UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WASHINGTON, D.C.

TERESA C. CHAMBERS,	)	**DOCKET NUMBER**
	)	**DC-1221-04-0616-W-1**
Appellant,	)	
	)	
v.	)	
	)	Date: December 15, 2004
DEPARTMENT OF INTERIOR,	)	
	)	
Agency.	)	
	)	
	)	
	)	
_____	)	

APPELLANT TERESA C. CHAMBERS'
PETITION FOR REVIEW OF INITIAL DECISION

Pursuant to 5. C.F.R. §§ 1201.113-1201.115, the Appellant asks the Board to grant this petition and review and reverse the conclusions and findings of the AJ in the Initial Decision adverse to Appellant which conclusions are based on erroneous interpretations and applications of law and which findings are not supported by substantial evidence. Appellant Chambers requests that the Board reverse the Agency's removal of Appellant as arbitrary, unsupported by a preponderance of evidence and contrary to law and required procedure, and find that the Agency's actions to remove Appellant, to propose her removal, to place her on administrative leave and to restrict her communications with the press, Congress and other parties were prohibited personnel practices in violation of 5 U.S.C. §§ 2302(b)(8), (b)(9) and (b)(12).

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danger of loss of life and destruction of a national monument resulting from a known terrorist threat.

6. Appellant disclosed a potential violation of law, which was protected activity under 5 U.S.C. sec. 2302(b)(8), and the AJ erred in holding otherwise.

7. Appellant Chambers made protected disclosures outside the Agency to the press and Congress, and to her non-immediate superiors inside the Agency, which disclosures were not made in the normal course of her duties, and the AJ erred in both misconstruing and misapplying Huffman v. Office of Personnel Management, 263 F.3d 1341 (Fed. Cir. 2001) when the AJ found these disclosures to not be protected activities.

8. The AJ erred and applied a double standard in holding Appellant to be the author of the quoted and paraphrased statements attributed to her in the Washington Post on December 2, 2003 when the AJ sustained Agency charges based on Appellant having made such statements, but when analyzing whether Appellant made protected disclosures, the AJ refused to credit the Appellant with having made the same statements based on Appellant's allegation that some of the Post statements were not accurate.

B. Even If Ms. Chambers' Disclosures Of Imminent Dangers Of Loss Life And Destruction Of A National Monument, And Other Disclosures, Were Found Not To Be Specific Or Substantial Enough To Be Protected, The AJ Nonetheless Erred In Denying Appellant Chambers' Affirmative Defense Of Whistleblowing Because The Agency Clearly Perceived Chief Chambers To Be A Whistleblower.

C. The Gag Order Issued By The Agency That Prohibited Appellant From Speaking With The Press Or Congress (Or Other Parties) Was A Covered Personnel Action That The Board Could Address, And The AJ Erred In Holding Otherwise.

D. Appellant's Protected Disclosures Were Established As Contributing Factors In The Agency Removal Action And Other Actions Taken Against Her, And The AJ Erred In Holding That Some Of These Disclosures Were Not Contributing Factors.

E. The Agency Failed To Established By Clear And Convincing Evidence That It Would Have Removed Chief Chambers Absent Her Protected Disclosures To The Washington Post, Congress, And Agency Officials, And The AJ Erred In Holding Otherwise.

1. The Agency has a burden under the WPA to show by clear and convincing evidence that it would have removed Appellant even in the absence of her protected whistleblowing disclosures, as the AJ properly recognized.

2. The Agency's proffered evidence in support of its charges was legally insufficient to meet the clear and convincing evidence standard under the Act, and the AJ erred in holding otherwise.

3. Appellant presented compelling evidence of retaliatory motive in several categories including inadequate investigation of the charges against Appellant, Agency use of irregular procedure, direct evidence of illegal motive, and dramatic proximity in time evidence, and the AJ erred in ignoring this evidence.

4. The Agency engaged in disparate treatment, and the AJ erred in holding otherwise.

II. THE AGENCY ENGAGED IN A PROHIBITED PERSONNEL PRACTICE IN VIOLATION OF 5 U.S.C. § 2302(B)(12) WHEN IT RESTRICTED MS. CHAMBERS' COMMUNICATIONS WITH CONGRESS, PLACED HER ON ADMINISTRATIVE LEAVE, AND REMOVED HER IN RETALIATION FOR HER COMMUNICATIONS WITH CONGRESS, IN VIOLATION OF FEDERAL LAW INCLUDING 5 U.S.C. § 7211, AND THE AJ ERRED IN HOLDING OTHERWISE.

III. THE AGENCY FAILED TO PROVIDE APPELLANT NOTICE AND AN OPPORTUNITY TO RESPOND TO THE EXTENSIVE *EX PARTE* COMMUNICATIONS THE PROPOSING OFFICIAL AND OTHER AGENCY PERSONNEL HAD WITH THE FINAL AGENCY DECISION MAKER, AND THE AJ ERRED IN HOLDING THIS FAILURE WAS NOT A VIOLATION OF APPELLANT CHAMBERS' DUE PROCESS AND STATUTORY RIGHTS.

