

Appendix A:

- Order Denying Rehearing (June 5, 2025)

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

CAMERRON L. BRADBERRY,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1112

Petition for review of the Merit Systems Protection
Board in No. DE-1221-23-0108-W-1.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA,
TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and
STARK, *Circuit Judges*.¹

PER CURIAM.

O R D E R

Camerron Lewis Bradberry filed a petition for rehearing en banc. The petition was referred to the panel that

¹ Circuit Judge Newman did not participate.

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heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

June 5, 2025

Date

Appendix B:

- Federal Circuit Decision (April 10, 2025)

**United States Court of Appeals
for the Federal Circuit**

CAMERRON L. BRADBERRY,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1112

Petition for review of the Merit Systems Protection Board in
No. DE-1221-23-0108-W-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

April 10, 2025
Date


Jarrett B. Perlow
Clerk of Court

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

CAMERRON L. BRADBERRY,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2025-1112

Petition for review of the Merit Systems Protection
Board in No. DE-1221-23-0108-W-1.

Decided: April 10, 2025

CAMERRON LEWIS BRADBERRY, Lakewood, CO, pro se.

WILLIAM PORTER RAYEL, Commercial Litigation
Branch, Civil Division, United States Department of
Justice, Washington, DC, for respondent. Also represent-
ed by REGINALD THOMAS BLADES, JR., BRIAN M. BOYNTON,
PATRICIA M. MCCARTHY.

Before DYK, REYNA, and STARK, *Circuit Judges*.

Appendix C:

- MSPB Final Order (Aug. 27, 2024)

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

CAMERRON L. BRADBERRY,
Appellant,

DOCKET NUMBER
DE-1221-23-0108-W-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: August 27, 2024

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Camerron L. Bradberry, Lakewood, Colorado, pro se.

Larry Pruitt, Esquire, Joint Base Andrews, Maryland, for the agency.

BEFORE

Cathy A. Harris, Chairman
Raymond A. Limon, Vice Chairman
Henry J. Kerner, Member*

*Member Kerner recused himself and did not participate in the adjudication
of this appeal.

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which denied his request for corrective action in his individual right of action appeal. On petition for review, the appellant argues, among other things, that there was a plot to retaliate against him, and that the findings related to his conduct and

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

performance were based on hearsay and personal opinions.² Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

² The appellant also claimed that he proved his claim of whistleblower reprisal, and that the administrative judge illegally denied him corrective action in order to protect his reputation and career. Petition for Review File, Tab 1 at 5-6. The appellant's contention is not based on any evidence of the record. If an appellant proves that his protected disclosure was a contributing factor in a personnel action taken against him, corrective action must be granted unless the agency can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *Smith v. Department of the Army*, 2022 MSPB 4, ¶ 13; see 5 U.S.C. § 1221(e). The administrative judge properly applied the whistleblower protection analytical framework, and found that, although the appellant proved that he made a protected disclosure that was a contributing factor in his termination, the agency proved by clear and convincing evidence that it would have terminated the appellant in the absence of his whistleblowing. Initial Appeal File, Tab 42, Initial Decision at 27. Accordingly, the appellant is not entitled to corrective action, and the appellant's accusations are without merit. Furthermore, to the extent that the appellant asserts that the administrative judge acted with prejudice or bias, he has produced no evidence that would overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980); see *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (explaining that an administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence a deep-seated favoritism or antagonism).

NOTICE OF APPEAL RIGHTS³

You may obtain review of this final decision. 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 final decision, 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 of issuance of this decision. 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:

³ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

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 you receive** this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days after your representative receives** this decision. 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/CourtWebsites.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 you receive** this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days after your representative receives** this decision.

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 either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁴ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 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.

⁴ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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.

Gina K. Grippando

FOR THE BOARD:

Gina K. Grippando
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Service Camerron Bradberry
Served on email address registered with MSPB

Agency Representative

Electronic Service Chief Law
Served on email address registered with MSPB

Agency Representative

Electronic Service Larry Pruitt
Served on email address registered with MSPB

08/27/2024

(Date)

John Hayes

John Hayes

Appendix D:

- MSPB Initial Decision (Aug. 10, 2023)

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE**

CAMERRON L. BRADBERRY,
Appellant,

DOCKET NUMBER
DE-1221-23-0108-W-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: August 10, 2023

Camerron L. Bradberry, Lakewood, Colorado, pro se.

Chief Labor Law, Joint Base Andrews, Maryland, for the agency.

Larry Pruitt, Joint Base Andrews, Maryland, for the agency.

BEFORE

Glen D. Williams
Administrative Judge

INITIAL DECISION

INTRODUCTION

On January 23, 2023, the appellant timely filed an individual right of action (IRA) appeal alleging reprisal for whistleblowing when he was terminated from Federal service during his trial period. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. § 1221(e). The hearing requested by the appellant was held on May 2, 2023. IAF, Tab 38 (Hearing Recording (HR)).

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

ANALYSIS AND FINDINGS

Background

On September 15, 2019, the appellant received a conditional appointment with the agency in the excepted service position of Human Resources Assistant (Military), GS-0203-06, working for the Promotion Board Eligibility (PBE), Headquarters Air Reserve Personnel Center (HQ ARPC), at Buckley Air Force Base (now Space Force Base), Colorado. IAF, Tab 24 at 22.¹ The Notification of Personnel Action, Standard Form (SF) 50, memorializing his appointment stated, "Appointment is subject to completion of a two year trial period beginning 16-SEP-2019." *Id.*

On February 5, 2020, Major Ruben Hernandez, Chief, Promotion Eligibility Division, issued a Notice of Termination During Trial Period to the appellant, terminating him for alleged postappointment conduct reasons. *Id.* at 14-16.

The appellant filed a Complaint of Prohibited Personnel Practice or Other Prohibited Activity, OSC Form 14, on or about February 7, 2020. IAF, Tabs 1 at 3, 8 at 4-30.² The complaint was assigned OSC Case File No. MA-20-001093. IAF, Tab 1 at 14.

