21-1417

No. 21-

In the Supreme Court of the United States

VAUGHN HOEFLIN STANDLEY

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Should not an agency's Congressional budget justifications be considered compelling evidence of the agency's belief?

Statement of Related Proceedings

This case arises from the following proceedings:

- *Standley v. Dep't of Energy*, No. DC-1221-20-0788-W-1 (M.S.P.B. June 1, 2021).
- *Standley v. Dep't of Energy*, No. 2021-2149, (Fed. Circ. February 16, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

Table of Contents

Table of Authorities

Cases

Statutes

Opinions Below

The Federal Circuit's opinion is reported at Standley v. Dep't of Energy, No. 2021-2149, (Fed. Circ. February 16, 2021) and is reproduced at App. 1a – 14a. The opinion of the Merit Systems Protection Board is reported at Standley v. Dep't of Energy, No. DC-1221-20-0788-W-1 (M.S.P.B. June 1, 2021) and is reproduced at App. 1b – 40b.

Jurisdiction

The judgment of the Court of Appeals for the Federal Circuit for Docket # 2021-2149 was entered on February 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). It is timely filed before 90 days after the Federal Circuit's decision.

Statutes at Issue

5 U.S.C § 2302:

(a) (2) For the purpose of this section—

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

(i) any violation of any law, rule, or regulation; or

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation

Section 1065, Public Law 110-181:

MAINTENANCE OF CAPABILITY FOR SPACE-BASED NUCLEAR DETECTION.

The Secretary of Defense shall maintain the capability for space-based nuclear detection at a level that meets or exceeds the level of capability as of the date of the enactment of this Act.

Statement of the Case

I am an employee of the U.S. National Nuclear Security Administration (NNSA), which is part of the U.S. Department of Energy (DOE). I allege that I made protected disclosures about the need to field the third Space and Atmospheric [Nuclear] Burst Reporting System (SABRS-3). SABRS-3 is a suite of instruments fielded on Department of Defense (DOD) satellites in support of treaty monitoring and Nuclear Command, Control, and Communications (NC3). Production of SABRS-3 is managed by NNSA's Office of Defense Nuclear Nonproliferation (DNN) Research and Development (R&D). Edward Watkins is the current Assistant Deputy Administrators (ADA) of DNN R&D, preceded by Rhys Williams, who left the NNSA in May 2016.

I claim that my disclosures are protected under 5 U.S.C § 2302(a)(2)(i), § 2302(b)(8)(A)(i), and § 2302(b)(9)(D) of the WPEA because the DOE documented its perception that it is required to produce nuclear detonation detection instruments to comply with Public Law 110-181, § 1065. Protection for such "perceived as" whistleblowers was established in *Montgomery v. Merit Systems Protection Board*, 382 Fed. App'x 942, 947 (Fed. Cir. 2010).

Pursuant to 28 U.S.C. § 1295(a)(9) (2012), I appealed to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") a final order of the Merit U.S. Merit Systems Protection Board (MSPB) denying requested relief as a part of an individual right of action (IRA) appeal. See *Standley v. Dep't of Energy*, No. DC-1221-20-0788-W-1 (M.S.P.B. June 1, 2021).

Argument

Americans have a right to know and trust what the DOE believes. The only way they really can is by being able to trust the department's written words in its official documents, like DOE's budget requests, or its reports to Congress about how to keep nuclear weapons safe and reliable. And yet, the Federal Circuit seems to think nothing of sacrificing this trust to get two DOE executives off the hook for retaliation. Its finding that DOE's Congressional budget justifications do not necessarily convey DOE's belief calls into question the integrity of DOE's written communications. It signals that neither Congress nor the public can rely on what the DOE says in them, about NC3 systems like SABRS-3, the safety and reliability of nuclear weapons, or anything else.

The Federal Circuit claims to have considered my petition "in the best light the facts and law allow and in considerable detail." (App. 13a) However, a cursory review of the facts shows this to be false. The Federal Circuit bent over backwards to rule in favor of the DOE, going so far as to falsify an MSPB finding. The incongruity and recklessness of not holding DOE to its beliefs documented in Congressional budget justifications is a sign of bias against whistleblowers. This bias is also plainly evident in the statistics of the appeals process and in the Federal Circuit's extracurricular remarks. Unless this court remedies the decision, severe and long-lasting harm will be done. The barrier for WPEA appellants to have their disclosures protected will be too great. Executives can too easily retaliate against whistleblowers and then dissemble to evade accountability.

Between 2013 and 2021, seven of DOE's Congressional budget requests state the department's belief that it is required by law to produce suites of nuclear detonation detection instruments. Referencing a requested increase of $25,650,000 for Nuclear Detonation Detection, DOE's 2013 Congressional budget request states, "The increase permits production of satellite sensors for nuclear detonation detection at the rate needed to sustain replenishment of current capability as required. This sustains the capability to monitor nuclear threats to the U.S. such as surface and above - ground nuclear detonations as required by Public Law 110 - 181; Sec 1065." (M.S.P.B. No. DC-1221-20-0788-W-1, Tab-32: *Appellant's Close of Record Submission*, p. 26). DOE's FY 2014 Congressional Budget Request states that the Nuclear Detonation Detection budget increase "reflects NNSA's assumption of sensor - satellite integration costs that the Department of Defense formerly paid. These sensor payloads provide the capability to monitor nuclear threats to the U.S. such as surface and above - ground nuclear detonations as required by Public Law 110 - 181; Sec 1065" (*Ib.*) DOE's FY 2015 Congressional budget request states, "DNN will contribute to the nation's space based global nuclear detonation detection capability per Public Law 110 - 181; Sec 1065." (*Ib.* 26 – 27). DOE's FY 2016 Congressional Budget request states, "DNN will also contribute to the nation's space based global nuclear detonation detection capability as required by law" (*Ib.* 27). DOE's FY2019, FY2020, and FY2021 Congressional budget requests all refer to "producing the nation's space - based global nuclear detonation detection capability as required by law." (*Ib.*)

The seven Congressional budget justifications quoted in the preceding paragraph mean exactly what they say and, like all others, involved a lot of formal review before appearing in DOE's budget requests, with the intent that they accurately represent the department's position. In fact, DOE policy required that these statements were reviewed and approved by Williams and Watkins. (*Ib.* 25).

The MSPB acknowledged that DOE's yearly budget requests "repeatedly reference Section §1065 as the justification for its request for funding the SABRS project" (App. 19b) And yet, inexplicably, the MSPB dismissed this evidence, arguing that a "[c]itation to a law as support for a budget item does not equate to that law requiring the program's existence" (App. 19b) Although this finding acknowledges the simple fact that words in an executive branch document carry no legal authority, it does not address DOE's belief about §1065 in any way, shape, or form. Had it, words like "belief" or "perception" would be included, and there would be some sort of accompanying explanation as to why the budget justifications do not represent DOE's belief. But the words and explanations are both missing, so it has nothing to do with DOE's beliefs.

The Federal Circuit falsified this MSPB finding by making it specifically about DOE's belief. It did so by adding the word "belief" to its recap of the conclusion: "as the Board explained, the statutory references in the budgetary requests did not necessarily equate to a belief that the agency was bound by that statute." (App. 9a) The Federal Circuit paraphrases this MSPB finding, instead of quoting it, so that the word "belief" can be added. It appears, therefore, that the judges

knew the change was necessary in order to convey the meaning required. This one-word change is what the Federal Circuit then uses to underwrite its false claim that the MSPB accounted for the beliefs documented in the budget requests. It then shamelessly washed its hands of the matter, proclaiming that it is not able to disturb the Board's finding because the Board had already weighed the Congressional budget statements against other "substantial evidence." (*Ib.*)

The Federal Circuit opinion is 3,364 words (App. A). The MSPB's Initial Decision is 10,613 (App. B). But each commit just one sentence to tossing out the evidence associated with the seven Congressional budget justifications. Altogether, zero reasons are given for why the Congressional justifications about § 1065 do not represent DOE's belief. Negligence is the only explanation. But the degree of negligence points to bias. Indeed, statistics of the appeals process confirms the presence of bias favoring the government. Of the 4,879 individuals who filed an MSPB appeal in 2021, only 139 were granted relief.[1] That's less than 3%. However, 4,879 is just a tiny fraction of the millions of federal workers who can file. It cannot be that there is so little fraud, waste, abuse, or corruption. Or, that employees are wrong so often. The reason for these low numbers is that employees are heavily deterred from appealing. Clearly, they do not believe that they will be treated fairly if they file a claim, and MSPB statistics indicate that they are correct to believe so. Alas, the MSPB and Federal Circuit seem blithely unaware of their bias.

