UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

CANDACE CARTER,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
AT-1221-13-2153-W-1

DATE: December 3, 2014

Kirby G. Smith, Esq., Decatur, Georgia, for the appellant.

Isaiah D. Delemar, Esq., Atlanta, Georgia, for the agency.

BEFORE
Pamela B. Jackson
Administrative Judge

INITIAL DECISION

On August 2, 2013, the appellant, Candace Carter, filed an individual right of action (IRA) appeal alleging that she had suffered several personnel actions in retaliation for having engaged in whistleblowing activity. The appellant holds the position of Biological Science Technician, (GS-7), at the National Park Service (NPS), Cape Canaveral National Seashore, Florida.

Inasmuch as the appellant has made a non-frivolous allegation that she has exhausted her administrative remedies before the Office of Special Counsel (OSC), she has engaged in whistleblower activity, and her whistleblower activity was a contributing factor in the agency's decision to take certain personnel actions, the Board has jurisdiction over the appellant's appeal. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

The appellant withdrew her request for a hearing; therefore, this matter has been decided based upon the documentary submissions of the parties. For the reasons discussed below, the appellant's request for corrective action is GRANTED.

ANALYSIS AND FINDINGS

Burdens of Proof

The Whistleblower Protection Act (WPA)[1] protects employees against certain personnel actions taken in reprisal for making disclosures protected by 5 U.S.C. § 2302(b)(8). *See* 5 U.S.C. §§ 1221(a), 2302(a). To prevail in an IRA appeal, an appellant must first exhaust her remedies before the OSC, and she must establish by preponderant evidence that she made a protected disclosure and that the disclosure was a contributing factor in the action against her. *Chambers v. Department of Interior*, 116 M.S.P.R. 17, ¶ 12 (2011). If the appellant meets that burden, the Board will order corrective action unless the agency shows by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *Id.*

The appellant has exhausted proceedings before the Office of Special Counsel.

The appellant alleges that she received an oral counselling on March 27, 2012, a letter of counseling on May 2, 2012, and a lower performance evaluation in October 2012.[2] Additionally, she alleges that she was physically assaulted by Chief Ranger Eric Lugo in March 2012, denied administrative leave in March

---

[1] The WPA was amended by the Whistleblower Protection Enhancement Act (WPEA), effective December 27, 2012. Inasmuch as all of the alleged retaliatory acts occurred prior to that date, the WPEA has not impacted the instant appeal. *See Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶¶ 10-12 (2014).

[2] The appellant states in her brief that she received the lowered performance evaluation in October 2011. Appeal File, Tab 26. The record, however, reflects that the lower evaluation was received on October 22, 2012. Appeal File, Tab 19, p. 51 of 79.

2012, and continually harassed by Lugo and others in retaliation for her whistleblower activity. It is undisputed that the appellant has exhausted her remedies before the OSC regarding these alleged "personnel actions." *See Summary of Telephonic Status Conference and Order Closing the Record,* Appeal File, Tab 25.

The alleged personnel actions

Although the agency does not dispute that the appellant has exhausted her remedies before OSC, it does dispute that the oral and written counselings, the alleged harassment, including the "physical assault" are "personnel actions" within the meaning of the WPA. It is undisputed that the denial of leave and the October 2012 performance rating are "personnel actions" within the meaning of the WPA. Appeal File, Tab 25.

The counselings

The appellant alleges that in March 2012, she was orally counseled to stop visiting the ticket booth at the Cape Canaveral National Seashore. Shortly after her oral counseling, on May 2, 2012, her immediate supervisor, John Stiner, issued her a "Letter of Counseling/Expectations" to address what he characterized as, "performance and other concerns…."

In support of its position that neither the oral nor written counseling is a personnel action, the agency cites, among other cases, *Special Counsel v. Spears,* 75 M.S.P.R. 639, 670 (1997). It presented evidence, in the form of a declaration from John Stiner, providing that he never memorialized the letter of counseling in a Standard Form (SF) -50 or -52, and no record of counseling was placed in the appellant's Official Personnel File (OPF). Appeal File, Tab 19. The agency, therefore, argues that under *Spears,* neither the oral counseling nor the letter of counseling meets the criteria of a "personnel action."

The appellant does not dispute that portion of Stiner's affidavit asserting that the counselings were neither memorialized in a SF-50 or -52, nor included in

her OPF. She nevertheless argues that the letter of counseling is a "personnel action" because it contains a threat, given that the letter stated she may be subject to "further disciplinary action," if she did not comply with Stiner's instructions. Appellant's Ex. U, Appeal File, 28. She also notes that Stiner directed her to, among other things, take her complaints "through the proper chain of command" and warned her that she would be "held accountable for her actions from this point forward."

In his defense, Stiner states in his declaration that he issued a letter of counseling at the behest of the Office of Human Resources, which advised all supervisors to issue letters of counseling to their employees, and that his statements regarding following the chain of command were simply reiterating agency and OSC policy which "encourages employees to work within the chain of command to resolve problems early and effectively." He further states that he never stated or implied that that the appellant should not report illegal activities. *Stiner Declaration*, Appeal File, Tab 19, p. 22 of 79.

The evidence establishes that the letter of counseling but not the oral counseling is a "personnel action" within the meaning of 5 U.S.C. § 2302(a)(2)(A).

Title 5 U.S.C. § 2302(b)(8) states that an agency "shall not ... take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee … because of a protected whistleblower disclosure." A "personnel action" includes "an action under chapter 75 of [Title 5] or other disciplinary or corrective action." 5 U.S.C. § 2302(a)(2)(A)(iii).

The agency is correct in its assertion that the Board has previously found letters of counseling which are not memorialized in a SF-50 or -52 not to be "personnel actions," within the meaning of the WPA. In *Spears*, the Board concluded that the memorandum of oral counseling in that case was not a personnel action because it did not constitute disciplinary or corrective action within the coverage of 5 U.S.C. § 2302(a)(2)(iii), and stated that a contrary

conclusion could discourage the resolution of workplace issues short of formal disciplinary action. *Spears,* 75 M.S.P.R. at 670.

The Board, however, made clear in *Campo v. Department of the Army,* 93 M.S.P.R. 1 (2002), that it was not saying in *Spears* that a letter of counseling not memorialized in a SF-50 could never be a "personnel action" within the meaning of the WPA. In fact, in *Campo*, the Board considered the content of a "memorandum of warning," which was not memorialized in a SF-50, and under the circumstances of that case concluded that the memorandum which threatened disciplinary action if the appellant did not cease making unfounded allegations about coworkers, was a "personnel action" within the meaning of the WPA. *Campo v. Department of the Army*, 93 M.S.P.R. 1 at 3-4.

