UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

EVELINE J. EMMENEGGER,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
SF-0432-21-0258-I-1

DATE: September 29, 2022

Jeff Ruch, Esquire, Washington, D.C., for the appellant.

Kevin Bell, Esquire, Silver Spring, Maryland, for the appellant.

Paula Dinerstein, Esquire, Silver Spring, Maryland, for the appellant.

Peter T. Jenkins, Esquire, Silver Spring, Maryland, for the appellant.

Emily Bright Hays, Esquire, Lakewood, Colorado, for the agency.

Kevin D. Mack, Esquire, Sacramento, California, for the agency.

BEFORE
Franklin M. Kang
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed this timely appeal challenging the agency action removing her from the position of Research Microbiologist (GS-403-12). Initial Appeal File (IAF), Tab 1. The appellant alleged that the removal was based on retaliation for protected whistleblowing disclosures. *Id*. at 15. The agency rescinded the removal and returned her to its rolls, but as discussed more below

there was a question about whether the agency restored her to status quo ante. IAF, Tab 6. The Board has jurisdiction. 5 U.S.C. §§ 7512(1), 7701. I held the appellant's requested hearing. IAF, Tabs 101-108; Hearing Record (HR). The parties submitted closing briefs. IAF, Tabs 109, 110. For the reasons discussed below, I conclude that the appellant proved her affirmative defense.

ANALYSIS AND FINDINGS

Questions to be Decided and Burdens of Proof

Because the agency rescinded the removal as discussed in greater detail below, the appellant primarily focused on the appellant's whistleblower retaliation affirmative defense. IAF, Tab 109; HR. The questions to be decided on that affirmative defense are: (1) whether the appellant can prove that she made protected whistleblowing disclosures, (2) whether the appellant can prove that these disclosures were contributing factors in her removal, and (3) if the appellant meets her burden, whether the agency can prove by clear and convincing evidence that it would have taken the same action even without the protected disclosures.

Protected whistleblowing occurs when an employee makes a disclosure[1] she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health and safety. 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008); *see also Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 10 n.3 (2015) (defining gross mismanagement as something more than management decisions which are

[1] A whistleblowing "disclosure" is defined at 5 U.S.C. § 2302(a)(2)(D) as a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure 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).

merely debatable; abuse of authority as an allegation that a Federal official has arbitrarily or capriciously exercised power which has adversely affected the rights of any person or has resulted in personal gain or advantage to himself or to preferred other persons; and gross waste of funds as more than a debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government).

The Federal Circuit set out factors to evaluate in deciding whether a disclosure is sufficiently substantial and specific to warrant protection in such appeals. *Chambers*, 515 F.3d at 1369. These factors include the likelihood of harm and whether the disclosed danger could only result in harm under speculative or improbable conditions, and when the alleged harm may occur. *Id*. The nature of the harm – the potential consequences – affects the substantiality of the danger. *Id*. In *Chambers*, the Federal Circuit cited legislative history that observed that general criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected, but an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would be protected. *Id*. at 1368-69; *see Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1370 (Fed. Cir. 2020) (discussing impact of Whistleblower Protection Enhancements Act on *Chambers* analysis).

The test for determining whether an employee had a reasonable belief that her disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced one of the categories of wrongdoing listed in 5 U.S.C. § 2302(b)(8)(A). *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (Feb. 22, 2000). The disclosures must be specific and detailed, not vague allegations of wrongdoing. *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 6 (2016). Even under the expanded protections afforded to whistleblowers under the Whistleblower

Protection Enhancements Act of 2012, general philosophical or policy disagreements with agency decisions or actions are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in the statute. *Webb*, 122 M.S.P.R. 248, ¶ 8.

Additionally, 5 U.S.C. § 2302(b)(9) prohibits retaliation for the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of section (b)(8); testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right; cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or for refusing to obey an order that would require the individual to violate a law, rule, or regulation. Once an employee has proven that she made protected disclosures or engaged in protected activity, she must next show that the protected disclosures or activity was a contributing factor in the personnel action on appeal. The most common way of proving the contributing factor element is the knowledge/timing test. *Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 21 (2016), 123 M.S.P.R. 592, ¶ 21 (citing *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 27 (2013)). Under the knowledge/timing test, an appellant can prove that her disclosure was a contributing factor in a personnel action through evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id*. Once the knowledge/timing test has been met, an administrative judge must find that the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if after a complete analysis of all of the evidence a reasonable factfinder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. *Mastrullo v. Department of Labor*, 123 M.S.P.R. 110, ¶ 18 (2015) (citing *Carey*

v. Department of Veterans Affairs, 93 M.S.P.R. 676, ¶ 13 (2003)). If the appellant does not satisfy the knowledge/timing test, other evidence will be considered, including, evidence pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether those individuals had a desire or motive to retaliate against the appellant. *Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, 273-74 (2011).

At the hearing stage, the appellant bears the burden on these showings (the existence of protected disclosures/activity and contributing factor) by preponderant evidence.[2] *Skarada v. Department of Veterans Affairs*, 2022 MSPB 17, ¶ 6. If the appellant meets her burden on these showings, the agency must show by clear and convincing evidence[3] that it would have taken the same action even absent the disclosure or activity. In determining whether the agency has met this burden, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. *Campbell v. Department of the Army*, 123 M.S.P.R. 674, ¶ 12 (2016) (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)); *see Whitmore v. Department of Labor*, 680 F.3d 1353, 1365 (Fed. Cir. 2012) (discussing *Carr* factors). Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and

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[2] Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

[3] Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than the preponderance of the evidence standard. 5 C.F.R. § 1209.4(e).

despite the evidence that fairly detracts from that conclusion. *Whitmore*, 680 F.3d at 1368. I will consider the strength of the agency's reasons for taking the now-rescinded removal action as part of the evaluation of the *Carr* factors.

To resolve issues of credibility and the weight to be given written statements and other documentary evidence, the Board is guided by *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981), and *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

Whistleblower Retaliation is an Affirmative Defense

The appellant's removal was a personnel action under 5 U.S.C. § 2302(a)(2)(A). The parties do not dispute that the Board has jurisdiction to review the removal or the appellant's whistleblower retaliation allegations. However, it is important to set out the precise basis for the Board's jurisdiction.

There are two ways to claim whistleblower retaliation before the Board: (1) as an affirmative defense to an otherwise appealable action, or (2) in an Individual Right of Action (IRA) appeal. In an otherwise appealable action, an appellant's claim of whistleblower reprisal is treated as an affirmative defense. *Campbell*, 123 M.S.P.R. 674, ¶ 11 (citing *Shannon v. Department of Veterans Affairs*, 121 M.S.P.R. 221, ¶ 21 (2014); *Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶ 19 (2013); 5 C.F.R. § 1201.56(b)(2)(i)(C)). In such instances, once the agency proves its adverse action case by the applicable standard, the appellant must show by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the agency's personnel action. *Id*. If an appellant meets this burden, the burden shifts to the agency to establish by clear and convincing evidence that it would have taken the same action absent the protected disclosure. *Id*. In otherwise appealable action cases, the Board evaluates only whether the decision on appeal was based on any prohibited personnel practice described in section 2302(b). 5 U.S.C. § 7701(c)(2)(B).

By contrast, an IRA may challenge any of the personnel actions identified in 5 U.S.C. § 2302(a)(2), but only with respect to whether the action was taken in retaliation for whistleblowing and not based on discrimination or other prohibited personnel practices. *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 17 (2015) (discussing 5 U.S.C. § 7121(g)). Ordinarily, an individual who first requests corrective action from the Office of Special Counsel (OSC) will be deemed to have made a binding election to proceed in that forum, meaning that the usual jurisdictional requirements for IRA appeal apply even if the contested personnel action would have been directly appealable to the Board. *Id*.

The usual jurisdictional requirements in an IRA appeal are as follows. The appellant must: (1) show by preponderant evidence that she exhausted administrative remedies before OSC; and (2) make nonfrivolous allegations that (a) she made protected disclosures or engaged in protected activity and (b) the disclosure or activity was a contributing factor in the agency's decision to take or fail to take a covered personnel action. *Hessami*, 979 F.3d at 1367 (citing *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001)); *see King v. Department of the Army*, 116 M.S.P.R. 689, ¶ 6 (2011). The Board is limited to reviewing the specific protected activities and personnel actions the appellant raised before OSC. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998); *Lewis v. Department of the Army*, 58 M.S.P.R. 325, 332 (1993). The appellant must provide OSC sufficient basis to pursue an investigation. *Skarada*, 2022 MSPB 17, ¶ 7; *Chambers v. Department of Homeland Security*, 2022 MSPB 8, ¶ 10 (collecting cases). Nevertheless, an appellant may give a more detailed account of his or her whistleblowing activities before the Board than he or she did to OSC. *See Chambers*, 2022 MSPB 8, ¶ 10 (citing *Briley v. National Archives & Records Administration*, 236 F.3d 1373 (Fed. Cir. 2001)).

As discussed in more detail below, the appellant contacted OSC after the proposal to remove. According to *Savage*, this would ordinarily constitute an

election of the IRA process. 122 M.S.P.R. 612, ¶ 17. While the appellant did not wait for OSC to conclude its investigation, an appellant may institute an IRA appeal at any time after more than 120 days since first contacting OSC. 5 U.S.C. § 1214(a)(3)(B); *Sabbagh v. Department of the Army*, 110 M.S.P.R. 13, ¶ 16 (2008). However, the appellant did not introduce evidence before the Board about what protected disclosures she made to OSC or identify any potential personnel actions for which she sought corrective action, other than the proposed removal. To this point, the appellant specified she filed an OSC complaint on March 4, 2020, while the January 29, 2020 proposal was pending, and an OSC attorney email specifies that complaint MA-20-001325 (1325) was closed on March 25, 2021; thereafter, the appellant declined to file an IRA based on Complaint 1325, and the appellant confirmed that this appeal was filed to challenge the agency's decision to remove her for unacceptable performance as set forth more fully in the record. IAF, Tab 14 at 5, 26; IAF, Tab 44 at 7; IAF, Tab 73 at 11. Because the Board can only evaluate protected disclosures/activity and personnel actions presented to OSC in adjudicating an IRA appeal, treating the present appeal as an otherwise appealable action with a whistleblower retaliation affirmative defense is more protective of the appellant, because it allows consideration of all the alleged protected disclosures identified through the prehearing process rather than guessing about what the appellant may have told OSC and limiting her accordingly. I advised the parties that I would treat the whistleblower retaliation allegations as an affirmative defense, and the parties did not object to that ruling. IAF, Tab 73. To this point, the record is clear, and I conclude that the Board has jurisdiction over an otherwise appealable action, *not* an IRA appeal.[4] *Id*.; IAF, Tab 22.

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[4] Moreover, treating this as an appeal from the removal rather than an IRA would have permitted the appellant to assert other types of affirmative defenses. *See Young v. Merit Systems Protection Board*, 961 F.3d 1323, 1327-28 (Fed. Cir. 2020) (IRA appeals cannot raise affirmative defenses such as discrimination). For example, one of

Factual Background and Findings on Disclosures, and Chronology

Through the Order and Summary of Prehearing Conference, I identified for adjudication the appellant's 17 disclosures claimed in this appeal. IAF, Tab 73. These disclosures were identified through the appellant's prehearing submissions, and consistent with her testimony about 17 different disclosures. HR (testimony of the appellant); *see* IAF, Tab 44. I will discuss each disclosure considering the applicable law discussed above.[5] To the extent possible, I discuss the facts chronologically to ensure context for the disclosures, and to minimize repetition in carefully analyzing the matters before the Board in this appeal.

Appellant's Work History

The appellant started her employment with the Western Fisheries Research Center (WFRC), a component of the U.S. Geological Survey, in 1992 as a part-time student trainee while she was finishing her master's degree. HR (testimony of the appellant); IAF, Tab 13 at 14. In 1994, after she obtained that degree, she occupied a GS-9 Research Microbiologist position; she progressed in terms of pay grades until 2011, when she occupied was promoted to the GS-12 position

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the allegations is that the appellant's former supervisor Maureen Purcell failed to accommodate the appellant's disability. As discussed in the Order and Summary of Prehearing Conference, the appellant confirmed that she was not claiming disability discrimination. IAF, Tab 73 at 24-28. The appellant objected to some aspects of the Order and Summary of Prehearing Conference, but not regarding any disability discrimination claim. IAF, Tabs 84-85. The appellant's closing argument does not refer to disability discrimination either. IAF, Tab 109. There is an important difference between the appellant choosing to not assert potential affirmative defenses, as happened here, and the Board treating this case in a way that would have *precluded* her from asserting such affirmative defenses.

[5] I do not consider any other potential disclosures. I gave the parties the opportunity to object to the Order and Summary of Prehearing Conference and they did not do so. IAF, Tab 73. Both parties discussed these disclosures in their closing arguments, numbered consistently with the Order. IAF, Tabs 109, 110. The Board has held that failure to timely object to identification of accepted disclosures precludes a party from raising other potential disclosures on appeal. *Thurman v. U.S. Postal Service*, 2022 MSPB 21, ¶ 22 (citing *Scoggins*, 123 M.S.P.R. 592, ¶ 6 n.4).

from which she was removed. HR (testimony of the appellant); IAF, Tab 13 at 14-17.

There are two types of scientists at the agency: four-factor "research grade evaluation" or "RGE" scientists, and "nine-factor series" scientists. HR (testimony of Supervisory Research Microbiologist Maureen Purcell and Supervisory Fish Biologist Tobias Kock). According to Kock, a supervisory RGE scientist who does not have supervisory authority over the appellant, an RGE scientist has more freedom to conduct research than a nine-factor series scientist, who works on specific projects. HR (testimony of Kock). For example, when Kock transitioned from a nine-factor series role to an RGE role, he went before a panel that suggested he was not a member of enough scientific societies and had not published enough. *Id*. Paul Wagner, Deputy Associate Director for the Ecosystems Mission Area and deciding official for the proposed removal, explained that RGE positions are focused on publication, with 85% to 90% of time spent on research activities. HR.

According to Purcell, who was the appellant's supervisor for most of the time relevant to this appeal and who proposed her removal, every four years, RGE scientists go before an independent science panel that reviews their work; this panel can keep the RGE scientists at the same level or promote or demote them. HR. RGE committees look at the overall scientific stature of a scientist based on the RGE scientist's research and impact, and use a scoring system to evaluate which grade applies. HR (testimony of Kock). Depending on the incumbent's RGE performance, a panel may recommend that someone who had been a GS-12 scientist be "dropped down" to GS-11. *Id*. However, Eric Janney, Deputy Center Director at WFRC and the appellant's supervisor after her reinstatement, said that being downgraded based on an RGE evaluation is "almost unheard of." HR.