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[1] MSPB, *Annual Report for FY 2021*, February 18, 2022, pp. 10 – 12.

In 2019, the MSPB ordered the DOE to rectify my 2015 and 2016 performance ratings, finding that Williams had "engaged in communications and generated documents so indicative of retaliatory animus they simply cannot be overcome by later explanations." See *Standley v. Department of Energy*, MSPB Docket No. DC-1221-18-0284-W-1 (November 21, 2018) (Initial Decision) at 48. Even though I prevailed, one can see that the judge felt pressure to explain away Williams' retaliatory animus. In the instant case, however, the MSPB and Federal Circuit explain away Williams' animus with one out-of-context "we hold no requirements" (App. 5a) e-mail.

Bias in this case is also found in the Federal Circuit's extracurricular remarks. The judges finish by snarking "that the record shows conclusively that Dr. Standley has had more than his day in court." (App. 14a) But having followed the WPEA appeals process, I could not have gotten "more" than is due me. We should all be surprised and disappointed that officers of the court would include such a snide remark. It is beneath the institution and casts doubt on the seriousness of the opinion. In truth, the remark betrays a contempt for pesky pro se WPEA appellants who dare pursue justice against overwhelming odds.

The decision sets an awful precedent, further constraining the already narrow and hyper technical criteria for establishing if an appellant's disclosures are protected. Because DOE's statements to Congress about § 1065 could not be clearer, the court's decision essentially tells federal employees that under no circumstances can they be "perceived as" a whistleblower based on the beliefs expressed by an agency in its statements to Congress.

The decision also makes it easier for dastardly executives to retaliate against whistleblowers and then dissemble to escape accountability. The record shows that Williams and Watkins opposed SABRS-3 because they wanted to apply its funds to unrelated work. I refused to cancel the SABRS-3 program to release these funds because Williams would not give me a direct order to do so. Frustrated by my refusal, he asked the National Security Council to cancel it. But it too refused, citing § 1065 as one of the reasons. Incensed, he and Watkins pretended they were never opposed to SABRS-3, set out to obstruct it, and retaliated against me for not going along. Such illegal conduct cannot be prosecuted unless agency executives are held accountable to the beliefs that they themselves help establish in the agency's statements to Congress.

An agency's Congressional budget justifications should be considered compelling evidence of the agency's belief, and no less so when deciding if a disclosure is to be protected under the WPEA.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Appendix A: U.S. Court of Appeals for the Federal Circuit Opinion, February 16, 2022

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VAUGHN HOEFLIN STANDLEY,

Petitioner

v.

DEPARTMENT OF ENERGY,

Respondent

2021-2149

Petition for review of the Merit Systems Protection Board in No. DC-1221-20-0788-W-1.

Decided: February 16, 2022

VAUGHN HOEFLIN STANDLEY, Gainesville, VA, pro se.

ALBERT S. IAROSSI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., FRANKLIN E. WHITE, JR.

Before MOORE, *Chief Judge*, PLAGER and O'MALLEY, *Circuit Judges*.

Dr. Vaughn H. Standley[1] at the time this case arose was employed by the U.S. Department of Energy (hereinafter "DOE") in its National Nuclear Security Administration. He petitions for review of the Merit Systems Protection Board's ("MSPB" or "Board") decision denying his request for corrective action in an individual right of action appeal.[2] We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

Petitioner alleges that the DOE retaliated against him when he made repeated attempts to correct what he considered a seriously erroneous agency decision related to the mission of providing space-based nuclear detection. Unsuccessful at the agency level and convinced that the agency thereafter retaliated against him for attempting to ensure our continued nuclear detection capability as required by law, Dr. Standley made repeated attempts to get the Merit Systems Protection Board to correct the agency. His attempts failed there as well.

As we shall explain, this case is his latest attempt to get help—including from this court—in his cause. Because the Board again ruled against him, we must decide whether the Board properly denied corrective action on the record presented.

BACKGROUND

By statute, the Secretary of Defense is responsible for our space-based nuclear detection capability.

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[1] Some of the records in the case refer to Standley as "Mr.," some as "Dr." There are references in the agency email exchanges indicating that Standley was referred to by the agency as "Dr. Standley"—we adopt that as his proper title.

[2] *Standley v. Dep't of Energy*, No. DC-1221-20-0788-W-1, 2021 WL 2290504 (M.S.P.B. June 1, 2021).

Section 1065of the National Defense Authorization Act of 2008 provides that "[t]he Secretary of Defense shall maintain the capability for space-based nuclear detection at a level that meets or exceeds the level of capability as of the date of the enactment of this Act."[3]

Although this statutory responsibility was assigned to the Secretary of the Department of Defense ("the Secretary"), the DOE traditionally has assisted the Secretary in this mission. To that end, the DOE provided a system of space-based sensors for nuclear detection, referred to as the Space and Atmospheric Burst Reporting System or SABRS. The Secretary then included SABRS on its Air Force satellites.

While this division of labor sounds straightforward in theory, apparently it has not been straightforward in practice, particularly with respect to funding. This is likely, in no small part, because, while the Secretary bears legal responsibility under § 1065, the statute

> does not prescribe any particular means or technology by which space-based nuclear detection capabilities must be maintained. Rather, it is only violated if detection capability falls below a pre-set standard, and a National Security Council ("NSC") interagency policy committee has the discretion to decide how best to maintain that standard.

Standley v. Merit Sys. Prot. Bd., 715 F. App'x 998, 1002 (Fed. Cir. 2017) (internal citation omitted).

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[3] Pub. L. No. 110-181, § 1065, 122 Stat. 3, 324 (2008).

Thus, while the Secretary in the past has relied on the DOE's SABRS program to assist in carrying out its mission, § 1065 does not require that the Secretary do so. Similarly, nothing in the statute requires that the DOE continue to provide its SABRS program to the Secretary.

With this background, we turn to the particular facts of this case. This requires a look at a complex of government agency decisional levels, and serious allegations by Dr. Standley spanning several years, amidst a veritable alphabet soup of governmental abbreviations.

At the time of the events at issue, Petitioner Dr. Standley, who appears before us *pro se*, was a General Engineer employed in the DOE's National Nuclear Security Administration ("NNSA"), Office of Defense Nuclear Nonproliferation Research and Development ("DNN"), Office of Nuclear Detonation Detection ("NDD").

The workplace hierarchy involved in the case, in ascending order of rank, was: General Engineer Dr. Vaughn Standley; NDD Director Tom Kiess; DNN Associate Assistant Deputy Administrator Edward Watkins; DNN Assistant Deputy Administrator Rhys Williams; DNN Deputy Administrator Anne Harrington; and NNSA Deputy Administrator Madelyn Creedon.[4] Prior to May 2015, the position of Dr. Standley's immediate superior, the NDD Director, was vacant, so Dr. Standley reported directly to

[4] Watkins replaced Williams as DNN Assistant Deputy Administrator in July 2016. David LaGraffe replaced Watkins as DNN Associate Assistant Deputy Administrator in April 2017.

Watkins in his role as DNN Assistant Deputy Administrator.

Dr. Standley worked on the third iteration of the SABRS program—SABRS3. He contends that over several years he sought to ensure that the program was funded and supported, in no small part because Dr. Standley believed this was legally necessary under § 1065. He alleges that, in contrast, his superiors attempted to block funding of and his work on SABRS3, despite—according to Dr. Standley—also believing that the DOE was legally responsible under § 1065. As noted, these allegations span several years, and involve several layers of officialdom; we recount the most salient facts below.[5]

On August 8, 2014, Dr. Standley emailed Williams, Watkins, and Kiess, indicating that Dr. Standley was studying how to include SABRS3 on an existing Air Force satellite. Williams responded via email:

> We need to talk. I do not, repeat do not, support NNSA being involved in any way, shape or form with a free flier. We provide the payload. Period. If DoD can't get it's [*sic*] act together to support the existing requirement, it's not ours to fix. We hold no requirements. And SABRS3 hosting and data down link is a kluge. I don't want NNSA stuck paying for this for the next 20 years—and we will. I am deciding now whether to stop SABRS3 funding and redirect. I plan to provide a decision brief to NA1/2 in the near future.

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[5] A more complete account is found in the record before the Board.