I find the letter of counseling in the instant matter to more similar to the memorandum in *Campo* than *Spears.* Specifically, I note that Stiner explicitly informed the appellant that if she went outside the chain of command to report perceived wrongdoing, discipline would ensue. Furthermore, although Stiner indicates in his affidavit that it was not his intention to prevent the appellant from reporting illegal activity, he did not so state in his letter of counseling. It does not appear that he did anything to affirm the appellant's right to go outside of her chain of command regarding suspected violations of law, rule, or regulation, without fear of reprisal. In fact, he told her the opposite – that she would be disciplined if she went outside her chain of command. In my view, such instructions stifle whistleblowing activity, especially if one is not comfortable reporting whistleblower activity to one's supervisor. I cannot conclude that the intent of the Board or the WPA was to preclude such statements from review because they are embedded in a "letter of counseling." I, therefore find, in agreement with the appellant, that inasmuch as the letter of counseling contained a threat of discipline if she did not cease going outside her chain of command, such constitutes a "personnel action" within the meaning of the WPA. *Id.*

On the other hand, given the evidence does not reflect that the Stiner threatened the appellant with discipline in the oral counseling, and issued no admonishments regarding going outside of her chain of command concerning her allegations of wrongdoing, I find that the evidence does not establish that the oral counseling constituted a "personnel action" within the meaning of the WPA.

The alleged harassment

The appellant alleges supervisors and agency employees harassed her on a continuing basis after she engaged in whistleblower activity, beginning around October 11, 2011. According to the appellant, around October 2011, shortly after the Office of Inspector General (OIG) began its on-site investigation, employee Natalie Harris (a subject of the OIG investigation)[3] and Chief Ranger Eric Lugo (who the appellant alleges is a close friend of Shawn Harris, another subject of the OIG)[4] whistled several times a week whenever she walked by in reference to her whistleblower activity. Additionally, the appellant alleges that Natalie Harris refused to speak to her. Also, according to the appellant, Park Superintendent Myrna Palfrey (another subject of the OIG investigation)[5] delayed in processing her December 2, 2011 "leave share" request until after the end of the leave year, when fewer employees donate leave. The appellant also alleges that beginning in October 2011, she received multiple electronic mail messages from coworkers attacking whistleblowers. The appellant argues that although any one of these events taken alone may not constitute a "personnel action" within the meaning of the WPA, when one considers their cumulative effect, the complained of events, in their totality, constitute harassment rising to the level of a personnel action.

---

[3] OIG Report, p. 67 of 69, Appeal File, Tab 34

[4] OIG Report, p. 67 of 69, Appeal File, Tab 34.

[5] OIG Report, P. 67 of 69, Appeal File, Tab 34.

In considering the parties' respective claims, I note that part of the definition of a "personnel action" under the WPA includes "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xi). As pointed out in *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583 (2010), *overruled* on *other grounds by Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 12 n.5 (2014), the legislative history of the 1994 amendment to the WPA indicates that the term "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system." *Id.* At 589, n. 4. The Board, therefore, concluded that the appellant's claims of harassment and disability discrimination in that case constituted a non-frivolous allegation that she was subject to a "personnel action" with the meaning of the WPA.

Based on *Cavarribias*, I find that claims of harassment can constitute a "personnel action" within the meaning of the WPA. Prior to resolving the issue of whether harassment in this case constitutes a "personnel action," I note that a dispute exists, which must be resolved, as to whether Harris and Lugo actually whistled in response to the appellant walking by.

In response to the appellant's allegation, Stiner states in his declaration that after the appellant informed him that Harris and Lugo were engaging in such behavior, he reported the allegation to Natalie Harris' supervisor, Bob Shannon, whose office opens on the hallway and is located between the appellant's and Harris' offices. According to Stiner, he and Shannon listened for the whistling but heard no whistling in the appellant's presence. Stiner states that he did notice that Lugo whistled and Harris sang several times when the appellant was not around, and he stayed alert for whistling in the appellant's presence, but heard nothing. Appeal File, Tab 19, pp. 24-25.

The appellant has offered no evidence, such as her own affidavit or the affidavit of others, that the whistling occurred. Thus, other than her bare allegation, there is no evidence that Lugo and Harris engaged in the conduct the appellant has attributed to them. Given there is no evidence that Lugo and Harris whistled when the appellant walked by, I find it unnecessary to determine whether the conduct rises to the level of harassment of the type which could constitute a "personnel action" within the meaning of the WPA. Accordingly, the allegations regarding Harris and Lugo whistling will not be considered further.

Similarly, the appellant has offered no evidence regarding electronic mail messages from other employees regarding her whistleblower activity. The appellant alleged that Mr. Edwin Correa sent an electronic mail message addressing the stressful weeks in the park while the OIG was investigating, and ended the email with the quote:

> "A wise man/woman is superior to any insults which can be put upon him/her and the best reply to unseemly behavior is patience and moderation."

She alleges that Mr. Correa has continued to send such quotes, and has not been punished. Although the agency has responded to the appellant's allegation, the appellant has submitted no evidence regarding her allegation. Given the appellant has set forth no more than a bare allegation regarding harassment suffered at the hands of Correa, I will not address the allegation further in this decision.

As to the allegations of harassment by Natalie Harris, assuming that Harris stopped speaking to the appellant, as the appellant alleges,[6] the record does not reflect that Harris has any supervisory authority over the appellant. In fact, although, as more fully explained below, the record supports a finding that Harris and Palfrey were friendly, Harris is merely a coworker. Given Harris has no

---

[6] The agency does not specifically dispute that Harris stopped speaking to the appellant.

supervisory authority, using an objective standard, I find that a reasonable person in the appellant's circumstances, including all of the harassment the appellant claims to have suffered, would be able to ignore the fact that Harris was not speaking and continue with her daily work. Given Harris was the only person not speaking to the appellant and Harris had no supervisory authority over the appellant, I find that Harris' failure to speak is not the type of conduct that normally could have a chilling effect on whistleblowing or otherwise undermine the merit system. I, therefore, find that the conduct does not rise to the type of harassment that could be considered a "personnel action."

The physical assault as harassment

In addition to the above alleged harassment, the appellant has introduced evidence which establishes that during a meeting called by Chief Ranger Lugo, the appellant was sitting at a table, with her elbows on the table and her chin resting in her palm, when Lugo asked her to remove her hands form the table. Lugo then grabbed the appellant's arm and forcibly removed it from the table.[7] The appellant argues in her closing brief not that Lugo assaulted her because of her whistleblower activity; rather, she argues that the agency failed to sufficiently punish Lugo for his conduct because of her whistleblower activity, and the agency's failure to do so added to the environment of harassment. *See* Appellant's Brief In Support of Appeal, Appeal File, Tab 26.