The Research Microbiologist position description in the records states in part, "Eighty percent of the scientist's assignment is researching the molecular

biology of fish viral pathogens[.]" IAF, Tab 13 at 55. Other duties included directing a technician. *Id*. at 58. The position description stated in part, "Non-research duties of the scientist requiring technical skills consume approximately 10% of the researcher's work assignment." *Id*.

In January 2016, James Winton, who was then the appellant's first-line supervisor, issued an "Addendum of Position Description of Record for RGE." IAF, Tab 47 at 4. The addendum noted that in 2009, the appellant was transferred to the Virology Research Team, and "a portion (40%) of her work duties were devoted to establishing the WFRC biosafety program … both as the WFRC Biosafety Officer and as the chair of the WFRC Institutional Biosafety Committee (IBC), and the management of the aquatic biosafety level three (BSL-3) laboratory research activities," with the "remaining (60%) work devoted to research." *Id*. "In 2011, after establishment of the WFRC IBC and center-wide biosafety program, the management of these tasks was reassigned to other personnel." *Id*. Going *forward*, the appellant was the "project leader for special and emerging aquatic pathogen research" and research activities would "comprise approximately 85% of her work." *Id*. The work managing the BSL-3 laboratory (also referred to as lab) involved coordinating inspections and certifications. HR (testimony of Purcell).

Jill Rolland, who was at different times the Center Director or Acting Center director, recalled speaking with Winton about the appellant being disappointed he did not recommend her for a grade increase, but Winton expressed to Rolland that the appellant was "not producing the same number of publications as other RGE scientists" as set forth in the record. HR. Between 2017 and 2019, on average, other members of the fish health group produced between 3 and 19 publications per person (as authors but not necessarily first authors), while the appellant produced only one. HR (testimony of Purcell).

The appellant testified that she was listed as "senior technical staff" in rosters, as opposed to research staff. HR (testimony of the appellant). She

testified that as time went on, she assumed more technical and operational duties. *Id*. She said that from 1994 to 2011, she worked as "the deputy radiation safety officer." *Id*. She was the biosafety committee chair from 2007 until 2012 when she asked to be removed. *Id*. She explained she also worked as a compliance officer for Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS) inspections, and worked on obtaining permits from the Washington Department of Fish and Wildlife (WDFW). *Id*. The appellant stated she was the manager of the BSL-3 laboratory, and as such she coordinated research and had to determine chlorine levels for each pathogen studied in the facility and confirm that effluent met expectations. *Id*. She said she checked the tanks every day. *Id*.

According to Purcell, the WFRC had several dry and wet laboratories, including a biosafety level two (BSL-2) wet laboratory, which was the main wet laboratory, and the BSL-3 wet laboratory. HR. Purcell explained that the BSL-2 handled pathogens native to Western North America and the Puget Sound area but not necessarily Lake Washington. *Id*. If scientists were working with higher risk pathogens, they would use the BSL-3. *Id*. Rolland testified that the BSL-2 was working on infectious hematopoietic necrosis virus (IHN or IHNV), which is endemic to Western North America. HR. Rolland testified there are known populations of wild salmon that carry IHNV that go through Lake Washington. *Id*.

According to Purcell, the effluent treatment systems for the BSL-3 are processed differently from the BSL-2 laboratory; all BSL-3 effluent is processed in a "secured room." HR (testimony of Purcell). Rolland explained that the WFRC had funding challenges in part related to old equipment that was at the end of life, and which required such creative solutions. HR. According to Rolland, "some of the employees had actually agreed to take leave without pay to try to garner more salary savings," and "we had entered into a novel funding approach known as -- as an energy savings performance contract . . . you partner with the

local utility that allows you to bring in new, updated, energy efficient equipment and to pay it off over a period of time . . . that allowed us to bring in new equipment that we otherwise did not have the funding to purchase." *Id*. Both the BSL-2 and BSL-3 laboratories had challenges related to their age, including with internal components. *Id*. Construction projects started in 2012 or 2013 and continued into 2019, and Center management worked with researchers to minimize some of their projects during times of busy construction. *Id*.

Alleged Disclosure No. 1

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 1 the following: In April 2016, the appellant made inquiries of Purcell, then serving as the chairperson of the Institutional Animal Care and Use Committee (IACUC) (the committee tasked with regulatory oversight of research animal subject welfare), Wet Lab Coordinator, Biosafety Officer, and Institutional Biosafety Committee (IBC) chairperson, concerning whether an electronic post-treatment check for the BSL-2 laboratory wastewater treatment system earlier proposed had been installed and if the chlorine levels were at the correct concentration. Purcell did not address this matter, but the appellant learned that no electronic system had been installed, and in May 2016 proposed a standard operating procedure (SOP) for manual BSL-2 laboratory effluent manual monitoring. According to the appellant, it was not followed. IAF, Tab 73 at 18-19.

The appellant explained that in April 2016, she had a shipment of koi coming in, and she checked with the BSL-2 laboratory beforehand to make sure chlorination levels were sufficient and confirm whether there was an electronic monitoring system, and eventually there was a "big meeting" to discuss effluent monitoring. HR. In May 2016, the appellant sent an email reminding Purcell, Winton, and microbiologist Dorothy Chase about an upcoming USDA APHIS inspection and the need to monitor the effluent levels, and potentially making a

report to the Environmental Protection Agency (EPA) because of Clean Water Act concerns. *Id*.; IAF, Tab 45 at 4.

Purcell explained that there was going to be a regular inspection of the wet laboratories, and one of the issues of concern was chlorine treatment of the facilities. HR; IAF, Tab 37 at 8. On May 17, 2016, the appellant sent an email and draft SOP that discussed regular manual chlorine sampling because the facility did not have an electronic monitoring system. IAF, Tab 37 at 8. Winton, then Chief of the Fish Health Section, indicated that they would "start with quarterly monitoring for now." *Id*. The appellant disagreed with this decision but did not "say anything at that time." HR (testimony of the appellant).

I conclude that this *does not qualify* as a protected disclosure for purposes of the whistleblower protection laws. The appellant did not establish that an electronic post-treatment monitoring system was required by law, rule, regulation, or similarly binding agency policy, or that there was (at this point) a discharge of untreated effluent that posed a danger to public health or safety. Moreover, based on Purcell's detailed explanation addressing how the BSL-2 laboratory handles only pathogens already present in the local area as noted in part above, a disinterested observer with knowledge of the essential facts would not reasonably conclude that the appellant's inquiries about the effluent monitoring systems disclosed prohibited conduct. While the appellant disagreed with Winton's decision to implement quarterly monitoring as opposed to more frequent monitoring, there is no basis in the record for concluding that this was so objectively unreasonable that it was not a permissible management decision.

Alleged Disclosure No. 2

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 2 the following: In July 2016, the appellant disclosed to Rolland that the lack of BSL-2 laboratory effluent treatment monitoring was a major biosafety risk. IAF, Tab 73 at 19.

After the events at issue in Disclosure 1, Rolland sent the appellant for general biosafety training in July 2016, and when the appellant returned, she requested a meeting with Rolland and Winton at which she provided thoughts and recommendations on actions to take. HR (testimony of the appellant); IAF, Tab 45 at 6-9.

Rolland testified that she understood there was a period during 2017 when the system was not effectively chlorinating effluent water from BSL-2. HR. Rolland said she met with Purcell and "facilities manager" Kyle Sato to investigate the situation and take steps to prevent something like that happening again. *Id*. Rolland recalled speaking with Winton about difficulties the appellant had communicating with Sato. *Id*. They also discussed whether they needed to report a leak described as a "chlorination failure" and concluded they did not need to do so but would raise it at the next interagency meeting. *Id*. After the appellant complained to Rolland that they had not notified external agencies, Rolland prepared "courtesy notifications." *Id*. The EPA acknowledged receipt but did not take other action, and the other agencies thanked Rolland for the notice. *Id*.

I conclude that this *does not qualify* as a protected disclosure. As with Alleged Disclosure No. 1, the appellant did not demonstrate that her requested effluent monitoring system was required by law, rule, or regulation, that failure to implement her recommendations rose to the level of gross mismanagement, or that there was an actual (as opposed to potential) danger to health and safety in the event there was a leak of untreated effluent. Even accepting that Rolland acquiesced to the appellant's request to notify other agencies, that does not demonstrate that the appellant disclosed covered misconduct.

Alleged Disclosure No. 3

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 3 the following: In May 2017, she verbally reported to Purcell (who by then had become her supervisor) that poor air quality in the BSL-3

laboratory was likely responsible for her falling unconscious after working long hours on a Saturday. IAF, Tab 73 at 19.

In April 2017, Purcell became the fish health section chief and the appellant's first-line supervisor. HR (testimony of Purcell). At the time, the appellant was assigned research on invasive or exotic fish pathogens (pathogens not native to Western North America) and coordinated activities of the BSL-3 laboratory. *Id*.

According to the appellant, in April 2017, she had been working in the BSL-3 all day on a weekend; the air quality was not good, and by the end of her day, she felt sick but was able to drive home, at which point she passed out. HR. She did not call an ambulance, did not go to the doctor, and did not (that day) tell anyone other than her spouse. *Id*.; IAF, Tab 37 at 67-68. Later that month, the appellant had her midyear performance discussion meeting with Purcell, and she told her that she was concerned about the BSL-3 air quality and had fainted. HR (testimony of the appellant). The appellant also indicated that she may have fainted because of dehydration or overwork. *Id*.; *see* IAF, Tab 37 at 67.

Purcell testified that in December 2017, research microbiologist Gael Kurath, who worked in the BSL-3 laboratory with the appellant, reported that she and a technician felt unwell after working in the BSL-3 laboratory, and requested that the appellant address it because she (the appellant) coordinated activities in the BSL-3 laboratory. HR. About a week later, the appellant forwarded the email from Kurath to Purcell, who promptly forwarded it to Rolland and the regional safety officer. HR; IAF, Tab 37 at 66-68. In her forwarding email to Purcell, the appellant wrote that this "past April I passed out after working all day in the BSL-3 lab on a weekend day, though I believe I was also dehydrated." IAF, Tab 37 at 67. Purcell responded that she was "really sorry" this issue had not been raised before and they should have delayed Kurath's experiment if there were safety concerns. *Id*. Purcell also wrote that she was "a bit concerned about the report of passing out" and "may need to seek some guidance here." *Id*. The

appellant emailed to say that she passed out in April and "told you and Jill [Rolland] about this in June." IAF, Tab 37 at 68. Purcell recalled the appellant telling her that she had been dehydrated and felt "very unwell at one instance" but not that she had passed out. HR (testimony of Purcell). Based on advice from the safety officer, Purcell implemented precautionary protocols. *Id*. Purcell testified that she believed the appellant "was pleased to have them addressed" in reference to Purcell's response to the appellant's concerns. *Id*.

Rolland said she was brought into the discussion because of personnel safety concerns, and that she contacted the regional safety officer Bill Simonds. HR. Rolland was unaware of concerns with the BSL-3 air quality prior to this discussion. *Id*.

I conclude that this *qualifies* as a protected disclosure as of December 2017. Personnel reporting feeling unwell in the BSL-3 laboratory demonstrates a danger to safety. In reaching this conclusion, I find that the appellant did not report that she fainted in April 2017. When the appellant told Purcell about the problems experienced by Kurath, Purcell testified "one of the things that caught me by surprise was that she said she had passed out" and Purcell sought guidance from the regional safety officer. HR; IAF, Tab 37 at 67. Observing Purcell as she testified and based on her demeanor during the hearing, which was forthright and gave no indicia of prevarication, I found credible Purcell's testimony that she was unaware that the appellant fainted prior to the email exchange in December 2017. *Hillen*, 35 M.S.P.R. at 458. Purcell's testimony was unequivocal and specific, and consistent with the written record. *Id*. As noted above, when the appellant emailed Purcell, Purcell promptly escalated the concern to Rolland; it is inherently improbable that Purcell would have acted so quickly in response to an email but not something raised in a midyear performance discussion. *Id*. Likewise, it is inherently improbable that the appellant would not have documented something so serious. *Id*.

Alleged Disclosure No. 4

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 4 the following: In June 2017, the appellant informed Rolland about BSL-3 laboratory air quality problems and animal care concerns in a meeting that included Purcell. IAF, Tab 73 at 19.

According to the appellant's submissions, in June 2017, Sato sent an email stating the building would be shut down for the weekend to resurface the floor. IAF, Tab 59 at 140-41. The email was sent on June 2, 2017, and referred to the following weekend (June 10 through 11). *Id*. Because the appellant had active experiments in the BSL-3, she requested a list of chemicals that would be used in order to evaluate the material safety data sheets. HR (testimony of the appellant. The appellant explained that fumes from the repair work would not impact the experimental animals but she was concerned about the risk to herself. *Id*.

According to the appellant, at some point, Purcell "yelled at me that I was being the problem with the situation[,]" and so they eventually had a meeting about it with Rolland. *Id*. The appellant testified that after meeting with Purcell and later Rolland, she "eventually" received the chemical list and had access to the laboratory that weekend. *Id*.

As additional background, Purcell explained that in summer 2017, Facilities wanted to repair the floors outside of the BSL-3 laboratory, which would involve stripping and reapplying sealant, and would do so over the weekend. HR (testimony of Purcell). The appellant told Sato and Purcell that she needed to access the BSL-3 that weekend and was concerned about potential exposure to the chemicals used by Facilities. *Id*.; IAF, Tab 59 at 140. The appellant, Sato, Purcell, and eventually Rolland exchanged emails about air pressure differentials because the appellant did not think it was "healthy or safe for me to be in the building while the flooring job is occurring for long periods of time." IAF, Tab 59 at 140-45. Purcell testified the issue was eventually "worked

out," and she did not believe that the appellant experienced any repercussions for raising this issue. HR.

I conclude that this *does not qualify* as a protected disclosure. The appellant did not disclose a violation of law, rule, or regulation, gross mismanagement, or abuse of authority. While it may have been reasonable for the appellant to worry about her safety being around the chemicals to be used, the evidence reflects that Facilities coordinated with her on schedule to ensure she was not exposed to hazardous chemicals. As such, the appellant did not make a protected disclosure.

Alleged Disclosure No. 5

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 5 the following: On July 24, 2017, at the IACUC meeting, the appellant presented evidence of animal welfare issues that caused distress and, in some cases, death for research subjects. These included substandard water conditions for fish/amphibians, absent or delayed scientist notification after water flow and temperature alarms, and access by scientists to monitor the intake water quality or to clean water storage holding tanks (headboxes) being blocked. IAF, Tab 73 at 19-20. In the Order and Summary of Prehearing Conference, I noted the following alleged consequences: One day following these disclosures, a gag-order was placed only on her by Purcell, forbidding her from communicating with Facilities staff unless for an emergency, and was slated for removal as a member of the IACUC, which was made official in November 2018. *Id*.