¹ Immediately prior to this appointment, the appellant was employed by the Department of Veterans Affairs (DVA) in the excepted service position of Contact Representative, GS-0962-05, in Denver, Colorado. IAF, Tab 12 at 32. There was no break in service between the DVA and the Air Force. *Id.*

² I note that the appellant alleged in his OSC complaint that he filed a grievance under a collective bargaining agreement (CBA) on February 5, 2020. IAF, Tab 8 at 9. Under 5 U.S.C. § 7121(g), an employee who is covered by a CBA and who believes that an agency retaliated against him for whistleblowing may elect only one of the following remedies: (1) An appeal to the Board under 5 U.S.C. § 7701; (2) a grievance under the applicable negotiated grievance procedure; or (3) a request for corrective action with OSC, followed, if the employee chooses, with an IRA appeal to the Board if OSC denies corrective action. *Johnson v. Department of Veterans Affairs*, 121 M.S.P.R. 695, ¶ 6 (2014), *aff'd*, 611 F. App'x 496 (10th Cir. 2015). The remedy first sought by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in other fora. *Sherman v. Department of Homeland Security*, 122 M.S.P.R. 644,

The appellant requested review of the termination and on February 12, 2020, Colonel William Bridgemohan, Director, Selection Board Secretariat, issued a Review of Termination During Trial Period sustaining the termination effective February 13, 2020. IAF, Tabs 1 at 11, 24 at 10.

On January 24, 2023, OSC issued its letter terminating its investigation and providing the appellant's appeal rights to the Board. IAF, Tab 1 at 14.

On January 23 or 24, 2023,³ the appellant timely filed his IRA appeal with the Board. IAF, Tab 1; 5 U.S.C. § 1214(a)(3).

On March 7, 2023, the Board issued an order finding jurisdiction. IAF, Tab 21. Specifically, the Board found that the appellant nonfrivolously alleged that he made a protected disclosure in a January 15, 2020 email concerning an incident with a coworker, Staff Sergeant Jacob Brown, NCOIC, Officer Promotion Eligibility, and that his January 15, 2020 disclosure was a contributing factor in the agency's decision to terminate him during his trial period. *Id.*

The record on the merits of this appeal closed on May 2, 2023, at the conclusion of the hearing. HR; IAF, Tab 37 at 12.

¶ 12 (2015). However, probationary employees and employees serving trial periods have no right to grieve under a negotiated procedure. *McCarty v. Environmental Protection Agency*, 105 M.S.P.R. 74, ¶ 11 (2007) (because the appellant here was serving in an excepted service appointment and the appointment was subject to a trial period, she was precluded from filing a grievance); *Scalera v. Department of the Navy*, 102 M.S.P.R. 43, ¶ 10 (2006). Because the appellant was serving an excepted service trial period, any grievance filed by the appellant concerning his termination was not a valid election and does not bar Board jurisdiction over the IRA appeal. *Scalera*, 102 M.S.P.R. 43, ¶ 9.

³ The petition indicates that it was received by facsimile on January 23, 2023. IAF, Tab 1. However, the petition indicates it was signed on January 24, 2023, which is the same date as the OSC closure letter. *Id.* at 6, 14. The petition states that the termination letter was dated January 23, 2023. *Id.* at 3.

Applicable law and burdens of proof

The Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16, as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, prohibits an agency from taking a personnel action because of a whistleblowing disclosure or activity. 5 U.S.C. § 2302(b)(8), (9); *Hudson v. Department of Veterans Affairs*, 104 M.S.P.R. 283, ¶ 10 (2006) (citation omitted). IRA appeals brought under the WPA operate in a burden-shifting framework. *Miller v. Department of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016). At the merits stage of the appeal, the appellant must prove by preponderant evidence that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), or engaged in activity protected by 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D), and that such disclosure or activity was a contributing factor in a personnel action taken against him. *Smith v. Department of the Army*, 2022 M.S.P.R. 4, ¶ 13 (citing 5 U.S.C. § 1221(e)(1) and *Lu v. Department of Homeland Security*, 122 M.S.P.R. 335, ¶ 7 (2015)); *Whitmore v. Department of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). If the appellant meets that burden, the agency is given an opportunity to prove by clear and convincing evidence⁴ that it would have taken the same personnel action absent the protected disclosure or activity. *Id.* (citing 5 U.S.C. § 1221(e)(1)-(2) and *Lu*, 122 M.S.P.R. at ¶ 7); *Whitmore*, 680 F.3d at 1367-68.

Protected disclosures/activity

Protected whistleblowing occurs when an appellant makes a disclosure that he reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial

⁴ “Clear and convincing evidence” is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(e). It is a higher standard than “preponderance of the evidence” as defined in 5 C.F.R. § 1201.4(q). *Id.*

and specific danger to public health and safety. *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 5 (2013); *see* 5 U.S.C. § 2302(b)(8). To establish that an appellant made a protected disclosure under 5 U.S.C. § 2302(b)(8), an appellant need not prove that the matter disclosed actually established one of the categories of wrongdoing listed under section 2302(b)(8)(A). *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015). Rather, he must show that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Salerno*, 123 M.S.P.R. 230, ¶ 6. The disclosures must be specific and detailed, not vague allegations of wrongdoing. *Id.*; *see El v. Department of Commerce*, 123 M.S.P.R. 76, ¶ 6 (2015) (stating that vague, conclusory, unsupported, and pro forma allegations of alleged wrongdoing do not meet the nonfrivolous pleading standard needed to establish the Board's jurisdiction over an IRA appeal), *aff'd*, 663 F. App'x 921 (Fed. Cir. 2016).

In determining whether a disclosure evidenced a substantial and specific danger to public health or safety, it is relevant for the Board to consider factors such as (1) the likelihood of harm resulting from the danger, (2) the imminence of the potential harm, and (3) the nature of the potential harm. *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 14 (2011) (citing *Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008)). In *Chambers*, the Federal Circuit explained that "the outcomes of past cases ... have depended upon whether a substantial, specific harm was identified, and whether the allegations or evidence supported a finding that the harm had already been realized or was likely to result in the reasonably foreseeable future." *Chambers*, 602 F.3d at 1376. "[S]pecific allegations or evidence either of actual past harm or of detailed circumstances giving rise to a likelihood of impending harm" are

needed to demonstrate that a disclosure evidences a substantial and specific danger to public health or safety. *Id.*; see *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 13 (2014). The potential harm disclosed does not need to be widespread. See *Groseclose v. Department of the Navy*, 111 M.S.P.R. 194, ¶ 25 (2009) (the appellant disclosed that a coworker may have snapped and had a knife); see also *Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996) (a danger may be substantial and specific even though the perceived danger was to a limited number of government personnel and not to the general public at large).

