UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

TERESA C. CHAMBERS,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBERS
DC-1221-04-0616-S-1
DC-0752-04-0642-S-1

DATE: July 27, 2004

Richard E. Condit, Esquire, Public Employees for Environmental Responsibility, Washington, D.C., for the appellant.

Robert L'Heureux, Esquire, Alexandria, Virginia, for the agency.

BEFORE

Elizabeth B. Bogle
Administrative Judge

ORDER DENYING STAY REQUEST

On July 9, 2004, Teresa C. Chambers (appellant) filed a request for a stay of a proposal to remove her and a decision to place her on administrative leave. On July 12, 2004, she filed another request for a stay of a decision to remove her. Because they contain identical or similar issues, I have joined the stay requests. 5 C.F.R. § 1201.36(b). Any employee, former employee, or applicant for employment seeking corrective action under 5 U.S.C. § 1221(a) may request that the Board order a stay of the personnel action involved. 5 U.S.C. § 1221(c)(1). For the following reasons, the appellant's stay requests are DENIED.

Background

The appellant held the position of Chief, U.S. Park Police, National Park Service. By memorandum dated December 5, 2003, Donald Murphy, Deputy Director, National Park Service, notified the appellant that she had been placed on administrative leave until further notice. He stated that the action was being taken until a review of her conduct could be completed. On December 17, 2003, Deputy Director Murphy proposed the appellant's removal for: (1) Improper budget communications; (2) Making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area; (3) Improper disclosure of budget deliberations; (4) Improper lobbying; (5) Failure to carry out a supervisor's instructions; and (6) Failure to follow the chain of command.

The appellant filed a complaint with the Office of Special Counsel (OSC) on January 29, 2004. In the complaint, she alleged that the agency placed her on administrative leave and proposed her removal in reprisal for disclosures she made on November 3, 2003, to Deborah Weatherly, an Interior Appropriations Subcommittee staff member, on November 20, 2003, to a Washington Post reporter, and on December 2, 2003, to Fran Mainella, Director, National Park Service. On July 9, 2004, the appellant filed a request with the Board to stay the proposed removal and placement on administrative leave.

On July 9, 2004, Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks, issued a decision on the proposed removal. Deputy Assistant Secretary Hoffman sustained all of the charges and imposed the penalty of removal. The appellant was removed effective July 10, 2004. On July 12, 2004, she filed a request with the Board to stay the removal action.

Legal standard

An appellant may request a stay of a personnel action allegedly based on whistleblowing at any time after the appellant becomes eligible to file an appeal

with the Board under 5 C.F.R. § 1209.5. 5 C.F.R. § 1209.8(a). The request must contain evidence and argument showing that: (1) The action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. § 1209.4(a); (2) The action complained of was based on whistleblowing, as defined in 5 C.F.R. § 1209.4(b); and (3) There is a substantial likelihood that the appellant will prevail on the merits of the appeal. 5 C.F.R. § 1209.9(a)(6). An appellant may provide evidence and argument addressing whether a stay would impose extreme hardship on the agency. 5 C.F.R. § 1209.9(b). The agency's response to the stay request must contain evidence and argument addressing whether: (1) There is a substantial likelihood that the appellant will prevail on the merits of the appeal; and (2) The grant of a stay would result in extreme hardship to the agency. 5 C.F.R. § 1209.9(c)(2).

The actions are covered personnel actions

Covered personnel actions are listed at 5 C.F.R. § 1209.4(a). An adverse action taken under 5 U.S.C. chapter 75 is listed. 5 C.F.R. § 1209.4(a)(3). Therefore, both the proposed removal and the decision to remove the appellant are covered personnel actions. The placement of an employee on administrative leave, while not specifically listed as a covered personnel action, is a "significant change in duties, responsibilities, and working conditions." 5 C.F.R. § 1209.4(11). As such, it also is a covered personnel action. *See, e.g., Carey v. Department of Veterans Affairs,* 93 M.S.P.R. 676, 682-83 (2003). In his written argument in support of the first stay request, appellant's counsel stated that a "gag order" was among the actions included in the stay request. Appellant's argument at 12. A "gag order" is not a covered personnel action.