The minutes for this meeting indicate there was a discussion about notification after wet laboratory alarms, cleaning of headboxes, and access to monitoring the headboxes for the BSL-3 and zebrafish wet laboratories. IAF, Tab 51 at 8-10; HR (testimony of the appellant that these were "three topics that I brought up"). The appellant testified that she had discussed these concerns with Purcell, who disagreed about notification, but they decided to make this an agenda item at the meeting. HR.

Regarding notification of alarms, the meeting notes indicate that the then current "policy is that investigators are not contacted after an alarm occurs unless the problem is long lasting (e.g. water stoppage for an extended period of time)[,]" and the appellant suggested there be a notification system "for specific headboxes, because some animals require more monitoring" and because "the preference varies among investigators on whether they want to be contacted after an alarm." IAF, Tab 51 at 8. The appellant explained that she was concerned about temperature alarms because the animals being studied are exothermic, so temperature shifts may prompt immune responses, may modify pathogen activity, or may otherwise impact experiments. HR.

Regarding the cleaning of headboxes, the appellant reported that the headboxes "have not been cleaned since ~2012" and had "debris, algae, mold and/or zooplankton in them." IAF, Tab 51 at 9. The appellant presented slides at the meeting. HR (testimony of the appellant); IAF, Tab 75 at 4-35. The slides show what the appellant described as dirty headboxes and potential supersaturated water that could have impacted her experiments. *Id*. The slides also show that the headboxes are on a high scaffold for which personnel must use a tether. IAF, Tab 75 at 12-14, 18. The IACUC discussed cleaning protocols and bleach concentrations, and concerns about whether biofilms may compromise experimental outcomes for bacterial challenges. IAF, Tab 51 at 9. The committee also discussed the "safety of scientists" when performing these tasks on the upper scaffolds, and agreed that they needed to address the issue with occupational health and the Safety Officer. *Id*.

Regarding the headboxes for the BSL-3 laboratory and zebrafish wet laboratory, the appellant reported that these were "separately located on the upper floor of the dry laboratory." *Id*. at 9-10. The supervisor for the zebrafish headbox had his access to the location revoked, and the appellant's request for access was denied. *Id*. The appellant had to contact Sato or other Facilities

personnel to access the headboxes. *Id*. The IACUC discussed safety training, but the issue was tabled because they needed to address other agenda items. *Id*.

The appellant complained that her removal from the Animal Care Committee was retaliatory. HR (testimony of the appellant). As the appellant recalled it, she was scheduled to be on leave the day of the committee meeting because she had family visiting, but adjusted her schedule to come in for the meeting; the agenda was changed "so that I could go first[,]" and after she left, Purcell addressed another wastewater issue and the constitution of the committee. *Id*.

Purcell testified that the appellant and another scientist believed the headboxes needed to be cleaned, and the two cleaned "these headboxes[;]" at the meeting, the appellant proposed having the scientists clean the headboxes instead of Facilities personnel. HR (testimony of Purcell). Purcell recalled the appellant saying something to the effect that the headboxes needed to be cleaned to provide appropriate conditions for the fish and aquatic amphibians. *Id*.

Rolland recalled that the appellant raised issues about water quality and organisms growing in the headboxes, but that she had "gone ahead and cleaned out the headbox" leading to the tanks with her animals. HR (testimony of Rolland).

I conclude that the appellant's report to the IACUC *does not qualify* as protected disclosures for purposes of the whistleblower protection laws. First, notifying and/or not notifying scientists when there were alarms, does not disclose a violation of law, rule, regulation, gross mismanagement, abuse of authority, or other prohibited agency conduct. Indeed, the committee meeting minutes indicate that there was variation in how different investigators liked to be notified. At most, the appellant expressed a preference for a change in procedure that was not necessarily shared by her colleagues. This is not a protected disclosure of covered misconduct.

Second, regarding the cleaning of headboxes, while the appellant identified that there was growth and invertebrates in the headboxes, the appellant did not articulate how this violated law, rule, or regulation, gross mismanagement, abuse of authority, or presented a substantial and specific danger to public health and safety (applying the *Chambers* analysis). On the issue of law, rule, or regulation, the appellant said she disclosed a violation of the Animal Welfare Act. IAF, Tab 44 at 10-11. However, Purcell and Rolland both testified that the Animal Welfare Act excludes cold-blooded vertebrates, including fish and amphibians, from the definition of "Animal," so their laboratory was not seen as being subject to it. *Id.*; HR. The appellant eventually agreed fish and amphibians are "not legally covered" by the Animal Welfare Act. HR (testimony of the appellant). To the extent the appellant did not understand that the Animal Welfare Act did not cover cold-blooded vertebrates, including amphibians and fish, this information was readily ascertainable by, *inter alia*, asking a colleague, reviewing the section of the USDA website defining Animal under the Animal Welfare Act, and/or reviewing the definition of the term Animal within the context of the Animal Welfare Act. *Lachance*, 174 F.3d at 1381. Based on this testimony, I conclude that the appellant did not allege a violation of law. Even if I accept that the presence of certain types of growth or biofilm may affect experiments, that does not demonstrate a covered disclosure. IAF, Tab 51 at 9. Indeed, considering the appellant's statement that the headboxes had not been properly cleaned since 2012, that was approximately 5 years, and suggests that reasonable minds could differ about the frequency with which such cleaning should occur. This is a general philosophical or policy disagreement that does not separately constitute wrongdoing as listed in the statute. *Webb*, 122 M.S.P.R. 248, ¶ 8.

Third, discussions about when and who should monitor the headboxes for the BSL-3 and zebrafish wet laboratories are, like cleaning them, policy disagreements that do not qualify as disclosures protected by 5 U.S.C. § 2302. As discussed above regarding jurisdiction, the only personnel action at issue in

this appeal is the appellant's removal, and not any "gag" order. IAF, Tab 73. Even if I were to consider it, the appellant did not demonstrate that the agency did anything improper.

Purcell was concerned during the IACUC meeting about potential safety issues because the headboxes are large and heavy. HR (testimony of the appellant). The day after the IACUC meeting, Purcell sent an email to the appellant that requested the PowerPoint slides the appellant used and said they would "hold off" on cleaning the headboxes until they resolved "the safety and training concerns." IAF, Tab 37 at 14. Purcell requested that the appellant provide a list of reasons she needed access to the mechanical room. *Id*. Purcell also directed as follows: "Please direct all future facility related communications to me," and "do not directly communicate with facilities by email or phone for any reason except in case of emergency." *Id*. Purcell requested that the appellant send facility requests to her and said she would communicate with Facilities. *Id*. Purcell testified that there was a "multi-million dollar construction project coming up" and it was "unreasonable for facilities to be getting emailed by all employees" and instead they needed "work order system" and have the section chiefs be the ones to communicate with Facilities. HR (testimony of Purcell). According to Purcell, this was because Rolland wanted to make sure that requests to Facilities were being handled. *Id*. Rolland also said that Facilities had numerous overlapping responsibilities and needed a system to triage requests. HR (testimony of Rolland). Some people reported to Rolland they had to wait "as long as a year" for their "nonemergency" Facilities requests to be handled. *Id*. Thus, Rolland required that nonemergency requests be "centralized and prioritized." *Id*. The appellant agreed that the entire staff received information about the work-order system, but disputed the timeline. HR (testimony of the appellant).

Considering the foregoing, the appellant was *not* subjected to a "gag-order." Rather, the agency reasonably required that the appellant and other

nonsupervisory employees route requests for action by Facilities through their supervisors to ensure that Facilities could prioritize tasks.

Alleged Disclosure No. 8

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 8 the following: The August 2017 BSL-3 laboratory alarm system failure and other incidents that occurred in 2017 were reported by the appellant in an annual report (2017 Annual BSL-3 Laboratory Inspection & Incident Report) to the United States Geological Survey (USGS) headquarters officials. The report also listed incidents of occupational health concerns due to poor air quality in the BSL-3 laboratory, and that Facilities staff were not following BSL-3 laboratory SOPs, particularly for ventilation filter checks, daily effluent treatment monitoring, and completing maintenance logs. In August 2017, the BSL-3 laboratory had a shutdown resulting in no water flows for four hours during an experiment, resulting in danger to test animals as well as possibly compromising the validity of the experimental results. IAF, Tab 73 at 20-21. As an alleged consequence, I noted that in November 2017, Purcell proposed removing all of the appellant's official BSL-3 laboratory containment and oversight work duties from her Employee Performance Appraisal Plan (EPAP). *Id*.

The appellant explained that she was responsible for preparing an annual report for the BSL-3. HR (testimony of the appellant); IAF, Tab 37 at 93-97. In that report, she identified there was a four-hour shutdown in the BSL-3. HR (testimony of the appellant). She believed this was a preventable error if Facilities had followed the standard operating procedures she recommended. *Id*.

The appellant reported the alarm malfunction to Purcell, who then requested that Sato investigate. HR (testimony of Purcell); IAF, Tab 45 at 47-49. When asked why Facilities did not act sooner, Purcell said the appellant did not mark the work order as "urgent[,]" and it was still addressed "within the same workday." HR. While the appellant complained to Purcell that the delay was attributable to her instruction against communicating directly with Facilities,

Purcell said this was exactly the reason Facilities had requested a structure because it was difficult with different people "just grabbing them" within the context of the circumstances as set forth above. *See id.*

Rolland said the first "biosecurity breach" was a "minor incident" where individuals did not follow standard operating procedures when they entered the effluent chlorination room to get a testing kit. HR (testimony of Rolland). The second incident was a failure of daily checks. *Id.* When asked if this was serious, Rolland said there was a "major discrepancy between Ms. Emmenegger's point of view and the facility staff[,]" the latter of whom believed the electronic monitoring system was sufficient and daily paper logs were excessive. *Id.* The third "incident" related to air quality concerns experienced by the appellant and Kurath. *Id.* Rolland said that after the air quality concerns were raised, they contacted an industrial hygienist and regional safety officer. *Id.* Even though Rolland did not think all of these issues needed to be reported to headquarters, at the appellant's request, she did so. *Id.* Rolland then had a conversation with the headquarters biosafety officer, but there was no written response. *Id.*

I conclude that the appellant's report *does not qualify* as a protected disclosure under 5 U.S.C. § 2302(b)(8). With respect to the four-hour shutdown, the appellant's email did not disclose a violation of law, rule, or regulation, or other covered misconduct. She said that the shutdown created a possibility for animal stress and impact to research integrity. IAF, Tab 37 at 95. This is conjecture; the appellant did not disclose a violation or law, rule, or regulation, or other prohibited conduct such as gross mismanagement or substantial and specific danger to health and safety. With respect to the alleged biosafety incident, facilities personnel were given the access code to the BSL-3 so they could borrow the chlorine monitor. While this may have violated agency policy as expressed in the SOPs, the appellant did not show that it violated law, rule, or regulation, or resulted in a danger to public health or safety.

As discussed above, the disclosure of the air-quality concerns in the BSL-3 qualify as protected disclosures, because there was a danger to staff safety. However, this was a repetition of the disclosure in Alleged Disclosure No. 3. The fact that the appellant repeated this issue to different people may be relevant to the contributing factor analysis, but it is not a separate disclosure.

August 2017 Request for Different Supervisor

In August 2017, the appellant requested that Rolland assign her a different supervisor. IAF, Tab 37 at 131-33. In her email making the request, the appellant complained that Purcell yelled at her and misrepresented events. *Id.* She summarized concerns with the chlorination issue discussed in June. *Id.* The appellant said it was part of her job responsibilities to ensure that the BSL-2 and BSL-3 laboratories complied with various requirements, and she "can be held personally accountable." IAF, Tab 37 at 131.

Rolland denied the request. HR (testimony of Rolland). Rolland found the appellant's statement about personal accountability for the laboratories unusual because it is usually the agency that is responsible; thus, she asked for more information. *Id.* The appellant did not provide the requested information. *Id.* Rolland disagreed that the appellant should have been notified about the chlorination issue because she did not have active experiments in the BSL-2 laboratory at the time. *Id.* Rolland also said the appellant's statement that "running the BSL-3 laboratories" was a "fundamental misunderstanding of what an RGE scientist is supposed to do[,]" because the appellant was a research scientist. *Id.*

When Rolland denied the request for a different supervisor, the appellant went to her doctor who "wrote up an FML [Family and Medical Leave], saying, this is a very stressful situation." HR (testimony of the appellant). While Rolland did not change supervisors to accommodate the appellant, the agency permitted a third party to be present for meetings or to have their primary means of communication by email. *Id.* The appellant filed a renewed "FMLA" the next

year. *Id*. The appellant said she did not "know if it was intentional or not" but she had panic attacks related to working with Purcell, for which her doctor provided a supporting opinion. *Id*.; IAF, Tab 81 at 111-12.

Alleged Disclosure No. 9

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 9 the following: On September 19, 2017, the appellant filed a Scientific Integrity Complaint to agency's Bureau of Scientific Integrity. It reported on three incidents: the animal care violations, the BSL-2 laboratory contaminated wastewater release, and the BSL-3 laboratory shutdown. The Complaint named Purcell, Sato, and Rolland as subjects who violated the agency's scientific integrity policy. These subjects were informed of the investigation and interviewed. The Scientific Integrity Complaint was finally dismissed in July 2019, based on a finding that there was no evidence that the actions were intentional, knowing or reckless. However, the report found, among other things, that laboratory systems related to water filtration and treatment, temperature regulation and flow, and effluent treatment were failing or had failed prior to the complaint being filed, that the BSL-2 laboratory effluent treatment failure led to discharges of untreated wastewater into Lake Washington, and that even after remedial actions, continued issues cast doubt on the treatment system's long-term stability. The report concluded: "The quality of science may have been adversely affected, but this does not appear to have been intentional or reckless." IAF, Tab 73 at 21-22.

In the complaint, the appellant complained about "substandard animal care" issues as she discussed in the IACUC, the 2017 effluent leak, and the August 2017 shutdown of the BSL-3 laboratory. IAF, Tab 62 at 260-81. These are repetitions of complaints identified in other disclosures as discussed above.

Rolland described scientific integrity complaints as a mechanism for employees to confidentially express concerns, and are often related to plagiarism or falsification of data. HR (testimony of Rolland). She understood that she had

been named in the complaint, but Rolland did not know who filed it. *Id*. Rolland said that it is an intentionally anonymous process. *Id*. Rolland understood the complaints were related to issues with Facilities impacting the quality of the science. *Id*. Rolland received a copy of the final report, including its recommendations for the Center. *Id*. Rolland recalled that she was already aware of, and working on all of the issues identified in the report. *Id*.