For purposes of an IRA appeal, “protected activity” includes: (A) the exercise of any appeal, complaint or grievance right granted by any law, rule, or regulation with regard to remedying a violation of section 2302(b)(8), discussed immediately above; (B) testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint or grievance right granted by any law, rule, or regulation; (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or (D) refusing to obey an order that would require an individual to violate a law. 5 U.S.C. §§ 2302(b)(9), 1221(a); see *Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶¶ 6-7 (2014).

As to the January 15, 2020 email to Senior Master Sergeant Dawn Couey, Superintendent, Promotion Boards, from the appellant, this email concerns an incident between the appellant and Brown on that same date that arose out of the appellant working a ticket that it is alleged he was instructed by Hernandez not to work and that Brown was tasked with working. The appellant stated in pertinent part:

After I had asked him a question about a MyPers ticket he charged my cubicle and blocked my entry/exit and started yelling at me demanding to know why I asked my management if the information he provide me was correct. He began using profanity saying “Your fucking irritating me”. After I asked told him “Jacob you are too

emotionally involved in this matter let's take a break and come back to this" I backed my chair further away from him which SSgt Brown then moved closed towards me and began waving his hands around in my face demanding to know why I asked for confirmation form you when he just gave me his answer.

IAF, Tab 10 at 13 (spelling and grammar original).

The Board previously found that this was a nonfrivolous allegation that the appellant disclosed a violation of law, rule or regulation. IAF, Tab 21 at 11. This finding was based in part on the allegation that Brown's conduct violated a policy concerning workplace comportment. The email may also be construed as a disclosure of a physical threat by Brown, which may be an allegation of abuse of authority.

In making a disclosure involving a violation of law, rule, or regulation, the inquiry ends upon a determination that the appellant disclosed a violation of law, rule, or regulation; there is no further inquiry into the type of "fraud, waste or abuse" involved. There is no exception for a disclosure of a trivial or de minimis violation of law, rule or regulation. *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 9 (2008); *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 11 (2000); *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 18 (2008). In general, a protected disclosure must identify a specific law, rule, or regulation that was violated. *Carvalho v. Department of Justice*, MSPB Docket No. SF-1221-15-0208-W-2, Final Order at ¶ 7 (Jan. 10, 2023)⁵ (citing *Langer v. Department of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001)). "Nevertheless, this requirement does not necessitate identifying a statutory or regulatory provision by title or number when the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule, or regulation." *Id.* The Board has suggested

⁵ This Order is nonprecedential; however, an administrative judge may cite to and follow a Board nonprecedential decision if the judge finds its analysis persuasive. I find this decision to be persuasive.

that a “rule” from “any violation of any law, rule, or regulation” includes established agency policy. *See, e.g., Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 25 (2013).

“[A]n abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” *Croft v. Department of Commerce*, MSPB Docket No. SF-1221-16-0254-W-1, Final Order at ¶ 14 (Feb. 23, 2023) (citing *Mithen v. Department of Veterans Affairs*, 122 M.S.P.R. 489, ¶ 27 (2015), *aff’d per curiam*, 652 F. App’x 971 (Fed. Cir. 2016)); *D’Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232-33 (1993), *rev’d on other grounds*, *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998), *overruled in part on other grounds by Ganski*, 86 M.S.P.R. 32. Harassment or intimidation of employees may constitute an abuse of authority. *Id.* (citing *Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 11 (2011)). There is no de minimis standard for abuse of authority. *Fabrick v. Department of the Treasury*, MSPB Docket No. CH-1221-15-0703-W-1, Final Order at ¶ 22 (Jan. 6, 2017) (citing *D’Elia*, 60 M.S.P.R. at 232).

An abuse of authority involving a threat of violence or harassment is most often found in situations where the alleged perpetrator had management authority over the appellant. *Id.* (Board has found that supervisory bullying and intimidation may be abuse of authority); *Murphy v. Department of the Treasury*, 86 M.S.P.R. 131, ¶ 7 (2000) (holding that a supervisor who engaged in “threats, swearing, [and] physical acts of aggression” to intimidate the appellant and other staff members into following the supervisor’s requests without question was abusing his authority); *Special Counsel v. Costello*, 75 M.S.P.R. 562, 580-83 (1997), *rev’d on other grounds*, 182 F.3d 1372 (Fed. Cir. 1999); *Heining v. General Services Administration*, 61 M.S.P.R. 539, 550-51 (1994). However, the definition of abuse of authority does not require that the perpetrator have authority over the appellant, and in *Heining*, for example, the Board held that

allegations of intimidation by auditors over other auditors was a nonfrivolous allegation of abuse of authority. 61 M.S.P.R. at 548-49.

The appellant testified concerning his poor working relationship with Brown. HR, appellant. He also denied that Hernandez had instructed him not to work the ticket at issue. *Id.* He did not add additional information regarding the January 15, 2020 incident with Brown, although he did allege that Couey attempted to cover up what Brown did. *Id.*

Couey testified she was present during the January 15, 2020 incident between the appellant and Brown. HR, Couey. According to Couey, the incident started when the appellant approached her asking questions about a ticket that the appellant was working after having been instructed not to work regarding an incorrect promotion due to its complexity. Brown overheard the appellant and he approached the appellant and Couey, telling the appellant he was already told not to work the ticket and that he was getting very annoyed with the appellant for doing things he was told specifically not to do. "And it kind of escalated into a verbal argument between the two of them, which I shut down pretty quick because it's an open cubicle area." *Id.* She then went with Brown to another room. She concluded that Brown did not assault the appellant, make threatening comments or make threatening gestures. *Id.*

Couey's testimony was consistent with her email to Hernandez on January 16, 2020, stating:

Cam sent me this yesterday after I spoke with him. SSgt Brown did not curse at Cam in anyway shape or form and SSgt Brown was standing outside of Cams cubicle, actually closer to my desk then Cams [sic]. He did not make any threatening comments or gestures. SSgt Brown was using the "knife hand". Cam first claimed that SSgt Brown physically assaulted him, then that changed to assault, then to feeling intimidated. Cam also changed the statement of what SSgt Brown said from "You are fucking annoying" to what he stated below. I also addressed with Cam that how he talks to people is an issue. Cam first asked me about the MyPers ticket, and I stated that sometimes DORs are correct in MyPers and to ask SSgt Brown how

he should reply to the ticket since it was already correct. Cam went to SSgt Brown and said "You sent me a MyPers ticket that was already done," etc. Then Cam came back to my desk and asked me about the ticket again and that is when SSgt Brown came. Over. [sic]

I intervened in 30 secs and separated them. I spoke with SSgt Brown about how he talks to and deals with Cam, to avoid these types of situations. Please let me know if you have any questions.