A. The Agency Officials' Extensive And Material Ex Parte Communications With The Final Agency Decision-Maker Violated The Rule Against Such Ex Parte Communications Established In Binding Legal Precedent, And The AJ Erred In Holding Otherwise.

B. The Agency Officials' Extensive And Material Ex Parte Communications With The Final Agency Decision-Maker, Without Notice To Appellant And Without An Opportunity For Appellant Chambers To Respond, Violated Appellant's Procedural Pre-Termination Due Process Rights, And The AJ Erred In Holding Otherwise.

IV. THE AGENCY'S CONCEALMENT FROM APPELLANT OF THE FINDINGS OF FACT MADE BY THE FINAL AGENCY DECISION-MAKER VIOLATED CONSTITUTIONAL AND STATUTORY MANDATES, AND WAS A BASIS FOR DEFAULT, AND THE AJ ERRED IN HOLDING OTHERWISE.

A. The Agency's Admitted Intentional Deletion Of The Agency Final Decision-Maker's Findings Of Fact From Its Decision Document, And Admitted Filing And Service Of A Version Of The Decision Document That Omitted These Still Referenced And Relied Upon Findings Of Fact, Violated 5 U.S.C. Sec. 7513(B), 5 C.F.R. Sec. 752.404(B), The AJ's Acknowledgement Order, 5 C.F.R. 1201.25, The Constitution's Fifth Amendment Due Process Guarantee, And Binding Legal Precedent, And The AJ Erred In Holding Otherwise.

B. The Agency Officials' Concealment From Appellant Of The Findings Of Fact Made By The Final Agency Decision-Maker Violated Appellant's Procedural Pre-Termination Due Process Rights, And The AJ Erred In Holding Otherwise.

C. The AJ Erred In Reviewing The Final Agency Decision-Maker's Deleted Findings Of Fact In-Camera And Then Refusing To Disclose Those Agency Findings Of Fact To Appellant, Notwithstanding That There Was No Legitimate Basis For These Agency Findings Of Fact Falling Under Any Attorney Client Or Other Privilege.

D. The AJ Erred In Denying Appellant's Motion To Compel Agency Responses To Document Requests And Interrogatories Which Sought Agency Production Of The Concealed Findings Of Fact, And Erred In Denying Appellant's Request That These Findings Be Produced At trial As "Prior Statements" Under 5 U.S.C. Sec. 1201.62.

V. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 2, AND THE AJ ERRED IN HOLDING OTHERWISE.

VI. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 3, AND THE AJ ERRED IN HOLDING OTHERWISE.

VII. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 5, AND THE AJ ERRED IN HOLDING OTHERWISE.

A. The Agency Failed To Meet Its Burden To Show Misconduct Regarding, And The AJ Erred In Sustaining, The Specification Of Charge 5 Regarding Chief Chambers' Alleged Failure To Follow An Instruction To Have Two Deputy Chiefs Take Medical Exams.

B. The Agency Failed To Meet Its Burden To Show Misconduct Regarding, And The AJ Erred In Sustaining, The Specification Of Charge 5 Regarding Chief Chambers' Alleged Failure To Follow An Instruction To Detail Ms. Pamela Blyth.

C. The Agency Failed To Meet Its Burden To Show Misconduct Regarding, And The AJ Erred In Sustaining, The Specification Of Charge 5 Regarding Chief Chambers' Alleged Failure To Follow An Instruction To Cooperate With DOI Attorney Myers.

VIII. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 6, AND THE AJ ERRED IN HOLDING OTHERWISE.

IX. THE AGENCY CHARGES WERE PROPOSED AND DECIDED BY BIASED AGENCY DECISION-MAKERS AND THEREFORE NONE SHOULD HAVE BEEN SUSTAINED, AND THE AJ ERRED IN HOLDING OTHERWISE.

X. REGARDING CHARGES 2 AND 3, WHICH ARE RELATED TO MS. CHAMBERS' ALLEGED STATEMENTS TO THE WASHINGTON POST, THE AGENCY FAILED TO INDEPENDENTLY VERIFY EXACTLY WHAT STATEMENTS WERE MADE BY MS. CHAMBERS TO THE POST BEFORE TAKING ACTIONS AGAINST HER, AND CONSEQUENTLY THESE CHARGES SHOULD NOT HAVE BEEN SUSTAINED, AND THE AJ ERRED IN HOLDING OTHERWISE.

XI. AGENCY RETALIATION AGAINST A FEDERAL EMPLOYEE FOR MAKING PUBLIC STATEMENTS ON MATTERS OF PUBLIC IMPORTANCE IS A VIOLATION OF THE FIRST AMENDMENT, AND THE AJ ERRED IN CONCLUDING THAT THE AGENCY DID NOT VIOLATE CHIEF CHAMBERS' FIRST AMENDMENT RIGHTS AND DID NOT ENGAGE IN A PROHIBITED PERSONNEL PRACTICE IN VIOLATION OF 5 U.S.C. § 2302(B)(12).