Appendix ("A") 3. In response, Dr. Standley agreed that it was a "total kluge," and noted that "[e]ach and every attempt by the community over the last 10 years to get them [the Air Force] to pay or accept funds/direction" had failed. *Id.* He also stated: "Dealing with that has been adhoc/ ugly. The whole hosted-payload business is messy. Personally, I feel well equipped to deal with it but someone (you) will decide how much mess we tolerate." *Id.*

Considerably later, during the week of March 26, 2015, Dr. Standley participated in a meeting with Air Force representatives to finalize a joint brief for the House Armed Services Committee ("HASC"). Dr. Standley requested that the brief include a statement that § 1065 required U.S. Nuclear Detection System ("USNDS") capability to be maintained in the future. An Air Force representative emailed Williams and Creedon, informing them of Dr. Standley's request, which was approved. Williams forwarded the email to Dr. Standley and others with the note "FYSA," which presumably meant "for your situation awareness."

Later still, in or around July 2015, Williams agreed to a Department of Defense ("DOD") request to suspend executive-level decision meetings of the USNDS Board of Directors, pending further guidance from the National Security Council on how to structure the USNDS. On July 29, 2015, Dr. Standley emailed Williams, asking him to reconsider his decision because it was necessary for the Board to "press a DOD decision to follow-through with funding the necessary ground infrastructure to support SABRS in the long term." A. 5. Williams thanked Dr. Standley for his input and stated he would consider it. Nevertheless, on September 18, 2015, Williams

instructed Dr. Standley to cease funding ground segment support related to the USNDS program.

Shortly thereafter, on September 23, 2015, Dr. Standley sent an email entitled "Obstruction of Public law 110-118, NDAA 2008, Maintenance of Space-based Nuclear Detonation Detection System" to Rose Gottemoeller, Under Secretary of State for Arms Control and International Security Affairs. Dr. Standley copied the email to the HASC Chairman, to Harrington, to Department of Defense representatives, and to the U.S. Office of Special Counsel. In the email, Dr. Standley claimed that Williams was obstructing compliance with § 1065.

Harrington forwarded that email to Williams, asking him to "fill in whatever background you have on this." A. 7. Williams responded:

> Dr. Standley raises, what he believes, are serious issues. That said, in no way has DNN R&D or myself obstructed implementation of US Law. In fact, we (NNSA) has [*sic*] increased funding for this important area and have driven the interagency to keep this a priority—to meet US law.

A. 7.

Following several earlier unsuccessful attempts to getthe DOE position changed, on August 6, 2020, Dr. Standley filed the instant individual right of action appeal with the Board. He alleged that the DOE and its employees, Williams and Watkins, retaliated against him for his efforts to change the DOE policy by not selecting him for any of three DOE Director positions posted in 2014, 2015, and 2017. Specifically, he alleged that Williams and Watkins *believed* that

the DOE was responsible under § 1065, and that Dr. Standley was engaging in protected whistleblowing when he opposed efforts to defund and cease work on the SABRS3 program. Dr. Standley contends that they subsequently retaliated against him for his whistleblowing by not selecting him for any of the three DOE Director positions.

The assigned MSPB administrative judge denied corrective action, finding that Dr. Standley failed to meet his burden of proving that the agency personnel perceived him as a whistleblower. In the absence of a petition for review at the MSPB, the decision became final on July 6, 2021. Dr. Standley timely petitioned for this court's review.

DISCUSSION

We must affirm the Board's decision unless it is "(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). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. Nat'l Labor Rels. Bd.*, 305 U.S. 197, 229 (1938). "[T]he standard is not what the court would decide in a *de novo* appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole." *Parker v. U. S. Postal Serv.*, 819 F.2d 1113, 1115 (Fed. Cir. 1987).

On appeal, Dr. Standley contends that the Board failed to consider certain evidence indicating that the DOE, Williams, and Watkins perceived Dr. Standley's

activities to be protected, and that the Board also failed to consider certain evidence indicating that the DOE acted fraudulently.

I

First, Dr. Standley argues that the Board failed to consider certain "direct" evidence supporting his position—namely, the September 2015 email from Williams to Harrington and the DOE's annual congressional budgetary requests over several years, which consistently referenced §1065 in requesting funds.[6]

Dr. Standley contends that this evidence reflects Williams's, Watkins's, and the DOE's perceptions that the DOE was required to continue the SABRS3 program to comply with § 1065. This is not an unreasonable argument, but it is one that the Board expressly considered and rejected in light of the evidence. *See* A. 20 (discussing email), A. 14–15 (discussing yearly budgetary requests).

As the Board explained, the email from Williams to Harrington demonstrated that Williams disagreed with Dr. Standley's views and instead believed that the DOE was continuing to support an important area of law, albeit one that was not the DOE's sole responsibility. In other words, as Williams stated in his email, the issue was one of interagency concern. Similarly, as the Board explained, the statutory references in the budgetary requests did not necessarily equate to a belief that the agency was bound by that statute.

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[6] Although Dr. Standley contends that the Board failed to consider this evidence, he admits that the Board considered the budgetary requests. See Opening Br. at 6.

A different fact-finder might have viewed the email and budgetary requests as supporting Dr. Standley's position, but, given the record, because substantial evidence supports the Board's conclusion we cannot reverse or vacate it. "[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002).

II

Second, Dr. Standley argues that the Board failed to consider certain "indirect" evidence—for example, Williams's statement about "meet[ing] US law"; Dr. Standley's request to reference § 1065 in the March 2015 HASC briefing; and Dr. Standley's September 2015 email. Dr. Standley contends that, given the "direct" evidence mentioned above, this "indirect" evidence supports his position. But again, the Board expressly considered this evidence and simply reached a different conclusion. *See* A. 19 (concerning Williams's statement about "meet[ing] US law"), A. 19– 20 (concerning the HASC briefing), A. 20–21 (concerning the September 2015 email).

As before, substantial evidence supports the Board's conclusion on each point. Williams's statement about meeting U.S. law was made in conjunction with his express belief that it was an interagency concern—not a matter solely for the DOE. Dr. Standley's HASC briefing request was not only unopposed but honored, which made sense given the Department of Defense's involvement in the briefing and ultimate legal responsibility under §

1065. Similarly, Dr. Standley's September 2015 email certainly demonstrated his own belief that the DOE was legally responsible under § 1065 via SABRS3, but Williams's followup response to Harrington indicated a consistent belief that the DOE was not responsible in that manner.

The evidence supports the agency's position that the SABRS3 program was part of the DOE's mission to *assist* the Secretary of Defense. Dr. Standley's suggested alternative conclusion is certainly possible, but it does not detract from the substantial evidence supporting the Board's conclusion. As before, we cannot reverse or vacate on this record given the standard of review.

III

Third, Dr. Standley contends that the Board failed to cite Watkins's affidavit and therefore failed to consider any of Watkins's sworn statements. Dr. Standley pinpoints Watkins's affidavit statement that "SABRS-3 hosting and gaps were the topic of on-going undersecretary-level Interagency Policy Committee (IPC) meetings." Opening Br. At 14 (quoting A. 32). Dr. Standley believes this statement demonstrates that Watkins and the DOE perceived the SABRS3 program as necessary for § 1065 compliance.

The Board found that Dr. Standley "failed to present preponderant evidence that Watkins perceived him as a whistleblower with respect to the allegations in this appeal." A. 22. While the Board could have viewed Watkins's statement as supporting Dr. Standley's position, the Board also could have viewed Watkins's statement as it did—supporting the

DOE's position that SABRS3 was not just an issue for the DOE, but instead had to be sorted out by the Interagency Policy Committee, as Watkins expressly indicated in his affidavit. *See* A. 32. Because the Board's conclusion was supported by substantial evidence, we cannot disturb it.

In a similar vein, Dr. Standley faults the Board for its statement that he "did not put forth particular evidence and argument regarding Watkins' alleged perception of him as a whistleblower with respect to any of the alleged whistleblowing in this appeal." Opening Br. at 7 (quoting A. 22). Dr. Standley asserts that, before the Board, he highlighted Watkins's statement that Dr. Standley's allegedly protected activities were "widely known." Opening Br. at 7.

But Watkins never made this statement, as Dr. Standley admits on the very same page. *See id.* Watkins referred to the "subject of potential gaps"—not Dr. Standley's actions— as "widely known." A. 32. That such gaps existed and were widely known does nothing to prove Dr. Standley's contention as to Watkins's perception of Dr. Standley's actions. Indeed, Watkins had no knowledge of the majority of Dr. Standley's actions. *See* A. 32–33. Further, in his submissions to the Board, Dr. Standley admitted that Watkins's affidavit was largely silent on these points, but Dr. Standley nevertheless contended that Watkins purposely obfuscated the truth.