I am persuaded that an agency's failure to appropriately discipline an offending employee for the type of conduct at issue in the instant appeal could have a chilling effect on whistleblowing or otherwise undermine the merit system. I, therefore, find that the agency's alleged failure to appropriately discipline Lugo for inappropriately touching or "assaulting" the appellant could

---

[7] The appellant's account of this event was corroborated by the agency's own investigator. *See* April 12, 2012 memorandum by Keith Rogers, Regional Law Enforcement Specialist, Appeal File, Tab 21, p. 19-20 of 57.

constitute harassment rising to the level of a "personnel action" cognizable under the WPA.

The delay in approving the appellant's request to participate in the leave donation program

The record reflects that in December 2012, the appellant submitted an application to participate in the agency's leave donation program. According to the appellant, the agency deliberately delayed in processing her application until after the leave year had ended, thereby greatly reducing her chances of receiving any donated leave, given employees tend to donate leave at the end of the leave year, rather than the beginning.

Inasmuch as a delay in approving the appellant's request could negatively impacted her pay or ability to take leave, I find that it is the type of conduct that could have a chilling effect on whistleblowing or could otherwise undermine the merit system. Accordingly, I find that a deliberate delay in approving the appellant's application could constitute harassment rising to the level of a "personnel action" cognizable under the WPA.[8]

The appellant has established that she made a protected disclosure.

The appellant's disclosure was an April 22, 2011 electronic mail complaint to the Department of Interior Office of Inspector General (OIG) that employees Mark Hempe and Shawn Harris were violating Federal Acquisition Regulations (FAR) by awarding work to relatives without going through a competitive bid process, and were making "split purchases" to avoid the competitive bid process.

[8] Inasmuch as the agency's delayed action could also be characterized as a decision concerning "pay" or "benefits," I find that the delayed approval could also be an independent "personnel action" within the meaning of 5 U.S.C. § 2302(a)(2)(A)(ix). In the context of this appeal, however, I have considered what the appellant alleged, *i.e.*, that the delay in approval constituted harassment.

The appellant also complained of nepotism in hiring practices, and other mismanagement.

The OIG conducted an on-site investigation in October 2011. The subjects of the investigations were not only Marke Hempe and Shawn Harris, but also Myrna Palfrey, Superintendent, Canaveral, NPS, and Natalie Harris, Information Technology (IT) Specialist and Human Resources (HR) Specialist at Cape Canaveral, National Park Service. Appeal File, Tab 34, p. 67 of 69. The record reflects that Natalie and Shawn Harris are married. The Harrises were investigated not only about the violation of the FAR regulations, but also nepotism, stemming from the hiring of Natalie Harris' sister, Jennifer Maryland, who was hired as a cashier, even though she had a retail theft criminal background, and whose background investigation request had never been received by OPM, although Natalie Harris, as the HR Specialist, was responsible for forwarding the request to the Office of Personnel Management (OPM). OIG Report, Appeal File, Tabs 32-35.

Superintendent Palfrey was questioned not only regarding the alleged FAR violations, but also the hiring of Maryland and the hiring of the son-in-law of Palfrey's secretary, Charles Holmes, who was hired by Palfrey even though he had a criminal record. Palfrey was also questioned regarding her use or misuse of her government issued cellular telephone. OIG Report, Tab 6; Appeal File, Tab 33, pp. 6-7 and 14.

Ultimately, on November 14, 2012, the OIG issued a Report of Investigation in which it found, among other things, evidence of FAR and DOI policy violations as well as ethical violations when employees Hempe and Harris circumvented procurement regulations by splitting requirements of specific projects, also known as making "split purchases," in order to hire vendors without competition, including the relatives of Hempe and Harris. Appeal File, Tab 34, pp. 57-69. The OIG noted that Myrna Palfrey became aware of the allegations of impropriety as early as May 2011, and did nothing to address the issue.

Additionally, the OIG cited Palfrey for her "lack of candor" during the investigation, based upon several instances of Palfrey misrepresenting facts or being less than forthcoming. OIG Report of Investigation, Appeal File, Tab 34, pp. 60-67.

Specifically, the OIG noted that prior to its on-site investigation, it had asked Palfrey not to notify employees of its upcoming visit. During the investigation, the OIG asked Palfrey if she had told anyone about the upcoming visit, and Palfrey replied that she had told no one. When the investigators noted that no one seemed surprised about the OIG visit, Palfrey then admitted she had told Eric Lugo. The OIG also noted that during Palfrey's investigative interview, Palfrey denied having a personal relationship with Shawn and Natalie Harris, and stated, "they don't hang out at her home." On the same day as the interview, later that evening, the OIG investigators observed Shawn Harris' vehicle at Palfrey's home. When confronted with the information, Palfrey admitted that both Shawn and Natalie Harris had been at her home discussing the OIG investigation. OIG Report, Tab 9c, p. 64 of 69, Appeal File, Tab 34.

In order for a disclosure to be protected by the WPA, the appellant must establish that she disclosed information she reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. Whether one has a reasonable belief is determined by 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 matter disclosed shows one of the categories of wrongdoing set out in the WPA. *LaChance v. White,* 174 F.3d 1378, 1281 (Fed. Cir. 1999).

The agency argues that the appellant "did not have a good-faith belief that agency officials violated any law, rule or regulation," and quoting Paflrey, goes so far as to state, "the agency did not fund the construction using split

purchases," and "Mr. Harris and Hempe followed all applicable Agency policy." Appeal File, Tab 9.

I am, frankly, astounded by the agency's representations and arguments. Unless it did not read its own OIG report, I cannot fathom how it could make such assertions. Clearly, its own OIG specifically found evidence of FAR violations almost identical to the appellant's allegations or disclosures. In my view, such is more than enough to conclude that the appellant's belief that FAR violations were occurring or had occurred was reasonable. Moreover, even in the absence of the OIG findings, I note that it is undisputed that FAR regulations prohibit breaking down larger purchases into smaller ones to circumvent FAR requirements.[9] At the time appellant made her disclosure to the OIG, she had specific evidence and/or belief, based upon the agency's own data, that certain construction projects had been parceled out in increments of $2,000 or less, with the total project costing in excess of $18,000. I, therefore, conclude that a disinterested observer with knowledge of the facts known to the appellant at the time could reasonably conclude that the matter disclosed showed a violation of the FAR. Accordingly, I find that the appellant made protected disclosures.

