



PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

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9/30/2020

**Benjamin E. Gruber**

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Dear Mr. Gruber,

Public Employees for Environmental Responsibility (PEER) represents Ms. Melissa Shawcroft, a Range Management Specialist in the San Luis Valley Field Office of the Bureau of Land Management (BLM).<sup>1</sup> On September 16, Melissa was emailed the Proposed Suspension signed by Ms. Melissa Garcia, Field Manager of the San Luis Valley Field Office to suspend her for 14 calendar days without pay.

**Introduction and Summary to the Proposed Suspension**

For nearly 30 years, Melissa has been a BLM Rangeland Management Specialist working in south-central Colorado's San Luis Valley. Her primary duty is administering approximately 70 grazing allotments and 50 grazing permits, with a focus on protecting the Rio Grande Natural Area from damage caused by livestock overgrazing. She has been recognized in the past by BLM for her exceptional work. In recognition of the quality of her work, in 2012, BLM gave her its Colorado Outstanding Rangeland Management Specialist Award.

The Rio Grande Natural Area is a seven mile stretch of the Rio Grande River and is one of the treasures of the San Luis Valley.<sup>2</sup> This is an arid area with primarily ephemeral waters to support wildlife and the Rio Grande is important as one of the few permanent waters. It is essential to the biodiversity of the area. In this area BLM has documented beaver, river otter, rabbits, deer and elk. This section of the river is full of bird life and is the protected habitat of migratory birds and raptors, herons, the threatened Western Yellow-billed Cuckoo, and the endangered

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<sup>1</sup> PEER is a nonprofit organization headquartered in Silver Spring, Maryland. It is a national alliance of local, state, and federal resource professionals. PEER's mission includes educating the public and speaking out, as well as defending those who speak out, about environmental ethics and compliance with environmental laws. PEER works nationwide with government scientists, land managers, environmental law enforcement agents, field specialists, and other resource professionals committed to responsible management of America's public resources, including BLM and other public lands. The Rocky Mountain Field Office is located in Denver, CO.

<sup>2</sup> See, Rio Grande Natural Area Act, Public Law 109-1337, Oct. 12, 2006 and the 2015 Rio Grande Natural Area Protection Plan at: <https://rgwcd.org/attachments/Rio%20Grande%20Natural%20Area%20-%20Private%20Land%20Plan1.pdf>.

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Southwestern Willow Flycatcher. It is estimated that there are only 900 remaining breeding pairs of the Willow Flycatcher and the birds have been documented nesting in this area. Unfortunately, this area is also highly attractive to cattle and though the west side of the river is BLM managed land, the east side is private land which is fenced sporadically. Throughout Melissa's career at BLM it has been her duty to protect this stretch of the river from illegal trespass and overgrazing.

Melissa was constantly repairing cut fence, handing out administrative grazing fines, or documenting and investigating numerous cattle brands. Because BLM realized that the problems with trespass cattle on the Rio Grande were too enormous for the range crew to handle, around 1994 BLM hired a law enforcement officer. In 1997 Melissa worked with the law enforcement officer and the Canyon City District office, to successfully impound approximately 30 head of cattle. This was one of the great successes of her career and had the deterrent effect of ending the trespass problem for a few years. She saw the river flourish with riparian regrowth of willow, cottonwood and new biodiversity. In 2012 Melissa received the Colorado Range Management Specialist Award for her work.<sup>3</sup> She has continued to receive successful evaluations and regular promotions.

In 2017 BLM appointed a new Field Office Manager, Ms. Melissa Garcia. Her husband, Mr. Brian Garcia, is the district Law Enforcement Officer (LEO). Soon after beginning, Ms. Garcia directed her husband not to take enforcement action against trespassers himself and instead put the burden and personal risk of dealing with violators on Melissa Shawcroft, sparing her husband conflict with the permittees. At the same time, Ms. Garcia favored Mr. Garcia with allowances of more funding and overtime pay for his law enforcement work, resulting in underfunding of Melissa's range management program.

The trespass incidents have now become unmanageable for Melissa. There were repeat offenses and the number of offenders increased as more family members brought more cattle to the area. From 2017 on, livestock have almost destroyed the riparian areas, the protected habitat of the endangered Southwestern Willow Flycatcher, and sadly, set the biodiversity of the region back almost to the status of the early 1990 era.