IAF, Tab 36 at 18.

Brown did not testify at the hearing. In an email set on January 15, 2020, in which he described their interaction as follows:

He turned around and laughed as though I should have processed the ticket before sending him the ticket to process. Directly following, he proceeded to ask SMSgt Couey the exact same questions and asked her what he should do with the ticket. I walked over and told him not to come to me if he was just going to disregard what I explained to him. He is wasting my time and becoming aggressive about the direction that I have been given. I am not stepping out of my lane. I assigned him the ticket and provided direction the same way that I would have if it was any other team member.

IAF, Tab 36 at 14.

I find that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that Brown's actions evidenced a violation of law, rule, or regulation, or an abuse of authority. Accordingly, the January 15, 2020 email to Couey was a protected disclosure under 5 U.S.C. § 2302(b)(8)(A).

Contributing factor

A protected activity is a contributing factor if it affects an agency's decision to threaten, propose, take, or fail to take a personnel action. *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 14 (2012); *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006); see 5 C.F.R. § 1209.4(c). To prove that a disclosure was a contributing factor in a personnel action, the appellant only need demonstrate that the fact of, or the

content of, the protected disclosure was one of the factors that tended to affect a personnel action in any way. *Payton v. Department of Veterans Affairs*, MSPB Docket No. AT-1221-16-0592-W-1, Remand Order at ¶ 21 (Jul. 21, 2023) (citing *Mastrullo v. Department of Labor*, 123 M.S.P.R. 110, ¶ 18 (2015)). The knowledge/timing test allows an employee to demonstrate that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*; see 5 U.S.C. § 1221(e)(1). Once the knowledge/timing test has been met, the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable factfinder could not conclude that her whistleblowing was a contributing factor in the personnel action. *Payton*, Remand Order at ¶ 21 (citing *Mastrullo*, 123 M.S.P.R. 110, ¶ 18).

It is undisputed that a decision to terminate the appellant constitutes a personnel action. 5 U.S.C. § 2302(a)(2)(A)(iii). Thus, the agency took a personnel action against the appellant.

Here, on January 16, 2020, Couey forwarded the appellant's January 15, 2020 email concerning the Brown incident to Hernandez. IAF, Tab 10 at 16; HR, Hernandez. Thereafter, on February 5, 2020, Hernandez issued the termination notice to the appellant. IAF, Tab 17 at 9-11. The appellant requested review of the termination by Bridgemohan. IAF, Tab 9 at 37. In his submission to Bridgemohan, the appellant stated, "This termination request is in response to cover up for an altercation that happened between me and TSgt Brown that I reported January 15, 2020." *Id.* at 43. He then appeared to reference a copy of the January 15, 2020 email. *Id.*

This blatant attempt to cover up this situation by SMSgt Couey is an offense to all codes of conduct required by law for all civilian

personnel. This has allowed this request for my termination to be acknowledged 15 business days after the date of the inference. Please see Article 4. This situation has not been given the proper amount of investigation, fact find, or mediation for this occurrence nor the proper guidance under The Whistleblower Protection Act of 1989, 5 U.S. C. 2302 (b)(8)-(9), Pub.L. 101-12. my statements have even been changed without my written or verbal consent.

Id. Thereafter, on February 13, 2020, Bridgemohan sustained the appellant's termination. IAF, Tabs 1 at 11, 24 at 10.

I note that Hernandez emailed Employee and Labor Relations (ELR) on January 15, 2020 – before he was aware of the incident with Brown – stating:

I would like to schedule an hour of your time to discuss some issues I have been having with one of my civilian personnel.

Please let me know if you have time this week or next.

I am getting ready to start a PIP [performance improvement plan] on the member.

IAF, Tab 36 at 17. Nevertheless, there is no indication that Hernandez had decided to terminate the appellant at this time and in fact, Hernandez testified that at the time he sent the email to ELR, termination was not something he thought was an option. HR, Hernandez. It was not until January 17, 2020, that Hernandez met with ELR and learned that termination was an option. *Id.*

I further note, however, that in a February 11, 2020 email to Bridgemohan – after the decision to terminate but before Bridgemohan sustained the termination on review – Hernandez discussed the appellant protected activity:

He has made false accusations regarding several members of the team, so much so, that witnesses had to attest to the facts of what truly occurred via written documentation. Please note his comments (in his file) that he felt threatened by TSgt Brown and SMSgt Couey and Ms. Conroy, who were present confirmed that in no way was TSgt Brown threatening or aggressive towards Cam.

IAF, Tab 31 at 7.

I find that both Hernandez and Bridgemohan were aware of the appellant protected disclosure at the time they issued their respective decisions.

Generally, the Board has found agency actions taken within one to two years of the employee's disclosure satisfy the knowledge/timing test. *Mastrullo*, 123 M.S.P.R. 110, ¶ 21; *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶¶ 20-22 (2010); see *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (finding that the appellant's disclosures were a contributing factor in her removal when they were made approximately 21 months and then slightly over a year before the agency removed her); cf. *Salinas v. Department of the Army*, 94 M.S.P.R. 54, ¶ 10 (2003) (finding that a delay of more than 2 years was too remote to satisfy the knowledge/timing test).

Based on the time frame of the disclosure and the personnel action, and by application of the knowledge/timing test, I find that the appellant has proven by preponderant evidence that his protected disclosure was a contributing factor in the agency's decision to terminate him during his trial period.