The appellant has not shown that she engaged in whistleblowing activity

The Board's jurisdiction to order a stay of a personnel action is limited to personnel actions allegedly based on reprisal for whistleblowing. 5 U.S.C. § 1221(c)(1); 5 C.F.R. § 1209.8(a). *See Williams v. Department of Defense,* 46

M.S.P.R. 549, 551-52 (1991). To establish that she engaged in whistleblowing activity, the appellant must show that she disclosed information that she reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4.

To prove that she made a whistleblowing disclosure, the appellant must show that she had a reasonable belief in the existence of one or more of the situations specified in section 2302(b)(8). She need not prove that the situation actually existed, only that a reasonable person in her position would believe that it did. *See Schaeffer v. Department of the Navy,* 86 M.S.P.R. 606, 612 (2000), *citing Geyer v. Department of Justice,* 63 M.S.P.R. 13, 16-17 (1994). *Id.* Next, she must show that she disclosed the situation to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in a disclosure to the press. *Id.*, *citing*, *Horton v. Department of the Navy,* 66 F.3d 279 282 (Fed.Cir.1995), *cert.denied,* 516 U.S. 1176, (1996).

The proper test for determining whether the appellant had a reasonable belief is: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence, for example, gross mismanagement? *LaChance v. White,* 174 F.3d 1378, 1381 (Fed.Cir.1999), *cert. denied,* 120 S.Ct. 1157 (2000). A purely subjective perspective of an employee is not sufficient even if shared by other employees. The Whistleblower Protection Act is not a weapon in arguments over policy or a shield for insubordinate conduct. *Id.* The Board's review starts out with a "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations," and this presumption stands unless there is "irrefragable proof to the contrary." *Pulcini v. Social Security Administration,* 83 M.S.P.R.

685, 691 (1999), *aff'd*, 250 F.3d 758 (Fed.Cir.2000) (Table), *citing, LaChance v. White,* 174 F.3d at 1381.

Internal disclosures - The appellant submitted an 87-page affidavit describing "internal disclosures to leadership in the National Park Service and the Department of the Interior" and presenting "additional relevant facts." The affidavit does not differentiate between an alleged disclosure and a statement of fact. Therefore, it is impossible to determine whether the affidavit was intended to allege new disclosures not raised before OSC. The affidavit describes her interaction with her supervisors (the Deputy Director and the Director of the National Park Service), employees of the agency's Budget Office, and other agency employees during the performance of her duties as Chief. I am unable to determine that any of the disclosures appellant made during the performance of her duties as Chief evidenced one of the situations at section 2302(b)(8). Generally, disclosures made in the normal performance of her duties as Chief would not be "protected disclosures." *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1353 (Fed.Cir.2001). And, when an employee reports that there has been misconduct by a wrongdoer to the wrongdoer (such as in a disagreement with a supervisor over job-related duties), she is not making a "protected disclosure" of misconduct. *Id.* at 1350. For these reasons, and because it is unclear whether the appellant's affidavit was intended to raise new allegations of whistleblowing activity, I find that she did not engage in whistleblowing activity by making disclosures of information to her supervisors and other agency employees during the performance of her duties. In reaching this conclusion, I have also considered that in the written argument of the appellant's counsel the only specific reference to her disclosures is "the Chief's November 28, 2003, memo to Director Mainella, her December 2nd e-mail to congressional staffer Weatherly, and the December 2nd Washington Post story and related media interviews." Appellant's brief at 8.

The November 3, 2003, disclosure to Deborah Weatherly – In her affidavit, the appellant appears to state that this disclosure took place on November 5, 2003, because she did not describe any contact with Ms. Weatherly on November 3. She wrote:

> On November 5, 2003, as I had done in the past and as I had been encouraged to do by Director Fran Mainella and Deputy Director Don Murphy in an effort to build positive relationships with congressional staff members, I telephoned Ms. Debbie Weatherly, a staff member of the House Interior Appropriations Committee, to ask her for clarification regarding who was to pay for the upcoming [National Academy of Public Administration – NAPA] report. When she returned my call, we had a pleasant conversation, and I provided her a general overview of the progress we had made toward the implementation of the NAPA goals. She seemed unaware and generally surprised by this information and even shared with me a story of a Federal employee who "bucked" a Congressional mandate similar to the NAPA study and that, according to Ms. Weatherly, Congressman Regula had this employee fired. Ms. Weatherly and I agreed to meet informally once each month to share insights and information.
>
> On November 6, 2003, I was summoned to Deputy Director Murphy's office with no explanation as to the topic. He asked if I had called Debbie Weatherly and, upon my confirmation, told me that he found it "highly inappropriate" and asked for a detailed explanation as to the content of the conversation. After explaining to deputy Director Murphy the substance of my conversation with Ms. Weatherly, Deputy Director Murphy simply left his office to go to another meeting without reacting to what I had told him and without providing any direction as to his expectations in the future. I returned to my office and wrote an e-mail "to file" detailing the conversation with Ms. Weatherly and my conversation with Deputy Director Murphy regarding this matter.

Appellant's affidavit at 40-41.

In her OSC complaint, the appellant alleged that she disclosed information to Ms. Weatherly that evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, and a substantial and specific danger to public health or safety. Based on the appellant's description of her discussion

with Ms. Weatherly, she disclosed information concerning the implementation of NAPA goals. Absent any more specific description of the disclosure, I am unable to find that it evidenced one of the situations at section 2302(b)(8). I am aware that the proposal and decision to remove the appellant state that the appellant "telephoned a senior staff member of the Interior Appropriations Subcommittee and told her that [she] believed that the [NAPA] review was not necessary and the U.S. Park Police should not have to pay for the review." Because the appellant does not allege that she made this statement (and the agency will be required to prove it in the removal appeal), it is unnecessary to determine whether, if made, the statement would constitute protected whistleblowing activity. The appellant, I conclude, has not shown that she engaged in whistleblowing activity by making a protected disclosure to Ms. Weatherly.

According to appellant's counsel, the disclosure to Ms. Weatherly was made in a December 2, 2003, e-mail. Appellant's brief at 8. In her affidavit, the appellant stated that she wrote to Ms. Weatherly "to seek her counsel on how to better inform members of congress and [the Office of Management and Budget – OMB] about our status with regard to NAPA recommendations." She also "alerted her to the dangerous situation that currently existed and would continue to grow if the United States Park Police continued to be without adequate funding." Appellant's affidavit at 54. The "dangerous situation" she described in the e-mail was substantially the same as the situation she described in statements made days earlier to the Washington Post about the impact of inadequate funding on staffing and the assignment of officers. Appellant's exhibit 76. For the reasons given in my analysis of the disclosure to the Washington Post, I find that the December 2, 2003, e-mail to Ms. Weatherly was not a protected whistleblowing disclosure.

The November 20, 2003, disclosure to the Washington Post – In her affidavit, the appellant states that she was interviewed on November 20, 2003, by a reporter from the Washington Post regarding information he had received from

Officer Jeff Capps, the Chairman of the U.S. Park Police Fraternal Order of Police (FOP) Labor Committee. The reporter asked her to "react and respond" to various data he had with regard to the United States Park Police staffing and budget. Appellant's affidavit at 45. An article that appeared in the December 2, 2003, edition of the Washington Post included the following statements:

> The U.S. Park Police department has been forced to divert patrol officers to stand guard around major monuments, causing Chief Teresa C. Chambers to express worry about declining safety in parks and on parkways.
>
> Chambers said traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four. In neighborhood areas, she said residents are complaining that homeless people and drug dealers are again taking over smaller parks.
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> "It's fair to say where it's green, it belongs to us in Washington, D.C.," Chambers said of her department. "Well, there's not enough of us to go around to protect those green spaces anymore."
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> In the long run, Chambers said, her 620-member department needs a major expansion, perhaps to about 1,400.
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> Park Police said that this spring, after a survey by the U.S. Secret Service and endorsed by the Department of Homeland Security, the Department of the Interior adopted rules requiring four officers to be posted at all times outside the Washington Monument and the Lincoln and Jefferson memorials. Previously, the Washington Monument had one or two officers stationed, and the two memorials had one each . . .
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> In many cases, police said, more officers on the Mall mean fewer officers elsewhere. Even the area that includes Anacostia Park and Suitland Parkway, one of the most violent that the Park Police force patrols, now has two cruisers at most times, instead of the previous four.
>
> Police point to several statistics to show the impact of the cutbacks. On the Baltimore-Washington Parkway, where patrols have been halved, 706 traffic accidents occurred from January to October, which was more than the annual total in the previous four years.