The permittees that Melissa has worked with her entire career, regularly reach out to her and ask BLM to do something to protect the public land. Their complaints, pictures of trespassing cattle and recorded brands are all documented with the office. However, without the support of law enforcement, the trespass is unrestrained and ongoing.

Melissa filed a complaint with the Inspector General in 2018 and an EEO complaint in 2018 and 2020 citing Ms. Garcia's willful disregard to the protection of the public lands and an OSC complaint in 2020 citing the nepotism, and the hostile work environment created by working with the Garcias. She has continued to speak to Ms. Garcia about illegal trespass and as recently as September 9, 2020 continued to ask both of the Garcias for help to address it.

On August 25, 2020 acting head of BLM, Mr. William Pendley appeared at BLM's San Luis Valley office where he spoke about, among other things, returning "accountability" to agency

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<sup>3</sup> <https://www.blm.gov/press-release/local-blm-staff-named-outstanding-rangeland-management-specialist>

operations. Melissa reached out via email to Mr. Pendley, disclosing damage to ranchers from illegal grazing and BLM's indifference:

“I am ‘speaking out’ to you on behalf of this rancher and other ranchers who are complaining about the lack of management and law enforcement in this office and I am speaking out for our public lands that are being destroyed and over grazed, as we speak, by the free grazing public. I have been reprimanded as a result of my reporting the below livestock trespass and the others that occur in the valley but I don't do well in looking the other way when there is a wrong especially when the public is screaming at us to do something.”

On September 16, 2020, Ms. Garcia filed a formal proposal to suspend her for 14 days without pay for “discourteous conduct, insubordination, boisterous or disruptive/disorderly conduct.” Clearly, as is evident from the above and will be shown herein, this as a pretext for whistleblower retaliation.

Melissa has been charged with four offenses:

1. Discourteous conduct.
2. Insubordination: disregard of directive; refusal to comply with a proper order.
3. Boisterous or disruptive/disorderly conduct; use of insulting, intimidating, abusive or offensive language to or about another employee or supervisor.
4. Failure or delay in carrying out instructions; failure or carelessness in performing assigned work; failure to take/complete officially-directed training in a timely manner.

These alleged offenses are a pretextual excuse for retaliation against Melissa and an attempt to silence her in her continued pursuit for protection of the Rio Grande Natural Area. This letter will review these allegations in turn along with specific evidence and discuss the applicability of the “Douglas factors” required to impose disciplinary actions.

### **The Proposed Suspension is Prohibited Retaliation**

Despite Ms. Garcia's creative explanation of the charges, which will be addressed below, the proposed suspension is retaliatory. Melissa engaged in multiple protected disclosures under the Whistleblower Protection Act, many of which involved alleged misconduct by Ms. Garcia. The real reason that a severe penalty has been imposed based on stale, weak and, even if true, minor charges of misconduct and personality, is whistleblower retaliation. Melissa engaged in activity protected under the Whistleblower Protection Act by identifying failures of both her manager and the acting head of BLM which provided a strong motive to retaliate against her.

It is important to recount some of her recent protected activity:

Melissa repeatedly, by email and in person, let her supervisor, Field Director, Ms. Garcia and by email to the acting head of BLM, Mr. William Pendley, know of the illegal trespasses in the allotments managed by the San Luis Valley Field Office. Melissa compiled a list of the

approximately 63 protected disclosures made by email to her supervisor Ms. Garcia.<sup>4</sup> Melissa also filed two EEO complaints and a complaint with the Office of Inspector General. She further brought up the decimation of the public land and the habitat of an endangered species by illegal trespass in each staff meeting, each year from May to October, from 2017 until December 11, 2019. This is approximately 12 additional, in-person, protected disclosures.

With each protected disclosure, her supervisor escalated the hostility and increased the level of adverse and retaliatory actions.

Additionally, Melissa reached out to Mr. Pendley on August 25, 2020 again citing the illegal trespass. She attached 22 pages of emails from angry permittees citing the BLM’s failure to protect their leased land.<sup>5</sup> Just three weeks after she emailed Mr. Pendley citing the degradation of public lands, she was retaliated against with the proposed 14 day suspension.