XII. THE ADMINISTRATIVE JUDGE MADE SIGNIFICANT PROCEDURAL AND EVIDENTIARY ERRORS.

A. The AJ Erred In Refusing To Allow Appellant To Make An Evidentiary Record Regarding Evidence Excluded By The AJ.

B. The AJ Erred In Ordering, Pre-Trial, That Appellant Would Not Be Allowed To Offer The Testimony Of Former Chief Langston To Show Disparate Treatment, And Then, Post-Trial, Ruling Against Appellant On The Basis That Appellant Had Not Offered Evidence Of Disparate Treatment.

C. The AJ Failed To Assess or Even Acknowledge The Existence Of The Substantial Impeachment Of Agency Witnesses That Occurred During Trial Cross Examination And Depositions Admitted Into The Record, And Other Substantial Credibility Evidence Which Should Have Precluded The AJ's Substantial Reliance On Those Witnesses.

1. The AJ failed to recognize that the Agency proposing official Donald Murphy gave blatant self-serving testimony that was completely unbelievable, and was established to lack any credibility.

2. The AJ failed to recognize that Agency final decision maker, Assistant Deputy Secretary of the Interior Paul Hoffman, was substantially impeached during his trial and deposition testimony, including via self-contradictory testimony, which should have precluded the AJ's substantial reliance on his testimony.

3. The AJ failed to recognize that Agency comptroller Bruce Sheaffer gave false testimony and demonstrated that he was unworthy of belief.

4. The AJ failed to recognize that Agency witness Myers via his testimony demonstrated that he was unworthy of belief by his failure to disclose a key material fact.

D. The AJ Erred In Denying Appellant's Motion To Compel Discovery Regarding Deputy Director Murphy's Private File On Appellant.

E. The AJ Erred In Denying Appellant's Motion To Compel Discovery Regarding U.S. Park Police Records Of Communications With Congress.

F. The AJ Erred In Not Drawing An Adverse Inference From The Agency's Failure To Call As An Agency Witness Agency Employee Scott Fear Who Was Present During The Washington Post Interview Of Chief Chambers.

G. The AJ Erred In Ruling That Although The Appellant's Extensive Affidavit Filed Pretrial Was In The Record, That The Numerous Exhibits Attached To The Affidavit Were Not In The Record.

H. The AJ Erred In Presuming The Agency Acted In Good Faith.

I. The AJ Erred In Excluding Pre-Trial Appellant's Defenses Under 5 U.S.C. 2302(B)(9) Other Than Allowing One Question Of One Particular Witness Regarding Appellant's Defense That She Was Removed Because She Had Exercised Appeal And Grievance Rights.

J. The AJ Erred In First Excluding Pre-trial The Testimony Of Former Fraternal Order Of Police President Jeff Capps, Whose Testimony Would Have Been Corroborative Of Appellant's Regarding What Appellant Did And Did Not Say To The Washington Post, And What Capps Did Say To The Post, And Then Ruling Post-Trial Against Appellant Chambers On The Basis That Appellant's Testimony On This Issue Was Not Corroborated.

XIII. THE PENALTY OF REMOVAL WAS UNDULY HARSH AND THE AGENCY FAILED TO CONSIDER NUMEROUS SIGNIFICANT MITIGATING CIRCUMSTANCES AND IMPROPERLY CONSIDERED CERTAIN CIRCUMSTANCES AS AGGRAVATING FACTORS WHEN IT DETERMINED REMOVAL TO BE THE PENALTY, AND THE AJ ERRED IN HOLDING OTHERWISE.

A. The Agency (Unwittingly) Admitted That The Nature And Seriousness Of The Charges Do Not Merit Termination When, On December 12, 2004, The Agency Offered To Forego Filing Any Of The Charges If Chief Chambers Would Agree To Allow Mr. Murphy To Screen All Of Her Future Media And Congressional Interviews, And The AJ Erred In Holding Otherwise.

B. Director Mainella, Appellant's Second Level Superior, Testified That, If It Were Her Decision, She Would Re-Instate Chief Chambers On An Agreement That Ms. Chambers Simply Follow The Rules, Which Also Constitutes An Agency Admission That The Agency Penalty of Removal Was Unduly Harsh, And The AJ Erred In Holding Otherwise.

C. Chief Chambers Was Not Fairly Placed On Notice Concerning The Alleged Conduct Rules She Was Charged With Violating, And The AJ Erred In Holding Otherwise.

D. Undisputed Evidence Establishes That The Training The DOI Required The NPS To Provide Ms. Chambers Regarding Agency Regulations And Policies Upon Chief Chambers' Hire From Outside The Federal Service Was Never Provided, And The AJ Erred In Not Holding This To Be A Significant Factor Mitigating the Penalty.