While Dr. Standley's interpretation of Watkins' statements is possible, the Board's contrary conclusion is again supported by substantial evidence. Substantial evidence supports the finding that Watkins's consistent belief was that the coverage gaps were an interagency issue—not one solely for the

DOE. Again, we cannot reverse or vacate on this record given the standard of review.

IV

Fourth and finally, Dr. Standley contends that the Board failed to consider facts indicating that the DOE acted fraudulently by misrepresenting its stance on § 1065 to avoid jurisdiction while simultaneously seeking funding from Congress based on § 1065. Dr. Standley highlights the DOE's annual congressional budgetary requests referencing § 1065, despite the agency's litigation position before the Board and this court that the DOE bore no legal responsibility under § 1065.

Again, the Board considered this argument and rejected it, finding that the mere mention of the statute in a budgetary request was insufficient to support Dr. Standley's claims. Given the record and Dr. Standley's arguments on appeal, we agree. That the DOE referenced the statute when seeking funds to support the Secretary of Defense's legal obligation does not necessarily mean that the DOE viewed that obligation as its own. Relatedly, since there were no findings of fraud, we cannot endorse Dr. Standley's argument that the Board should have viewed Williams in a less favorable light. As before, the Board's decision was supported by substantial evidence.

SUMMARY

Given the critical importance of the military program at issue, as well as Dr. Standley's well-intentioned beliefs about the mission, and his *pro se* status throughout this extended series of appeals, we have considered his petition in the best light the facts

and law allow and in considerable detail. This is the third decision by this court (and the fourth review before the MSPB) arising from the government's decision regarding funding and continuation of DOE's SABRS program.

In the two previous cases before this court, decided by nonprecedential decisions, Dr. Standley presented alternative theories for the reasons he should have been treated as a whistleblower. In this, the third theory, he tried to prove that the deciding officials believed all along that he was right, but ruled against him nevertheless. As in the previous cases, his effort to convert a government policy decision with which he disagreed into the appearance of an intended wrongful use of government property was unavailing.

The Board's decision was supported by substantial evidence and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or obtained without procedures required by law, rule, or regulation having been followed. We have considered Dr. Standley's remaining arguments and find them unpersuasive. In sum, we believe that the record shows conclusively that Dr. Standley has had more than his day in court.

CONCLUSION

For the foregoing reasons, we affirm the Board's decision.

AFFIRMED

COSTS

No costs.

Appendix B: Merit System Protection Board Final Order, June 1, 2021

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

VAUGHN HOEFLIN STANDLEY,

Appellant,

v.

DEPARTMENT OF ENERGY,

Agency.

DOCKET NUMBER

DC-1221-20-0788-W-1

DATE: June 1, 2021

Vaughn Hoeflin Standley, Gainesville, Virginia, pro se.

Saul Ramos, Albuquerque, New Mexico, for the agency.

BEFORE

Monique Binswanger
Administrative Judge

INITIAL DECISION

On August 6, 2020, the appellant timely filed the instant Individual Right of Action (IRA) appeal alleging the agency retaliated against him for perceived whistleblowing disclosures and activity. *See* Appeal File (AF), Tab 1. The Board has

jurisdiction over this appeal pursuant to 5 U.S.C. § 1221(a) and 5 C.F.R. § 1209.2; *see also* AF, Tab 14. The appellant did not request a hearing; accordingly, this decision is based on the written record.

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

ANALYSIS AND FINDINGS

Background

The appellant is a General Engineer with the agency's National Nuclear Security Administration (NNSA), Office of Defense Nuclear Nonproliferation Research and Development (DNN R&D), Office of Nuclear Detonation Detection (NDD). Also within the DNN R&D office was the Office of Proliferation Detection (PD). Both NDD and PD were overseen by two GS-15 Directors, both of whom report to the DNN Assistant Deputy Administrator (ADA). The ADA then reports directly to the DNN Deputy Administrator (DA), who reports to the NNSA DA. At all times relevant to this appeal, Madelyn Creedon served as the NNSA DA and Anne Harrington served as the DNN DA. Rhys Williams served as the DNN ADA from 2012 to May 2016. Edward Watkins served as Williams' Deputy (Associate ADA) during this time and was reassigned to the ADA position in July 2016 following Williams' departure. David LaGraffe, previously the PD Director, was promoted to the Associate ADA position in April 2017. During all times relevant to this appeal, the appellant was a GS-15 General Engineer in NDD and reported directly to the NDD Director. However, in or around 2014, the NDD Director position was vacancy and the appellant

reported directly to Watkins, the Associate ADA at that time. Tom Kiess was selected as the NDD Director in or around May 2015.

The appellant managed the agency's Space-based Nuclear Detonation Detection (SNDD) program. As relevant to this appeal, Section 1065 of Public Law 110-181 requires the Secretary of Defense to maintain a particular level of capability for space-based nuclear detonation detection. Pub. L. No. 110-181, § 1065. The Department of Energy (DOE), through the SNDD and in partnership with Los Alamos National Laboratory (LANL), produced the nuclear detonation detection sensors, known as the Space and Atmospheric Burst Reporting System (SABRS) that the Department of Defense (DOD) included in its satellites in satisfaction of Section 1065. During the events at issue in this appeal, the agency was working with LANL to produce the third iteration, SABRS-3, for inclusion in a DOD satellite.

On July 31, 2014, during a Program Management Review meeting, the appellant and LANL briefed Williams and Watkins on fielding SABRS-3 on a U.S. Air Force (USAF) Space Test Program (STP) aircraft (SAT-6) "to prevent a performance coverage cap." AF, Tab 32 at 15. This briefing addressed the concern that the USAF STP would need to obtain a satellite that would serve as the host for SABRS-3 sensors. *Id.* at 32. On August 8, 2014, the appellant emailed Williams, Watkins, and Kiess the following message regarding that possibility:

> FYI, in partnership with STP, we stopped 'dispositioning' of Boeing satellite and made it available as possible host of SABRS3. Was

> short turnaround since previous owner insisted it be off their books within a month. Integration study begins now.

AF, Tab 33 at 41. Immediately thereafter, Williams responded:

> We need to talk. I do not, repeat do not, support NNSA being involved in anyway, shape or form with a free flier. We provide the payload. Period. If DoD can't get it's act together to support the existing requirements, it's not ours to fix. We hold no requirements. And SABRS 3 hosting and data down link is a kluge. I don't want NNSA stuck paying for this for the next 20 years - and we will. I am deciding now whether to stop SABRS 3 funding and redirect. I plan to provide a decision brief to NA1/2 in the near future.

Id. The appellant responded:

> Understood. We will stop when you decide.
>
> I agree, it is a total kluge but it is the only way I can see to get it over the west. GEO has been a kluge since someone at AFSPC decided years ago that they didn't want it on SBIRS. Each and every attempt by the community over the last 10 years to get them to pay or accept funds/direction for GEO has failed. Dealing with that has been ad-hoc/ugly.
>
> The whole hosted-payload business is messy. Personally, I feel well equipped to deal with it but someone (you) will decide how much mess we tolerate.

Id. at 40-41.

Williams did not stop the program or redirect funding at that time. On December 9, 2014, Williams issued a memorandum for the record entitled "New Program Management Requirements for Space-Based Nuclear Detonation Detection (SNDD) Program." AF, Tab 33 at 65. Therein, Williams detailed measures DNN R&D would undertake to obtain assurances that the SNDD program was efficient and successful. *Id.* Accordingly, the appellant continued his work on SABRS.

During the week of March 26, 2015, the appellant participated in a meeting with USAF representatives to finalize a joint brief requested by the House Armed Services Committee (HASC) on U.S. Nuclear Detection System (USNDS) capability. During that process, the appellant requested the brief include a statement that PL 110-181 (Section 1065) requires USNDS capability to be maintained in the future. AF, Tab 1 at 64. The statement was included in the brief. *Id.* On March 26, 2015, USAF representative informed Creedon of the appellant's requested changes and that they were accepted, and requested her concurrence on the brief so it could be delivered to the HASC. AF, Tab 1 at 64.