Clear and convincing evidence

When, as here, an appellant shows by preponderant evidence that he made a protected disclosure, or engaged in protected activity, which was a contributing factor in the decision to take a personnel action, the burden of persuasion shifts to the agency to prove by clear and convincing evidence that it would have taken the same actions in the absence of the whistleblowing. *Smith*, 2022 MSPB 4, ¶ 23 (citing 5 U.S.C. § 1221(e)(2) and *Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 26 (2016)). Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion. *Whitmore*, 680 F.3d at 1368.

In determining whether the agency met its burden, the Board considers the following non-exclusive factors (the *Carr* Factors): (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and

(3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Robinson v. Department of Veterans Affairs*, 923 F.3d at 1004, 1018 (Fed. Cir. 2019) (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)). This is sometimes referred to as a showing of “independent causation.” See *Miller*, 842 F.3d at 1257, 1259 (Fed. Cir. 2016) (acknowledging that “independent causation” is another way the agency’s overall burden of proof has been described and recognizing that the first *Carr* factor is not a question of “whether the agency has put forward some evidence purporting to show independent causation, but instead ... whether such evidence is strong”). The WPA was not meant to shield employees from their own misconduct. *Dabner v. Environmental Protection Agency*, MSPB Docket No. CH-4324-17-0458-I-1, et al., Final Order at ¶ 8 (Apr. 28, 2023) (citing *Carr*, 185 F.3d at 1326).

The agency need not produce evidence with regard to each of these factors, nor must each factor weigh in favor of the agency for the agency to carry its burden. *Id.* at 1018-19. The Board does not view the *Carr* factors as discrete elements, each of which the agency must prove by clear and convincing evidence, but rather weighs them together to determine whether the evidence is clear and convincing as a whole. *Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 13 (citing *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 14 (2015) and *Lu*, 122 M.S.P.R. 335, ¶ 7).

Carr Factor 1 (strength of the agency’s evidence):

The first *Carr* factor focuses on the evidence as it stood at the time of the action and in light of what agency officials knew at the time they acted. *Soto*, 2022 MSPB 6, ¶ 13 n.5. In *Chambers v. Department of the Interior*, 116 M.S.P.R. 17 (2011), the Board held:

When examining the strength of the agency’s evidence, the Board will look at the evidence the agency had before it when it took the alleged retaliatory action. If the agency fails to investigate a charge

sufficiently before bringing an action, such a failure might indicate an improper motive. However, if relevant facts are developed on appeal to the Board that the agency had no prior reason to know, the Board will not find that such facts undercut the agency's otherwise sufficiently clear and convincing evidence that, at the time of the action, its decision would have been the same absent the whistleblowing.

Id. at ¶ 30 (internal citations and footnote omitted).

Neither the Board nor its reviewing court has articulated a standard applying the "clear and convincing" evidentiary standard with the very low threshold for termination of a probationary employee, compared with the "efficiency of the service" standard applicable to the removal of an employee with ordinary Board adverse action appeal rights. *See, e.g.*, 5 C.F.R. § 315.803(a) ("The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment").

At the outset, I consider it important to note the purpose of probationary periods. The Board has recognized that an agency has great latitude in assessing whether to retain an employee during such a period. *See Lewis v. Department of the Army*, 63 M.S.P.R. 119, 126 (1994), *aff'd*, 48 F.3d 1238 (Fed. Cir.) (Table), *cert. denied*, 516 U.S. 834 (1995). Here, the agency's February 5, 2020 notice terminating the appellant's during his trial period cited the following shortcomings in his conduct and performance:

On numerous occasions, I have discussed with you performance concerns and expectations as well as conduct issues. Specifically, your distracting behavior towards coworkers and the office as well as not following proper procedures or instructions. You failed to follow proper leave procedures and guidance on more than one occasion and continue to disregard leadership instructions for office protocol and professionalism. Furthermore, your performance over the last several months has not met expectations and standards due to a pattern of errors when working tasks. I have not seen any

improvement over time needed to show that you can work independently with little oversight.

IAF, Tab 24 at 14.

Hernandez credibly testified regarding his reasons for terminating the appellant. He testified that on October 11, 2019, he had a general “onboarding” discussion with the appellant after he had been working in the office a short time. HR, Hernandez; IAF, Tabs 9 at 17, 36 at 11. In that discussion, Hernandez discussed several complaints coworkers had made about the appellant’s distractive behavior in the office. *Id.*

He testified that on October 29, 2019, the appellant texted him asking if he could have the next day off due to an impending snowstorm. HR, Hernandez; IAF, Tabs 9 at 16, 36 at 9. Hernandez stated he told the appellant that type of closure decision would be made by the base commander, to which the appellant responded by stating he would take sick leave. *Id.*

Hernandez also discussed an incident on November 1, 2019, when the appellant was scheduled to work, but failed to show up without communicating that he would not be there – a “no call, no show.” *Id.* Hernandez stated he tried without success to reach the appellant by telephone. He then telephoned others “that may have known where he was at or I thought, you know, just to get some kind of knowledge as to where he was that day.” HR, Hernandez. He also checked detention facilities. Finally, he sent Master Sergeant Jenny Sanchez, Manager, Promotion Board Eligibility, and Brown to the appellant’s residence and, when no one answered the door, he called the police to conduct a welfare check. *Id.*; IAF, Tabs 9 at 16, 36 at 9. He then received a call from the appellant and he canceled the welfare check. *Id.* The next day, he met with the appellant and the appellant showed him on the appellant’s phone that he had texted Hernandez. Hernandez told him “[t]hat at a minimum he should verify that I received and approved his leave for the day.” IAF, Tabs 9 at 16, 36 at 9; HR, Hernandez.

Hernandez testified that on November 21, 2019, Couey forwarded an email from Brown, in which Brown reporting that the appellant "failed his AF NEO Non-prior Military training on ADLS." HR, Hernandez; IAF, Tab 36 at 12. In addition to the failed training, Couey reported that the appellant had been combining his two 15-minute breaks, and when advised that he could not do that, he stated he was going to continue to do so. *Id.*

Hernandez testified that in December 2019, he gave the appellant permission to spend 30 minutes decorating the directorate for the holidays. HR, Hernandez. On December 9 or 10, 2019, Sanchez told him that the appellant had used excessive time decorating. HR, Hernandez; *see also* HR, Klein. Sanchez followed this up by an email on December 10, 2020:

Per our discussion, yesterday events were as follows:

- When I arrived to work I witnessed Mr. Bradberry decorating the office for Christmas. I reminded him that he was told by you last week to cease decorating
- Approximately 1.5 hours later I told him again as he continued decorating.
- Around 11 as I was discussing the AFI for promotions vs Title 10 with Ms. Klein, and SSgt Brown in the GIB, Mr. Bradberry entered the GIB with MSgt Starks and proceeded to rummage through the Christmas decoration in the back closet of the GIB.