<u>The appellant has established that her whistleblowing activity was a contributing factor in the personnel actions at issue.</u>

Inasmuch as I have found that the appellant made protected whistleblower disclosures, the next issue to be resolved is whether those disclosures were a

---

[9] Section 13.003(c)(2) of the FAR provides:

> Do not break down requirements aggregating more than the simplified acquisition threshold … or the micro-purchase threshold into several purchases that are less than the applicable threshold merely to (i) Permit use of simplified acquisition procedures; or (ii) Avoid any requirement that applies to purchases exceeding the micro-purchase threshold.

contributing factor in the personnel actions suffered by the appellant. The appellant argues that she has established the "contributing factor" requirement because she meets the knowledge/timing test, given that all of the personnel actions occurred within a short time – within a year – either of her disclosures or the on-site investigation of her disclosures.

The record reflects that two of the personnel actions at issue here – the May 2012 letter of counseling and the October 2012 performance evaluation -- were taken by the appellant's first line supervisor, John Stiner. Superintendent Palfrey was responsible for two other complained of actions – the denial of the appellant's request for administrative leave, and the alleged harassment, including the delay in approval of the appellant's participation in the leave transfer program.

The agency seems to argue that the appellant does not meet the knowledge/timing test because the officials responsible for taking the actions had no knowledge of the appellant's whistleblowing activity. In support of its claim, the agency offered the declaration of John Stiner, who was responsible for the October 2012 performance evaluation, and the May 2, 2012 written counselling.

Stiner states in his declaration that he had "no knowledge" of the appellant's whistleblower activity until after May 2, 2012,[10] when the appellant informed him that she was the whistleblower. He does, however, acknowledge, that "throughout the investigation, [the appellant] would occasionally tell [him] that she was conversing with the IG..." Appeal File, Tab 19, p. 23 of 79. Moreover, the May 2, 2012, counseling letter indicates that Stiner had a belief

---

[10] On page 2 of his affidavit, Stiner states that he had no knowledge of the appellant's whistleblower activity until May 2, "2013." On page 5 of the same affidavit, Stiner says the appellant informed him on May 2, "2012." I believe the "2013" date to be either a misstatement or a typographical error, and from the content of Stiner's statement on page 5, I believe that Stiner intended to state that the appellant made him aware that she was the whistleblower on May 2, 2012. Agency's Narrative, pp. 20-23 of 79; Appeal File, Tab 19.

that the appellant was making complaints outside her chain of command, as he counselled her to follow her chain of command in making complaints. App Ex. U; Appeal File, Tab 9, p. 25 of 44. Furthermore, he implicitly acknowledges that the appellant was making complaints regarding matters outside of his supervision, as he counselled the appellant, "What occurs in other divisions or their activity is not our focus." Appeal File, Tab 21, p. 15 of 57.

The appellant contends that although she did not specifically tell Stiner she was a "whistleblower," she frequently spoke to Stiner about improprieties in the park, including the FAR violations, and she did so as early as May 2011. The appellant further contends that it was common knowledge among employees within the park that she was the whistleblower who had occasioned the OIG investigation.

In support of that claim, she submitted a letter from several employees, including Charles H. Buzzard, who stated that the Cape Canaveral National Seashore is a small park, in which most of the employees interact. Buzzard could not fathom anyone who did not know about the appellant's whistleblower activity. App. Ex. X; Appeal File, Tab 28, p. 34 of 44.

Based upon the above, I find that even though the appellant may not have specifically informed Stiner that she was a "whistleblower," until May 2012, she did tell him prior to that time that she was meeting with the OIG. Given she had complained to him about alleged improprieties[11] in the work place, I find he had actual knowledge of her whistleblower activity, at least by the time the OIG began its onsite investigation in October 2011. *See Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶ 10(2014)(appellant's notification to supervisor that he intended to contact OSC sufficient to find constructive knowledge of appellant's whistleblower activity). I find further support for a

[11] Indeed, the appellant had complained so much about improprieties in the work place, that Stiner felt the need to counsel the appellant about it.

finding that Stiner had constructive knowledge given the uncontroverted evidence that the workplace was relatively small, and it was commonly believed among employees that the appellant was the person who occasioned the OIG investigation.

As to Myrna Palfrey's knowledge, Palfrey, in a declaration submitted by the agency, denied having knowledge of the appellant's whistleblowing activity until August 30, 2013, when she was informed by the Human Resources office of the appellant's appeal to the Board. I, however, was not impressed by Palfrey's denial. I note, as concluded by the OIG, that Palfrey failed to tell the truth on more than one occasion during the OIG investigation, and I have no confidence that she would be any more honest or forthright before the Board. I, therefore, did not credit her declaration of "no knowledge." I also note that she, unlike Stiner, was one of the subjects of the investigation. Furthermore, notwithstanding her denial of such, the record reflects that she was friendly with the Harrises, the other subjects of the investigation. I, therefore, find it more likely than not that Palfrey had more than a casual interest in the origin of the complaints being investigated.

Given the evidence reflects that the investigation was frequently discussed in the work place, and it was widely believed by employees that the appellant was the whistleblower, I find it appropriate to conclude that Palfrey had at least constructive, if not actual knowledge, that the appellant was at least partially responsible for the complaint.[12] I further find that Palfrey had constructive knowledge of the appellant's protected activity at least by October 2011, and

---

[12] In this regard, I note that Palfrey admitted to OIG investigators that, notwithstanding their instructions not to do so, she had discussed with the Harrisses the ongoing OIG investigation. Furthermore, Natalie Harris indicated in her OIG statement that she knew where the complaints were coming from and attributed an "influx of complaints" to a small group of "white Caucasians." OIG Report (Tab 10); Appeal File, Tab 35, p. 5 of 13. The record reflects that the appellant is Caucasian. Appeal File, Tab 28, p. 5 of 44.

based upon the OIG report, I find that she had actual knowledge of the allegations or disclosures as early as May 2011.

Given that all of the complained of actions, including the alleged harassment, occurred within one year of Stiner's and Palfrey's knowledge of the appellant's whistleblower activity, and within two years of the actual disclosure, I find that the appellant meets the knowledge/timing test. *See Schell v. Department of the Army*¸114 M.S.P.R. 83, ¶ 22 (2010)(a personnel action taken 1 to 2 years after the appellant's disclosure satisfies the knowledge/timing test). Accordingly, I find that the appellant has presented sufficient evidence to meet her burden of establishing that her disclosure was a contributing factor in the personnel actions at issue in the instant appeal). *McCarthy v. International Boundary and Water Committee: U. S. and Mexico,* 116 M.S.P.R. 594, ¶ 40 (2011)(once the knowledge timing test has been met, the appellant has shown that whistleblowing was a contributing factor in the personnel action at issue, even if after a complete analysis of all the evidence a reasonable fact finder could not conclude that the appellant's whistleblowing was a contributing factor to the personnel action).

