UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 21

Docket No. NY-1221-12-0131-W-2

Carlos Aquino,

Appellant,

v.

Department of Homeland Security,

Agency.

March 26, 2014

Thomas E. Tierney, Esquire, Norwalk, California, for the appellant.

Aaron Baughman, Esquire, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the administrative judge's initial decision ordering corrective action in the appellant's individual right of action (IRA) appeal. As explained below, the agency's petition for review is DENIED, and the administrative judge's initial decision reversing the appellant's removal is AFFIRMED.

BACKGROUND

¶2 The appellant served as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) at the Luis Munoz Marin

International Airport in San Juan, Puerto Rico. Initial Appeal File (IAF), Tab 5, Subtab 4l. The agency proposed to remove the appellant on 2 charges: failure to follow required security screening procedures and inattention to duty. IAF, Tab 5, Subtab 4h. The agency alleged that the appellant failed to adequately review images of scanned items at one of the airport's screening checkpoints, and it separately charged that the appellant engaged in conversations with other agency employees when he should have been reviewing the scanned images of passengers' carry-on luggage. *Id.* The deciding official sustained both of the charges and imposed the appellant's removal. IAF, Tab 5, Subtab 4g. The appellant filed an internal appeal of his removal with agency's Office of Professional Responsibility Appellate Board, which did not sustain the first charge of failure to follow required security screening procedures, but sustained the second charge of inattention to duty and affirmed the appellant's removal. IAF, Tab 5, Subtab 4b.

¶3 The appellant thereafter filed a complaint with the Office of Special Counsel (OSC) alleging that his removal was reprisal for whistleblowing. *See* Petition for Review (PFR) File, Tab 10. The appellant alleged that in early June 2011, he expressed his concerns to his fourth-level supervisor about his immediate supervisor's removal of the line control stanchions which guided the flow of passengers to be screened as they approached one of the airport's screening checkpoints. *Id.* The appellant claimed that the removal of the line control stanchions not only made it more difficult for him to control the flow of passengers approaching the area, but it also created the possibility that an individual could bypass the screening area entirely. *Id.* Additionally, the appellant asserted that, as the Divesting Officer (the role to which he was assigned on the day in question), he was responsible for randomly selecting individuals to be screened by the advanced image technology (AIT) screener, a more-advanced form of passenger screening designed to detect explosives and other non-metallic objects secreted on a person's body that may not be detected

by a traditional metal detector. *Id*. According to the appellant, the removal of the line control stanchions prevented him from randomly selecting individuals to be screened by the AIT screener and could allow individuals to self-select their screening method by avoiding the only line leading passengers to the AIT screener. *Id*. Six days after the appellant expressed his concerns about his supervisor's conduct, the appellant's supervisor notified higher-level management officials that he believed that the appellant was inattentive to his duties while screening baggage. *See* Refiled Appeal File (RAF), Tab 11, Initial Decision (ID) at 7-8 (citing hearing compact disc (HCD)); IAF, Tab 5, Subtab 4i. This complaint served not only as the impetus for the investigation into the appellant's conduct but also as the sole factual predicate for the appellant's removal. IAF, Tab 5, Subtab 4h. After exhausting his remedies with OSC, the appellant timely filed the instant IRA appeal challenging his removal. *See* PFR File, Tab 10; IAF, Tab 1.

¶4 Following a hearing, the administrative judge granted the appellant's request for corrective action and ordered the appellant reinstated to duty. ID at 15. In her initial decision, the administrative judge found that the appellant proved by preponderant evidence that he made a protected disclosure of a substantial and specific danger to public health or safety by disclosing his concerns about the removal of the line control stanchions at the screening checkpoint, and she further found that his disclosure was a contributing factor in his removal because the appellant's supervisor's report influenced both the proposing and deciding officials' decisions to propose and impose the appellant's removal. *Id*. at 11-12. The administrative judge concluded that the agency failed to demonstrate by clear and convincing evidence that it would have removed the appellant in the absence of his protected disclosure; she noted that the strength of the agency's removal action was weakened by the internal appellate board's decision not to sustain one of the charges and that the appellant presented

evidence of other similar instances of employee misconduct that only resulted in suspensions ranging from 7 to 45 days. *Id*. at 13-15.