Below is a table with **just a portion** of the protected disclosures and retaliations. This table makes clear the temporal proximity from Melissa’s protected disclosures to the retaliation by Ms. Garcia. It also shows how Melissa’s job responsibilities have been eroded over the past three years until she has been effectively terminated.

Date	Protected Disclosure	Date	Retaliatory Action	Job Restrictions
2017-2018	Melissa is a <u>Rangeland Management Specialist</u> , with the primary function of “conserving, developing, and managing public rangelands.” <sup>6</sup>  Over two years, Melissa reported approximately 40 illegal trespasses and continued to ask for legal assistance to protect the land.	1/31/18	Ms. Garcia begins to restrict Melissa’s ability to do field work by keeping her from meeting with permittees.	Melissa writes, “ <i>I Wanted to bring something to your attention that I feel is pretty important to my BLM job and my ability to work with my permittees in the future. Chuck Finnegan and Tony Martinez have informed me that you sent them an email asking that they don’t contact me in the future concerning their permit and only deal with you.</i> ” <sup>7</sup>
2/9/18	Melissa files an EEO complaint citing management’s failure to enforce illegal trespass in endangered species habitat, the Rio Grande Natural Area. <sup>8</sup>	2/22/18	Ms. Garcia issues a Letter of Reprimand. <sup>9</sup>  Melissa is no longer the lead on any NEPA documents.	Ms. Garcia writes, “ <i>you have tried to undermine the credibility and professional integrity of our Law Enforcement Officer with the Staff and the State Director and Acting</i>

<sup>4</sup> List of Protected Disclosures of livestock trespass and destruction of endangered species habitat made by email from Melissa to Ms. Garcia: **2017:** 3/2, 3/29, 6/13, 6/14, 6/16, 6/22,7/7, 7/17, 7/18- 3 disclosures, 7/20, 8/5, 8/16, 12/1. **2018:** 5/18, 6/1, 6/7, 8/1, 8/3, 8/4, 8/9, 8/20, 8/24, 8/27, 8/28, 8/30, 9/2, 9/6, 9/10, 9/18, 9/21, 10/6, 10/20, 10/28, 11/14, 11/18, 12/6, 12/14. **2019:** 5/29, 5/30, 7/10, 7/11, 7/23, 8/2, 8/3, 8/5, 8/10, 8/13, 8/21, 9/5, 9/14, 9/28,10/2, 10/3, 10/7, 10/16, 10/19, 11/1, 12/4, 12/12. **2020:** 8/11,8/14, 9/19.

<sup>5</sup> Attachment A, Email to Mr. William Pendley, 9/25/20.

<sup>6</sup> Position Description in Proposed Suspension, TAB 10.

<sup>7</sup> Exhibit B, Email to Ms. Garcia, 1/31/18.

<sup>8</sup> Exhibit C, EEO Complaint, 2/9/18.

<sup>9</sup> Proposed Suspension, TAB 5.

			Ms. Garcia tells the permittees that Melissa is not to meet with them. <sup>10</sup>	Associate State Director by saying that they refuse to do anything and are compromising the resource.” Melissa’s work was characterized as disruptive. Ms. Garcia stated that “[you] refuse to be a team player” with the BLM’s “way of doing business” on unauthorized use with non-permittees. <sup>11</sup>
8/16/18	Email from Melissa to Ms. Garcia “I would like to suggest as a possible partial solution to the ongoing livestock trespass that might make my job as well as my seasonal's easier and safer as we continue to engage in future livestock trespass in years to come in the area of the Rio Grande. 1. I would like to suggest that the LEO take a more active role in contacting the non-permittee livestock owners as well as in communicating with the range program the day to day occurrences and contacts that the LEO is making with the public.” <sup>12</sup>	8/17/18	Ms. Garcia emails Melissa with a Directive to further limit her job responsibilities. <sup>13</sup>	Ms. Garcia states, “Just to reiterate, I am directing you to: 1) Limit your trespass investigations on unauthorized non-permittee grazing on the River to one time per week.”
11/14/18	Melissa files a complaint with the Office of Inspector General for Whistleblower Reprisal. <sup>14</sup>	12/17/18	Email from Ms. Garcia to Melissa substantially changing the work responsibilities to completely administrative. <sup>15</sup>	Ms. Garcia states, “From Monday, December 17th until the documentation is pulled together and organized, put into the boxes and in the shared Google folder that Ryan sent out to everyone, I want you to focus your time in the office gathering all of