> Since April, the number of arrests made by Park Police in the Washington area has declined about 11 percent compared with the same period last year, police said.
>
> Chambers and the head of the Park Police union, Jeff Capps, said that morale is low and that many officers may leave the force if conditions do not improve.
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> She said a more pressing need is an infusion of federal money to hire recruits and pay for officers' overtime. She said she has to cover a $12 million shortfall for this year and has asked for $8 million more for next year. She also would like $7 million to replace the force's aging helicopter.
>
> In recent weeks, the Park Police administration and the force's union have said they fear that the stationary posts on the Mall have hurt anti-terrorism efforts, because fewer officers are able to patrol in the area. Chambers said that she does not disagree with having four officers outside the monuments but that she would also want to have officers in plainclothes or able to patrol rather than simply standing guard in uniform.
>
> "My greatest fear is that harm or death will come to a visitor or employee at one of our parks, or that we're going to miss a key thing at one of our icons."

The appellant alleged in her OSC complaint that she disclosed information to the Washington Post that evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, and a substantial and specific danger to public health or safety. As an initial matter, it is unclear what information the appellant provided the reporter. The only evidence of her statements appears to be the newspaper article, and the appellant's counsel stated in written argument that some of the quoted statements were not accurate and some were paraphrased.

Based on my review of the article, I am unable to determine that the appellant disclosed any information that evidenced a violation of law, rule or regulation. Any disclosure of a violation of law, rule or regulation is protected if it meets the reasonable belief test. *See Ganski v. Department of the Interior,* 86 M.S.P.R. 32, 36 (2000). And the employee is not required to cite any specific

law, rule or regulation that she believes was violated. *See Kalil v. Department of Agriculture,* 96 M.S.P.R. 77, 84-85 (2004); *Ivy v. Department of the Treasury,* 94 M.S.P.R. 224, 229 (2003). Other than the inference that may be drawn from the appellant's statements that others may commit violations if the Park Police are insufficiently staffed to deter them, I cannot find that a disinterested observer reasonably could conclude that the statements appellant made evidenced a violation of law, rule or regulation.

Gross mismanagement, a gross waste of funds, and a substantial and specific danger to public health or safety, each include qualifying language that specifies a degree to which the wrongdoing must rise before its disclosure is protected. *Wheeler v. Department of Veterans Affairs,* 88 M.S.P.R. 236, 241 at n. * (2001). Gross mismanagement means management action or inaction that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission but it does not include management decisions which are merely debatable, nor action or inaction which constitutes simple negligence or wrongdoing; there must be an element of blatancy. *See, e.g., Schaeffer v. Department of the Navy,* 86 M.S.P.R. at 615, *citing, Embree v. Department of the Treasury,* 70 M.S.P.R. 79, 85 (1996). A gross waste of funds is a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See, e.g., Gaugh v. Social Security Administration,* 87 M.S.P.R. 245, 248 (2000). A revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing is not a disclosure of a substantial and specific danger to public health or safety. *Sazinski v. Department of Housing and Urban Development,* 73 M.S.P.R. 682, 686 (1997).

I have reviewed the statements purportedly made by the appellant and reported in the Washington Post. She (1) expressed worry about declining safety in parks and on parkways; (2) stated that traffic accidents have increased on the Baltimore-Washington Parkway and residents are complaining that homeless