I told him again to stop decorating and that there was a lot of work to accomplish. Ms. Klein then reminded him that he had been told by several members to stop decorating and that Col Bridgemohan had stated that we would not have extreme decorations within the office.

- At approximately 1330, Mr. Bradberry placed a Christmas ribbon on my desk. I told him that I had asked several times throughout the day and that on a personal level I was asking him to stop leaving Christmas decorations! Alebeit my tomen [sic] and approach was inappropriate and harsh.

IAF, Tab 17 at 14.

On January 7, 2020, Sanchez emailed Hernandez:

“[For your situational awareness], I have spoken with Mr. Bradberry several times in literally two days with regards to being on the phones and using the correct state. As you can see he has been in a not ready state for 2 hours and 46 minutes. As I have the “supervisor” role in CISCO I can push him into a ready status, however I am trying to showcase his lack of responsibility.”

IAF, Tab 36 at 13; HR, Hernandez. Hernandez stated that at the time the unit was also a call center and would receive numerous calls from the field from other reserve units regarding promotion board eligibility or any promotion board questions. Everyone that was in the office would be in a “ready status,” which meant that they would be ready and able to answer any incoming phone calls. Not being in a ready state when at your desk not on a break violated protocol. HR, Hernandez.

On January 14, 2020, Couey memorialized a conversation with Hernandez regarding the appellant:

Below is the information I discussed with you today on Cam:

7 Jun - I spoke with him about going through SSgt Brown or Penny for IT items. He stated that he wants it done now, not later and that when people do not do things when he wants them done he will be very demanding and mean to get what he wants. I again informed him that in a military organize he needs to follow the process and things are not done on his time line.

14 Jan - Cam stated that he feels like he is always in trouble and does not understand why. I told him its [sic] because he is always late, makes inappropriate comments and does not listen to people. He also made several negative comments to SrA Gonzalez about info being incorrect in MyPers and that it didn't matter. He then made comments to himself that to get SSgt Brown to do. any [sic] work, not even lighting a fire under his ass would make him move faster. He also said that Mr. Homic was just being a pain in the ass about his work and that he (CAM) needed to be the bigger person. Later today he made the comment about his “Homework assignment” saying that it was fucking pointless and why couldn't Mr. Homic just tell him and that it was a waste of time. I told cam that he was not being the bigger person and he was acting like he was 12 and to stop making negative comments about co-workers that are trying to train him and show him how processes work.

Overall, he is late to work almost daily by 10-15 minutes. He does not want to train on his tasks and does not complete his work in a timely manner. He is always disappearing from his desk and he is very disrespectful.

IAF, Tab 24 at 19.

On January 15, 2020, Senior Airman Marianela Gonzalez responded to Hernandez's request for an update on the appellant's progress in training. HR, Hernandez; IAF, Tab 36 at 15.

These are the main mistakes and concerns:

1. Promotion Orders, still making mistakes reference 191208-002343
2. Doesn't read tickets before answering or requesting more documents. He was instructed to update MILPDS and asked for documents in order to do a calculation. Reference 191220-009711
3. MILPDS updates he has had a couple tickets where he switched the DOR and Effective DOR. This can be a big deal especially if ticket gets closed because no one will have eyes on it. If this mistake wasn't caught the member wouldn't meet the board on time and possible result in SSB. The reference mention shoes [sic] a 5 year difference in the error. We could create a second level review but this is such an easy task and would be creating more work. It would honestly be easier if someone else completed the task then actually create second level review. Reference 200103-011470
4. Responded to member instead of private note, this is bad practice.

It's frustrating because he focuses his energy in work that isn't in our scope and that he decides is important. He still has so many questions and we task him with the easiest stuff PBE has and he makes so many careless [sic] mistakes. When he does date of rank calculations he makes mistakes and when I try to correct him he doesn't see them as a big deal. It's difficult to help him because he has a question on every task and expects help immediately. Not to mention right now he has soo [sic] many questions with our DOR calculations and the accession piece and will respond "arguing" that the method requested might be incorrect.

IAF, Tab 36 at 15.

Hernandez also testified regarding a ticket regarding the erroneous promotion or promotion date of an Active Guard Reserve officer. HR, Hernandez. Hernandez directed the appellant to not work the ticket – “I just felt because it was such a high level case where it was a colonel that I wanted my most experienced folks to work on the case to correct it.” *Id.* Nevertheless, he learned that the appellant continued to work the ticket in an email from Brown on January 16, 2020:

After our conversation with Cam regarding Col Melissa Day's erroneous promotion to Col because she is an AGR, you directed me to work the case and directed Cam specifically not to work it. You told him that he could train with me when I had time. I told him I did not mind training him on it. At approximately 1440, Cam was at Nelly's desk working the ticket he was specifically told not to do. He took SrA Gonzalez, Ms. Conroy and SMSgt Couey away from their work to seek assistance with the case. I called him out on it and asked him to stop working the case with Nelly, as he was directed by you not to work it. He told me that you did not say that and continued discussing the case with Nelly in front of me. I told Nelly that I was working it and to stop engaging with Cam regarding that case. This is now the third conflict in three days which is distracting me from completing my work. As you recall, I was more than willing to train Cam on the case when I worked it.

IAF, Tab 24 at 17.

Similarly, Gonzalez emailed Hernandez on January 16, 2020:

I am frustrated because I was helping Cameron and it was revealed to me that he was asked not to work on a ticket this ticket by you. This makes me feel like I am wasting my time. I just want to report this because SSgt Brown gets frustrated justly so because Cameron tried to disregard everyone's direct orders and has me helping him for no reason. Now I'm involved because I had no idea that I wasn't supposed to be helping him. He is asking everyone how to do this one ticket and so many people are involved and wasting our time. This ticket is above his scope of training he can't even accomplish smaller tasks. Also while trying to help him he has the “I know, I already did that” mentality but doesn't even know what he's doing. Something needs to change this is seriously very difficult to work with.