Williams was copied on the email. *Id.* That same day, Williams forwarded that email to the appellant, "FYSA," copying Harrington, Watkins, Lagraffe, and other agency and LANL employees.[1] *Id.* He also commented in the email: "My sense is [Creedon] may

[1] FYSA is commonly understood to mean to "for your situational awareness."

want to hold until the IPC [Interagency Policy Committee meeting] - now scheduled for [April] 8th." *Id.*

On April 8, 2015, the IPC met to discuss the future of the SABRS program. The following day, the appellant emailed a large group of individuals involved in the SABRS program to notify them that the IPC stated there would be no SABRS coverage gaps. AF, Tab 34 at 21. He states the IPC further confirmed DOD's "responsibility for the ground system." *Id.* He concludes, therefore, that the team would continue to work with USAF STP on fielding the satellite for SABRS-3 and an additional experiment, referred to as "SENSER," to be included. *Id.* On April 10, 2015, Williams emailed the appellant and credited him for achieving the "positive outcome" of the IPC meeting, specifically stabilization of the NNSA program. AF, Tab 1 at 89. Williams relayed his concern that LANL may want to focus on the "fun science" of SENSER rather than the "mundane engineering and integration" of SABRS-3. *Id.* at 89-90. He stated, however, that the agency "must do" SABRS-3 and informed the appellant that all funding and focus must be prioritized toward that goal, at the expense of SENSER, if necessary. *Id.* at 89-90.

In or around July 2015, Williams agreed to a DOD request to suspend executive-level decision meetings of the USNDS, including the interagency USNDS Board of Directors (BOD), pending further guidance from the National Security Council (NSC) on how to structure the USNDS. AF, Tab 1 at 67. On July 29, 2015, the appellant emailed Williams and requested he reconsider his decision. AF, Tab 34 at 24; AF, Tab 1 at 67. He stated a BOD was necessary in order to

"press a DOD decision to follow-through with funding the necessary ground infrastructure to support SABRS in the long-term." AF, Tab 34 at 24. He stated DOD's internal debate on funding could lead to delays that have "potential cost impacts to the NNSA and STP." *Id.* He concluded a BOD would "hopefully develop much needed cross-agency leadership within the USNDS program." *Id.* Williams thanked the appellant for his input and stated he would consider it. *Id.* On September 18, 2015, Williams instructed the appellant to cease funding ground segment support related to the USNDS program. AF, Tab 34 at 25.

In response to these actions, on September 23, 2015, the appellant sent an email to Rose Gottemoeller, Under Secretary of State for Arms Control and International Security Affairs, entitled "Obstruction of Public law 110-118, NDAA 2008, Maintenance of Space-based Nuclear Detonation Detection System." AF, Tab 1 at 65-68. The appellant copied Harrington, HASC Chairman Mac Thornberry, the Office of Special Counsel, and DOD representatives. *Id.* At 68. Therein, the appellant states that Williams is "obstructing compliance with Section 1065 of Public Law 110-118." *Id.* As support for his statement, he references Williams' July 2014 email to him and states Williams pressured him to stop working on SABRS-3, though he acknowledges Williams did not direct him to halt work. *Id.* at 66. The appellant further alleged that Williams verbally recommended to NSC staff that they terminate SABRS-3, despite recognizing that doing so "would likely mean the end of all future SABRS and thus a degradation in space based nuclear detection capabilities – a clear violation of the public law." *Id.*

at 66. The appellant stated that Williams' recommendation was rejected and the IPC ordered continued work on SABRS-3 and subsequent systems. *Id.*

The appellant stated that Williams threatened to cancel SABRS-3 if the DOD "did not follow through on its responsibility to field the ground segment." *Id.* at 67. He further stated Williams ordered him to stop funding on all groundside integration activity for SABRS because Williams believed DOD was responsible for ground-side integration work and expending DOE funds would violate appropriations. *Id.* Finally, the appellant took issue with Williams' agreement to a DOD request to suspend executive-level decision meetings of the BOD. He stated this decision would "seem innocuous," except that he believes DOD was attempting "to frustrate those seeking to comply with Congress' direction to continue the SABRS program." *Id.* at 67. He alleged that suspension of executive-level leadership meetings "has allowed the DOD to abrogate responsibility for the SABRS ground segment" and that this will inevitably lead to a halt in production of SABRS-3 and cancellation of the entire SABRS program. *Id.* at 68. He concluded that Williams "is both actively and passively hindering execution" of the program by his actions and omissions in this regard. *Id.*

In response to the appellant's email, Harrington forwarded the message to Williams and others, and asked that Williams "fill in whatever background you have on this." AF, Tab 34 at 26. Williams responds:

> Absolutely. Dr. Standley raises, what he believes, are serious issues. That said, in no way has DNN R&D or myself obstructed implementation of US Law. In fact, we (NNSA) has increased funding for this important area and have driven the interagency to keep this a priority – to meet US law.

Id. at 26. In November 2015, Kiess, wrote in his Fiscal Year 2015 performance evaluation:

> Even though he disagrees with the activities of some organizations involved in the USNDS, his strong disagreements with some individuals are (perhaps too) well known in the community, which could impact efforts to build rapport and foster closer working relationships.
>
> The Sept 23 disclosure was done in a way that may have been counterproductive.

AF, Tab 34 at 30. In October 2016, the appellant was detailed to the National Defense University (NDU) College of International Security Affairs and remained on detail with the NDU December 2020. In late-October 2016, DNN R&D hired Craig Sloan to manage the office's LYNM program.

In May 2017, the agency announced a vacancy for the PD Office Director Position. The appellant applied for the position and was interviewed, along with six other applicants. Three applicants, including Sloan, were given second interviews. The appellant was not amongst these applicants. In August 2017, Sloan was selected for the position.

Nonselection actions

The appellant alleges Williams and/or Watkins retaliated against him for perceived whistleblowing activities when he was nonselected on the following three occasions for the NDD and PD Office Director positions. The parties have stipulated to the basic timeline facts regarding these selections. AF, Tab 25.

14-0127-GOV

On September 19, 2014, the agency advertised the NDD Director position and the appellant timely applied. Six candidates, including the appellant, were certified as eligible for the position. On October 28, 2014, Watkins cancelled the vacancy announcement, citing his dissatisfaction with the candidate pool and stating his intention to reannouncement the position with a modified job analysis to "widen the net." AF, Tab 16 at 29.

15-0086-GOV

On March 6, 2015, the NDD Director position was readvertised and the appellant again timely applied. Ten applicants were certified as eligible for the position. Watkins served as the recommending official and Williams served as the selection official. Watkins formed an interview panel of himself and three other managers. The appellant received a first interview with the hiring panel but was not one of the two candidates selected for a second interview with Williams. In or around May 2015, Tom Kiess was selected for the NDD Director position.

17-0124-GOV

On May 8, 2017, the agency announced a vacancy for the PD OfficeDirector and the appellant timely applied for the position. 17 applicants were certified as eligible for the position. LaGraffe and four other managers comprised the hiring panel and Watkins served as the selecting official. The appellant received a first interview with the hiring panel but was not one of the three candidates selected for a second interview with Watkins. In or around July 2017, Craig Sloan was selected for the PD Director position.

Procedural History

The appellant has had several prior IRA appeals before the Board that involve, *inter alia*, the communications he now alleges are the root cause of Williams' and Watkins' perception of him as a whistleblower. A brief discussion of those prior appeals and the outcomes thereof is therefore prudent to this discussion.

DC-1221-16-0168-W-1

On November 26, 2015, the appellant filed an IRA appeal alleging the agency retaliated against him for whistleblowing, which he alleged included his July 31, 2014 briefing to Williams regarding fielding of SABRS-3 on the USAF STP satellite, and his response to Williams' August 8, 2014 email regarding possible halting of SABRS-3 funding. *See Standley v. Department of Energy*, MSPB Docket No. DC-1221-16-0168-W-1 (January 13, 2016) (Initial Decision). The appellant alleged that, because of his protected disclosures and activity, in October 2014 the agency nonselected him for the NDD Director position and

canceled the vacancy. *Id.* On January 13, 2016, MSPB Administrative Judge Andrew Dunnaville issued an Initial Decision dismissing the appeal for lack of jurisdiction. *Id.* AJ Dunnaville found the appellant's alleged disclosures and activity were not protected under Sections (b)(8) or (b)(9), as the appellant's statements regarded a policy debate, did not involve a "substantial and specific danger to public health and safety," and, with respect to the August 2014 email, was not a refusal to obey an order that would require him to violate the law. *Id.*

The appellant filed a petition for review (PFR) of the AJ's decision to the Board and, on January 3, 2017, the Board denied the appellant's PFR. *Standley v. Department of Energy*, MSPB Docket No. DC-1221-16-0168-W-1, 2017 WL 56181 (January 3, 2017) (Final Order). The Board affirmed AJ Dunnaville's finding that the appellant failed to make a protected disclosure under Section (b)(8). *Id.* In so holding, the Board stated that the responsibility to maintain space-based nuclear detection "falls to the Secretary of Defense" rather than to the Department of Energy or the appellant's colleagues therein. *Id.* at ¶ 11. The Board noted that members of the U.S Strategic Command and the USAF opposed the SABRS-3 program and that SABRS was not the only way the Secretary of Defense could satisfy its obligation under Section 1065. *Id.* For these reasons, the Board held the appellant did not have a reasonable belief that he was disclosing a violation of law. *Id.* The Board further noted that "decision pertaining to continuing SABRS3 followed considerable interagency consultation and debate in the context of broader programmatic discussions" and that disagreement

with such fairly debatable policy decisions such as this are not protected under Section (b)(8). *Id.* at ¶ 13.