The Report of Investigation into the Scientific Integrity Complaint concluded that there was no violation of agency policy on the integrity of scientific or scholarly activities because there was no evidence the actions were intentional, knowing, or reckless, but found "mission-critical components" were degraded "to the point that they were failing or near failure, before remedial activities were taken." IAF, Tab 42 at 16. This was due to Center leadership "employing an insufficient number of facilities personnel" to keep the laboratories in working order and meet the needs of the scientists. *Id*. The report also noted that the investigators had referred the complainant to the Office of Inspector General Whistleblower Protection Program "for retaliation concerns." IAF, Tab 42 at 15.

Purcell testified that she learned of the complaint in January 2018 as a "pretty high-level notification[.]" HR. She did not know who filed the complaint, and eventually met with the investigators. *Id*. By summer 2019, Purcell learned that the complaint was closed, and understood the center management received a report with recommendations. *Id*. Even at the point she learned of the recommendations, Purcell did not know who filed the complaint. *Id*. Purcell testified that she had not seen the appellant's email about the complaint until she was shown it during the hearing. *Id*.; IAF, Tab 45 at 53; Tab 51 at 206-07.

I conclude that the Scientific Integrity Complaint *does not qualify* as a protected disclosure under 5 U.S.C. § 2302(b)(8), because the substance of the

disclosures is duplicative of other accepted disclosures.[6] However, I conclude that it *does quality* as protected activity under 5 U.S.C. § 2302(b)(9) because it was made to an agency component responsible for internal investigation or review, which investigated and issued recommendations.

Alleged Disclosure No. 7

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 7 the following: On September 20, 2017, the appellant reported the January to June 2017 BSL-2 laboratory untreated effluent releases to the USDA APHIS, and the WDFW as a violation of the conditions of WFRC's import permits and of State fish disease regulations. Rolland was copied on the notifications to these agencies. After the appellant's disclosures, Facilities staff started excessively delaying or closing her work orders, and Purcell refused to allow her to participate in BSL-2 laboratory effluent monitoring duties that all other animal caregivers and scientists participated in. IAF, Tab 73 at 20.

According to the appellant, in late July 2017, she discovered that there was a discharge of untreated wastewater from the BSL-2 laboratory into a wetland park that drains into Lake Washington. The appellant believed this would not have happened if the agency had followed her recommendations, as discussed in Alleged Disclosure No. 1. *See* IAF, Tab 109 at 7 (agreeing that Alleged Disclosure No. 1 and No. 7 were linked).

As additional background, Purcell explained that the facility regularly cycles water from and back to Lake Washington, and usually chlorinates and dechlorinates it. HR. In June 2017, Purcell, Winton, and Chase identified that there was a problem with the chlorine detection systems for effluent from the

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[6] The Report of Investigation, which found no policy violations but identified areas of concern with equipment maintenance, further supports my determination that an objective observer would not find that the appellant's complaints about effluent monitoring and their impact on research subjects (Alleged Disclosure Nos. 1, 2, 4, 5, and 8) disclosed a violation of law, rule, regulation, or other covered misconduct.

BSL-2 laboratory, which meant effluent was being released without being dechlorinated. *Id*. Purcell explained that she was unfamiliar with the chlorination process; thus, after they tested the meter and did not get a reading, they called the Facilities manager who confirmed that the meter was not working. *Id*. Purcell and others devised a redundancy system that was in place within approximately a month; Purcell also reported the issue both up and down her chain of reporting but not outside the agency. *Id*. Purcell documented the system in a report dated July 21, 2017. IAF, Tab 51 at 204-07. Purcell presented the report to the IACUC, and while the appellant was present for some of the meeting (as discussed above in Disclosure 5), she had left by the time Purcell presented this report. HR (testimony of Purcell). Purcell also clarified that the fact the effluent was not treated did not necessarily mean that there was a pathogen release. *Id*.

In late July 2017, the appellant observed someone using the chlorine meter from the BSL-3 laboratory and asked about it; Purcell overheard and joined the conversation, and explained the situation with monitoring for the BSL-2 laboratory. *Id*. (testimony of Purcell). During the hearing, Purcell recalled the appellant asking whether the EPA needed to be notified of the effluent discharge. *Id*. The appellant called Purcell to ask "the same questions over again," and the conversation "ended with her [the appellant] essentially saying whatever and slamming the phone down." *Id*. Purcell thought the conversation was unprofessional, thus, she contacted Rolland and then human resources. *Id*. Purcell sent the appellant a follow-up email documenting the discussion and confirming that she ordered another meter. IAF, Tab 37 at 112-13. The email noted that during the conversation in the hallway, the appellant made comments to the effect of it was "good that you have covered your ass" and "This is going to look bad when it gets out[.]" *Id*. Purcell wrote that she "found your comments yesterday threatening and inappropriate[,]" and asked the appellant to not make these types of comments to her in the future. *Id*. The appellant responded by

writing that she "never stated you needed to 'cover your ass'" but did say the chlorination shutdown would look bad if not handled properly. *Id*. at 113 (emphasis original). The appellant also wrote that the reference to threatening and inappropriate comments was false and retaliatory because the appellant had "stated earlier in the week that I was considering filing a grievance." *Id*. Purcell responded, disagreed that her comments were retaliatory, and encouraged the appellant to talk with two different people (Chris Cox and Cheryl Caldwell) regarding "your grievances." *Id*. at 114. During the hearing, Purcell testified that she was confident the appellant had used these terms, because this was the first time in her Federal career that she had called employee relations about how to handle a situation. HR (testimony of Purcell).[7]

The appellant referred to this as "the major disclosure report that I had[.]" HR (testimony of the appellant). As she described it, the agency had known about the need to test wastewater effluent for a long time, but there was a "major wastewater – contaminated wastewater spill into the effluent." *Id*. The appellant said that the issue involved unchlorinated water being released into the wetland, and because there had not been monitoring, she could not tell how much impact there was. *Id*. The appellant discovered the spill later, by happenstance, when she ran into a technician that had taken the testing kit from the BSL-3 laboratory to monitor the BSL-2 effluent. *Id*. After discussions with Purcell indicated that Purcell had sent the issue up within agency reporting chains, but not regulating agencies, the appellant determined that she should make disclosures to the WDFW and USDA APHIS. *Id*. The appellant believed that as a permit recipient, she was "personally responsible" for reporting this matter. *Id*. The appellant communicated with personnel at USDA APHIS and the WDFW regarding the

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[7] The appellant testified she was under stress, particularly after Purcell "accused me that I had cussed at her." HR. After that, she did not want to be alone with Purcell "in case she said or misconstrued something I said." *Id*. She hid in the bathroom sometimes to avoid Purcell. *Id*.

issue. IAF, Tab 45 at 53-58. During the hearing, the appellant displayed difficulty remembering details about this disclosure without being shown documents, stating "Again, can you again give me some reference?" when asked about her disclosures to USDA APHIS and WDFW as set forth more fully in the record within the context of the this specified response. *Id*.

The appellant informed Rolland and contract veterinarian Joy Evered that she was obligated to inform WDFW and USDA APHIS about the June 2017 effluent issue. IAF, Tab 62 at 209. Rolland understood that the WDFW permit applied only to the BSL-3 laboratory, and the release occurred from the BSL-2 laboratory, thus, she did not believe it was a required reporting situation. HR (testimony of Rolland). However, after the appellant said that her import permits made her personally responsible, Rolland said that if the appellant felt she needed to notify these agencies, it was her right to do so. *Id*. Rolland did not know whether the appellant notified these agencies, and was not copied on the appellant's eventual notices to WDFW or USDA APHIS. *Id*. On November 27, 2017, Rolland emailed the appellant to say that all follow-up questions from her (Rolland's) notifications had been addressed and the case was "considered closed by all parties with no further action required." IAF, Tab 56 at 39.

On September 6, 2017, the appellant emailed Purcell and others to request an urgent work order for the wet laboratory because the "bleach reservoir or some tube is leaking" and there were bleach precipitates around the power strip and computer wiring. IAF, Tab 37 at 116. Purcell testified that this was something that needed to be investigated in a timely fashion. HR. In the email, the appellant also requested that Facilities open a headbox. IAF, Tab 37 at 116. Purcell said this was standard after the agreement for Facilities to open spaces for scientists as needed. HR (testimony of Purcell).

I conclude that the appellant's reports to USDA APHIS and WDFW *do not qualify* as a protected disclosure under 5 U.S.C. § 2302(b)(8) for the following reasons.

Prior to the appellant's happenstance discussion with a technician, Purcell and others had already identified problems with monitoring and were conducting manual sampling. The Whistleblower Protection Enhancements Act does not exclude disclosures of information already known. 5 U.S.C. § 2302(f)(1)(B); *see Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶ 18 (2013). Thus, it is immaterial to the whistleblower retaliation analysis that Purcell and others had already identified the problem and were taking steps to address it. However, the disclosure must still qualify under § 2302(b)(8), and these disclosures do not.

The appellant argued that the chlorination system "likely was not functioning" properly "for about six months," which according to her meant the laboratory effluent was "passed straight out into the wetland untreated." HR (testimony of the appellant). There are two problems with this argument. First, based on the description of the BSL-2 effluent treatment and monitoring systems described by Rolland and Purcell, the fact the effluent was not treated did not necessarily mean that there was a pathogen leak. HR. Second, even assuming there may have been a leak, this was the BSL-2 laboratory, which only handles pathogens that already exist in the local area as set forth in detail above. Thus, it would require multiple assumptions to find that the appellant reasonably believed she disclosed a "leak" *and* that any such leak violated a law, rule, or regulation, or posed a substantial and specific danger to public health or safety.[8] Considering that Purcell, Rolland, and the others involved who had identified the problem before the appellant became aware of it believed the situation was remediable within the WFRC and discussed it with the IACUC, I conclude that these assumptions are not adequately supported.

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[8] As further support for the conclusion that a disinterested observer would not find a violation of law, rule, regulation, gross mismanagement, or substantial and specific danger to health and safety, I note that the Report of Investigation following the Scientific Integrity Complaint noted only potential concerns related to BSL-2 effluent. IAF, Tab 42 at 23-24.

In support of her contention that she reasonably believed she had to report, the appellant cited the import permits. HR (testimony of the appellant). The appellant cited an email in which she reported a state employee who "confirmed that I was required to report if any conditions of the permit weren't adhered to." IAF, Tab 45 at 57. However, reviewing the permit specifically deals with the importation of virus specimens and generally refers to inspection requirements. IAF, Tab 47 at 9-11. Moreover, saying that the appellant was required to report when permit conditions were not adhered to does not show that permit conditions were violated. As indicated above, Rolland understood that the WDFW permit applied only to the BSL-3 laboratory, and the release occurred from the BSL-2 laboratory. HR (testimony of Rolland).

I accept that the appellant personally believed there was cause to be concerned about the potential for untreated effluent to contaminate the local water supplies, and personally believed it was appropriate to notify other agencies. However, § 2302(b) requires that evaluating whether a disclosure is protected by done by asking whether a disinterested observer with knowledge of the essential facts could reasonably conclude that the actions of the government were covered. Applying this objective test, I conclude that the appellant did not meet her burden: there is no evidence that there was a leak of contaminates such as pathogens, or that if there was such a release, that it was out of line with background levels for the pathogens studied in the BSL-2 as set forth in detail above.

Performance Discussions in 2017 and 2018

Purcell gave the appellant her annual performance evaluation in October 2017. HR (testimony of Purcell). Purcell said that the appellant's then-applicable standards were difficult to use because they were vague or not easily measurable, so she followed Winton's practice and rated the appellant as superior. *Id.* Purcell wanted to adjust the appellant's duties, including reframing the prominence of her work in the Aquatic BSL-3 laboratory (she denied

removing the appellant's BSL-3 oversight duties in November 2017). *Id*. After issuing the 2017 performance evaluation, Purcell reworked the appellant's standards to "use ones that were appropriate for an RGE scientist." *Id*. The appellant disagreed with the revisions, because she felt it was setting her up for failure; Purcell disagreed with that assessment. *Id*. Based on their conversation, it was clear to Purcell that they did not have a common understanding about the appellant's duties, so she "held off" implementing them. *Id*. As Purcell recalled it, the appellant thought her primary responsibility was to be the BSL-3 manager, but Purcell thought this was supposed to be 10% or less of her time with research being her focus. *Id*.

As discussed above, in November 2017, the appellant provided a request for Family and Medical Leave Act (FMLA) leave. According to the appellant, this included a requirement restricting communications with Purcell to email. *Id*. (testimony of Purcell). According to Purcell, this form permitted the appellant to take FMLA protected sick leave intermittently as needed. *Id*. Purcell understood the appellant made an informal request to communicate in writing. *Id*. After the appellant indicated she had medical condition that prevented her from speaking, Purcell took it as a request for reasonable accommodation. *Id*.[9]

In February 2018, Purcell was meeting with Winton, who was then an "emeritus scientist[,]" and the appellant came in, was "very, very upset," then "started yelling at Dr. Winton about something," and when Purcell tried to interrupt, the appellant "pointed her finger at me and kept saying no, and would not let me speak," and "eventually, stormed out of the room." *Id*. (testimony of Purcell). Purcell then worked with employee relations to prepare a non-disciplinary letter of warning. *Id*.; IAF, Tab 56 at 75. The appellant responded to

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[9] Purcell appropriately handled this situation. As indicated in the title, the Family and Medical Leave Act deals with leave requests. Requests to modify how the work is done are requests for reasonable accommodation.

say that she "left Jim's office because I was starting to cry and I said I needed to take a break." IAF, Tab 56 at 77.

Alleged Disclosure No. 10

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 10 the following: In March 2018, the appellant disclosed to USDA APHIS and WDFW a violation of permit conditions due to two biocontainment leaks within the BSL-3 laboratory. As a result, BSL-3 laboratory work was suspended by the USGS Regional Director and that laboratory was decommissioned. IAF, Tab 73 at 22.

On January 16, 2018, the appellant wrote to Purcell to say that even though someone from maintenance placed a bucket under an effluent pipe, there was still water on the floor. IAF, Tab 37 at 78. Purcell agreed to pass the information along to Facilities. *Id*. The next day, the appellant emailed Purcell to report a power surge that resulted in a loss of differential air pressure in the BSL-3 with a delayed alarm. *Id*. at 76. The appellant reported that there was no air flow, and when she went in to check on the ultralow freezer and water flow, had an instant headache. *Id*.

Thirteen minutes later, Purcell responded to say she had received a text message saying that they had restarted the system, and it was showing as in safe mode. *Id*. Purcell relayed that no one should enter if a warning light was still on. *Id*. Purcell said that she was concerned the appellant went into the BSL-3 because it was dangerous to the appellant because the appellant knew the air handler system had gone down and because entering violated the entry procedures, and the appellant would have known they were down. HR (testimony of Purcell). Rolland said that there was no release into the environment because of the different ways that BSL-3 effluent is processed from BSL-2 effluent within the agency's facility. *Id*.

The appellant said that Facilities staff were aware of a leak in the BSL-3 effluent treatment system but did not alert her. HR (testimony of the appellant).