¶5 The agency has filed a petition for review arguing that the appellant's disclosure did not constitute a disclosure of a substantial and specific danger to public health or safety because it was too speculative and because a reasonable person in the appellant's position would not have believed he was making a protected disclosure. *See* PFR File, Tab 1 at 9-10. The agency also contends that the administrative judge erred in finding that the appellant's supervisor influenced the entire removal proceeding in light of the proposing and deciding officials' testimony that neither of them was aware of the appellant's disclosure, and it further claims that it demonstrated by clear and convincing evidence that it would have removed the appellant in the absence of his disclosure. *Id*. at 15-19. The appellant has filed an opposition to the agency's petition for review, *see* PFR File, Tab 5, and the agency has filed a reply, *see* PFR File, Tab 6.

ANALYSIS

The Board declines to dismiss the agency's petition for review for failure to comply with the administrative judge's interim relief order.

¶6 The appellant has moved to dismiss the agency's petition for review on the ground that the agency has failed to provide interim relief as ordered by the administrative judge. PFR File, Tab 3; *see* 5 C.F.R. § 1201.116(d). Specifically, the appellant challenges his placement on administrative leave pending the Board's final decision on the ground that the agency has not made a determination under 5 U.S.C. § 7701(b)(2)(A)(ii)(II) that his "return [to work] . . . is unduly disruptive to the work environment." PFR File, Tab 3 at 4-5. In response, the agency argues that the appellant's placement on paid administrative leave has returned the appellant to the same position he was in prior to his removal because he was on administrative leave prior to the effective date of his removal. *See* PFR File, Tab 4 at 7.

¶7 We agree with the appellant that his return to paid administrative leave, without an accompanying certification from the agency that his return to work would be "unduly disruptive to the work environment," fails to evidence the agency's compliance with the administrative judge's interim relief order. *See, e.g., Wilson v. Department of Justice*, 66 M.S.P.R. 287, 294 (1995) (although an undue disruption determination need not take any particular form, the agency must at least inform the appellant that his return or presence in the workplace would excessively or in an unwarranted fashion cause disorder or turmoil to the normal course of the agency's operation). The agency has not presented any evidence that it informed the appellant that his return to work would be unduly disruptive; rather, the agency has only submitted an affidavit from a human resources specialist explaining the steps the agency has taken to place the appellant on paid administrative leave and to provide him compensation and benefits for this interim period of time. *See* PFR File, Tab 1 at 23-24.

¶8 If an agency fails to establish its compliance with the interim relief order, the Board has the discretion to dismiss its petition for review but need not do so. *Kolenc v. Department of Health & Human Services*, 120 M.S.P.R. 101, ¶ 11 (2013). We exercise our discretion in this case not to dismiss the petition for review because, inter alia, the agency has provided the appellant compensation and benefits since the date of the administrative judge's initial decision, and the issue of the agency's compliance with the interim relief order is now moot by virtue of our final decision ordering the appellant reinstated to employment. *See Garcia v. Department of State*, 106 M.S.P.R. 583, ¶ 7 (2007) (interim relief is in effect only pending the disposition of a petition for review). We accordingly exercise our discretion not to dismiss the agency's petition for review.

Legal Standards Governing IRA Appeals

¶9 In order to secure corrective action from the Board in an IRA appeal, an appellant must first seek corrective action from OSC. *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶ 5 (2012). If an appellant has exhausted his

administrative remedies before OSC, he can establish Board jurisdiction over an IRA appeal by nonfrivolously alleging that he made a protected disclosure and that the disclosure was a contributing factor in the agency's decision to take a personnel action. *Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 8 (2011). Once an appellant establishes jurisdiction over his IRA appeal, he is entitled to a hearing on the merits of his claim. *Id*.

¶10 When reviewing the merits of an IRA appeal, the Board considers whether the appellant has established by a preponderance of the evidence that he made a protected disclosure under 5 U.S.C. § 2302(b)(8) that was a contributing factor in an agency's personnel action. *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 17 (2013). A preponderance of the evidence is "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2). If the appellant is able to offer such proof, the Board must order corrective action unless the agency can establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Chavez*, 120 M.S.P.R. 285, ¶ 17. 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. *Id*.

¶11 During the pendency of this IRA appeal, Congress passed, and the President signed into law, the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. 112-199, 126 Stat. 1465. In *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶¶ 25-26 (2013), we found that the WPEA clarified the definition of a protected disclosure under section 2302(b)(8) and held that the WPEA's clarified definition of a protected disclosure should be applied to cases pending before the Board. We have separately held, however, that the expanded scope of recovery authorized by the WPEA does not apply to cases pending on review when it "attaches new legal consequences for events completed before its enactment." *King v. Department of the Air Force*, 119

M.S.P.R. 663, ¶¶ 15-18 (2013) (finding that the WPEA's authorization for compensatory damages does not apply to pending cases).