The appellant appealed the Board's decision to the U.S. Court of Appeals for the Federal Circuit (CAFC) and, on November 13, 2017, the court upheld the Board's decision finding the appellant did not make protected disclosures. *Standley v. Merit Systems Protection Board*, 715 Fed. App'x 998 (Fed. Cir. 2017). The court found that the appellant's allegations "amount to a policy dispute" and that a disinterested observer could not reasonably believe his allegations "evidenced either a violation of law or a danger to public health and safety." *Id.* at 1002. The court noted that the DOE is not statutorily responsible for the requirements in Section 1065 and that "[a]ny pronouncements or decisions made by members of the NDD and NNSA would amount to policy considerations taken to aid the Secretary of the DOD, with whom ultimate legal authority rests." *Id.* The court further echoed the Board's holding that Section 1065 did not "prescribe any particular means or technology by which space-based nuclear detection capabilities must be maintained." *Id.* It found that several interagency partners opposed the SABRS3 project and

> [a] disinterested observer could not reasonably conclude that recommending to an external agency how to exercise its discretion, particularly where the recommendation fit within the agency's available and considered options, is a violation of the law.

Id. The appellant petitioned for a writ of certiorari to the U.S. Supreme Court and, in May 2018, the Court

denied the writ. *Standley v. Merit Systems Protection Board*, 138 S.Ct. 2596 (May 29, 2018). Accordingly, the Board's decision finding the appellant's allegations do not constitute protected disclosures remains intact.

DC-1221-17-0091-W-1

On November 1, 2016, the appellant filed an IRA appeal alleging the agency retaliated against him for, in part, his September 23, 2015 letter to Gottemoeller, copied to OSC, when the agency nonselected him for promotion in May 2015 and he received a lowered performance rating in FY 2015. *See Standley v. Department of Energy*, MSPB Docket No. DC-1221-17-0091-W-1 (April 13, 2017) (Initial Decision). During case processing, AJ Mehring ruled that the Board does not have jurisdiction over the September 23, 2015 letter as a protected disclosure under Section (b)(8), as his statements therein constituted a policy dispute and he failed to establish a reasonable person would believe he was disclosing a violation of law. *See* DC-1221-17-0091-W-1 Appeal File, Tab 13 at 8. AJ Mehring also noted that the statements therein were very similar to those the Board held were not protected under (b)(8) for the same reasons. *Id.* AJ Mehring found, however, that the letter constituted protected activity under Section b(9)(C) because the appellant also sent the letter to OSC, and she assumed jurisdiction over that claim. *Id.* at 9.

On April 13, 2017, following a hearing, AJ Mehring dismissed the appeal for lack of jurisdiction, finding the appellant failed to exhaust his claim that he was retaliated against for protected activity under Section (b)(9)(C), i.e., that he was retaliated against

specifically for sending the letter to OSC rather than for the contents thereof. *See Standley v. Department of Energy*, MSPB Docket No. DC-1221-17-0091-W-1 (April 13, 2017) (Initial Decision). The appellant appealed AJ Mehring's decision to the CAFC and, on November 13, 2017, the court affirmed the decision. *See Standley v. Department of Energy*, 715 Fed. App'x 1008 (Fed. Cir. 2017).

DC-1221-18-0284-W-1

On January 29, 2018, the appellant filed an IRA appeal alleging, in relevant part, that the agency retaliated against him for forwarding his September 23, 2015 letter to OSC with respect to his FY 2015 and FY 2016 performance ratings. *See Standley v. Department of Energy*, MSPB Docket No. DC-1221-18-0284-W-1 (November 21, 2018) (Initial Decision). AJ Harrell found the appellant had now exhausted his claim with OSC that his letter constituted protected activity under Section (b)(9)(C) and that the Board had jurisdiction over his reprisal claim. *See* DC-1221-18-0284-W-1 Appeal File, Tab 18 at 10-11. On November 21, 2018, AJ Harrell issued an Initial Decision finding the agency retaliated against the appellant for his protected activity when Kiess issued him a lowered FY 2015 and FY 2016 performance rating. *See Standley v. Department of Energy*, MSPB Docket No. DC-1221-18-0284-W-1 (November 21, 2018) (Initial Decision). She ordered the agency to reconstruct the appellant's FY 2015 and FY 2016 ratings. *Id.*

On August 6, 2020, the appellant filed the instant appeal, alleging the agency nonselected him for vacancies 14-0127-GOV, 15-0086-GOV, and 17-0124-GOV in retaliation for perceived whistleblowing vis a vis his statements on July 31, 2014, August 8, 2014, March 26, 2015, and September 23, 2015. Specifically, the appellant alleged that, though prior adjudications determined these statements do not constitute actual protected disclosures or activity under Sections (b)(8) or (b)(9), Williams and Watkins *perceived* him to have made protected disclosures or activity with regard thereto. To support his claims, the appellant alleges Williams and Watkins believe Section 1065 governs the agency's actions with respect to the SABRS program and, therefore, they perceived him to have been disclosing a violation of law and refusing to obey an order that would require him to violate the law (August 8, 2014 email).

On November 10, 2020, I issued an Order Finding Jurisdiction, wherein I found the Board has jurisdiction over the appellant's claims. AF, Tab 14. The appellant did not request a hearing on his claims. Pursuant to my Close of Record Order, the parties timely submitted written evidence and argument regarding the appellant's claims. *See* AF, Tabs 32-37. The record is now ripe for review and I have considered all evidence of record in issuing this decision.

Applicable Law

The appellant has the burden of proving by a preponderance of the evidence[2] that the agency perceived him to have made a protected whistleblowing disclosure and/or engaged in protected whistleblowing activity, and that this perception was a contributing factor to the personnel actions at issue. A protected disclosure is one that the employee reasonably believes[3] evidences one or more of the categories of wrongdoing listed in 5 U.S.C. § 2302(b)(8), even if his belief is mistaken. *Mithen v. Department of Veterans Affairs*, 122 M.S.P.R. 489, ¶ 24 (2015), *aff'd*, 652 F. App'x 971 (Fed. Cir. 2016).

In cases of perceived whistleblowing, the analysis focuses on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8) or engaged in protected activity under 5 U.S.C. § 2302(b)(9). *King v. Department of the Army,* 116 M.S.P.R. 689, ¶ 8 (2011). The appellant must then prove the agency's perception was a contributing

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[2] A "preponderance of the evidence" is defined as that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. §1201.56(c)(2).

[3] A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the Government evidence one of the categories of wrongdoing listed in section 2302(b)(8)(A). Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999); Chavez v. Department of Veterans Affairs, 120 M.S.P.R. 285, ¶ 18 (2013).

factor in its decision to take or not take the personnel action at issue. If the appellant meets this burden of proof, corrective action must be ordered unless the agency shows, by clear and convincing evidence,[4] that it would have taken the same action even in the absence of a protected disclosure. 5 U.S.C. § 1221(e)(2); *Chavez*, 120 M.S.P.R. 285, ¶ 28 (2013).

The appellant failed to prove he was perceived as a whistleblower

I find the appellant failed to meet his burden of proving either Williams or Watkins perceived him as a whistleblower. The appellant alleges Williams and Watkins knew that Section 1065 legally required the agency to progress with SABRS, specifically the development of SABRS-3. He argues:

> The appellant...concluded that it was necessary to field the SABRS-3 satellite on the STPSAT-6 satellite to prevent foreseeable gaps in the capability that would cause it to fall out of compliance with § 1065. After communicating this analysis to Williams and Watkins, they too perceived that fielding SABRS-3 on STPSAT-6 would prevent a performance gap and loss of compliance with PL 110-181 and that there was no other practical way to do so.