<sup>10</sup> See email from 2/21/18 from Melissa to Ms. Garcia, “I got a call from Chuck Finnegan about an hour ago concerning the email I sent him today about the spring permittee meetings you wanted me to set up with all of my permittees. He said that you had called him today and informed him that I was **not** to be at this meeting....news to me! He said he could not understand it because I had administered his permit for 20 something years and there was a working history there. He told me that he had informed you that he would have none of this over the phone on the “nasties” you were saying about me.”

<sup>11</sup> See, Letter of 2/22/18, Proposed Suspension, TAB 5.

<sup>12</sup> Exhibit D, Email 8/16/18.

<sup>13</sup> *Id* at 8/17/18.

<sup>14</sup> Exhibit E, OIG Complaint, 11/14/18.

<sup>15</sup> Exhibit F, Email, 12/17/18.

				<p><i>the pertinent information, copying it, and putting it into the correct file boxes and electronic files as described below.”</i></p> <p><i>“You are not to follow up on or record unauthorized use once a week by non-permittees within the Rio Grande Natural Area while you do this work and/or until further notice.”</i></p>
	The Inspector General continues to investigate the charges against Ms. Garcia and Melissa continues to report illegal grazing and trespass to Ms. Garcia and the agency fails to protect the Rio Grande Natural Area.	3/1/19	Ms. Garcia issues a Letter of Directive to limit the scope of Melissa’s job to administrative work and gives all of her field responsibilities to the temporary seasonal worker. <sup>16</sup>	Ms. Garcia writes, “Your temporary seasonal employee is selected, hired, lined out with work (monitoring and methodology, checking and inventorying range improvements, knows who is going out to pasture, number of animals, and what dates for permittees using the allotments of crossing during this time period , trained in using collector app, equipment, vehicle)and trained to hit the ground running and cover the Southern Program in your absence.”
		12/11/19	Letter of Directive Issued to prevent Melissa from doing her job. <sup>17</sup>	Melissa is no longer allowed to speak with the public including permittees. “You are not to follow up on or record unauthorized use [illegal trespass] once a week by non-permittees with the Rio Grande Natural Area.”
1/3/20	Melissa files an OSC complaint citing the agencies failure to enforce illegal cattle trespass and the nepotism between Ms. Garcia and the individual assigned to enforce illegal trespass, Law Enforcement Officer, Mr. Garcia. <sup>18</sup>	1/13/20	Letter of Directive from Ms. Garcia to Melissa in which she imposes control on every aspect of Melissa’s work.	Melissa is only allowed to make calls or have meetings when Ms. Garcia could also be on the call or in the meeting. Ms Garcia requires that she review each email before Melissa could send it. <sup>19</sup>
2/19/20	Melissa files an EEO	3/3/20	Ms. Garcia sends	Ms. Garcia quotes Melissa

<sup>16</sup> Exhibit G, Directive, 3/1/19.

<sup>17</sup> Proposed Suspension, TAB 4.

<sup>18</sup> Exhibit H, OSC Complaint, 1/3/20.

<sup>19</sup> Proposed Suspension, TAB 3.

	complaint for harassment and discrimination by Ms. Garcia. <sup>20</sup>		Melissa home from work and places her on Administrative Leave.	as saying, “ <i>she could not do her job as she saw it by being restricted from direct contact with permittees.</i> ” <sup>21, 22</sup>
5/4/20	Melissa informed Acting Director Mr. William Pendley that she had been placed on Administrative Leave during the Pandemic while all other employees are teleworking. <sup>23</sup> She received a response that day and eventually a reprieve was granted but Melissa paid the price in other ways.	5/24/20	Via email, Ms. Garcia takes additional steps to set Melissa up for termination. <sup>24</sup>	<i>Ms. Garcia removes Melissa, “While being placed on an ALWP status, you are being directed to cease from performing any work. You will be asked to immediately surrender your badge, keys, and any property of the BLM. If you have a question or need to make arrangements regarding your assigned work please contact me. Other than calling Human Resources or myself, do not place calls or send e-mail messages concerning your assigned work to anyone else. Do not contact BLM Staff (e.g. place phone calls or e-mail messages, etc.) concerning your work.”</i>
		6/5/20	Ms. Garcia issued a “Letter of Expectation” placing Melissa on telework. Ms. Garcia further restricts Melissa’s job responsibilities and she is given more administrative tasks and busywork.	Ms. Garcia states “ <i>You are not permitted to go to the field during the telework period.</i> ” Further she is “ <i>not to correspond or contact permittees without I or Dario reviewing all emails, letters, requests, responses or mailings first.</i> ” <sup>25</sup>
		6/8/20	Ms. Garcia in an email restricts Melissa from calling in to staff meetings. <sup>26</sup>  She is not permitted to be included in any safety, NEPA or permittee meetings.	Melissa is completely isolated from all other personnel.  Ms. Garcia states, “ <i>Yes, the tasks did not include meetings, so I do not expect you to attend those meetings and the</i>