¶12 As noted by the administrative judge, at the time he filed his IRA appeal with the Board, the appellant, as an employee of the TSA, was only able to file such an appeal through a memorandum of agreement entered into by the TSA and the Board which gave TSA employees the right to file IRA whistleblower reprisal appeals once they exhausted their claims with OSC. *See* IAF, Tab 5, Subtab 4p; ID at 3. The WPEA, however, now provides TSA employees with a statutory right to file an IRA whistleblower appeal with the Board. *See* 5 U.S.C. § 2304(a).[1] Because the Board has jurisdiction over the appellant's whistleblower reprisal claim under both the memorandum of agreement and the WPEA, we need not decide whether the provisions of the WPEA governing appeals by TSA employees should apply retroactively in this case.

The appellant has established by preponderant evidence that he made a protected disclosure of a substantial and specific danger to public health or safety under 5 U.S.C. § 2302(b)(8).

¶13 "[T]he inquiry into whether a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA [Whistleblower Protection Act] is guided by several factors, among these: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences." *Chavez*, 120 M.S.P.R. 285, ¶ 20 (quoting *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010)). 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."

[1] The WPEA extended this right to TSA employees upon the WPEA's enactment, November 27, 2012, whereas the remaining provisions of the WPEA became effective 30 days after the act's enactment. *See* WPEA §§ 109(c), 202.

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.*

¶14 We agree with the administrative judge that the appellant made a protected disclosure of a substantial and specific danger to public health or safety when he disclosed his concerns about his supervisor moving the line control stanchions, which guided passengers entering one of the airport's screening checkpoint areas. ID at 11-12. The record reflects that the appellant believed that the removal of the stanchions not only created the possibility that an individual could bypass the screening checkpoint area but also prevented him from randomly assigning individuals to the AIT screener. *See* ID at 11-12 (citing HCD); IAF, Tab 1. These disclosures qualify as disclosures of a substantial and specific danger to public health or safety. *See Chambers*, 602 F.3d at 1379 (holding that a disclosure about reduced staffing levels leading to additional traffic accidents qualified as a disclosure of a danger to public safety); *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶¶ 15-17 (2011) (holding that disclosures about systematic problems regarding inadequate patient care were protected); *Miller v. Department of Homeland Security*, 111 M.S.P.R. 312, ¶¶ 15-19 (2009) (holding that disclosures about changes to standard operating procedures for baggage screening constituted disclosures of danger to the public).

¶15 The potential consequences of the harm which could result from allowing one or more individuals to bypass an airport screening checkpoint are, unfortunately, substantial, and the concern over the use of explosive devices which cannot be detected by traditional metal detectors, and the corresponding usage of advanced image screening technologies to detect such devices, has risen. The employment of such technologies and the random assignment of passengers to advanced screening procedures reflect the seriousness of these threats and their imminence. *See Miller*, 111 M.S.P.R. 312, ¶ 19 (the extensive screening

measures that have been put in place by the government to prevent such an occurrence are a reflection of how likely and imminent the threat may be).

¶16 Contrary to the agency's arguments on review, *see* PFR File, Tab 1 at 14, an appellant does not have to prove that the public was actually being harmed at the time he made the disclosure, and the fact that no harm resulted from the change in the arrangement of the line control stanchions does not undermine the appellant's claim that he believed he was disclosing a danger to public safety. *See Chavez*, 120 M.S.P.R. 285, ¶ 21 (finding that disclosures regarding failure to change a patient's dressings were protected, regardless of whether harm actually occurred, because the potential harm was readily foreseeable); *Parikh*, 116 M.S.P.R. 197, ¶ 17 (noting that a subsequent investigation which confirmed that no harm existed did not erode the reasonableness of the appellant's belief at the time he made the disclosure). Additionally, the fact that higher-level management officials did not perceive the change in the lane control stanchions the same way as the appellant does not erode the reasonableness of the appellant's beliefs. *See* PFR File, Tab 1 at 11-12 (agency argument that other officials did not believe that the change in the lane control barriers created a risk of danger). When assessing whether an employee reasonably believes that his disclosure evidences a substantial and specific risk to the public, the Board uses an objective test: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the matters disclosed show a substantial and specific danger to public health or safety. *Miller*, 111 M.S.P.R. 312, ¶ 5 (citing *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)). Thus, the fact that other agency officials may have disagreed with the appellant's assessment does not show that the appellant's beliefs were unreasonable in light of the information available to him at the time of his disclosure. *See Miller*, 111 M.S.P.R. 312, ¶ 17 (it was error to determine that the appellant's belief was not reasonable simply because

management officials involved in the review process did not agree with the appellant).