IAF, Tab 24 at 18.

The appellant testified that he was not instructed by Hernandez to work this ticket. HR, appellant.

Hernandez's testimony is consistent with notes he prepared in advance of his meeting with ELR:

Performance Concerns - Mr. Camerron Bradberry

PD related issues -

Training, retraining and errors.

12/11/19

Mr. Bradberry trained on the PV PRF process and processed 2 PRFs with assistance. Not ready to accomplish on his own due to lack of PRF's.

Trained on DOR Calculation and will have multiple careless errors when processing. Attention to detail has been emphasized. Can complete task but needs constant check.

Manual promotion orders - struggles with details. He has yet to accomplish an order that does not require corrections at the second level review. Not sure if he is grasping the concepts of our programs.

1/15/2020

Promotion Orders, still making mistakes reference 191208-002343

Doesn't read tickets before answering or requesting more documents. He was instructed to update MILPDS and asked for documents in order to do a calculation. Reference 191220-009711

MILPDS updates he has had a couple tickets where he switched the DOR and Effective DOR. This can be a big deal especially if ticket gets closed because no one will have eyes on it. If this mistake wasn't caught the member wouldn't meet the board on time and possible result in SSB. The reference mention shoes [sic] a 5 year difference in the error. We could create a second level review but this is such an easy task and would be creating more work. It would honestly be easier if someone else completed the task then [sic] actually create second level review. Reference 200103-011470

Responded to member instead of private note, this is bad practice.

Conduct-Behavioral Issues

10/11/19-

Discussion of distracting behavior in the office. We discussed chain of command and to come to me first if there is an issue or question and not to go to our PB Directorate or the Deputy Director. We also discussed office distractions, such as offering food, snacks, etc. We discussed that this is distracting especially when folks are at their desk working. He was given a task to provide me daily goals and to accomplish goals.

10/31/19

No call no show after Halloween. PB staff reached out to him, did a welfare check at this house in the AM. Also had local PD go out to house but was called off after email came in from Mr. Bradberry Friday PM at 3:23 Nov 1, 2019. He was told to contact until he receives positive confirmation or response to email, vm, text, etc. Counseling memo signed on 11/2.

10/29/19

Cam texted on this date and asked if he could take off 10/30 due to predicted snowstorm. I told him that telework was not an option for him and we need to see what the installation decides regarding the storm. He then said that he could take sick leave which "wont" [sic] cause issues or suspicion". I told him that this is not acceptable and is considered misuse of the sick leave program.

12/9/19

I had given Mr. Bradberry permission to spend 1/2 half [sic] hour on decorating our directorate, as discussed earlier with our PB director. Col B did not want to spend too much time on office decorating and we felt that 1/2 should be plenty. He was found decorating after 1.5 hours and was reminded that we only allotted for .5 hours. Later in the day he was found decorating the area after being told that only .5 hour was authorized.

1/14 IT issues

Mr. Underhill requesting that Mr. Bradberry not come into his section due to his frustrations and demands for computer equipment. He has assisted as much as he can and has asked him to work directly with his supervisor and/or his equipment custodian.

Note: Please review notes in file for further details. This paper serves as a synopsis of incidences that have occurred over the last several months.

IAF, Tab 17 at 12-13.

The appellant contends that he was not a probationary employee at the time of his termination. *See, e.g.*, IAF, Tab 9 at 37.

It seems there was a small miscalculation when I was transferred over to the organization but it is a mistake which was corrected by my losing agency (Department of Veterans Affairs) but not on my gaining agency (Buckley Air Force Base). I can provide this evidence to you of this occurrence which happened only happened on 1/29/20 upon our meeting if you could grant me one. I do not believe Major Hernandez is aware of this because this was so recent.

Id.

Immediately prior to his appointment with the agency, the appellant was employed by the DVA in the excepted service position of Contact Representative, GS-0962-05, in Denver, Colorado. IAF, Tab 12 at 32. There was no break in service between the DVA and the Air Force. *Id.* The appellant did not submit a copy of the SF-50 memorializing his DVA appointment, but it appears that he was appointed to that position on December 9, 2018. *Id.* at 31. Because the appointment SF-50 is not in the record, it is unknown what appointment authority was used or whether the SF-50 designated a duration for a trial period.⁶

An individual who meets the definition of an "employee" in 5 U.S.C. § 7511(a)(1) may challenge his removal from the federal service by filing an appeal with the Board. *See* 5 U.S.C. §§ 7512(1), 7513(d). As relevant in this case, the definition of "employee" includes a nonpreference eligible individual in the excepted service "who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service" or "who has

⁶ "For the excepted service, the trial period can vary, but is often either one or two years."

www.mspb.gov/studies/adverse_action_report/14_IdentifyingProbationers.htm#_ftn3

completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less. 5 U.S.C. § 7511(a)(1)(C). An individual serving a probationary or trial period, is not a public employee who can only be removed for cause, and thus, has no Constitutional right to pretermination "process." *Pope v. Department of the Navy*, 62 M.S.P.R. 476, 479 (1994) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 535, 538-39, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985)).

It is clear that Hernandez and Bridgemohan reasonably believed that the appellant was serving a trial period. On the record before me, I cannot determine whether the appellant was serving a trial period or whether the appellant otherwise met the definition of an employee. Even if the appellant was an "employee," I would still find that the agency had strong evidence to support a removal action against the appellant even under Chapter 75.

I find that the agency's reasons for terminating the appellant's appointment during his trial period, detailed above, were credibly explained, consistent with the purpose of a trial period, and represent strong evidence supporting termination. Thus, for purposes of this IRA appeal, I find that *Carr* factor 1 favors the agency.

Carr Factor 2 (motive to retaliate):

When applying the second *Carr* factor, the Board will consider any motive to retaliate on the part of the agency officials who ordered the action, as well as any motive to retaliate on the part of other officials who influenced the decision. *See Carr*, 185 F.3d at 1326. As stated in *Chambers*, "One of the factors to consider in ruling on whether the agency met its burden of proof is the strength of any retaliatory motive on the part of the officials who were involved in the decision in question. Because direct evidence of a retaliatory motive is rare,

petitioners may rely on circumstantial evidence giving rise to an inference of impermissible intent.” 116 M.S.P.R. 17, ¶ 58 (internal citations omitted).