AF, Tab 32 at 25. The appellant thus alleges that Williams' and Watkins' belief that Section 1065

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[4] "Clear and convincing evidence" is defined as the 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(d). It is a higher standard than "preponderance of the evidence." Id.

applied to the DOE proves both Williams and Watkins perceived him to be a whistleblower with respect to the alleged disclosures and actions:

Even though the MSPB and CAFC later ruled that Section 1065 does not apply to the DOE, Williams' and Watkins perception that it did apply means that the Appellant's disclosures and activity related to Section 1065 are protected by 5 U.S. Code § 2302(b)(8) and § 2302 (b)(9)(D). *Id.*

The appellant has failed to support his argument by a preponderance of the evidence. First and foremost, the appellant fails to provide any reference to the record supporting his conclusion that Williams and Watkins agreed with his conclusions that SABRS-3 was required in order to comply with the law. I find the record does not reflect that conclusion. The appellant points to the agency's yearly budget requests, which repeatedly reference Section 1065 as the justification for its request for funding the SABRS project. AF, Tab 32 at 26. Even if Williams and Watkins believed Section 1065 was the basis for the agency's funding of the SABRS-3 program, the appellant has failed to establish that either Williams or Watkins believed failure to fund SABRS-3 would violate that provision. Citation to a law as support for a budget item does not equate to that law requiring the program's existence. Rather, Williams' August 8, 2014 email to the appellant suggests otherwise, in that he reiterates to the appellant that the DOE "holds no requirements" and that it was DOD's responsibility to ensure various aspects of the SABRS-3 project were both funded and viable.

The appellant also pointed to statements from other agency and external government officials suggesting they believed funding SABRS-3 was required to comply with SABRS-3. For example, the appellant pointed to Harrington's February 26, 2013 statement to the HASC that budget cuts to the NDD R&D program would cause it to miss its delivery milestone, resulting in the carrier satellite being launched without the SABRS-3 sensors and a degradation of U.S. nuclear detonation detection capability required by Section 1065. AF, Tab 32 at 26. He also pointed to IPC Member Mathew Heavner's deposition testimony that that the IPC decided "the United States Government, including the Department of Energy, would continue funding and implementing the SABRS-3 satellite as part of the Administration's compliance with Section 1065. *Id.*at 27; AF, Tab 1 at 57. The appellant has failed, however, to establish that these opinions reflected Williams' or Watkins' perception of the appellant's actions as whistleblowing.

The appellant's arguments gloss over the central requirement of the perceived whistleblower claim. The crux of a perceived whistleblower claim is not that the agency perceived the appellant to have alleged a violation of a law. Rather, particularly as here where the alleged disclosures were not actually protected, the appellant must show the observer believed it was protected, i.e., that the observer perceived it as a reasonably-believed allegation that the law was violated. *See Demery v. Department of the Army*, 809 Fed. App'x 892, 898 (Fed. Cir. 2020) (even if the alleged disclosure was later determined to be unprotected, the appellant may still have a

whistleblower claim "if the agency officials nevertheless perceived her as having engaged in protected activity"); *Montgomery v. Merit Systems Protection Board*, 382 Fed. App'x 942, 947 (Fed. Cir. 2010) (agency officials did not perceive appellant as a whistleblower where they did not concede the legitimacy of the allegations and perceived them as frivolous).

Williams' and Watkins' knowledge of the appellant's allegations alone does not equate to their perception that the allegations disclosed actual wrongdoing, i.e., their perception of protected disclosures. *Id.* In *Montgomery,* the Federal Circuit held that an appellant was not perceived as a whistleblower by supervisors who acknowledged her allegations of wrongdoing against them and cautioned her in writing about those allegations, because they believed her allegations were frivolous. 382 Fed. App'x at 947. Given that perception, the court stated it would be "unreasonable" for the agency to perceive the appellant as a whistleblower and retaliate against her, absent specific evidence otherwise. *Id.* Coverage therefore extends to an appellant who is perceived to have made *protected* disclosures rather than unprotected allegations.[5]

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[5] Though the Federal Circuit in Montgomery appears to suggest the perceived whistleblower doctrine could apply to reprisals for frivolous, unprotected allegations ("[a]ccordingly, absent specific evidence that OIG retaliated against Ms. Montgomery for her frivolous allegations, the perceived whistleblower doctrine does not apply"), the court cited as support for this statement *Special Counsel v. Spears*, 75 M.S.P.R. 639, 654-55 (1997) and specifically referenced the Board's holding therein that "the alleged disclosure must at least be reasonable for the perceived whistleblower doctrine to apply."

The appellant acknowledges that both the Board and the Federal Circuit ruled that the appellant did

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382 Fed. App'x 942, 947. Furthermore, the Board in *Spears* specifically rejected the argument that it need not find "whether the disclosures could reasonably be believed to evidence matters protected under the statute." Id. at 653. The Board stated:

> Where the individual making the disclosure cannot be determined, it is still possible, and necessary, to determine whether a hypothetical observer could reasonably believe that the information is evidence of agency wrongdoing covered by the statute. Absent such a reasonable belief, the statute does not apply.

Id. at 653. The Board then discussed several of its prior perceived whistleblower cases, all of which involved underlying disclosures that either did or were reasonably believed by the recipient to have exposed covered wrongdoing. Id. at 653-54; citing *Mausser v. Department of the Army*, 63 M.S.P.R 41, 44 (1994); *Special Counsel v. Department of the Interior*, 68 M.S.P.R. 19, 23 (1995); *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 581-82 (1991). I find the Montgomery court's reliance on Spears is affirmative of the Board's long-held interpretation that the perceived whistleblower doctrine applies only to circumstances in which the agency perceived a protected disclosure was made, rather than a perception of unprotected allegations. *Id.* This is further consistent with the Federal Circuit's more recent decision in *Demery*, wherein the court referenced *Montgomery* and held that an appellant whose disclosure was later found to be unprotected could still have a claim if the agency nevertheless perceived her as having made such a protected disclosure. 809 Fed. App'x at 898. Accordingly, I find the Montgomery case does not stand for the proposition that WPA coverage extends to cases wherein the recipient does not perceive the appellant to have made "disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8)." *King*, 116 M.S.P.R. at ¶ 8.

not have a reasonable belief that he was disclosing a violation of law, i.e. that his statements were not protected disclosures. Accordingly, it is simply unreasonable for the appellant to suggest that Williams or Watkins held such a belief absent any evidence substantiating that suggestion. I find no such evidence in the record. The appellant has failed to provide preponderant evidence that Williams or Watkins perceived his statements as anything other than policy disagreements over the direction of the SABRS program. Regarding the appellant's July 2014 briefing, it is clear the briefing discussed the vehicle for the sensor payload as the necessary "gap-filler" for Section 1065 compliance. AF, Tab 32 at 32. The briefing explained the STP would provide the "gap-filler host" satellite that would house the SABRS-3 sensors. *Id.* It is therefore apparent that the concern was not over whether DOE would meet its production target for the payload sensors, but whether the DOD would meet its responsibility to field a satellite to carry those sensors into orbit. I find, therefore, there is no reason for Williams or Watkins to have perceived the appellant to have been reasonably alleging any violation of law with his comments during this briefing, nor has the appellant presented any such evidence.

Likewise, it is unreasonable to conclude that Williams perceived his August 8, 2014 email about the STP host to have directed the appellant to violate the law, or that the appellant's response thereto was a refusal to violate the law on his behalf. In his email to the appellant, Williams expresses a clear distinction between the agency's responsibility to produce SABRS-3 sensors ("We provide the payload.

Period.") and DOD's responsibility to field a satellite capable of housing those sensors ("If DoD can't get it's act together to support the existing requirements, it's not ours to fix"). His email stresses that DOE must stay out of DOD's responsibilities so that it does not get "stuck" having to commit funding to the issue for years in the future. AF, Tab 1 at 87. He further states that he is deciding "whether to stop SABRS 3 funding and redirect." *Id.*

No reasonable person could perceive that this statement, given the context of the email, was a directive to violate the law by stopping SABRS-3 work, nor has the appellant provided sufficient evidence that Williams otherwise perceived or intended his email to have that effect. The appellant alleges Williams' email "served as tacit approval to the Appellant for him to [cancel SABRS-3] while at the same time intimidating the Appellant into a course of action that Wiliams could later disavow." AF, Tab 32 at 37. He further alleges Williams knew DOD had not "gotten its act together" and that DOE would be required to "fix" it. *Id.* at 52. He concludes "Williams just said these things because he was frustrated and trying to get the Appellant to do what he would not, which was to stop spending money on SABRS-3 so he could 'redirect' the funds to [a different program]." *Id.*

I find the appellant's argument convoluted, illogical, and simply not supported by the record. It is evident from his email that Williams believed the program was in jeopardy due to DOD's delays and, as discussed above, Williams believed the responsibility for successfully launching the SABRS-3 host rested with DOD. The appellant himself argues that, at the

time of this email, Williams expected the IPC to stop SABRS-3 funding because he did not expect "a credible plan" would emerge to spend those funds given DOD's delays. AF, Tab 32 at 52. He further states that Williams believed the DOD had "given up on SABRS" and, therefore, the funds for SABRS-3 could be redirected. *Id.* at 54. There is simply no evidence that Williams perceived himself to be setting the appellant up to take illegal action by simply expressing his intention to redirect funds from a program of questionable viability. The record likewise does not support the appellant's claim that Williams perceived the appellant's response as a refusal to obey any order that would require violation of law. In his response, the appellant *agrees* with Williams regarding the funding "kluge" and states he would execute Williams' decision to stop funding SABRS-3 if and when it is made ("We will stop when you decide"). The appellant makes no refusal and does not indicate to Williams that he believes he has been directed to violate the law. Accordingly, I find it unreasonable to conclude that Williams perceived this response to have done so.