¶17 Unfortunately, threats of violence on airplanes and in airports are neither speculative nor improbable, and the nature of the resulting harm could be, and has been, substantial. The dangers associated with individuals bypassing an airport screening checkpoint or successfully evading the TSA's detection of explosives or other prohibited items is not the type of "negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing[.]" *Chambers*, 602 F.3d at 1376 n.3. To the contrary, the threat of danger identified by the appellant has the requisite substantiality and specificity needed for a disclosure to qualify as a protected disclosure of a threat to public health or safety under section 2302(b)(8). *See id*.

The appellant has established by preponderant evidence that his disclosures were a contributing factor in his removal.

¶18 The administrative judge found that the appellant's disclosures were a contributing factor in his removal based upon a theory of constructive knowledge. ID at 12-13. We agree that the appellant has proven that the agency's proposing and deciding officials had constructive knowledge of the appellant's protected disclosures based upon the appellant's supervisor's influence over the challenged personnel action. *See Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 11 (2012).

¶19 An appellant can show that a protected disclosure was a contributing factor in a personnel action by proving that the official taking the action had either actual or constructive knowledge of the protected disclosure. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 22 (2010). An appellant may establish an official's constructive knowledge of a protected disclosure by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Dorney*, 117 M.S.P.R. 480, ¶ 11. The Supreme Court has adopted the term "cat's paw" to

describe a case in which a particular management official, acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action. *Id.* (citing *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1190, 1193-94 (2011)).

¶20 In her initial decision, the administrative judge explained that, although the appellant did not make his disclosure to his immediate supervisor, his immediate supervisor quickly learned of the appellant's disclosure after the management official to whom the appellant complained informed the appellant's supervisor of the appellant's disclosures. *See* ID at 12 (citing HCD). The record reflects that the appellant's supervisor learned of the appellant's disclosure on the same day the appellant made his disclosure and that only a few days later the appellant's supervisor reported the appellant's alleged misconduct to upper-level management. *Id.* at 8; IAF, Tab 5, Subtab 4i. Based upon the appellant's supervisor's report of misconduct, the agency commenced disciplinary action against the appellant. IAF, Tab 5, Subtab 4h.

¶21 We agree with the administrative judge's finding that this chronology of events supports imputing knowledge of the appellant's disclosures to the proposing and deciding officials under a cat's paw theory. *See Dorney*, 117 M.S.P.R. 480, ¶ 11. In *Staub*, the Supreme Court explained that "if a supervisor performs an act motivated by [prohibited] animus that is intended by the supervisor to cause an adverse employment action, and if the act is a proximate cause of the ultimate employment action, then the employer is liable[.]" 131 S. Ct. at 1194 (emphasis omitted). As explained above, only days after learning about the appellant's disclosures, the appellant's supervisor reported to upper-level management his concerns about the quality of the appellant's work performance, which was then exclusively relied upon by the agency in proposing and effectuating the appellant's removal. Under these undisputed facts, we find that the appellant has proven by preponderant evidence that his supervisor influenced the challenged personnel action, thus satisfying the standard for

establishing the officials' constructive knowledge of his disclosures under *Staub*. *See Dorney*, 117 M.S.P.R. 480, ¶ 11.

¶22 The agency argues on review that there is insufficient evidence to establish the officials' constructive knowledge of the appellant's disclosures under a cat's paw theory. *See* PFR File, Tab 1 at 16-17. We disagree. In *Staub*, the Supreme Court held that, under the motivating factor standard employed by the Uniformed Services Employment and Reemployment Rights Act (USERRA), "[p]roximate cause requires only 'some direct relation between the injury asserted and the injurious conduct alleged,'" and the Court then explained that, although a "decisionmaker's exercise of judgment is also a proximate cause of the employment decision, [] it is common for injuries to have multiple proximate causes." 131 S. Ct. at 1192 (citation and emphasis omitted). The employee in *Staub* alleged that two management officials caused another official to terminate him from employment, in part, based upon their frustrations with the appellant's military service; based upon these undisputed facts, the Court held that this showing was sufficient to establish that the anti-military animus of the lower-level management officials was a motivating factor in the employee's removal in violation of USERRA. *Id*. at 1189-94.