On January 16, 2018, the appellant notified Purcell that the leak had not been repaired and someone had just put a bucket on the floor under the middle effluent pipe. IAF, Tab 45 at 74. On February 23, 2018, the appellant completed a "Reporting of 2017 Laboratory Inspection Results[.]" IAF, Tab 37 at 93-97. Purcell said that preparing this report was part of the appellant's regular duties as the coordinator for the BSL-3 laboratory. HR (testimony of Purcell).

According to Purcell, in spring 2018, Rich Ferrero, Regional Director, suspended all operations of the Aquatic BSL-3. *Id*. As Purcell understood it, there were concerns about the air quality as reported by the appellant and Kurath, as well as cracks in the effluent line, all of which needed to be repaired. *Id*. On March 2, 2018, Rolland emailed a copy of the memorandum suspending operations while the BSL-3 laboratory was repaired. IAF, Tab 37 at 80. Over the next few days, the appellant and Purcell emailed about keeping their time in the BSL-3 laboratory to a minimum (when the appellant needed to access a freezer), and the appellant's list of repairs she believed were required. IAF, Tab 37 at 80-83. Likewise, Rolland testified that after discussions with Ferrero and headquarters personnel, considering the concerns about air quality and chlorinate, led them to conclude they needed to shut down the BSL-3 laboratory to investigate and address the problems. HR. Among other things, the tank had to be specially fabricated, which required going through the procurement process. *Id*.

On March 19, 2018, Rolland issued a memorandum to USDA APHIS official Mark Pagalla and others, that announced the shutdown of the BSL-3 laboratory for repairs. IAF, Tab 37 at 84-85. The appellant disputed how Rolland characterized the events and asked that Rolland send additional information the appellant prepared, and on April 10, 2018, Rolland did so. HR (testimony of Rolland); IAF, Tab 37 at 86-92. Rolland did not believe that clarification was warranted and did not usually send out such clarifications, but

did so because she "felt that if I did not allow it to go out that Ms. Emmenegger would claim that I was censoring her." HR (testimony of Rolland).

During her testimony, Rolland said that the BSL-3 is at the end of its usable life and needs to be completely redone, but based on funding decisions by headquarters, this is not scheduled to be addressed until 2026. *Id*. She said that the WDFW told her that while there was no legal requirement, they would appreciate courtesy notifications earlier. *Id*.

I conclude that this disclosure *qualifies* as a protected disclosure. The safety issues disclosed by the appellant, including her own headache when accessing the BSL-3, were serious. Along with information from others, management made the determination to decommission the BSL-3 based on these disclosures.

Alleged Disclosure No. 11

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 11 the following: In April 2018, the appellant distributed a report that provided the correct information concerning the leaks in Disclosure 10, and including a second BSL-3 laboratory effluent leak, to several agencies, including: U.S. Fish and Wildlife Service, Northwest Indian Fisheries Commission, USDA APHIS, WDFW, the University of Washington, and several WFRC employees and officials. IAF, Tab 73 at 22-23.

The appellant testified that she complained to Rolland and Purcell that they did not disclose the other leak, so she prepared additional information. HR; IAF, Tab 45 at 85-88. On April 10, 2018, Rolland forwarded the appellant's report to USDA APHIS, WDFW, and others. IAF, Tab 45 at 82.

I conclude that this disclosure *does not qualify* as a protected disclosure, because it is duplicative of Alleged Disclosure No. 10, which I found qualified.

2018 Midyear Discussion and Revisions to Performance Plan

On April 30, 2018, Martina Koller, M.D., the appellant's physician, sent a letter to Rolland asking that the appellant receive a "different work supervisory environment that will be perceived as less hostile[,]" and referred to difficulties the appellant had with Purcell. IAF, Tab 81 at 4.

Purcell testified that their communications were so unproductive that she wanted a professional facilitator to work with them. HR. However, that office did not provide any services because the appellant indicated she "was not interested in their services." *Id*. Purcell then brought in Caldwell in summer 2018 to facilitate discussions, but the appellant said she would only communicate with Purcell in writing. *Id*.

During an off-site meeting between the appellant, Purcell, Caldwell, and the acting Center Director Jonathan Sleeman, the appellant read a prepared statement saying that she would not participate in a facilitated conversation because she was uncomfortable with the format of the meeting. *Id*.

In summer 2018, the Department of Interior released new standards for the EPAPs, and Purcell had to rework the plans for her employees. *Id*. (testimony of Purcell). Cathleen Smith, the supervisory human resources specialist, testified that this change occurred in the 2017/2018 timeframe, and were intended to clarify and address the research responsibilities associated with RGE positions. HR.

For the appellant and other RGE employees, Purcell used an example from the Eastern Ecological Research Center, which was a comparable laboratory, and focused on scientific productivity standards. HR (testimony of Purcell). For the critical element related to scientific productivity (element 4), the RGE had to submit a significant scientific product such as an article or presentation. *Id*.

Purcell delayed having a midyear performance discussion in 2018 with the appellant because she was hoping Caldwell could assist them have a conversation, but eventually she issued a written midyear discussion. HR

(testimony of Purcell). The appellant uploaded documents about her concerns about the effluent leak and other issues, so Purcell sought advice about whether to sign the midyear; employee relations employee Chris Andahl directed Purcell to delete those uploads and sign the midyear, but the appellant then declined to sign it. *Id*.

Purcell said that after the midyear discussion, the appellant requested reasonable accommodation, and one of the recommendations from her doctor was to communicate in writing, but the agency provided a third-party for the discussions instead. HR (testimony of Purcell). The appellant said Purcell followed this limitation "a majority of the time," but on a handful of occasions would come to her office, and the appellant would feign the need to use the restroom, request to continue the conversation by email, or would make sure other employees were brought into the conversation. HR (testimony of the appellant). The appellant was "shocked and really upset" when Purcell changed this arrangement for the 2019 midyear meeting as discussed further below. *Id*.

Alleged Disclosure No. 12

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 12 the following: In July 2018, the appellant disclosed concerns regarding the effluent tank leak to the USGS headquarters Biosafety Specialist Guelaguetza Vazquez-Meves. The appellant then informed then-Interim Center Director Jonathan Sleeman. He ordered her to no longer directly contact the Specialist. IAF, Tab 73 at 23. As alleged consequences, I accepted that after these events, the appellant was "barred" from reporting to the regulatory agencies, from monitoring or reporting on laboratory system failures, maintenance, or repairs, and from entry into the BSL-3 laboratory effluent treatment room. *Id*. She was permanently removed from the IACUC in November 2018. *Id*. In December 2018, Purcell changed her job duties to remove management and safety oversight of the laboratories from her primary duties. *Id*.

According to the appellant, after the BSL-3 laboratory was decommissioned, there were problems with the heating, ventilation, and air conditioning (HVAC) system and they were "trying to exclude me" from making her daily checks of the BSL-3. HR (testimony of the appellant). The appellant spoke with Vazquez-Meves and Camille Hopkins, Wildlife Disease Coordinator, about her concerns, and Hopkins eventually told the appellant to work with Sleeman as the acting Center Director. IAF, Tab 81 at 5-9.

In August 2018, the facilities team was conducting major work on the main BSL-2 laboratory. HR (testimony of Purcell). There were problems with damage to the equipment and other interference. *Id.* Amid these efforts, the appellant requested to access the main BSL-2 laboratory headboxes because she was "suppose to be monitoring their condition." IAF, Tab 37 at 118. Sleeman (the acting Center Director) denied the request and explained that there was damage to the headboxes in previous cleaning efforts so Facilities would handle monitoring. *Id.* The appellant pushed back, saying that she was responsible for monitoring them, and said that restricting access is "not a team approach to providing the best care to animals we care for" and a "continuation of the policies of suppressing the disclosure of issues/problems[.]" *Id.* at 119. Sleeman reiterated his decision that only Facilities would have access to the headboxes. *Id.* The appellant complained about this decision to Byron Shumate, Rama Kotra, and Richard Colemand; Purcell explained that these people were with the Office of Scientific Integrity. *Id.* at 122; HR (testimony of Purcell). When asked if the headboxes were clean and sufficient for animal safety, Purcell was unaware of any headbox cleaning issues leading to animal health outcomes. HR (testimony of Purcell).

Rolland recalled that Sleeman instituted the work order process because there had been instances of inadvertent damage to the Facilities by scientific staff, so the compromise was to have Facilities staff accompany scientific staff. HR (testimony of Rolland).

I conclude this *qualifies* as a protected disclosure. Specifically, HVAC issues after the BSL-3 was decommissioned pose health and safety concerns for personnel working in the BSL-3 and other locations still active.

However, I do not consider whether the agency tried to "exclude" the appellant or review the wisdom of the agency's decision to assign Facilities (and Facilities only) to clean the headboxes. First, and most importantly, the appellant did not present to OSC for potential corrective action the instruction to have Facilities only be responsible for cleaning the headboxes. As discussed above regarding jurisdiction, the whistleblower retaliation claims in this appeal are an affirmative defense to the removal action, which means I do not have jurisdiction to review this as a potential personnel action as if this had been exhausted as part of an IRA appeal. Second, because there was damage to the headboxes from work done by non-Facilities personnel, there was nothing improper with Sleeman's determination to limit such repairs to Facilities.

Likewise, I do not consider whether the instruction to not directly contact the Specialist, meaning Vazquez-Meves, was a personnel action. Even if I were to consider it, was nothing improper for Hopkins or Sleeman to direct the appellant to communicate concerns within the usual chain of command.

Regarding the IACUC, according to Purcell, the appellant was never a standing member of the IACUC, but was instead an alternate who did not have voting rights. HR (testimony of Purcell). In summer 2018, Sleeman recommended the WFRC restructure their committees, including the IACUC, because it was "too large" and there were difficulties establishing a quorum. *Id*. By fall 2018, Jane Reed, Sleeman's successor as acting Center Director, cut the IACUC from 12 to 6 primary members, moved the remainder of the original quorum to alternates (including Purcell), and rotated off all of the prior alternates (including the appellant). *Id*. The appellant agreed that Sleeman and Reed were involved in the reorganization of the committees. HR (testimony of the appellant). While the appellant potentially raised the reorganization as an issue

in Complaint 1325, because the appellant did not pursue corrective action as discussed in greater detail above, I cannot the reorganization of the committee as a potential personnel action.

Alleged Disclosure No. 13

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 13 the following: In August 2018, the appellant reported to the IACUC another series of improperly treated BSL-2 laboratory wastewater releases into the adjacent wetland and to Lake Washington from January to March 2018. IAF, Tab 73 at 23. As consequences, I accepted that after this, she was repeatedly excluded from any discussions regarding the monitoring or oversight of the wastewater treatment system at the WFRC. *Id.*

According to the appellant, she noticed that between January and March 2018, there were instances in which "we were below the chlorine level that we were supposed to be at the outfall of the lab" meaning that "it was, again, not being treated properly" so she reported it to the IACUC. HR (testimony of the appellant). At the meeting, they discussed whether "this was an event[.]" *Id.* The appellant sent an email summarizing that the chlorination results were lower than expected. IAF, Tab 60 at 35.

According to Purcell, after the June 2017 release, the facility increased the monitoring of effluent to three times per week, done by technicians with a group of scientists visually inspecting the system during the weekends. HR (testimony of Purcell). Purcell said the appellant did not volunteer for this project, and had her own weekend responsibilities. *Id.* Purcell forwarded the appellant's email to the IBC (biosafety committee) for action by that committee. IAF, Tab 60 at 35. The appellant said she agreed that transitioning effluent treatment oversight from the IACUC to the IBC was an "excellent idea." *Id.* at 36.

I conclude this *does not qualify* as a protected disclosure. As discussed in more detail regarding Alleged Disclosure No. 7, just because there may have been a release of untreated effluent – or in this case, insufficiently treated effluent –

does not mean that there was a violation of law, rule, or regulation, of danger to public health and safety. As discussed elsewhere, the BSL-2 handles pathogens that are present in the local area, so I cannot assume that a leak automatically means there was a danger, such as release of a pathogen in excess of background levels. Moreover, the matter was reassigned to the IBC to make its own determination about whether to report and how to monitor effluent going forward.

2018 Performance Discussion

For the fiscal year 2018 final evaluation, Purcell again applied Winton's standards and rated the appellant as fully successful. HR (testimony of Purcell). The appellant considered the rating a downgrade and requested reconsideration; thereafter, Purcell gave her the paperwork to challenge it. *Id*. Employee relations specialist Shari Walters handled the request. HR (testimony of Walters). The employee relations office advised management that the appellant should not be rated on one critical element involving supervision, because the appellant supervised a contractor, but no Federal employees; based on this advice, the appellant's overall score was "raised to superior." *Id*.; HR (testimony of Purcell).

By December 2018, Purcell proposed the new EPAP standards (for the 2019 fiscal year) and gave them to the appellant for feedback; the appellant said she preferred the earlier standards but gave feedback and ultimately signed them. HR (testimony of Purcell); IAF, Tab 35 at 123-25, 141-56. The appellant was concerned that the EPAP did not include BSL-3 coordination activities, but Purcell was not worried because, at that point, "the BSL-3 was closed at this point" leaving no activities to coordinate. HR (testimony of Purcell). Purcell further said that there is no position on the organizational chart for "BSL-3 manager or coordinator[,]" but it was a collateral duty assignment. *Id*.

Walters, the assigned employee relations specialist, testified that the performance elements and standards for the appellant were consistent with those of other research grade scientists. HR.

2019 Midyear Discussion

By the time of the 2019 midyear, Purcell wanted to have a conversation with the appellant, because they were communicating only in writing and the appellant was teleworking, so Purcell did not have a good sense of what the appellant was doing. HR (testimony of Purcell). On April 22, 2019, following advice from employee relations, Purcell issued a memorandum saying that she could no longer accommodate the appellant's request for only written communication. IAF, Tab 37 at 137. The appellant then attended a midyear discussion. HR (testimony of Purcell).

According to Purcell's summary of the meeting, they discussed submitting one paper for fiscal year 2019, either of two options depending on available data, and that there are "no 'permanent' projects" and instead each project must be handled on a topic-by-topic basis with an end date, and that the appellant needed to plan for what new proposals she would develop in fiscal year 2020. IAF, Tab 35 at 174. The appellant told Purcell she was on-track to complete one publication and otherwise she was going to focus on backing up her projects. HR (testimony of Purcell). They only had one additional meeting, because the appellant brought "prepared written materials and would read off of it" rather than answering questions. *Id*. The appellant expressed difficulty, and Purcell "interpreted what she was saying as the fact that she need a reasonable accommodation[.]" *Id*. According to Purcell, during this meeting, the appellant brought a garbage can and "spit into it" during the meeting, and did not vomit. *Id*. According to the appellant, she vomited. *See* HR (testimony of the appellant).