The agency's burden

When an appellant shows by preponderant evidence that she 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 v. Department of Veterans Affairs,* 120 M.S.P.R. 285, ¶ 28 (2013). 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.*

The agency has failed to establish by clear and convincing evidence that the appellant would have received a lower appraisal for the 2012 performance year absent her whistleblower activity.

The appellant alleges that her rating for the 2011/2012 performance year was the lowest rating she had received in her career. The record reflects that prior to the October 2012 rating, the appellant had received "superior" summary ratings. App's Ex Y; Appeal File, Tab 28, pp. 38-43.

The appellant's summary rating for October 2012 was "fully successful"[13] -- one tier below the "superior" she had received the year before, and lower in three of the five individual elements. She received one "2" rating; three "3" ratings," and one "4" rating. Appeal File, Tab 19, p. 51 of 79. A "2" rating is "Minimally Successful." A "3" rating is "Fully Successful." A "4" is "Superior," and a "5" is "Exceptional."

In considering the evidence, I note that Stiner was the rating official, and the evidence does not support a finding that Stiner had any personal motive to retaliate against the appellant in that Stiner was not implicated in any of the appellant's disclosures, and the record does not reflect that Stiner had anything to do with the conduct at issue, or that he was even interviewed by the OIG.

Stiner is, however, supervised by Palfrey, who given she was implicated in the wrongdoing, I find had a strong motive to retaliate. Although Palfrey makes a point that she was not the Park Superintendent when the split purchases occurred,

---

[13] Although the appellant received a summary rating of "Fully Successful," according to the instructions on the appraisal form, her summary rating should have been "Minimally Successful" because she received a "minimally successful" rating of "2" in a critical element. In order to have appropriately received a "Fully Successful" rating, she could receive "No critical element rated lower than "Fully Successful" or "3." Appeal File, Tab 19, p. 51 of 79.

the OIG makes the point that agents had made Palfrey aware of the split purchase allegations in May 2011, and Palfrey did nothing, not even ask Harris for an explanation as to why the purchases were made in the manner they were made. OIG Report – Synopsis; Appeal File, Tab 34, p. 65 of 69, and OIG Report, Tab 6; Appeal File, Tab 33, p. 7 of 54.

Moreover, the OIG found evidence of nepotism in hiring selections made by Palfrey, and the OIG noted that when Palfrey received complaints that the two employees who allegedly benefitted from nepotism had criminal histories, Palfrey "did not move a finger" (Palfrey's words) to investigate. OIG Report – Synopis; Appeal File, Tab 34, p. 65 of 69. The report goes on to outline more unflattering conduct, if not misconduct, by Palfrey, not the least of which, as discussed above, was her "lack of candor" during the investigation.

For these reasons, I find that Palfrey would be highly motivated to retaliate against the appellant. I note, however, that although Palfrey may have been highly motivated to retaliate, there is no direct evidence that Palfrey had any input into the appellant's evaluation. Even though the appellant alleges that Stiner told her he was being pressured to, at least, discipline the appellant, Stiner denies such in his declaration, and the appellant has not provided conclusive evidence of such. Given, however, the agency's burden of establishing by clear and convincing evidence that it would have taken the same action absent the appellant's whistleblower activity, Stiner's explanation for his actions warrants scrutiny, even more so because Palfrey was in a position to influence Stiner, if she so desired.

In discussing the appellant's performance, Stiner states that in rating the appellant "fully successful," he deemed her to have performed some tasks well, but there were important areas that needed improvement. Although Stiner did not specifically identify to what performance element the appellant's alleged shortcomings pertained, I have tried to identify the relevant performance element based upon the shortcoming described.

The first shortcoming described by Stiner appears to pertain to critical element 1, in which the appellant received a "2" or a "minimally successful" rating. Stiner stated that the appellant was required to timely complete a 2012 Marine Turtle Nesting Summary, and at the time of her performance rating, the report was more than six months overdue. Stiner also stated that the appellant was required to maintain adequate gas and nesting supplies, and implied that her failure to maintain nesting supplies hampered nest protection efforts. Appeal File, Tab 19, p. 24 of 79.

The critical element I believe to be at issue, provides as follows:

> **GPRA/Strategic Goal: 1a2A T&E Species Recovering**
>
> **Performance Measure:** Coordinates Sea Turtle Nest Protection Program: Provides direction and support to seasonal employees to achieve GPRA goal 1a2A (improve or maintain status of T&E species). Ensures that nesting data and reports are complete, accurate and submitted on time. Ensures that ATV fleet is properly maintained and all needed supplies are obtained. Oversees volunteer recruitment, training and scheduling.

The performance appraisal described "Fully Successful" performance as follows:

> See Benchmark standards attached.[14] In addition: Nest survey data is reviewed for accuracy once a week. Supplies are obtained with only 1-2 days interruption of normal operation (barring uncontrollable circumstances), Necessary ATV repairs are addressed within three to four days of occurrence. Ninety percent of the viable nests receive protective screens (barring unforeseen storm events or severe funding constraints). After all data collected, coordinate completion of CANA annual sea turtle nesting summary within 3 months.

Under the category of "Minimally Successful" performance, the following is provided:

> The Department of the Interior has not developed a benchmark standard for Minimally Successful standard for this performance

[14] As far as I can determine, there were no Benchmark standards attached to the appraisal contained in the record. Appeal File, Tab 19, pp. 51-62 of 79.

> cycle; however, managers and supervisors must develop a Minimally Successful standard when plans are established for the year and/or if it is determined that an employee has not achieved Fully Successful performance. This may include a specific Benchmark standard in the EPAP itself or a narrative Letter of Expectations attached and made part of the performance standard which must indicate the following information: 1) the employee is on notice that his/her performance is less than Fully Successful; 2) that the employee's performance is Minimally Successful and what constitutes the Minimally Successful performance (written in a forward, not backward manner), such as "your performance is Minimally Successful which means that you have completed certain work products 50% of the time"; 3) that the employee must continue at this level in order to avoid falling to the Unsatisfactory level; and 4) that the expectation is that the employee will get back to the Fully Successful level of performance. Please contact your servicing Human Resources Office for assistance.