<sup>20</sup> Exhibit I, EEO Complaint, 2/19/20.

<sup>21</sup> Proposed Suspension, TAB 6.2

<sup>22</sup> Melissa responded by email, “*you are taking this all out on me...the fact that the public is mad at you because nothing is being done to curb the ongoing criminal livestock trespass at the river.*” Proposed Suspension, TAB 6.5

<sup>23</sup> Exhibit J, Email to Pendley, 5/4/20.

<sup>24</sup> Exhibit K, Email 5/24/20.

<sup>25</sup> Proposed Suspension, TAB 2.

<sup>26</sup> Exhibit L, Email 6/8/20.

				<i>meetings are not built into the allotted timelines. Bringing you back in telework status is only designed for you to follow those tasks and timelines as I described in the letter.”</i>
8/25/20	Email sent to Acting head Mr. William Pendley requesting help with protection of the public resources. <sup>27</sup>	9/11/20	Proposed 14 day suspension without pay.	Melissa states, “ <i>Melissa Garcia keeps picking away at my job until there is nothing left of the job I once had.</i> ”

These multiple disclosures are protected by the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). It is a prohibited personnel practice to take or threaten to take a personnel action, including firing, detailing, transferal, or demotion, against an employee, in connection with “any disclosure of information by an employee . . . which the employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8).

In this instance, the specifications of the proposed suspension arise from the same subject matter and, as such, are inextricably connected with Melisa’s protected disclosures.

To establish “reasonable belief,” the employee must only show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified. The test, outlined in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), asks whether a disinterested observer with knowledge of the essential facts readily known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act. *See also Wojcicki v. Dep’t of the Air Force*, 72 M.S.P.R. 628, 632 (M.S.P.B. 1996) (citing *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991) *aff’d*, 976 F.2d 1400 (Fed. Cir. 1992)) and *Horton v. Dep’t of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996)).

Nothing in the proposed suspension casts the slightest doubt on the reasonableness of the concerns that Melissa repeatedly expressed.

### **Discussion of the Incidents and Proposed Charges**

Since 2017, when Ms. Garcia moved to the San Luis Valley Field Office and became Melissa’s supervisor, she continually retaliated against Melissa for speaking out about the illegal trespass that the BLM was failing to enforce and the destruction of endangered species habitat. Melissa was also retaliated against for standing up for herself and attempting to reclaim the responsibilities that had been part of her job for decades. The courts have found that a perceived change in employee conduct after a protected activity is direct evidence of retaliation. This can

<sup>27</sup> Attachment A, Email to Mr. William Pendley, 9/25/20.



also be shown by a long record of positive performance but then a bad performance finding after engaging in protected activity. See, *Fierros v Texas Dept of Health*, 274 F.3d 187 (5<sup>th</sup> Cir. 2001), *Thomas v Texas Dept of Criminal Justice*, 220 F.3d 389, 394 (5<sup>th</sup> Circuit 2000) (evidence that employee had 18 year record of no prior complaints, but disciplined after filing EEO complaint).

The Proposed Suspension begins by describing in length incidents that occurred in December 2019 and March 2020, nine and six months prior to the proposed suspension and events which were addressed at the time. In our view, it is more than coincidental that Melissa's more recent August 25th email to William Pendley, preceded (or prompted) Ms. Garcia to issue the Proposed Suspension.