In October 2019, the appellant submitted a self-assessment. IAF, Tab 37 at 155-59. Purcell could not evaluate whether the appellant had completed objectives for a multi-year project (Critical Element 3), and determined the appellant had not completed a significant scientific product (Critical Element 4). HR (testimony of Purcell).

The appellant claimed that during the fiscal year 2019 midyear review, Purcell did not say that she was in danger of failing. HR (testimony of the appellant). According to the appellant, during the midyear she discussed two papers she wanted to potentially submit, one involving sturgeon viruses and for which she was waiting on data from a co-author, and the second was the koi research that eventually became the submitted paper. *Id*. The appellant acknowledged she did not complete the sturgeon paper in fiscal year 2019. *Id*. She acknowledged she had not completed the koi paper by the end of fiscal year 2019. *Id*. She also acknowledged that she had presented the sturgeon viruses research at an "international conference more than a year prior" to the notice of unacceptable performance. HR (testimony of the appellant).

Alleged Disclosure No. 6

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 6 the following: When the issues in Disclosure 5 were not corrected, the appellant made additional disclosures concerning animal care issues at the subsequent IACUC meetings in January 2018, August 2018, March 2019, and September 2019. Among other things, these disclosures evidenced violations of humane animal care standards. IAF, Tab 73 at 20.

The appellant said she followed up on her concerns at an IACUC meeting on January 25, 2018. IAF, Tab 81 at 18-23; HR (testimony of the appellant). On cross-examination, the appellant did not remember what she disclosed in the meetings without having documents presented to her. *Id*. On cross-examination, the appellant declined to say whether the IACUC took action on her agenda items, or even whether the veterinarian attended IACUC meetings, without being shown documents. *Id*.

The meeting notes from January 2018 indicated that the committee followed up on notification preferences, with the appellant expressing an interest in being called immediately after an alarm, Kurath expressing a "follow-up on all alarms[,]" and all other investigators requesting follow-up for "significant

alarms." IAF, Tab 81 at 19. They also discussed the appellant's concerns with temperature, but the appellant reported that the koi and frogs she was working with were the "least sensitive animals at the facility" and tolerated a range of temperatures. *Id*. at 20. The appellant said she "just want to provide the best animal care and not compromise the integrity of our experiments[.]" *Id*. Others raised the issue that headbox specific alarms would be expensive because the alarms would have to be connected to a data line. *Id*. The committee discussed a deficiency and two comments identified in a University of Washington inspection, and noted that based the semi-annual inspections, the prior issues had been resolved. *Id*. at 21.

The meeting notes from March 2019 discussed changes to protocols, importing animals without health history reports, including that the appellant trusted a local amphibian importer more than some of her colleagues did, and continued discussions about which headboxes were cleaned. IAF, Tab 58 at 7-13. The appellant reiterated that she did "not want to repeat situation like the breach in effluent treatment to occur again[,]" and again raised a headbox cleaning standard operating procedure and temperature monitoring. *Id*. at 13.

The appellant alleged that in September 2019, she "presented information that the alarm notifications by Facilities were not happening again" and raised issues about "temperature fluctuations and continuing poor water quality in the headboxes." IAF, Tab 44 at 15. The parties did not identify where these notes are in the record and I was unable to locate them using search terms such as IACUC and September. Therefore, I will assume that these meetings discussed similar issues to the other meetings summarized above.

I conclude that the appellant's reports to the committee *do not qualify* as protected disclosures for purposes of the whistleblower protection laws. As with Alleged Disclosure No. 5, the appellant identified items that she thought were suboptimal, but did not disclose violations of law, rule, or regulation, or other covered misconduct such as substantial and specific dangers to health or safety.

To the extent there were concerns about potential violations of humane animal care standards, as discussed above, the Animal Welfare Act does not apply to the animal subjects at the facility. To the extent the appellant believed that headbox cleaning, temperature modulation, or alarms were risks to the animal subjects, these concerns are akin to general criticisms the EPA is not doing enough to protect the environment, not a specific disclosure about a defect in nuclear reactor cooling system. *Chambers*, 515 F.3d at 1368.

Alleged Disclosure No. 14

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 14 the following: In September 2019, during the fall IACUC meeting, the appellant presented information that again the necessary alarm notifications by Facilities were not being given, and further concerning temperature fluctuations and continuing poor water quality in the headboxes. Purcell was aware of these statements. IAF, Tab 73 at 23-24.

According to the appellant, she was to receive an alert by text message, when there was an alarm event so that she could go inspect, but this was not happening so she reported it to the IACUC. HR (testimony of the appellant). I conclude that this *does not qualify* as a protected disclosure. Even if local SOPs may have required alarms, the appellant did not prove that any law, rule, or regulation did. Likewise, the appellant did not prove that there was other covered misconduct by the agency with respect to these notices or the water quality.

Alleged Disclosure No. 15

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 15 the following: On October 7 and 11, 2019, the appellant reported to Purcell, Rolland, and other employees an airflow shutdown in the BSL-3 laboratory and associated alarm malfunctions that had occurred on October 6, 2019. IAF, Tab 73 at 24. Consequently, following the first of these disclosures, on October 10, 2019, Purcell ordered the large ultralow high-risk

freezer to be removed from the BSL-3 laboratory to a lower biosecurity area so that the appellant would not have a reason to enter the laboratory for her work or continued monitoring of laboratory conditions. *Id*.

The appellant testified that the BSL-3 had been decommissioned and was under repairs, so they had an industrial hygienist come from headquarters, and they wanted her to do a "wet run[.]" HR. The appellant went in and discovered the air flow was not working, and she had not received any prior alert. *Id*. The appellant agreed that the antechamber gauge showed no airflow, and resisted answering one way or another, whether it violated protocol for her to enter when the gauge did *not* display there was appropriate airflow, saying that she felt compelled to take a photograph inside the laboratory. *Id*.

The appellant emailed Purcell on October 7, 2019, to notify her that there was no airflow in the BSL-3 laboratory and no alarm, and there was a problem with chlorination system data. IAF, Tab 37 at 98-100. Purcell responded to say that she submitted a work order, but the BSL-3 was still decommissioned, and the effluent treatment was under repair, so she did not forward the appellant's concerns about chlorination. *Id*. at 100-01. Purcell then requested that an industrial hygienist come evaluate the air quality. HR (testimony of Purcell). Purcell believed the only reason the appellant needed to access the decommissioned BSL-3 laboratory was to access the freezer; after consulting with the biosafety officer, Purcell requested that the Facilities manager relocate the freezer. *Id*. The appellant disputed that the freezer remained locked after it was relocated. HR (testimony of the appellant).

Purcell testified that she believed there were adequate methods of securing the freezer despite not having it in the BSL-3 laboratory. HR (testimony of Purcell). Ecological Section Chief David Beauchamp testified that the freezer that had been in the BSL-3 was moved to a room that had other ultralow freezers, and that the move was supervised by the biosafety officer. HR.

Purcell testified that because she "had never worked in that laboratory" in reference to the BSL-3 laboratory, she relied on the appellant and Facilities to update her on activities in the BSL-3 laboratory, so she did not immediately realize how potentially serious the chlorine leak was. HR (testimony of Purcell). Once she understood the situation, Purcell believed the experiment should have been "terminated." *Id*. Purcell thought it was a useful thing for the appellant to have reported. *Id*.

When asked whether any supervisor had tasked her with duties with respect to the decommissioned BSL-3, the appellant refused to commit, making comments such as "that's not entirely true" and "I'm going to have to – sorry – say no." HR (testimony of the appellant). When pressed about who tasked her with duties for the decommissioned BSL-3, the appellant gave muddled testimony about Sleeman and Rolland, and the standard operating procedure requiring daily monitoring, even when the facility was decommissioned. *Id*.

I conclude that this *qualifies* as a protected disclosure. Even though the BSL-3 had been decommissioned, as long as the ultralow freezer was still only accessible by accessing the BSL-3, employees, including the appellant, needed to access it. As such, air flow and alarm problems disclosed dangers to health and safety. Even though the appellant acted in a potentially irresponsible manner in accessing the BSL-3 despite knowing (or reasonably being able to know) that there was insufficient air flow, the whistleblower protection laws still apply. *See Whitmore*, 680 F.3d at 1377 (holding that the whistleblower protection laws protect even highly unprofessional conduct).

I do not have authority to decide whether the relocation of the freezer was a covered personnel action, because the appellant did not pursue corrective action from OSC as set forth in detail above within the context of discussing Complaint 1325. Moreover, based on the issues disclosed by the appellant, the agency had good reasons to relocate the freezer, and it was the freezer (and its contents) that

were relevant to the appellant's research, not the decommissioned BSL-3 where it was located.

Alleged Disclosure No. 16

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 16 the following: On October 11, 2019, the appellant submitted a complaint and agenda item for the IBC because removal of the BSL-3 laboratory ultralow freezer was a deviation from the laboratory's SOPs and operations manual. IAF, Tab 73 at 24. A few days later, on October 17, 2019, the appellant received the unacceptable performance rating and Notice of Unacceptable Performance and Opportunity to Demonstrate Acceptable Performance from Purcell. *Id*.

The appellant testified that removal of the ultralow freezer violated the standard operating procedures, and the freezer should not have been removed. HR. She felt it was retaliatory to move the freezer, even though management said that they wanted to move the freezer so the appellant did not need to access the decommissioned BSL-3. *Id*. Purcell testified that while the appellant had generally complained to her about the relocation of the ultralow freezer, she was not aware whether the appellant had filed a formal complaint about that relocation. HR (testimony of Purcell).

I conclude that this *does not qualify* as a protected disclosure. First, it is unclear that relocating the ultralow freezer actually violated WFRC internal SOPs, but even if it did, those SOPs are not law, rule, or regulation. Second, the appellant did not disclose a danger to public health and safety. Indeed, the agency relocated the ultralow freezer to reduce the risks to the appellant and other employees associated with accessing the decommissioned BSL-3. It would place the agency in an untenable position if the Board were to hold (as I did in Alleged Disclosure No. 15) that having the ultralow freezer in the decommissioned BSL-3 posed a danger to health and safety, and also hold that the agency acted improperly when it mitigated those dangers.

Performance Improvement Plan

When Purcell determined the appellant had not successfully completed either Critical Element 3 or 4, she contacted employee relations and put the appellant on a Notice of Unacceptable Performance and Opportunity to Demonstrate Acceptable Performance (sometimes referred to as a NODAP). HR (testimony of Purcell). On October 16, 2019, Purcell issued a NODAP to the appellant. IAF, Tab 13 at 81-92; IAF, Tab 35 at 176. Consistent with policy that telework is provided only for employees who are performing successfully, Purcell directed the appellant to return to the office. HR (testimony of Purcell). Purcell said that she understood she was giving the appellant "an extra month" to finalize publications that had been discussed in the midyear and for which Purcell believed the appellant had data in hand. *Id*. As part of the performance improvement process, the appellant met with Purcell on a regular basis; and Beauchamp, a third-party, was there to take notes. *Id*. At some point, Beauchamp interjected to provide suggestions on statistical analysis. *Id*. They discussed that the appellant was not feeling well, and Purcell confirmed that she could take sick leave that would not count against the NODAP deadlines. IAF, Tab 35 at 184. At some point, the appellant requested an attorney for these meetings, and Purcell said she would check with employee relations, which recommended that it was not appropriate for attorneys to be at workplace progress meetings. HR (testimony of Purcell). By the third meeting, Purcell believed the paper was coming along. *Id*.

The appellant gave inconsistent statements about whether Purcell helped her with statistical analysis on the draft koi paper. When asked whether Beauchamp assisted with statistical analysis, she said: "Mr. Beauchamp was the observer. It was Maureen Purcell that worked with me on the statistical." HR (testimony of the appellant). Immediately thereafter, she was asked, "And Dr. Purcell worked with you on the statistical analysis?" to which the appellant

answered "I wouldn't say worked with; the answer is no." *Id*. (testimony of the appellant).

Purcell tried to keep the appellant "absolutely focused on that NODAP work product," so she reassigned most of the appellant's other duties and asked the appellant to keep her updated on projects that took a significant amount of time. HR (testimony of Purcell).

On November 15, 2019, Purcell explained that the appellant should submit the manuscript to her directly instead of to WFRC internal peer review manager Debra Becker through the usual channels. IAF, Tab 35 at 208; *see* IAF, Tab 61 at 38. However, on November 20, 2019, the appellant submitted her draft to Becker; while she copied Purcell on the communication to Becker, she did not send the draft separately to Purcell. IAF, Tab 35 at 209; HR (testimony of Purcell).

Regardless, Purcell started her own review and forwarded it to Fish and Wildlife Service Pacific Region Fish Health Program Manager Andrew Goodwin, because Goodwin had agreed to be a reviewer. *Id*. The parties stipulated he is an expert in "spring viremia of carp" during the hearing. HR (testimony of Goodwin and stipulation).[10] Because Purcell realized she needed to better understand the expectations for a GS-12 scientist (the appellant is the only GS-12 RGE scientist she supervised), she worked with other center directors and section chiefs and collected four manuscripts for comparison with the published versions. HR (testimony of Purcell). Purcell used a standard Peer Review Checklist for the other manuscripts. *Id*. In comparison with the other manuscripts, she believed the appellant needed to do better articulate the need for the research. *Id*. Unlike the other manuscripts, Purcell concluded the appellant's needed major work. *Id*.

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[10] Rolland testified that her involvement in the performance process was limited to suggesting Goodwin. HR.

Purcell concluded that the appellant had the resources and knowledge necessary to undertake a statistical analysis of her data but did not do so, instead using a visual inspection of the trends with "anecdotal references to raw data." IAF, Tab 36 at 60-62. Purcell said this was not an acceptable way to handle the data, and if it were, the appellant could have included that as a caveat in the manuscript. HR (testimony of Purcell). The appellant also classified all animals that survived for three or four days as convalescent even though they were still experiencing mortality. *Id*. Purcell also concluded that the draft needed simplification for readability. *Id*. Another issue was that the discussion section was "bloated" and did not convey the importance of the project. *Id*.; *see* IAF, Tab 36 at 66-68. Purcell identified specific revisions that were needed. IAF, Tab 36 at 68-71. She concluded that the appellant had not produced a satisfactory draft. HR (testimony of Purcell). When asked about this matter at the hearing, Purcell said she did not conclude that the paper was not publishable, but it did not meet the quality standards set out in the NODAP. *Id*.