Appeal File, Tab 19, p. 52 of 79.

Based upon the above, I find that the agency has failed to establish that the appellant would have been rated "Minimally Successful" in the absence of her whistleblower activity. Initially, I note that Stiner does not mention what standard he used to determine that the appellant's performance was "Minimally Successful." Furthermore, as reflected above, the performance appraisal does not contain a standard for "Minimally Successful" performance.[15] I, therefore, have nothing by which to measure the appellant's performance to determine if it was, in fact, "minimally successful."

Furthermore, the evidence submitted by the agency does not establish that the appellant's performance was less than "Fully Successful" under Critical Element 1. Although Stiner did state that the appellant failed to submit a sea turtle nesting summary within 3 months and failed to maintain nesting supplies, as required by the "Fully Successful" standard, there is no evidence in the record establishing that failure to achieve one or two parts of the multi-part standard

---

[15] Nor does the record reflect that Stiner afforded the appellant any of the other procedures outlined in the appraisal prior to rating her "minimally successful."

would cause one not to achieve a rating of fully successful for the entire standard. *Cf. Shuman v. Department of Treasury*, 23 M.S.P.R. 620, 628 (1984)(when agency finds employee's performance unacceptable on fewer that all components of a critical element, the agency must establish that the employee's performance warranted an unacceptable rating on the critical element as a whole).

I note further than the "fully successful" criteria of element 1 seems to make allowances for some lack of supplies and some interruption for lack of supplies, and still meet the standard. Although Stiner stated in his declaration that the appellant had failed to maintain adequate nest screening supplies "throughout the sea turtle nesting season," he does not indicate that there was ever any interruption caused by lack of supplies, let alone an interruption of more than one or two days. Based upon the standard, it appears that if the lack of supplies caused less than a 1 or 2 day interruption of normal operations, the appellant could have still met the criteria for a "fully successful" rating.

I also note that Stiner's declaration in support of the appellant's rating in at least one instance appears to contradict the actual performance evaluation he completed for the appellant in October 2012. For example, in Stiner's declaration he lists as an area needing improvement, "Maintaining ATVs in good condition during the non-nesting season." In the appellant's performance evaluation, however, he states under the heading of "good work:" "Candace did well at getting ATV's in for servicing, particularly undercoating." Appeal File, Tab 19, p. 53 of 79. Stiner did also state in the appellant's performance evaluation that she should periodically check the condition of the ATV's in the off-season, but he made no mention of the ATV's being in poor repair during the off-season; rather, he stated that the ATV check should be done "so that there are operational bikes in both ends if needed for patrols and response to emergencies." Appeal File, Tab 19, p. 53 of 79.

Inasmuch as the agency has failed to produce the necessary performance standard by which to measure the appellant's performance, given the evidence

does not reflect that Stiner ever developed or used a "minimally successful" performance standard, and Stiner's declaration appears on at least one occasion to contradict the narrative of the October 2012 performance evaluation, I find the agency has failed to establish by clear and convincing evidence that the appellant's performance in critical element 1 was, indeed, minimally successful.

Critical Element 4

The appellant's performance rating in Critical Element 4 declined from a "5" rating to a "4." Critical Element 4, reads as follows:

> **GPRA/Strategic Goal: IVb1A Partnerships**
>
> **Performance Measure:** Contributes to development of specific partnerships and collaboration with groups and organization that further park goals of resource protection, visitor services and efficient management.

Appeal File, Tab 19, p. 59 of 79.

Stiner does not explain in his declaration what was different about the appellant's performance during the 2011 performance year from the previous year, or why he believed the appellant's rating warranted a lower score in 2011 than the previous performance year. In the performance evaluation itself, he does not indicate there has been any decline in the appellant's performance. To the contrary, he seems to indicate that she has performed as usual. Specifically, Stiner stated:

> As always Candace did an excellent job interacting with NASA, TNC, FWC and multi-agency Shorebird Alliance to complete shorebird, scrub jay and beach mouse monitoring and to respond to marine mammal and sea turtle stranding. Specifically, she enlisted help for the park's scrub jay survey.

If there was some element that distinguished her performance in 2011 that was not present in 2012, the agency did not identify such. I, therefore find the

evidence insufficient to conclude that the appellant's performance evaluation warranted the lower rating she was given in critical element 4.

Critical element 5

In critical element 5, the appellant's performance rating declined from a "4" to a "3." Critical element 5, is described as follows:

> GPRA Strategic Goal: IV Organizational Effectiveness
>
> Performance Measure: Maintains good working relationship with other park division, agencies and cooperators. Works with above groups to promote understanding of park's resource management programs and objectives and to accomplish resource management, research and monitoring goals. Partners with above groups to increase efficiency and save money.

The standard for a "Superior" rating is:

> See Benchmark standards attached. In addition: Enhances and improves relationship with other park divisions, agencies and cooperators. Increases understanding of park's resoucrce management program and objectives. Develops new ways to cooperate that will further park goals and increase efficiency. Strengthens relationship with FWCC by providing all INBS and SNBS reports by required date and STSSN reports with 48 hours of notification.

The standard for a "Fully Successful" reads:

> In addition to attached Benchmark standards, [m]aintains good relationship with other park divisions, agencies and cooperators. Maintains current understanding of park's resource management program and objectives. Maintains relationship with FWCC by generally providing INBS and SNBS reports by required date and STSSN reports with 72 hours of notification. Continues current cooperative efforts to accomplish resource management, research and monitoring goals.

In Stiner's declaration, he stated that the appellant needed to improve in the area of "Interaction with Student Conservation Association interns to track progress." Appeal File, Tab 19, p. 24 of 79. In the appellant's performance evaluation, Stiner wrote:

1. Areas of good work:

> Candace maintained good relationships with other park divisions, which sometimes requires patience and tact. Coordinated with other divisions to repair ATV's, move supplies, rescue injured wildlife and complete stranding reports. She worked hard to stay focused on her job despite internal and outside distractions. Towards end of season she spent time with North District turtler which helped program run more smoothly.
>
> Candace completed stranding reports in a prompt manner and submitted STSSN reports to FWC by set due dates, fostering a strong relationship with that agency.

2. Areas needing improvement:

> Interact more frequently with SCA Interns and other resource management personnel to strengthen relationships. Continue progress in avoiding distractions.

For the appellant's mid-term review, Stiner listed as an area of "good work," the "Timely completion of sea turtle stranding reports to FWC." He did not list any areas that needed improvement.