¶23 Unlike USERRA, which employs a motivating factor standard of causation, the WPA employs a lesser causation standard, i.e., contributing factor. *See Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *cf. Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶¶ 34-35 (2012) (explaining that the burden for proving reprisal for prior equal employment opportunity activity, which is a "but for" showing, is higher than proving an anti-military reprisal claim under the USERRA "motivating factor" standard). In *Marano*, the Federal Circuit explained that the 1989 WPA amendments "substantially reduc[ed] a whistleblower's burden to establish his case" and emphasized that, "[r]ather than being required to prove that the whistleblowing disclosure was a 'significant' or 'motivating' factor, the whistleblower under the WPA . . . must evidence only

that his protected disclosure played a role in, or was a 'contributing factor' to, the personnel action taken[.]" 2 F.3d at 1140. Thus, *Staub* and *Marano*, when read together, establish that an appellant can demonstrate that a prohibited animus toward a whistleblower was a contributing factor in a personnel action by showing by preponderant evidence that an individual with knowledge of the appellant's protected disclosure influenced the deciding official accused of taking the personnel action. *See Marano*, 2 F.3d at 1140; *Dorney*, 117 M.S.P.R. 480, ¶¶ 11-13. Additionally, under a cat's paw theory, an agency cannot escape liability by arguing that an independent investigation supported the challenged act. *See Staub*, 131 S. Ct. at 1193 ("[T]he supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. . . . Nor do we think the independent investigation somehow relieves the employer of 'fault.'").

¶24 We find that the imputed knowledge standard has been met based upon the appellant's supervisor's report to higher-level officials about the appellant's alleged misconduct only days after the appellant made his protected disclosure about his supervisor's conduct.[2] Under these facts, we find that the appellant's supervisor reported his concerns about the appellant's conduct to higher-level officials with the intent to cause the agency to take a personnel action. The administrative judge therefore correctly held that the appellant's protected disclosure was a contributing factor in the agency's personnel action under a cat's paw theory.

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[2] We note that there is no evidence in the record suggesting that the agency would have investigated the appellant in the absence of his supervisor's report. *See Staub*, 131 S. Ct. at 1193 ("[I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . ., then the employer will not be liable.").

The agency has not shown by clear and convincing evidence that it would have removed the appellant in the absence of his protected disclosure.

¶25 When an appellant shows by preponderant evidence that he made a protected disclosure which was a contributing factor in the decision to take a personnel action, the Board will order corrective action unless the agency shows by clear and convincing evidence that it would have taken the personnel action in the absence of the whistleblowing activity. *Chavez*, 120 M.S.P.R. 285, ¶ 28. In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action, the Board generally considers the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Id*. (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)).

¶26 Applying these factors, the administrative judge concluded that the strength of the agency's evidence in support of the appellant's removal was weak, especially in light of the internal review board's decision not to sustain one of the two charges. *See* ID at 13-14. The administrative judge further found that, although neither the proposing nor deciding official had a motive to retaliate, the motive to retaliate on the part of the appellant's immediate supervisor was well-documented; the administrative judge also found that the agency imposed lesser discipline in other similar instances of employee misconduct. *Id*. at 14-15. Weighing these factors, the administrative judge concluded that the agency could not meet the clear and convincing standard, and she therefore ordered corrective action. *Id*. at 15.

¶27 We agree with the administrative judge that an analysis of the *Carr* factors does not demonstrate by clear and convincing evidence that the agency would have removed the appellant in the absence of his protected disclosures. When

conducting an assessment of the *Carr* factors, the Federal Circuit has instructed the Board to "evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately," *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012), and, building on this directive, the Board has held that a proper analysis of the clear and convincing evidence issue requires that all of the evidence be weighed together—both the evidence that supports the agency's case and the evidence that detracts from it, *Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶ 37 (2013) (citing *Whitmore*, 630 F.3d at 1368).

¶28 With regard to the strength of the agency's evidence in support of removal, we agree with the administrative judge that agency's internal review board's decision to not sustain one of the two charges cited by the deciding official detracts from the overall strength of the agency's personnel action. *See, e.g.*, *Shibuya*, 119 M.S.P.R. 537, ¶ 36 (explaining that the decision to sustain all charges "is a factor weighing in favor of the agency on the clear and convincing evidence issue"). Moreover, although we are not reviewing the reasonableness of the appellant's removal on the one charge sustained by the internal review board as we would in a chapter 75 appeal, *see Weaver v. Department of Agriculture*, 55 M.S.P.R. 569, 576 (1992) (in an IRA appeal, the Board can either grant or deny a request for corrective action, and the appropriateness of the penalty imposed by the agency is not at issue), we agree with the administrative judge that the remaining sustained charge of inattention to duty is sparsely supported by the record, thus undermining the overall strength of the agency's personnel action under the first *Carr* factor, *see* ID at 14. Accordingly, we agree with the administrative judge that there is little evidence in the record that the agency would have taken the same personnel action even in the absence of the protected disclosure. *See Shibuya*, 119 M.S.P.R. 537, ¶ 32.