E. Chief Chambers Was Never Provided Specific Training Regarding The Alleged Rules Allegedly Violated, Specific Written Expectations In A Job Description, A Performance Appraisal, Performance Standards, Advance Notice Of The Perceived Violations Prior To Disciplinary Action, Or Written Or Unambiguous Instructions On The Matters Charged, And The AJ Erred In Not Holding These Circumstances To Be Significant Factors Mitigating the Penalty.

F. The Penalty Of Removal Was Improper Because The Agency Decision Maker Hoffman, In Analyzing The "Notoriety' Of The Offenses, Cited "Numerous Newspaper Articles And Radio And Television News Stories" As Well As The Time That NPS Employees Spent Responding To "Letters And Telephone Calls" Concerning The Case, Matters For Which Chief Chambers Cannot Properly Be Held Responsible, And The AJ Erred In Not Holding This To Be A Factor Which Would Invalidate Or Mitigate the Penalty Of Removal Applied By Hoffman.

G. The AJ Erred In Citing "Lack Of Remorse" As A Basis For Removal As A Penalty, Apparently Adopting Agency Decision Maker Hoffman's Rationale That

Chief Chambers Should Be Removed Because Of Her “Inability To See That You Have Engaged In Misconduct And Your Lack Of Contrition,” With The Only Basis In The Record For Such A Finding Being Appellant’s Exercise Of Her Rights To Appeal And Respond To False Accusations.

CONCLUSION

QUESTIONS PRESENTED

1. Whether the Administrative Judge (AJ) erred in denying Appellant's whistleblower defense.

2. Whether Appellant Chambers' disclosures to the media, Congress, and Agency officials of an imminent danger to the public in federal parks and parkways, and her disclosure of an imminent danger of destruction by terrorists of one or more of the "icon" national monuments, were disclosures protected by the Whistleblower Protection Act (WPA).

3. Whether the AJ erred in holding that Appellant's disclosures did not reveal a specific and substantial danger to "any particular person, place or thing," and therefore these disclosures were not protected, notwithstanding that the only specifics omitted from Appellant's disclosures – the names and precise locations to be targeted by terrorists and criminals -- could only be identified by a psychic or after it was too late to prevent the tragedy.

4. Whether the AJ erred in holding that the Appellant was required to identify and had not identified "any management action or inaction that created the alleged safety risk" which Appellant disclosed, and therefore these disclosures were not protected, notwithstanding that the law imposes no requirement that the source of the danger disclosed be Agency management actions or inaction.

5. Whether the AJ erred in holding that the Appellant was required to explain and had not explained, even if the danger disclosed resulted from "management action or inaction," that the management action or inaction "was anything other than debatable, simple negligence or wrongdoing with no element of blatancy," notwithstanding that the law imposes no such "blatancy" requirement regarding disclosure of dangers to the public, as distinguished from disclosures of gross mismanagement or abuse of authority.

6. Whether the AJ erred, after explicitly choosing to not decide, in the IRA analysis portion of the Initial Decision, whether Appellant Chambers' December 2, 2003 e-mail to Congress was protected activity (because the AJ concluded Appellant failed to exhaust her OSC remedies for that disclosure), when the AJ then, in the later portion of the Initial Decision presenting the AJ's analysis of Ms. Chamber's Chapter 75 appeal of the Agency removal action, again failed to decide whether this e-mail, which disclosed an imminent danger of loss of life and destruction of a national monument, was a protected disclosure, notwithstanding that the law imposes no exhaustion of OSC remedies requirement on an Appellant's affirmative defense of whistleblowing to an Agency removal action directly appealable to the Board pursuant to 5 U.S.C. sections 7511-7513.

7. Whether the AJ erred in holding that Appellant's disclosures were not protected given the substantial information of which Appellant was aware, including a key Inspector General's report, that informed her reasonable belief that there was a specific and substantial danger of loss of life and destruction of a national monument resulting from a known terrorist threat, combined with U.S. Park Police staffing and funding limits, a danger specifically recognized in the Inspector General's report, and given that the law judges the reasonableness of an

employee's belief objectively based on the information available to the employee at the time of her disclosures.

8. Whether Appellant disclosed a potential violation of law (a potential violation of the Privacy Act) in Appellant's letter of complaint delivered to Director Mainella on December 2, 2003, given that this letter complains of an improper failure by Agency officials to maintain the confidentiality of Appellant's personnel files, and given that the law does not require an employee to cite to a specific law violated in the disclosure.

9. Whether the AJ erred in misconstruing Huffman v. Office of Personnel Management, 263 F.3d 1341 (Fed. Cir. 2001) and erred in misapplying Huffman, holding that disclosures by Ms. Chambers to her superiors regarding abuse of authority and gross mismanagement related to mishandling the U.S. Park Police budget were disclosures made in the normal performance of Appellant's duties and constituted reporting wrongdoing to the wrongdoer and were therefore, for both reasons, not protected.