Goodwin testified that some parts of the paper were done well but there were problems with clarity, concision, and articulation of scientific impact. HR. In his written comments, Goodwin wrote that the authors had "surmounted" obstacles with challenge studies, said the paper "represents a great deal of careful work and analysis" and with "some revision, the work is publishable" but was likely to have low impact. IAF, Tab 46 at 186-87. He identified concerns that the manuscript overstated the nature of its examination, suggested concerns with overstating the data, and identified concerns about the limited nature of the tested subjects. *Id*. During the hearing, he explained that koi genetics are "really complicated" so it is hard to apply experimental inferences from one lineage to others. HR (testimony of Goodwin). He explained that there are so many variables that it is hard to control for potential confounding factors. *Id*. He also said that the appellant's study used five isolates of "1A viruses" and just one isolate of 1B, C, and D viruses, so it was "really hard to make any conclusions

about viruses B, C, and D." *Id*. He commented that the manuscript did not fully identify why the research mattered or discuss the limitations in the data. *Id*. He said that one of the appellant's tables presented a lot of information but it was not useful information for the purpose presented. *Id*. He said there were "a lot of topics raised and discussed that are really speculative, that don't link directly to the data." *Id*. It was "well written but too long" and appeared to show a "tendency to try to keep extrapolating and building upon to … increase its impact" and could have been "well done in about half of the length that they ended up." *Id*. When he gave his opinion to Purcell, his "response was that it would need major revision before it was ready to go to journal," including explaining the significance of the work, shortening it, changing some figures, and looking at conclusions; "there was a lot of work to be done." *Id*. He said that "publishable" is an ambiguous concept, because there is essentially a journal for everything. *Id*. Goodwin also acknowledged that essentially all manuscripts need some work before they are in a final form. *Id*.

While Purcell had not requested the appellant send her draft to peers, the appellant had sent it to scientist Bill Batts and Kurath, both of whom gave Purcell feedback. HR (testimony of Purcell). Kurath wrote: "Overall it is in great shape – good organization and clear presentation of results" with good content in the intro and discussion, and concluded that she did not have "any substantive suggestions." IAF, Tab 36 at 386. Purcell considered this assessment but found Kurath's feedback "superficial[.]" HR (testimony of Purcell). As Purcell saw it, Batts essentially looked only for typographical errors. *Id*.

Walters testified that she was familiar with two other research grade scientists being put on a NODAP for the quality of their research, both at locations other than Seattle: one improved and no action was taken and the other retired before completing the NODAP. HR.

Disclosure No. 17

In the Order and Summary of Prehearing Conference, I accepted as Alleged Disclosure No. 17 the following: In January 2020, the appellant reported a BSL-2 Wastewater Treatment System bleach leak to the Safety Committee. IAF, Tab 73 at 24.[11]

During the hearing, the appellant did not provide any information about this disclosure. HR (testimony of the appellant). The record contains an email dated January 6, 2020, from the appellant to John Hansen with agenda items for an upcoming biosafety meeting. IAF, Tab 57 at 43-50. In that email thread, the appellant referred to a relocation of the BSL-3 ultralow freezer as having caused a significant change to the standard operating proceeds and "was done with a submission of a significant change request or IBC review." IAF, Tab 57 at 43. The appellant said that Hansen canceled the meeting for a variety of reason, and then "about a week and a half later, I was removed from the facility." HR (testimony of the appellant).

I conclude that this *does not qualify* as a protected disclosure. The appellant did not articulate a BSL-2 bleach leak that was disclosed to the biosafety committee. To the extent the appellant told Hansen about the relocation of the ultralow freezer, I concluded above that the appellant's statements about that situation were not protected disclosures.

Proposal to Remove

After concluding the review process for the draft, Purcell worked with human resources to prepare a proposal to remove. HR (testimony of Purcell). Walters said that her observations of Purcell indicated Purcell was focused on the performance issues, and there were no "red flags." HR (testimony of Walters).

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[11] The Order and Summary included a typographical error that included 2 Alleged Disclosure Nos. 16. The latter alleged disclosure is appropriately No. 17.

On January 29, 2020, Purcell issued a notice of proposed removal. IAF, Tab 14 at 5-11. The proposal was based on the performance improvement process of Chapter 43 and the appellant's "unacceptable performance in Critical Element 4" of the EPAP. *Id*. The proposal identified Marijke van Heeswijk as the deciding official. *Id*. at 10.

The appellant was put on administrative leave between the proposal and decision to remove. HR (testimony of the appellant). She said that her email was "disconnected" during this time so colleagues could not contact her, and the website said, "this employee no longer works here." *Id*.

Contact with Office of Special Counsel

The appellant believed the NODAP and resulting proposal to remove were retaliatory because Purcell "did not want people finding out about [so many mishaps in the lab] because she was one of the main people responsible for having caused those mishaps." HR (testimony of the appellant).

According to her prehearing statement, the appellant contacted OSC on March 4, 2020, after the issuance of the proposal to remove as set forth above. IAF, Tab 44 at 7. OSC then contacted the agency on March 19, 2020. IAF, Tab 14 at 16. OSC requested "an informal stay on the proposed removal" later that month. *Id*. at 15.

In October 2020, OSC attempted to engage in alternative dispute resolution. *Id*. at 18-25. The decision was stayed while OSC conducted mediation, which was ultimately unsuccessful. HR (testimony of Walters).

Decision to Remove

While the OSC process was occurring, van Heeswijk retired, and the agency selected Wagner as the deciding official. *Id*. (testimony of Walters).

On March 5, 2021, Wagner issued a decision to remove. IAF, Tab 41 at 92-103; HR (testimony of Wagner). Wagner considered the appellant's two written responses and an oral presentation. *Id*.; IAF, Tab 36 at 400-02. Wagner

recalled reviewing the NODAP and believed it was appropriate in terms of time. HR (testimony of Wagner). He believed that a paper that met the EPAP requirements should have been started before the NODAP was issued, because such a paper was part of the performance plan. *Id*. Wagner reviewed and considered the reviews by Goodwin and Kurath, and found that Goodwin identified "some quite significant deficiencies" while Kurath's review was "somewhat superficial" and more concerned with copy editing than substance. *Id*. Wagner agreed with Purcell's analysis of the manuscript, including that the manuscript was deficient when it came to the appellant's use of visual trend lines instead of more rigorous statistics and the lack of hypothesis testing. *Id*. Wagner recalled that the appellant "agreed that the paper could use more work." *Id*. He disagreed that the appellant was a whistleblower. *Id*. However, Wagner concluded that "boy, there are some real problems in the lab" and specifically focused on the time the appellant fainted. *Id*. Wagner thought the appellant's behavior in going into areas with *known* air quality issues was "reckless" and he wondered why facilities managers were not "getting a handle on this." *Id*.

Wagner said he took seriously the charges of whistleblower retaliation that were raised in the oral presentation. *Id*. While he said he had not researched what is legally required to constitute whistleblowing, he did not find evidence of harassment or retaliation. *Id*.; IAF, Tab 41 at 101.

The decision to remove gave the appellant information about her right to file a Board appeal or seek corrective action from OSC, or to file an equal employment opportunity (EEO) complaint. IAF, Tab 14 at 41-42. The agency explained that electing any of these processes would preclude proceeding under another. *Id*. After the appellant filed this appeal, OSC closed its investigation as set forth above. IAF, Tab 14 at 26.

Rescission of the Removal

On April 9, 2021, human resources specialist Duane Newton issued a memorandum rescinding the removal and reinstating the appellant effective May

9, 2021. IAF, Tab 14 at 78. Smith, who was Newton's supervisor, said the agency did this because of a Board initial decision that related to the agency's performance management system. HR (testimony of Smith).[12] After reinstating the appellant, the human resources department worked to calculate and process back pay, process a within-grade increase, and take other actions to return the appellant to status quo ante. *Id*.; IAF, Tab 42 at 47-49.

Since her reinstatement, Purcell has not worked with the appellant. HR (testimony of Purcell). Rolland denied saying that the appellant would not manage the BSL-3 again, because that decision would be made by WFRC leadership. HR (testimony of Rolland).

Return to Work

Deputy Center Director Eric Janney supervised the appellant after her reinstatement. HR (testimony of Janney). He is the Deputy Center Director for WFRC and is physically stationed in Klamath Falls, Oregon. *Id*. Janney said that the BSL-3 was decommissioned in 2018 and remains closed and locked. *Id*. He further explained that the agency has other facilities projects, including repairs to a seawall and relocating a facility currently leased from another agency, that take priority over recommissioning the BSL-3. *Id*. Janney reissued the EPAP put in place by Purcell, and the appellant complained that it was retaliatory. *Id*.

Janney testified that following her return to work, the appellant's first priority has been to finish and publish research on projects that were started before her removal. *Id*. Janney also tasked the appellant with obtaining "soft funding" to pursue a project related to invasive African claw frogs. *Id*. (testimony of Janney). The appellant said that she had never been required to bring in funding and should not be required to do so now. *Id*. Janney explained

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[12] As discussed more below, on July 6, 2022, the Board reversed that initial decision. *Laminack v. Department of the Interior*, DA-0432-20-0177-I-1, 2022 WL 2525497 (July 6, 2022).

that all of the other RGE scientists in Seattle are engaged in seeking soft funding. *Id*. They also discussed a project related to probing for pathogens. *Id*.

The appellant said that she submitted the paper prepared during the NODAP to Diseases of Aquatic Organisms, which she described "one of the sort of top for fish disease" and it was published. HR (testimony of the appellant). She recalled there were both internal review with Janney and two rounds of journal reviews, the first of which involved "moderate to major" changes and the second of which involved "minor" changes. *Id*. The appellant characterized the revisions as the sort usually encountered in scientific publishing. *Id*.; IAF, Tab 83 at 107-201.

The appellant requested data on chlorine monitoring, and Janney said that any such work should be around 5% of her time. HR (testimony of Janney); IAF, Tab 50 at 24-25. There is a biosafety committee that monitors the BSL-2 effluent system, and the appellant is not on that committee. HR (testimony of Janney). On February 28, 2022, Janney sent the appellant an email that set out her priorities (the research discussed above), and directed her to refrain from activities that are not her responsibility, including investigating facilities issues such as the BSL-2 effluent system, any functions associated with the BSL-3 while it is in decommissioned status, or spending time around the laboratory when not actively working on project. IAF, Tab 50 at 50-51. He wrote: "I want to make clear that employee safety, animal care, and biosecurity are important to WFRC leadership and I encourage you to report any concerns you have." *Id*. "However, that is where your responsibility ends." *Id*. He warned that spending time on activities not her responsibility "will lead to formal disciplinary actions." *Id*. Janney further explained that permit application, management, and oversight of a laboratory are more associated with nine-factor positions, and RGE scientists typically only do operational duties "begrudgingly" because they are not factored into RGE panel reviews. HR (testimony of Janney). He further said that prior RGE panels had suggested the possibility of the appellant moving into a nine-

factor position because of the amount of operational duties she had. *Id*. Janney said there were no areas of the Seattle facility from which the appellant was restricted, subject to usual professional courtesy about going into areas in which other scientists have projects. *Id*.

The appellant complained that she had not been restored to any committees, despite initial conversations suggesting she would be. HR (testimony of the appellant). She also complained that she was not given access to the same laboratory areas where she had worked before, because the agency required her to bring in funds for research. *Id*. The appellant believed the BSL-3 had been repaired and approved by USDA APHIS. *Id*.

The appellant "discovered they had another waste water spill in April 2021, the appellant requested data because it was "associated with the renewal and the inspection," and while the agency eventually gave her a report, it "never provided raw data." *Id*.

Appellant Proved Contributing Factor

The Board has held that a personnel action taken with 1-2 years of a disclosure satisfies the knowledge/timing test. *Skarada*, 2022 MSPB 17, ¶ 19. As discussed above, "[o]nce the knowledge/timing test has been met, an administrative judge must find that the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if after a complete analysis of all of the evidence a reasonable factfinder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action." *Mastrullo*, 123 M.S.P.R. 110, ¶ 18.

As set out above, I conclude that the appellant proved that Alleged Disclosure Nos. 3, 10, 12, and 15 were protected disclosures for purposes of 5 U.S.C. § 2302(b)(8), and Alleged Disclosure 9 was protected activity for purposes of § 2302(b)(9).

The earliest of these protected disclosures, No. 3 was in May 2017 and involved Purcell. No. 10 was in March 2018, and Purcell knew about it. No. 12

was in July 2018, but there is no indication that Purcell was aware of this conversation between the appellant and Sleeman, Vazquez-Meves, or Hopkins. While I accepted No. 9 as protected activity, Purcell and Rolland credibly testified that they did not know that the appellant was the one who made the scientific integrity complaint, and the appellant did not introduce evidence or argument supporting a conclusion that that their testimony on this point should not be credited. Thus, for purposes of the knowledge/timing test, I conclude that the only relevant disclosures are No. 3 and No. 10.

The NODAP was issued in October 2019, the proposal to remove was issued in January 2020. This is within two years of the protected disclosures, especially counting from the date of No. 10 in March 2018. Accordingly, I "must" conclude that the appellant proved contributing factor. *Mastrullo*, 123 M.S.P.R. 110, ¶ 18.

Agency Did Not Prove by Clear and Convincing Evidence

Because the appellant proved that she made at least some protected disclosures, and proved contributing factor, I next turn to the agency's burden to demonstrate by clear and convincing evidence that it would have taken the same action anyway.

Carr Factor One

Here the agency rescinded the removal, but I still consider the strength of the agency's reasons for taking that action as part of evaluating *Carr* factor one.

To remove an employee under Chapter 43, the agency must prove the following: (1) the Office of Personnel Management (OPM) approved its performance appraisal system and any significant changes thereto; (2) the agency communicated to the appellant the performance standards and critical elements of the position; (3) the appellant's performance standards are valid under 5 U.S.C. § 4302(c)(1); (4) the appellant's performance during the appraisal period was unacceptable in one or more critical elements; (5) the agency warned the

appellant of the inadequacies in performance during the appraisal period and gave the appellant an adequate opportunity to demonstrate acceptable performance; and (6) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element. *Lee v. Department of Veterans Affairs*, 2022 MSPB 11, ¶ 15 (citing *Santos v. National Aeronautics and Space Administration*, 990 F.3d 1355, 1360-61 (Fed. Cir. 2021) for the proposition that an agency must justify initiating a PIP).

First, I conclude that OPM approved the performance appraisal system. The agency rescinded this removal after receiving an initial decision that found OPM had not approved its performance appraisal system. *Laminack v. Department of the Interior*, DA-0432-20-0177-I-1, 2021 WL 972143 (March 10, 2021). In a nonprecedent decision, the Board reversed, finding that OPM had approved the performance appraisal system. *Laminack*, 2022 WL 252497. I accept that the agency satisfied this element.

Second, the agency communicated its performance expectations to the appellant. The appellant is an RGE scientist. While the appellant believed that she should have been afforded time to perform more administrative tasks as part of her role with the BSL-3 laboratory and other facilities, the record reflects a consistent reduction in such administrative functions. In 2009, as much as 40% of the appellant's work was administrative, with the remaining 60% focused on research. In January 2016, Winton reduced the portion focused on administrative functions so that the appellant could spend 85% of her time on research. At the appellant's insistence, Purcell maintained the 2016 description from Winton, until Purcell updated them in summer 2018 consistent with agency-wide standards as set forth above. The appellant agreed that she signed the EPAP in December 2018. Critical element 4 of that EPAP required at least one significant scientific research contribution such as manuscripts submitted for publication. IAF, Tab 35 at 147.