I note that the criteria for obtaining a "Superior" and "Fully Successful" rating are very similar, though not identical. For example, to obtain a "Fully Successful" rating, one need only "maintain" good relationships with other park divisions, and to obtain a "Superior" rating, one needed to "enhance and improve" relationships with other park divisions. The narrative Stiner wrote in the appellant's performance evaluation reflects that the appellant merely "maintained" good relationships. There was, however, no explanation in Stiner's declaration as to what was different about the appellant's performance from the previous year, and why he determined that her performance warranted a lower rating in critical element 5. I, therefore, did not find the agency's evidence to be especially strong.

In considering the totality of the agency's performance evaluation evidence, I find it weak as a whole. I find it especially troubling that the agency presented no performance standard for the "minimally successful" rating in

Critical Element 1, and minimal explanation. Moreover, it failed to follow its own procedures in finding the appellant "Minimally Successful." It is also troubling that Stiner's immediate supervisor, Palfrey, had a strong motive to retaliate against the appellant. Taking these factors into consideration leads to a finding that the agency has failed to present clear and convincing evidence that it would have lowered the appellant's performance evaluation in the absence of her whistleblower activity.

Even if, however, I were to take out of the equation the strong motive that Palfrey had to retaliate, and consider only the lack of motive that Stiner had to retaliate, the agency has presented such flimsy evidence to substantiate its claim that a lower performance evaluation was warranted, that I would still be compelled to conclude that the agency has failed to establish by clear and convincing evidence that the appellant would have received a lower overall performance rating in the absence of any whistleblower activity.

<u>The agency has not produced clear and convincing evidence that it would have issued a written counseling in the absence of the appellant's whistleblower activity.</u>

As reflected above, in April 2012, Stiner issued a written counseling, with the Subject line, "Letter of Counselling/Expectations." Stiner informed the appellant that failure to comply with the letter would lead to "further disciplinary action." The letter includes several items pertaining to the appellant's work assignments as well as telephone and leave usage. It also, however, includes the following paragraphs:

> Any complaints or issues you have with other employee[s] or involving the park in general will be directed through your proper chain of command, or to me, your immediate supervisor. As my subordinate, I expect you to follow the chain of command and I will determine how to proceed from here. Understand that I expect you to treat your coworkers with respect and with a professional attitude.
>
> . . .

> What occurs in other divisions or their activity is not our focus. The resource management workload is considerable and demands our full attention.

Appeal File, Tab 21, p. 15 of 57.

Stiner explains that he issued the letter of counselling at the direction of Southeastern Region (SER) Human Resources. He admits, however, that of his employees, he issued a letter of counseling only to the appellant. He contends that he did so because the appellant was his only full-time employee. He did not, however, explain why he limited the counselings to only full-time employees.

Stiner states the following regarding his rationale for issuing the letter of counseling:

> This was done to improve the work environment which had deteriorated among rumors of an IG investigation. While at the park, the HR representative held a mandatory meeting with the staff to stress the need to continue its high quality work during the investigation and that both managers and employees would be held accountable to meet performance standards. Meetings would be held between employees and supervisors to clarify expectations, to allow everyone to get reset and start a "new day."

Stiner Declaration, Appeal File, Tab 19, p. 23 of 79.

Although there is much in the letter of counselling that is benign, I find it noteworthy that Stiner admits that he issued the counselling, not because he saw the need to formally address the appellant's performance or conduct, but he did so at the direction of HR; and HR wanted the counseling done because of the environment which had been created as a result of the IG investigation. Stiner does not elaborate as to the nature of the "deterioration" that had occurred in the work environment. He does, however, attribute the deteriorated environment to the IG investigation "rumor."

I note that in April 2012, the IG investigation was more than a rumor, and was actually a full-blown investigation, with the IG having made at least one on-site visit. Based upon Stiner's explanation, it appears that if the IG investigation, which was based upon the appellant's whistleblowing had not occurred, HR (or

whoever saw the need for HR to intervene) would not have deemed the counselings necessary. Moreover, the appellant's counseling was not limited to her work assignments and matters of leave but also included instructions which on their face appeared to attempt to curtail whistleblower activity.[16]

Given the evidence reflects 1) that Stiner on his own would not have issued the appellant a verbal or written counselling regarding any issue, including performance or conduct absent the direction from HR, which was concerned about the climate created by the OIG investigation, 2) that the appellant was the only employee that Stiner issued a counselling, 3) that Stiner failed to explain why he distinguished between part-time and full-time employees when he decided which employees to counsel, I conclude that agency has failed to establish by clear and convincing evidence that it would have issued the counselling in the absence of the appellant's whistleblower activity.

The agency has established by clear and convincing evidence that it would have delayed in approving the appellant's leave request even absent her having engaged in whistleblower activity.

The appellant alleges that the agency delayed in approving her request to participate in the leave donation program in retaliation for her having engaged in whistleblower activity, and such was, in effect, harassment. The evidence reflects that several months after filing her complaint with the OIG, and a few months after the OIG's October 2011 on-site investigation, on December 2, 2011,

---

[16] I can only surmise that Stiner's instructions to bring complaints to him were given at the direction of HR, as the record reflects that Stiner's heretofore consistent instructions to the appellant were essentially to mind her own business and not worry about what others were doing. He did not appear inclined to want to hear what the appellant had to say about the perceived improprieties of others. He, in fact, reiterates such in the letter of counseling stating, "what occurs in other divisions or their activity is not our focus." I note if the appellant had heeded those instructions, the improprieties noted in the IG report may well have never come to light and might continue today.

the appellant submitted a form requesting to participate in the agency leave share program, which allows agency employees to donate leave to other agency employees in need of leave. According to the appellant, Superintendent Palfrey delayed in approving her request, which caused the request to be approved after the leave year had ended and most employees had already donated any leave they were inclined to donate.

The agency responds that Superintendent Palfrey did not initially approve the appellant's leave share request because it did not include a required medical statement, and by the time appellant perfected her request, on December 23, 2011, Palfrey was on pre-approved leave. The agency maintains that Palfrey promptly approved the request on her return on January 4, 2012.

The record reflects that the appellant's "Application to Become a Leave Recipient under the Voluntary Leave Transfer Program," provided that she needed leave to provide care for her parents until she could place them in an assisted living facility. Block 11 of the application form provides as follows:

> Name of physician who will verify the medical emergency. (Attach documentation from the physician (or other appropriate expert) showing the diagnosis, prognosis and duration of illness.)

Appeal File, Tab 21, p. 36 of 79.