10. Whether the AJ erred and applied a double standard in holding Appellant to being the author of the quoted and paraphrased statements attributed to her in the Washington Post article of December 2, 2003 when the AJ sustained certain Agency charges against Appellant based on Appellant having made such statements to the Post, but elsewhere in the Initial Decision, when analyzing whether Appellant made protected disclosures, the AJ refuses to credit the Appellant with having made any particular statements to the Post based on Appellant's allegation that some of the Post statements were not accurate.

11. Whether even if Ms. Chambers' disclosures of imminent dangers of loss life and destruction of a national monument, and other disclosures, were found not to be specific or substantial enough to be protected, the AJ nonetheless erred in denying Appellant Chambers' affirmative defense of whistleblowing because the Agency clearly perceived Chief Chambers to be a whistleblower as reflected by a host of blatant circumstances which included the Chief being given a gag order the day the Post article was published.

12. Whether the AJ erred in holding that the gag order issued by the Agency that prohibited Appellant from speaking with the press or Congress (or other parties) was not a covered personnel action that the Board could address.

13. Whether Appellant's disclosures were contributing factors in the Agency removal action and other actions taken against her.

14. Whether the Agency failed to established by clear and convincing evidence that it would have removed Chief Chambers absent her protected disclosures to the Washington Post, Congress, and Agency officials, and whether the AJ erred in holding otherwise notwithstanding substantial evidence of the Agency's retaliatory motive, substantial evidence of disparate treatment, weak evidence supporting the Agency's charges, and strong evidence that the Agency's charges were a pretext.

15. Whether the Agency's proffered evidence in support of its charges was legally insufficient to

meet the clear and convincing evidence standard under the Act.

16. Whether the AJ erred in ignoring entire categories of evidence of retaliatory motive including inadequate investigation of the charges against Appellant, Agency use of irregular procedure, direct evidence of illegal motive, and dramatic proximity in time evidence.

17. Whether the Agency engaged in disparate treatment in charging Chief Chambers with misconduct, and whether the AJ applied an incorrect legal standard for disparate treatment, holding in effect that there could be no employee "similarly situated" to Chief Chambers.

18. Whether the Agency engaged in a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(12) when it restricted Ms. Chambers' communications with Congress, placed Ms. Chambers on administrative leave, and removed Ms. Chambers' from her position and the federal service because she communicated with Congress, and whether the AJ erred in holding otherwise notwithstanding that retaliation for communications with Congress is a violation of federal law including 5 U.S.C. § 7211.

19. Whether the AJ erred in concluding that the Lafollette Act, 5 U.S.C. § 7211, and the Anti-Gag Statute, do not implement or directly concern the merit system principles, and therefore erred in concluding that an action by the Agency against Appellant in violation of these laws is not actionable under 5 U.S.C. § 2302(b)(12).

20. Whether the Agency failed to provide Appellant notice and an opportunity to respond to the extensive *ex parte* communications the proposing official and other Agency personnel had with the final Agency decision maker, and the whether the AJ erred in holding this failure was not a violation of Appellant Chambers' due process and statutory rights.

21. Whether the Agency officials' extensive and material *ex parte* communications with the final Agency decision-maker violated the rule against such *ex parte* communications established in Board precedent such as Stone v. Federal Deposit Insurance Corp., 179 F.3d 1368 (Fed. Cir. 1999), and whether the AJ erred in holding otherwise.

22. Whether the Agency officials' extensive and material ex parte communications with the final Agency decision-maker, without notice to Appellant and without an opportunity for Appellant Chambers to respond, violated Appellant's procedural pre-termination due process rights recognized in Cleveland Board Of Education V Loudermill, 470 U.S. 532 (1985), and the AJ erred in holding otherwise.

23. Whether the Agency's concealment from Appellant of the findings of fact made by the final Agency decision-maker violated constitutional and statutory mandates, and was a basis for default, and whether the AJ erred in holding otherwise.

24. Whether the Agency's admitted intentional deletion of the Agency final decision-maker's findings of fact from its decision document, and admitted filing and service of a version of the decision document that omitted these still referenced and relied upon findings of fact, violated 5 U.S.C. § 7513(b), 5 C.F.R. § 752.404(b), the AJ's acknowledgement order, 5 C.F.R. § 1201.25,

the Constitution's Fifth Amendment Due Process guarantee, and binding precedent from the Federal Circuit established in case decisions such as Stone V. Federal Deposit Insurance Corp., 179 F.3d 1368 (Fed. Cir. 1999), all of which legal authorities provide that Appellant is entitled to be provided the reasons relied on by the decision-maker in taking its removal action against her.

25. Whether the AJ erred in holding that the Agency officials' concealment from Appellant of the findings of fact made by the final Agency decision-maker did not violate Appellant's procedural pre-termination due process rights recognized in Cleveland Board Of Education V. Loudermill, 470 U.S. 532 (1985).