people and drug dealers are taking over smaller parks; (3) stated that there were not enough officers on patrol; (4) stated that her department needed a major expansion; (5) along with Officer Capps stated that morale was low and officers might leave the force; (6) expressed a "pressing need" for an infusion of Federal money to hire recruits, pay for overtime, and replace a helicopter; (7) stated her preference for the assignment of officers in plainclothes or on patrol rather than simply standing guard; and (8) expressed her "greatest fear" that harm or death will come to a visitor or employee or that a "key thing" would be missed at one of the monuments. In summary, the appellant appeared to be claiming that without more and differently assigned officers, the safety of visitors to areas under the jurisdiction of the U.S. Park Police could be jeopardized. She did not identify any management action or inaction that created the alleged safety issue, and, if she had, she did not explain how it was anything other than debatable, simple negligence or wrongdoing with no element of blatancy. The appellant did not appear to identify any wasted funds. If any of her statements was an expression of her disagreement with the way funds were being spent (for example, on officer assignments), the information concerned no more than a debatable expenditure. Finally, while the appellant's statements draw the obvious connection between the need for more officers and funding and visitor safety, her statements do not reveal a substantial and specific danger to any particular person, place, or thing. For these reasons, I find that the information disclosed to the Washington Post does not rise to the level of wrongdoing required to show that they evidenced gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety.

The December 2, 2003, disclosure to Director Fran Mainella – The appellant stated in her affidavit that on December 2, 2003, she hand delivered to Director Mainella's office a sealed envelope containing a complaint about Deputy Director Murphy's "unprofessional comments" about her during a November 26, 2003, nation-wide teleconference. Appellant's exhibit 74. According to the

appellant, Deputy Director Murphy went "into a tirade" blaming her for the U.S. Park Police having insufficient funds and accusing her of never responding when asked about budget matters or cooperating in the budget process. Appellant's affidavit at 48. In the complaint delivered to Director Mainella, the appellant stated that Deputy Director Murphy had "impugned" her character and "slandered" her. Although far from clear, it appears from paragraph four of the complaint that the appellant is alleging that she received a written reprimand from Deputy Director Murphy for violating a "policy, procedure or statute." Despite Deputy Director Murphy's assurance that he would keep the only copy and "throw it away after a few weeks," she was questioned about the discipline during a deposition she gave in an unrelated disciplinary action and a copy was produced in discovery. The appellant never informed Director Mainella in the complaint of the remarks she considered slanderous and the record does not otherwise document them.

In her OSC complaint, the appellant alleged that the information she disclosed to Director Mainella evidenced an abuse of authority. An 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 other preferred persons. *See, e.g., Ramos v. Department of the Treasury,* 72 M.S.P.R. 235, 241 (1996). The definition of abuse of authority does not contain a de minimus standard or threshold. *Id.* Because the statements appellant regarded as "slanderous" are not described, I am unable to find that a disinterested observer reasonably could conclude that the appellant disclosed information about them that evidenced an abuse of authority. And even though the appellant alleges that Deputy Director Murphy mislead her to believe her reprimand would be discarded after a few weeks, a disinterested observer could not reasonably conclude that an agency official engages in an arbitrary or capricious exercise of power by producing a copy of a document (even one he had agreed to discard) if it was required to be

produced in response to a discovery request. The appellant, I conclude, has not shown that she disclosed information that evidenced an abuse of authority.

According to appellant's counsel, the disclosure to Director Mainella was made in a November 28, 2003, memorandum. In her affidavit, the appellant stated that on that date she submitted a memorandum to Director Mainella in response to a request for her comments on the fiscal year 2005 budget process. Appellant's affidavit at 51-52. She included in her response, comments about the impact of inadequate finding on staffing and assignment of officers similar to statements she had made in the e-mail to Ms. Weatherly and to the Washington Post. Appellant's exhibit 68. For the reasons given in my analysis of the statements made to the Washington Post and because the statements made to Director Mainella were made in the normal performance of her duties as Chief, the statements to Director Mainella were not protected whistleblowing activity. *Huffman v. Office of Personnel Management,* 263 F.3d at 1353.

The appellant, I conclude, has not shown in her stay requests that she engaged in protected whistleblowing activity by disclosing information that evidenced gross mismanagement, a gross waste of funds, a substantial and specific danger to public health or safety, or an abuse of authority. Because she has not shown that she engaged in protected whistleblowing activity and because she has not otherwise shown that there is a substantial likelihood that she will prevail on the merits of her appeal, the requested stays are DENIED. Because the appellant failed to establish the necessary elements for granting the stays, it is unnecessary to consider whether granting the stays would result in extreme hardship to the agency.

FOR THE BOARD:

Elizabeth B. Bogle
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

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July 27, 2004
(Date)

Marie A. Sumner
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