The agency has presented evidence that although the appellant completed her application on December 1, 2011, she did not submit the medical documentation until on or after December 23, 2011. Appeal File, Tab 19, pp. 35 and 36 of 79. Given the application form clearly indicates that medical documentation is required and the appellant failed to provide it, and there is no evidence that the agency selectively enforced the requirement, I find that agency has established by clear and convincing evidence that approval would have been delayed even in the absence of the appellant's whistleblowing activity.

The agency has failed to establish by clear and convincing evidence that it would have denied the appellant's request for administrative leave absent her having engaged in whistleblower activity.

After the March 13, 2012 meeting, described above, in which Chief Ranger Eric Lugo grabbed the appellant's arm and pulled it off the table, the appellant requested leave without pay (LWOP) or administrative leave, until the "situation" regarding Lugo was resolved. Palfrey denied the appellant's request for administrative leave, and instructed the appellant to submit a request for LWOP "in the proper manner." App. Ex. F, Appeal File, Tab 27, p. 16 of 50. The record does not reflect whether the appellant re-requested the LWOP "in the proper manner." The appellant did thereafter request administrative leave to visit an Employee Assistance Program (EAP) counselor. Palfrey granted administrative leave to the appellant for six visits; however, she denied the appellant's request for leave beyond six visits. Appeal File, Tab 27, p. 19-20 of 50.

Palfrey did not explain, and I cannot find anything in the record which explains, why she denied the appellant's request for leave. On the leave slip, Palfrey wrote:

> CANA has granted you administrative leave for 6 visits to the EAP. While we encourage you to continue EAP visits if needed, no further administrative leave will be authorized for this matter.

The appellant, of course, has no right to administrative leave, and she acknowledges that whether to grant her administrative leave was clearly a matter within Palfrey's discretion. I can think of many legitimate as well as some improper reasons why Palfrey may have denied the appellant's request. I do not, however, have the benefit of Palfrey's reasoning. The record only reflects the denial. Given Palfrey's strong motive to retaliate, the lack of any evidence that similarly situated employees were treated the same, and the lack of explanation as to why Palfrey denied the appellant's request for administrative leave, I find that the agency has failed to establish by clear and convincing evidence that it would

have denied the appellant's request for administrative leave absent her protected activity.

The agency has established by clear and convincing evidence that it would have disciplined Lugo in the same manner, even in the absence of the appellant's whistleblower activity.

As set forth above, the appellant's claim regarding Chief Ranger Eric Lugo's physical "assault" is not that Lugo assaulted her because she engaged in whistleblower activity; rather, her argument is that Palfrey, because of the appellant's whistleblower activity, failed to adequately punish Lugo for the assault. *See* Appellant's Brief in Support of Appeal, Appeal File, Tab 26. The appellant argues that the agency failed to follow its own procedures regarding violence in the workplace. Specifically, she notes that the agency took no steps to separate her from Lugo, but left the two working together, notwithstanding the appellant's requests that she and Lugo be separated. The appellant alleges that the matter should have been elevated to the agency's Office of Professional Responsibility (OPR),[17] but the agency failed to do so.

The agency presented evidence that the incident between the appellant and Chief Lugo occurred on March 13, 2012. The matter was reported to the Southeast Regional Office and six days after the incident, on March 19, 2012, Keith Rogers, Regional Law Enforcement Specialist from the Southeast Regional Office in Atlanta, Georgia reported to the Canaveral National Seashore Park to investigate the incident. Approximately three weeks later, on April 12, 2012, Rogers issued a report, finding that Lugo had grabbed the appellant's arm during a meeting, as reported by the appellant, and that Lugo intentionally provided inaccurate information about the incident. Approximately two weeks later, on May 3, 2012, Palfrey proposed Lugo's suspension for three days for 1)

[17] The appellant did not cite any authority for this assertion.

unprofessional conduct, and 2) providing inaccurate information to an investigating officer. Approximately 30 days later, Shawn Benge, the Deputy Regional Director of the Southeast Regional Office, issued a decision suspending Lugo for three days. In his decision, Benge noted the agency's "Zero Tolerance" against incidents which "could possibly be construed as work place violence." He further noted that as a Police Officer, Lugo held a position of trust, and Lugo's actions had caused Benge and others to lose confidence in Lugo's abilities. In Lugo's favor, Benge noted that Lugo had 24 years of satisfactory service and performance, with no prior disciplinary record, was well-liked, and got along with his coworkers.

Contrary to the appellant's assertions, I found nothing in the agency's bulletin concerning work place violence that required the agency to separate the appellant and Lugo, based upon the one incident of Lugo grabbing the appellant's arm. Nor did I find anything in the bulletin indicating that the agency failed to elevate the investigation to the proper office.

From the evidence presented by the agency, it appears that either Palfrey or someone else in a position of authority, shortly after the incident occurred, elevated the matter for an outside investigation, which occurred in a timely manner. Furthermore, within two weeks after the investigative report was issued, Palfrey imposed discipline for Lugo, and that discipline was agreed upon by the deciding official. Although one might quibble as to whether the discipline was severe enough, I was persuaded by the deciding official's explanation that the discipline the agency imposed was within the bounds of reasonableness. Given the agency presented evidence that it took the incident seriously, timely investigated the incident, and timely imposed discipline that is within the bounds of reasonableness, I find that the agency has presented clear and convincing evidence that it would have taken the same steps to deal with Lugo's conduct, even in the absence of the appellant's whistleblowing activity.

DECISION

The appellant's request for corrective action is GRANTED.

ORDER

I ORDER the agency to rescind the letter of counselling, to rescind the performance rating issued in October 2012, and issue to the appellant a new performance rating of "Superior." Additionally, the agency must provide to the appellant any benefits to which she may be entitled due to her "Superior" rating. The agency must also provide the appellant administrative leave for any medically necessary medical visits or visits to the Employee Assistant Program regarding the March 13, 2012 physical incident.

I **ORDER** the agency to perform these actions no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to comply with this order and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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. I **ORDER** the agency 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.

FOR THE BOARD: _____/S/_____
Pamela B. Jackson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 7, 2015**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with

supporting evidence and argument, must be filed with Clerk of the Board at the address below.

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.

ENFORCEMENT

The settlement agreement has been made part of the record. If you believe there has not been full compliance with the terms of the agreement after this initial decision becomes final, you may ask the Board to enforce the agreement by filing a petition for enforcement with this office.

Your petition for enforcement must describe specifically the reasons why you believe there is noncompliance. It must include the date and results of any

communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed within a reasonable period of time after you discover the asserted noncompliance. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

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 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 this initial decision becomes final. *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 this 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 review of this decision only after it becomes final by filing in the United States 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 after the date on which this decision becomes final. *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.

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