26. Whether the AJ erred in reviewing the final Agency decision-maker's findings of fact in-camera and then refusing to disclose those Agency findings of fact to Appellant on the basis that the AJ did not perceive the Agency findings to reveal any material evidence when there was no legitimate basis for these Agency findings of fact falling under the attorney-client, attorney-work product, or any other privilege.

27. Whether the AJ erred in denying Appellant's motion to compel Agency responses to document requests and interrogatories which sought Agency production of the concealed findings of fact, given that there is no basis in the law of privilege or otherwise in law to protect findings of fact drafted by an Agency decision-maker when those findings of fact continue to be relied upon by the decision-maker and are referenced in the final decision document, even though deleted from it.

28. Whether the AJ erroneously sustained Agency charge number 2, which alleges that Chief Chambers disclosed to the Washington Post security sensitive information, notwithstanding that the Agency did not establish that the information disclosed was "sensitive" nor that Ms. Chambers' conduct violated any established rule.

29. Whether the AJ erroneously sustained Agency charge number 3, which alleges that Appellant Chambers made an improper disclosure to the Washington Post of budget information, notwithstanding that the Agency failed to prove that the information Appellant Chambers disclosed was confidential or that Ms. Chambers' conduct violated any established rule.

30. Whether the AJ erroneously sustained Agency charge number 5, which alleges that Chief Chambers failed to follow three supervisor's instructions, notwithstanding that the Agency failed to prove in each case either that the alleged instructions were ever actually given to Ms. Chambers or that Ms. Chambers failed to follow the instruction given.

31. Whether the AJ erred in sustaining Agency charge number 6 which alleges that Chief Chambers failed to follow the chain of command in appealing to Deputy Secretary Griles to stop the imminent detail by Mr. Murphy of Ms. Pamela Blyth because the Agency had no policy prohibiting Chief Chambers from appealing to Deputy Secretary Griles, Mr. Griles did not object to Ms. Chambers approaching him on the matter and granted her request to stop the detail, Ms. Chambers made a good faith effort to exhaust the chain of command, and Mr. Griles did not direct or approve that any discipline be taken against Ms. Chambers for having appealed to him.

32. Whether the AJ erred in sustaining four of the six charges notwithstanding that the charges were proposed and decided by biased Agency decision-makers.

33. Whether the AJ erred in sustaining charges 2 and 3, charges related to Ms. Chambers' alleged statements to the Washington Post, because the Agency failed to independently verify exactly what statements were made by Ms. Chambers to the Post before taking actions against her.

34. Whether the AJ erred in concluding that the Agency did not engage in a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(12) when it restricted Ms. Chambers' communications with the media and Congress, placed Ms. Chambers on administrative leave, and removed her from her position and from federal service because she communicated with the media and Congress regarding imminent and substantial dangers to the public and national monuments, in violation of Ms. Chambers' First Amendment rights.

35. Whether the Administrative Judge erred in refusing to allow Appellant to make an evidentiary record regarding certain evidence excluded by the AJ.

36. Whether the AJ erred in ordering, pre-trial, that Appellant would not be allowed to offer the testimony of former Chief Langston to show disparate treatment, and then, post-trial, ruling against Appellant on the basis that Appellant had not offered evidence of disparate treatment.

37. Whether the AJ failed to assess or even acknowledge the existence of the substantial impeachment of Agency witnesses that occurred during trial cross examination and depositions which were admitted into evidence, and other substantial credibility evidence, and consequently incorrectly placed substantial reliance on those Agency witnesses.

38. Whether the AJ erred in denying Appellant's motion to compel the Agency to produce Deputy Director Murphy's private file on Appellant.

39. Whether the AJ erred in denying Appellant's motion to compel the Agency to produce U.S. Park Police records of communications with Congress by the U.S. Park Police and former Chief Langston, which relate to disparate treatment, and records related to Ms. Chambers' communications with Congress, which communications are both protected activities and one of the asserted Agency reasons for removing her.

40. Whether the AJ erred in not drawing an adverse inference from the Agency's failure to call as an Agency witness Agency employee Scott Fear who was present during the Washington Post interview of Chief Chambers.

41. Whether the AJ erred in narrowly viewing the issue of disparate treatment as only regarding the penalty issue, and excluding the issue of disparate treatment in the Agency's practice of charging misconduct for certain types of actions.

42. Whether the AJ erred in ruling that although the Appellant's extensive affidavit filed pretrial was in the record, that the numerous exhibits attached to the affidavit were not in the record.

43. Whether the AJ erred in presuming the Agency acted in good faith.

44. Whether the AJ erred in limiting pre-trial Appellant's ability to offer evidence to establish Appellant's defenses under 5 U.S.C. § 2302(b)(9) other than allowing one question at trial of one particular witness regarding Appellant's (b)(9) defense that she was removed because she had exercised appeal and grievance rights.