The termination action was taken by Hernandez and, after review, sustained by Bridgemohan. Both Hernandez and Bridgemohan denied that their decisions were motivated by the appellant’s disclosure concerning Brown. HR, Hernandez, Bridgemohan. The disclosure concerning Brown was not directed at Hernandez and Bridgemohan did not implicate them in any way. Moreover, there is no reason to believe that either Hernandez or Bridgemohan would be subjected to discipline or any other negative repercussions due to the appellant’s protected activity. As noted above regarding contributory factor, Hernandez initiated discussions about how to address the issues with the appellant’s conduct and performance with ELR on January 15, 2020 – before he was aware of the incident with Brown – and this would indicate a nonretaliatory motive for taking the termination action. IAF, Tab 36 at 17. However, it cannot rule out reprisal. Nevertheless, I discern no personal motive on their part to retaliate against the appellant for reporting Brown’s conduct.

“The administrative judge also should consider whether the appellant’s disclosures reflect on the appellant’s supervisors in their capacities as managers and employees, which may be sufficient to establish a substantial retaliatory motive.” *Pridgen v. Office of Management and Budget*, 2022 MSPB 31, ¶ 70.

[W]hen a whistleblower makes highly critical accusations of an agency’s conduct that draws the attention of high-level agency managers, the fact that an agency official is “outside the whistleblower’s chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower’s disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence,” and that the Board should consider any motive to retaliate on the part of the agency official who ordered the action, as well as that of any officials who influenced the action.

Soto, 2022 MSPB 6, ¶ 14 (citing *Whitmore*, 680 F.3d at 1368); *Robinson*, 923 F.3d at 1019 (although the deciding official did not have a personal motive to

retaliate against the appellant for contradicting an agency Under Secretary, the Board erred by failing to consider whether he had a “professional retaliatory motive” against the appellant because his disclosures “implicated the capabilities, performance, and veracity of [agency] managers and employees, and implied that the [agency] deceived [a] Senate Committee).

Hernandez testified that the appellant’s email regarding the Brown incident portrayed the Air Force in a bad light. HR, Hernandez. But even with that said, it is hard to see how an incident involving inappropriate behavior in the workplace by a sergeant toward a peer would “implicated the capabilities, performance, and veracity of” Hernandez and Bridgemohan. I further find that because the disclosure was not made to individuals outside of the unit, the professional motive to retaliate would be minimal.

I find that the individuals making or influencing the decision to terminate the appellant had no personal motive to retaliate against the appellant and, at best, a slight professional motive to retaliate against him. Thus, *Carr* Factor 2 weighs very minimally for the appellant.

Carr Factor 3 (similar actions against nonwhistleblowers):

Regarding *Carr* Factor 3, it is the agency that bears the burden of proving that it would have taken the same action in the absence of the appellant’s protected activity. *Smith*, 2022 MSPB 4, ¶ 30 (citing *Alarid*, 122 M.S.P.R. 600, ¶ 14). Only evidence reflecting the agency’s treatment of similarly situated nonwhistleblower employees is relevant to *Carr* Factor 3. *Wilson v. Department of Veterans Affairs*, 2022 MSPB 7, ¶ 67 (citing *Siler v. Environmental Protection Agency*, 908 F.3d 1291, 1299 (Fed. Cir. 2018)). While the agency does not have an affirmative burden to produce evidence concerning each and every *Carr* factor, and “the absence of any evidence relating to *Carr* Factor 3 can effectively remove that factor from the analysis,” the failure to produce such evidence if it exists “may be at the agency’s peril,” and “may well cause the agency to fail to

prove its case overall.” *Whitmore*, 680 F.3d at 1374-75. Moreover, because the agency bears the burden of proof at this stage of the analysis, when the agency fails to introduce relevant comparator evidence, the third *Carr* factor cannot favor the agency. *Smith*, 2022 MSPB 4, ¶ 30 (citing *Smith v. General Services Administration*, 930 F.3d 1359, 1367 (Fed. Cir. 2019) and *Siler*, 908 F.3d at 1299).

The agency proffered no evidence that it removed other probationary or trial period employees who did not engage in whistleblowing activity for similar issues as demonstrated by the appellant. For their part, Hernandez and Bridgemohan testified they had little experience supervising civilians and Bridgemohan had only been involved in one prior removal. HR, Hernandez, Bridgemohan. The appellant proffered no comparators. I find that Carr factor 3 is of little import here. *Tito v. Department of the Interior*, MSPB Docket No. SF-0752-15-0684-I-1, Final Order at ¶ 16 (Feb. 28, 2023) (*Carr* factor 3 was “of relatively little import” where “the agency did not present any evidence regarding this factor, the charged misconduct was unique to the experience of both the proposing and deciding officials, and none of the purported comparators identified by the appellant were valid comparators.”). Thus, I find that the absence of evidence on the third *Carr* factor is a neutral factor. *Soto*, 2022 MSPB 6, ¶ 18; see *Rickel v. Department of the Navy*, 31 F.4th 1358, 1365 (Fed. Cir. 2022) (holding that “[t]he lack of evidence on the third *Carr* factor appears neutral”).

Considering the record as a whole, and weighing the three *Carr* factors, I find the agency met its burden to show by clear and convincing evidence that it would have terminated the appellant even absent his whistleblowing. Thus, I find that although the appellant established that he made a protected disclosure that was a contributing factor in the agency’s decision to terminate him during his trial period, I nevertheless find he is not entitled to corrective action.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

/S/

Glen D. Williams
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 14, 2023**, unless a petition for review is filed by that date.⁷ 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.

⁷ On August 4, 2023, MSPB announced the October 2, 2023 launch of the new e-Appeal and the planned downtime for the system transition. Due to this transition, MSPB will suspend the processing of all cases beginning on Saturday, September 9, 2023, through Friday, October 6, 2023. All filing and processing deadlines that fall during that period will be automatically extended by 28 calendar days. A copy of this announcement is available on the MSPB website at www.mspb.gov.

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>).

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. 420 (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/CourtWebsites.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