1221-14-0756-B-1
v.	
DEPARTMENT OF THE INTERIOR, Agency.	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]

[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).

APPENDIX :

C

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 2 8 2012

OCIO DIRECTIVE 2012-005

To: Assistant Directors for Information Resources

From: Bernard J. Mazer
Chief Information Officer

Subject: Enterprise Secure Communications Program Management

Purpose:

This document establishes policy and responsibility for Enterprise Secure Communications Program Management within the Department of the Interior (DOI). This includes the control of communications security (COMSEC) material and equipment and other secure communications methods and systems.

Secure Communications is defined as:

The protection resulting from all measures designed to deny unauthorized persons information of value that might be derived from the possession and study of telecommunications, or to mislead unauthorized persons in their interpretation of the results of such possession and study. Also called COMSEC. communications security includes: cryptographic security, transmission security, emission security, and physical security of communications security materials and information.

a. *Cryptographic security--The component of communications security that results from the provision of technically sound cryptosystems and their proper use.*
b. *Transmission security--The component of communications security that results from all measures designed to protect transmissions from interception and exploitation by means other than cryptanalysis.*
c. *Emission security--The component of communications security that results from all measures taken to deny unauthorized persons information of value that might be derived from intercept and analysis of compromising emanations from crypto-equipment and telecommunications systems.*
d. *Physical security--The component of communications security that results from all physical measures necessary to safeguard classified equipment, material, and documents from access thereto or observation thereof by unauthorized persons*[1]

[1] http://www.thefreedictionary.com/Secure+communications

APPENDIX : D

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

February 21, 2013

The President
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. President:

I write to request that you act without further delay to nominate a permanent Inspector General for the Department of the Interior ("Department"). The operations and management of the Department's Office of Inspector General ("IG") are in serious need of independent leadership.

Nearly four years ago to the day, you appointed the Department's previous Inspector General, Earl Devaney, to lead the Recovery, Accountability and Transparency Board, leaving the Department without a permanent, independent watchdog. Since that time, there have been too many instances where the Department's IG office has been mismanaged by Deputy Inspector General Mary Kendall, serving as acting Inspector General, and IG Chief of Staff Stephen Hardgrove. For too long, their accommodation of the Department's leadership has compromised and undermined the professional work of the IG's career staff. It is time to end the decline in trust that has resulted from their administration of the IG and provide the office with a clear leader empowered with the authority that flows from the permanence and independence of a Presidential nomination and Senate confirmation.

For over two years, the House Committee on Natural Resources ("Committee") has been conducting oversight of the IG, and today a report prepared by the Committee's Office of Oversight and Investigations Majority staff is being released to document these efforts. This report details that Ms. Kendall has openly expressed the desire to receive your nomination to become permanent IG while she and Chief of Staff Hardgrove administered the IG's oversight role in a manner that can best be described as privately accommodating to senior Department officials and your Administration. This was a distinct departure from the assertive, public calling to account style practiced previously by the IG's office during prior Administrations.

Instances of mismanagement by Ms. Kendall and Mr. Hardgrove include: not pursuing investigations involving political appointees or Administration priorities; informing senior Department officials of problems without conducting formal investigations and not issuing reports to Congress and the public; not adequately documenting the management of IG investigations and operations; serving in an appointed policy role in conflict with the IG's investigative duties; preventing an investigator from seeking information from a White House official; and providing inaccurate and misleading information to Congress.

Under the Inspector General Act of 1978, as amended, an Inspector General is expected to be a politically independent watchdog responsible for identifying fraud, waste and abuse, and to report management problems to the Department head and Congress so that they may ensure such problems are appropriately addressed. Regrettably, Ms. Kendall has not appropriately upheld this standard and it is not appropriate for her to remain in charge of the IG's office any longer.

Again, I urge you to act without further delay to nominate a well-qualified, uncompromised individual to serve as a permanent Inspector General for the Department of the Interior.

Sincerely,

Doc Hastings
Chairman