45. Whether the AJ erred in first excluding pre-trial the testimony of former Fraternal Order of Police president Jeff Capps, whose testimony would have been corroborative of Appellant's regarding what Appellant did and did not say to the Washington Post, and then ruling post-trial against Appellant Chambers on the basis that Appellant's testimony on this issue was not corroborated.

46. Whether the Agency and the AJ failed to consider numerous significant mitigating circumstances when determining the penalty, including the Agency's failure to provide to Appellant required training, the Agency's failure to fairly place Appellant on notice concerning the alleged conduct rules she was charged with violating.

47. Whether the Agency improperly considered aggravating factors not disclosed or referenced in the Agency notice of proposed removal given to Appellant Chambers, including the "notoriety of the offenses" and lack of "remorse" and "contrition."

48. Whether the Agency improperly considered certain circumstances as "aggravating," including "numerous newspaper articles and radio and television news stories" as well as the time that Agency employees spent responding to "letters and telephone calls" concerning the case, as well as the fact that Appellant Chambers maintained her innocence of the charges and exercised her appeal rights.

INTRODUCTION

The Administrative Judge (AJ) made numerous errors, both of law and of fact. The errors of law include both incorrect interpretation of applicable statutes, regulations, and binding case precedent as well as incorrect application of the law. These errors alone constitute sufficient grounds for the Board to review and reverse the initial decision. The factual errors made by the Administrative Judge are likewise numerous and significant, and support the conclusion that the initial decision was fundamentally flawed.

STATEMENT OF FACTS WITH CITATIONS TO THE RECORD

1. Appellant, Teresa C. Chambers, competed in the Fall of 2001 with candidates from across the United States for the position of Chief of the United States Park Police. She was offered the position by National Park Service (NPS) Director Frances P. Mainella and began working in that capacity on February 10, 2002. Chief Chambers soon learned that her day-to-day supervision would come from Deputy Director Donald W. Murphy. (See Appellant's Affidavit at Paragraphs 4 and 6.)
2. Prior to her arrival, key staff of the National Park Service identified tasks that needed to be completed related to Chief Chambers' arrival. One of those tasks was to provide Chief Chambers training deemed necessary regarding Federal rules, laws, regulations, policies and procedures. That task was assigned to Major Michael Fogarty of the United States Park Police but was never carried out. Ms. Chambers never received the promised training An email to various responsible parties documented the tasks that were to be accomplished including this training. Deputy Director Murphy was copied on this email. (See Appellant's Hearing Exhibit "GG," and Tr. ____)

3. Chief Chambers received neither a position description nor any training upon entering the Federal service. Additionally, she has never received a performance evaluation as a Federal employee. (See Agency Response to Removal Appeal Exhibit "4 j 15," transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 105, Lines 8 – 15.) (See also Appellant's Hearing Exhibit "J," Deposition of Deputy Director Donald W. Murphy, August 11, 2004, Page 18, Line 6 – Page 26, Line 13.) (See also Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Director Donald W. Murphy, September 8, 2004, Page 109, Line 19 – Page 110, Line 1.)
4. The only position description provided to Chief Chambers by the Department of the Interior (DOI) was one provided <u>after</u> her termination as a part of the Agency's response to her request for production of documents. The typewritten position description is dated 1988, 14 years <u>before</u> Chief Chambers was employed by the National Park Service. The position description shows the United States Park Police Chief reporting under a subunit of the National Park Service rather than to the Director herself, as it has existed since Chief Chambers was hired. The "supervisor" who signed the position description was Robert Stanton, who at the time the position description was originally prepared was identified on the form as the "Regional Director, National Capital Region," even though Mr. Stanton's most recent position was that as Director of the entire National Park Service and was retired before Chief Chambers was hired. It appears as though whatever name was typed in as the "employee" has been "whited out" and the name "Teresa Chambers" handwritten in its place. (See Appellant's Hearing Exhibit "MM.")

5. Soon after she began working in her position as Chief of the United States Park Police, Chief Chambers initiated individual meetings with her immediate supervisor, National Park Service Deputy Director Donald W. Murphy, and his supervisor, National Park Service Director Fran Mainella, to learn what she could about their expectations of her. In general, Chief Chambers was told that they knew she had been a Chief of police for four years prior to coming to the National Park Service and that they expected that she would use common sense in deciding when to involve them in decision making and when to brief them on issues of importance. (See Appellant's Affidavit at Paragraph 6.)
6. Prior to the protected disclosures Chief Chambers made in the Summer, Fall, and Winter of 2003 and her increased focus on alerting her superiors to critical staffing and funding shortages, the relationship between Chief Chambers and Director Mainella, Deputy Director Murphy, and those above them was both professional and affable. (See Appellant's Affidavit at Paragraph 7.)
7. There was no expectation that Chief Chambers' interviews with the press had to have prior approval or clearance regardless of the topic. Many times, she was asked by Department of Interior press office employees to act as the Department of Interior's spokesperson on specific matters regarding sensitive law enforcement and security matters. She was not provided guidance on how to handle these matters or what to say nor was she ever criticized or corrected in any manner by her superiors following these interviews. Conversely, she frequently received praise for her approach with the media and her ability to handle "tough" interviews. (See Agency's Response to Removal Appeal Exhibit "4 i 12 – 13," transcript of interview of National Park Service Director

Fran Mainella by Deputy Assistant Secretary Paul Hoffman, February 12, 2004, Page 12, Line 17 – Page 13, Line 8.)