Third, the performance standards are valid under 5 U.S.C. § 4302(c)(1). Critical element 4 had a very straightforward, objective criteria: whether the RGE scientist submitted a significant research project during the evaluation year.

Fourth, the agency proved that the appellant's performance during the evaluation year was deficient. The appellant did not submit any manuscripts for publication during the rating period. Thus, in October 2019, after the end of the prior rating period, Purcell put the appellant on a NODAP. As Purcell credibly described it, this was *extra* time for the appellant to meet the performance goals, with her other work reassigned so she could focus on the manuscript as set forth above. Because the appellant had not satisfied the requirement to submit a significant project within the year, the agency justified the initiation of the NODAP.

Fifth, the agency proved that it warned the appellant. The 2019 midyear discussion specifically addressed the need to submit a significant project, and discussed the appellant's pending projects that might qualify. Indeed, at that point, the appellant said she believed she would be able to submit.

However, I conclude the agency did *not* prove the sixth element; that the appellant's performance was deficient. The appellant submitted a manuscript during the NODAP period. She did not comply with Purcell's instructions to submit it to her (Purcell) but instead went through the usual internal review process. Nevertheless, Purcell evaluated the manuscript and obtained a review by Goodwin, and they both identified significant deficiencies in the manuscript. The appellant pointed to evidence that other reviewers found the draft sufficient, including specifically Kurath who said the manuscript was in "great shape" as set forth above. IAF, Tab 36 at 386. If I were deciding only a Chapter 43 action, I would find substantial evidence supported Purcell's decision that the manuscript did not meet the requirements of the NODAP. Goodwin's report and testimony were particularly persuasive that the manuscript had deficiencies and did not explain why the paper said anything particularly important. But I am not

deciding a regular Chapter 43 action and must apply the considerably higher clear and convincing evidence standard. Applying that higher standard, the evidence is that Kurath found the paper in "great shape" and after the appellant's reinstatement, she resubmitted the manuscript and it was published following revisions consistent with the usual journal publication process. Thus, considering all evidence that supports and detracts from the agency's burden, I conclude that *Carr* factor one favors the appellant.

Carr Factor Two

On *Carr* factor two, the qualifying disclosures all involved matters on which the agency acted. Disclosure Nos. 3, 10, 12, and 15 all dealt with personnel safety concerns in the BSL-3 laboratory, and the agency agreed those were serious issues so it decommissioned the BSL-3 laboratory and later relocated the ultralow freezer outside the decommissioned laboratory. The appellant disagreed with the decision on decommissioning the BSL-3 and on relocating the freezer, but these were significant and expensive decisions, and all evidence underscores that the agency took the decisions after serious consideration of the risks, including those to the appellant. Taking action to respond to the appellant's disclosures does not indicate an intent to retaliate against the appellant.

There is significant evidence of personality conflicts between the appellant and Purcell, which resulted in the appellant's requests for other supervisors, requests to communicate in writing only, and request for a third-party during other discussions. Whether the appellant cried or vomited before meetings, it is still apparent that the appellant seriously reacted to having discussions with Purcell. Other than the time when the appellant recalled Purcell saying that she was the *problem* and the conversation about whether Purcell was *covering her ass* as set forth above, it is unclear what would have prompted the appellant's reactions to interacting with Purcell.

The record is also full of evidence that there was a dispute about the appellant's job duties, including whether she was required to do as much research as other RGE scientists or whether she had more administrative tasks. For example, the appellant identified herself as "senior technical staff" instead of research staff, and said she assumed more technical and operational duties. HR (testimony of the appellant). The appellant repeatedly expressed concerns with her roles managing permits and overseeing the BSL-3. *Id*. But I do not see anything retaliatory about the agency's efforts to make her more like other RGE scientists. The appellant was *not* a nine-factor series scientist who might have been tasked with more administrative tasks; she was an RGE scientist, and I find clear and convincing evidence that the agency worked to transition her to duties consistent with other RGE scientists. Purcell credibly testified that she looked at other RGE scientists' EPAPs throughout the country to bring the appellant's duties into conformity. Indeed, I find the agency had clear and convincing reasons to treat the appellant like similarly situated RGE scientific employees.

The appellant argued that it was not credible for Purcell to say that she did not know who filed the scientific integrity complaint, and argued other employees had figured out it was likely the appellant. IAF, Tab 109 at 11-12. I do not see it the same way. Purcell and Rolland both testified that they were not informed of who filed the complaint, and that it was common for the complaint to be kept anonymous to minimize a risk of retaliation. Moreover, the Report of Investigation did not find specific misconduct by Purcell or Rolland, but rather that there were general staffing deficiencies for Facilities personnel that led to the degradation of mission-critical components. IAF, Tab 42 at 16. This does not support a conclusion that Purcell (or Rolland) knew or guessed that the appellant was the one who made the complaint.

To the extent there was evidence of a reason to treat the appellant differently from other employees, it related to the appellant's tendency to complain about matters that were not necessarily related to her assigned duties.

For example, as discussed regarding Alleged Disclosure No. 5, the appellant insisted on accessing scaffolds that required the use of a tether, even though she was not trained; once Purcell learned of this, it was reasonable for Purcell to want to investigate the safety issues before allowing continued access to this area that required the use of a tether, and it was reasonable for management to decide that that cleaning should be done only by Facilities personnel. Likewise, the appellant was not in a position that required that she monitor BSL-2 effluent, and there is no evidence that any of her research projects dealt with effluent after the conclusion of her experiments. But both before and after her removal, the appellant demanded access to monitoring data. As discussed in Disclosure No. 15, the appellant went into the BSL-3 to take photographs even though she knew it did not have adequate airflow. Nevertheless, I also appreciate the appellant's perspective that she was able to investigate these locations and data until she started complaining about what she perceived as failures by the WFRC with respect to effluent treatment. While I did not find that these were protected disclosures, I appreciate that the appellant personally believed they were, thus it is not surprising that she would feel retaliated against.

The appellant argued that the basis for her removal was "unprecedented" which shows a motive to retaliate. IAF, Tab 109 at 10-11. I disagree. There was no evidence from either party that other RGE scientists failed to produce even one significant scientific project within a review year as discussed above; thus, the record is consistent with a conclusion that the appellant's situation as an RGE scientist was indeed unprecedented. Balancing the foregoing, I find that *Carr* factor 2 favors the agency.

Carr Factor Three

Through a human resources representative working in employee relations, the agency introduced evidence of two other RGE scientists who were put on a NODAP based on the quality of their work. HR (testimony of Walters). The agency did not introduce evidence that Purcell knew about these other employees,

but it is a reasonable inference from the fact that Purcell worked with human resources to develop the NODAP that the agency would have advised about whether a NODAP was unprecedented. I conclude that this factor favors the agency.

Consideration of the Record as a Whole

Considering the record as a whole, I place primary weight on *Carr* factor one and conclude that the agency did not have strong evidence that it would have found the appellant's performance so deficient that it warranted removal as opposed to some other process. While I accept that Purcell and Goodwin reasonably identified deficiencies in the appellant's manuscript, Kurath provided a contrary opinion, and when it was presented to a journal, it was published with the usual type of edits. Thus, if the agency had not rescinded the removal, I likely would have been required to reverse it based on the requirements of the clear and convincing standard.

For the foregoing, I find that the agency did not prove by clear and convincing evidence that it would have taken the same action regardless of the appellant's protected disclosures and protected activity. As such, the appellant proved her affirmative defense of whistleblower retaliation.

Status Quo Ante

Having found that the appellant proved her affirmative defense, I turn to whether the agency effectively restored the appellant to status quo ante. Restoration to the status quo ante requires that the appellant be placed as nearly as possible in the same situation that he would have been in if the action had never occurred. *Fairley v. U.S. Postal Service*, 63 M.S.P.R. 10, 12 (1993). Status quo ante relief includes: cancellation of the applicable personnel action; reinstatement to the former position or to another substantially equivalent position, as appropriate; back pay; interest on back pay; and other employment benefits that he would have received had the action not occurred. *Kerr*

v. National Endowment for the Arts, 726 F.2d 730, 735 (Fed. Cir. 1984) (in addition to considering whether an individual was reinstated to the same title, grade, and pay, the Board should make a substantive assessment of whether the actual duties and responses to which the employee was returned are either the same as or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge). For the following reasons, I conclude that the agency effectively restored the appellant to the status quo ante.

The agency introduced evidence, through the testimony of Smith and Janney, that it rescinded the removal, paid back pay with interest, processed a within-grade-increase, processed Thrift Saving Plan contributions, removed the removal from her personnel file (and moved it to a litigation file), and returned the appellant to the EPAP that was in place prior to her removal. HR. The appellant's closing argument did not identify any alleged deficiencies in the agency's efforts to restore her to status quo ante as related to these financial issues. IAF, Tab 109 at 16-18.

The appellant's argument about status quo ante relief is largely driven by her perception of what her job entailed. IAF, Tab 109 at 16-18. For example, she argued that her position description should treat her as the BSL-3 manager even though it is decommissioned, and she should be involved in conversations about recommissioning the BSL-3 laboratory; and argued that she should have "monitoring duties" that were not provided after her return. *See* HR (testimony of the appellant).

Status quo ante relief does not require restoration to exactly the same duties; it is sufficient if the employee is restored to a substantially equivalent position. Thus, I find unpersuasive the appellant's reference to *Eikenberry v. Department of the Interior*, 37 M.S.P.R. 438, 441 (1988). In that case, the Board found the agency had not restored the employee to status quo ante when the employee was "allowed to perform the more routine functions of his position"

but not the "full range of his duties." *Id*. Here, the agency proved that the appellant is able to perform the full range of duties of an RGE scientist.

Based on the evidence of record, the agency proved that monitoring effluent – and overseeing scheduling in the BSL-3 laboratory – were collateral duties. Requiring the agency to return the appellant to administrative tasks she performed at various points throughout her tenure would essentially require the creation of an RGE position that performs considerably less research than other RGE positions, and yet is somehow different from a nine-factor position. While the status quo ante analysis requires making a substantive assessment of *substantial equivalence*, the Board does not have the necessary expertise for creating such a hybrid position. The evidence of record, including from Janney, is that the appellant is performing the full range of research work associated with her actual RGE position of record. Indeed, the appellant criticized Janney's testimony that excessive administrative work may be an impediment to promotion within the RGE system. IAF, Tab 109 at 17. However, Kock credibly testified from his own experience that he had to conduct more research, including being a member of scientific societies and publishing, before he converted from a nine-factor position to an RGE position. Likewise, Rolland recalled that Winton thought the appellant was not suited for promotion because she was not producing enough research. HR (testimony of Rolland). *If* I were to force the agency to create a hybrid position that still treated the appellant as an RGE scientist but afforded her administrative duties that required more than 10% of her time, it would only invite the Board into unnecessary meddling when the appellant is next up for promotion. The better approach is to defer to the agency and its existing processes for evaluating and distinguishing between RGE and nine-factor scientists.

Based on the testimony in the record, the agency faces difficult budgetary choices about how and what to fund, including whether and when to recommission the BSL-3 laboratory. Budgetary and related staffing concerns are

the sorts of issues for which the agency has expertise and for which the Board does not. Simply put, the Board does not have authority to require the agency to reopen the BSL-3 laboratory, along with staffing the relating Facilities functions, just so that the appellant can be a manager of it again. Moreover, the Board does not have authority to require the agency to reappoint the appellant to manage the BSL-3 laboratory if or when it is recommissioned. These are the sorts of classic assignment of work questions that are within the agency's responsibility.

The appellant also complained that she was not restored to status quo ante because she was not previously required to obtain outside funding, but she is now. The credible evidence from Janney is that other RGE scientists are required to obtain funding. If the appellant were a nine-factor scientist, then she may not be required to obtain such funding. But as long as she is an RGE scientist, the agency's decision to require her to do the same fundraising as her RGE peers in other RGE roles, is consistent with a conclusion that the agency is treating her like other such scientists.

The appellant next complained that she was not restored to different committees, but as set out above, the agency permissibly restructured those committees long before the proposal to remove. For example, the IACUC was restructured so that there were fewer standing members and fewer alternates.

Finally, the appellant complained that Janney threatened disciplinary actions if the appellant returned to working on facilities issues such as effluent monitoring or spending time in the BSL-2 when not engaged in research there. While these are things the appellant did before her removal, they were not critical elements then or now. These were collateral duties before and there is nothing improper about the agency changing what collateral duties may be assigned to the appellant. The whistleblower protection laws are designed to prevent agencies from taking specific personnel actions, including making *significant* changes to duties, responsibilities, and working conditions; they are not designed to freeze in place how an employee performs the non-critical elements of their position or

prohibit agencies from making like employees do like work. The whistleblower protection laws do not require that an agency permit an employee who once made a protected disclosure to assume some sort of continuing oversight role for those issues, especially where, as here, managing those issues is not part of the employee's regular job duties.

For the foregoing reasons, I conclude that the agency met its burden of showing that it has restored the appellant to the status quo ante and is having her do the work of the RGE scientist position she encumbers.

DECISION

The appellant proved her affirmative defense of whistleblower retaliation and is entitled to associated relief. However, I determine that the agency has provided the appellant with status quo ante relief. Because the agency provided status quo ante relief, there are no grounds for me to order the agency to pay back pay or for me to order interim relief.

FOR THE BOARD: /*S*/

Franklin M. Kang
Administrative Judge

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition 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 no more than 30 days after the date of service of the agency's notice that it has complied with the decision. 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 PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **November 3, 2022**, 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 one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review

must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S.

Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL AND/OR COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet

the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.204.

In addition, the Whistleblower Protection Enhancement Act of 2012 authorized the award of compensatory damages including interest, reasonable expert witness fees, and costs, 5 U.S.C. §§ 1214(g)(2), 1221(g)(1)(A)(ii), which you may be entitled to receive.

If you believe you are entitled to these damages, you must file a motion for consequential damages and/or compensatory damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

NOTICE TO THE PARTIES

If this decision becomes final and the Board "determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action" under 5 U.S.C. § 1215. 5 U.S.C. § 1221(f)(3). Please note that while any Special Counsel investigation related to this decision is pending, "no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel." 5 U.S.C. § 1214(f).

	DEFENSE FINANCE AND ACCOUNTING SERVICE **Civilian Pay Operations**

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx.**

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.

☐ 3) Signed and completed "Employee Statement Relative to Back Pay".

☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under 5 U.S.C. § 5551 for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

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

Attachments to AD-343

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

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

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

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

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