Regarding the appellant's March 2015 edits to the HASC briefing, I find the appellant failed to prove either Williams or Watkins perceived the edits as whistleblowing. The appellant requested that the USAF include reference in the brief to Section 1065 as requiring USNDS to be maintained in the future, which the USAF did. I note the appellant described the briefing as a joint document prepared by the Secretary of Defense "in coordination with the Secretary of Energy and the Secretary of State." AF, Tab 32 at 38. It is therefore entirely reasonable to

reference Section 1065's basic requirement *for the DOD* in the briefing. The appellant failed to present evidence indicating either Williams or Watkins perceived him to have disclosed a violation of law with this simple edit. In fact, he failed to present evidence that either had had any reaction to the appellant's edit at all. Rather, the email was sent as an "FYSA" to the appellant, who acknowledges Williams forwarded the email "without expressing an objection" or any sign of surprise. AF, Tab 32 at 39, 43. The appellant argues only that Williams statement that Creedon may want to hold off on the brief until after the IPC evidenced his expectation that the IPC would stop SABRS-3 funding, despite "knowing" the appellant "would not stop advocating for SABRS-3 as the way to comply with Section 1065 unless given a direct order." AF, Tab 32 at 39. The appellant's arguments again convolute the gravamen of a perceived whistleblower claim and fails to meet his burden of proof.

Regarding the appellant's September 23, 2015 letter, his statements have been previously adjudicated as unprotected policy discussion. Accordingly, it would be unreasonable to find that Williams or Watkins perceived the appellant made a protected disclosure absent particular evidence establishing that perception. Again, the appellant has failed to present such evidence. Williams' response to Harrington specifically refuted the appellant's allegations. It states that, while the appellant raised "what he believes" to be serious issues, Williams responds unequivocally that "in no way has DNN R&D or myself obstructed implementation of US Law." AF, Tab 34 at 26. He reiterates that, "[i]n fact,

we (NNSA) has increased funding for this important area and have driven the interagency to keep this a priority-to met US Law." *Id.* Williams similarly testified in a prior Board proceeding "I felt that the content was incorrect that that was neither here nor there." AF, Tab 32 at 58.

The appellant has failed to present any evidence that either Williams or Watkins behaved in a manner that suggested they gave the appellant's allegations credence. *C.f., e.g., Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 581-82 (1991) (manager perceived appellant as a whistleblower where there was evidence that he believed the disclosure would be embarrassing and possibly evidence mismanagement and abuse of discretion). Rather, he alleges more generally that Williams was negatively affected by the letter. The appellant presents evidence that the appellant was questioned by Harrington regarding the contents of the letter and, after speaking with her, Harrington directed him to call all those copied on the letter to "explain the content." AF, Tab 32 at 57. The appellant further alleges that Harrington fielded questions about the letter from Creedon after a January 2016 meeting on another topic, and said she was looking into the matter. *Id.* at 57; AF, Tab 35 at 10. He also points to Kiess's sworn testimony, provided during an earlier Board proceeding, regarding Williams' reaction to the letter:

> I think [Williams] was taken by surprise. I think we had some professional differences of opinion on issues we were debating at the time. I think [Williams] was surprised by the disclosure, not expecting it and I think he was

> seeing what impact...not sure how the people who received the letter were going to respond and I think he adopted a sort of wait and see attitude....I think he was perhaps a little surprised, maybe a little disappointed that our differences on issues resulted in that...I think [Williams] just took stock of it and kept on going, managing the office.

AF, Tab 34 at 50. The appellant concludes that "Williams had to actively respond to the appellant's September 23, 2015 letter and that it involved high level meetings that required preparation. Reacting to the Appellant's disclosure was inconvenient, and very likely included some embarrassment." AF, Tab 32 at 58. He states that his letter "forced Williams to do extra work and spend time explaining his view of those matters to his supervisors." *Id.*at 60.

I find this evidence corroborates Williams's expressed disagreement with the appellant's assertions rather than his perception of their validity. Nothing about Williams' actions in this regard supports the appellant's burden of proving Williams perceived the appellant to have had a reasonable belief that he was disclosing a violation of law.[6] Nor

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[6] The appellant points to AJ Harrell's Initial Decision finding, in part, that Williams and Kiess had a "strong motive" to retaliate against the appellant as a result of the September 23, 2015 letter when Kiess issued him a lower FY 2015 performance evaluation, with which Williams concurred. See *Vaughn v. Department of Energy*, MSPB Docket No. DC-1221-18-0284-W-1 (November 21, 2018) (Initial Decision). I note that this finding was made specifically with respect to the appellant's protected activity under 5 U.S.C. 2302 § (b)(9)(C), in that he submitted a copy of the letter to the OSC. AJ Harrell did not make findings

does the record otherwise contain such support. The appellant speculates that Williams left the agency the year after his September 23, 2015, a move he alleges "may have been motivated by a desire to escape the SABRS-3 episode." AF, Tab 32 at 60. The appellant presents nothing but conjecture to support that allegation. I find no indication in the record that the letter either caused Williams to depart the agency, or that his departure was otherwise negatively prompted by the letter. In fact, other than the appellant's argument that Williams had to do "extra work" to explain the appellant's allegations to the letter's recipients, the appellant presents no evidence of any negative effect his letter had on Williams. As the appellant points out, Williams left the agency to take a job with the Department of the Defense (DOD). I note that that Director of Global Operations for the DOD U.S. Strategic Command was copied on the September 23, 2015 letter. AF, Tab 1 at 68. I find the appellant allegation are speculative, conclusory, and generally unsupported by the record.

I note that the appellant did not put forth particular evidence and argument regarding Watkins' alleged perception of him as a whistleblower with respect to any of the alleged whistleblowing in this appeal. He states that "Williams' perceptions are much more important that [sic] Watkins' because Williams was the ADA" during the first two nonselections at issue. AF, Tab 36 at 32. I find the appellant failed to present preponderant evidence that Watkins perceived him as a whistleblower with

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as to whether Williams perceived the appellant as having made protected disclosures within that letter. *Id.*

respect to the allegations in this appeal. In support of his claim, the appellant argues only that Watkins was aware of the appellant's alleged whistleblower disclosures and activity but registered no disagreement with any of them. AF, Tab 36 at 32. Regarding the September 23, 2015 letter, the appellant alleges in a perfunctory manner that "Watkins was also involved, and it likely affected him too." AF, Tab 32 at 60. I note, however, that the appellant did not copy Watkins on the letter and the letter did not address or dispute his actions with any substance. AF, Tab 35 at 10. Nevertheless, Watkins' knowledge of the statements and actions at issue does not itself establish that he perceived the appellant to have been a whistleblower. Rather, as discussed in detail above, the appellant must establish Watkins perceived the appellant to have been disclosing a violation of law or refusing to obey an order that would violate a law. The appellant has failed to do so. I find the appellant has simply failed to support his allegations with respect to both Williams and Watkins.

As the appellant has failed to meet his burden of proving the agency perceived him as a whistleblower with respect to the statements and actions at issue, I need not address whether those statements and actions contributed to the nonselections at issue, or whether the agency would have nonselected him regardless of his statements and actions.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/

Monique Binswanger
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **July 6, 2021**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections

to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

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

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the

record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date

you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board

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

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

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

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

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an

action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

http://www.uscourts.gov/Court_Locator/Court Websites.aspx.

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

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

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

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

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

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

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you

must submit your petition to the court at the following address:

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

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

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

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

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx¶