¶29 We also agree with the administrative judge's conclusion that the evidence reflects a motive on the part of the agency to retaliate, especially in light of the

appellant's supervisor's role in reporting the appellant's alleged misconduct. *See Herman v. Department of Justice*, 119 M.S.P.R. 642, ¶ 16 (2013) (noting that the administrative judge should consider any motive on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of the other agency officials who influenced the decision). We find that the totality of the evidence, including the close proximity in time between the appellant's disclosure and his supervisor's report and the absence of any other factual predicate supporting the appellant's removal other than his supervisor's report, suggests a strong retaliatory motive. *See* IAF, Tab 5, Subtabs 4h-4i; *see also Russell v. Department of Justice*, 76 M.S.P.R. 317, 326 (1997) (finding that the officials involved had a strong motive to retaliate because they were the subjects of the appellant's protected disclosures and both knew about the appellant's protected disclosure when they made their reports that formed the basis of the charged misconduct). Consistent with our application of *Staub*, above, we conclude that the second *Carr* factor weighs against the agency in light of the influence exerted by the appellant's supervisor over the challenged personnel action. *See, e.g.*, *Russell*, 76 M.S.P.R. at 326-28.

¶30 Lastly, we agree that the record as a whole demonstrates that the agency imposed lesser forms of discipline for similar offenses which did not involve whistleblowers. *See* ID at 14-15 (citing IAF, Tabs 32-33). The record reflects that although the agency imposed suspensions ranging from 7 to 45 days on charges of failure to follow required security screening procedures, the agency removed the appellant for inattention to duty. *Id*. The agency argues on petition for review that the appellant's charge of inattention to duty is more severe than the comparators' charges of failure to follow security screening procedures, thus justifying the difference in treatment. *See* PFR File, Tab 1 at 19-20. Pursuant to *Whitmore*, however, we disagree with the agency's nuanced reading of the charges. The appellant's charge of inattention to duty is based largely upon the same facts as the charge of failure to follow security screening procedures, which

was invalidated through the agency's internal review process, *see* IAF, Tab 5, Subtab 4h; we discern no meaningful difference between the appellant's sustained misconduct and that of the proffered comparators. Both the appellant's and the comparators' charges are rooted in the same agency policy regarding TSOs' screening of baggage, and the essence of these charges is that the employees did not pay sufficient attention to the screened images of baggage to ensure that prohibited items were not present. *Compare* IAF, Tab 5, Subtab 4h, *with* IAF, Tabs 32-33. We find that the agency's attempt to differentiate the appellant's and the proffered comparators' charges by relying on the labels of those charges runs counter to *Whitmore*'s command that the "importance and utility" of the third *Carr* factor "should not be marginalized by reading it so narrowly as to eliminate it as a helpful analytical tool." *Whitmore*, 680 F.3d at 1374. We therefore reject the agency's suggestion that the third *Carr* factor rests solely on a comparison of the charges' labels of misconduct.

¶31 Thus, considering the evidence as whole, we agree that the agency has failed to meet the high burden of proving by clear and convincing evidence that it would have removed the appellant in the absence of his protected disclosure.

ORDER

¶32 For the above-stated reasons, the agency's petition for review is DENIED, and the administrative judge's initial decision ordering corrective action on the appellant's IRA whistleblower appeal is AFFIRMED.

¶33 We ORDER the agency to cancel the removal action and restore the appellant to duty effective August 30, 2011. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶34 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this

decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶35 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶36 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶37 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶38 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.202 and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

A copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(f)(3).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal

Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
   a. Employee name and social security number.
   b. Detailed explanation of request.
   c. Valid agency accounting.
   d. Authorized signature (Table 63)
   e. If interest is to be included.
   f. Check mailing address.
   g. Indicate if case is prior to conversion. Computations must be attached.
   h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

   a. Must provide same data as in 2, a-g above.
   b. Prior to conversion computation must be provided.
   c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.