8. In March of 2003, an incident often described as "Tractor Man" occurred on National Park Service property between Constitution and Independence Avenues. During the 36-hour ordeal, Chief Chambers kept Deputy Director Murphy and Director Mainella updated on the progress of the situation and, in fact, was called in by Department of the Interior Secretary Gale Norton herself for a personal briefing. (See Appellant's Affidavit at Paragraph 8, which makes reference to an exhibit, two pages of which are emails that serve as examples of praise Chief Chambers received for her handling of this event.)
9. At no time during or after this incident did Deputy Director Murphy or any person in Chief Chambers' chain of command direct her to work with the Office of the Solicitor or any of its members with regard to this matter except for Deputy Director Murphy's direction to involve the Office of the Solicitor in reviewing the written critique of the operational aspect of this situation. (See Agency's Response to Removal Appeal Exhibit "4 l 39," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 39, Paragraph 1.)
10. In March of 2003, the United States Park Police under Chief Chambers' direction submitted their "budget call" information for Fiscal Year 2005 (FY '05) in the amount of approximately $42 million. (See Appellant's Hearing Exhibit "Z.")
11. It became clear to Chief Chambers in the Summer of 2003 that the United States Park Police would be facing a dire fiscal crisis in Fiscal Year 2004, and she recognized that it was her obligation to alert her supervisors to the situation and the possible ramifications. She immediately began doing so. (See Appellant's Affidavit at Paragraph 12.)

12. On June 3, 2003, Chief Chambers received a telephone call from a member of the National Park Service's Human Resource Office regarding an inquiry from the Office of the Solicitor for the Department of the Interior into whether psychological evaluations had been given to Deputy Chiefs Barry Beam and Dwight Pettiford as part of their hiring in June 2002. (See Agency Response to Removal Appeal, Exhibit "4 m 128," an email to Chief Chambers dated June 4, 2003, documenting that this matter was discussed the previous day, June 3, 2003, with Chief Chambers and others.)
13. This inquiry by the Office of the Solicitor was a result of an ongoing investigation by the Office of Special Counsel (OSC) into the hiring of Deputy Chiefs Beam and Pettiford pursuant to a complaint filed by "one or more mAJors of the U.S. Park Police." (See Appellant's Hearing Exhibit "II," Page 5, memorandum from Patricia Armstrong to Janice Brooks [secretary to Deputy Director Donald Murphy], June 6, 2003.)
14. Chief Chambers had additional conversations regarding the evaluations with Patricia Armstrong, a member of the Solicitor's Office, on June 5, 2003. (See Agency Response to Removal Appeal, Exhibit "4 m 129," a faxed handwritten note, fax machine stamped June 5, 2003, from Patricia Armstrong to Chief Chambers following a conversation they had earlier in the day.)
15. Also on June 5, 2003, Chief Chambers alerted Deputy Director Murphy as to the request from the Office of the Solicitor to have Deputy Chief Beam and Deputy Chief Pettiford take an entrance-level psychological test. Deputy Director Murphy expressed surprise by Chief Chambers' notification and, in fact, openly recalled that he had waived that test in the case of the Chief's hiring since the test is only geared toward young applicants who have never before held police positions. (See Agency's Response to Removal Appeal

Exhibit "4 m 153," the applicable page from a memorandum from Deputy Director Murphy to the appropriate Department of the Interior authority asking for and receiving a waiver of the psychological testing [and other matters] during the hiring process of Chief Chambers.)

16. Further, during this initial conversation with Chief Chambers on June 5, 2003, Deputy Director Murphy said he would have "them" (NPS Personnel) waive the requirement for the deputy Chiefs. (See Agency's Response to Removal Appeal, Exhibit "4 L 33," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 33, Paragraph 3.)
17. Larry Parkinson, Deputy Assistant Secretary for Law Enforcement and Security in the Department of the Interior, asked Chief Chambers to meet with him on June 5, 2003, regarding budget matters. Accompanying her were the civilian Executive Command Staff member responsible for all United States Park Police fiscal matters, Ms. Pamela Blyth, and the United States Park Police Budget Officer, Ms. Shelly Thomas. Also present in this meeting were United States Park Police Fraternal Order of Police (FOP) Labor Chairman, Leon J. "Jeff" Capps, and DOI Budget Office member, Bob Baldauf. (See Appellant's Affidavit at Paragraph 16.)
18. The United States Park Police representatives at this meeting, including Chief Chambers, believed that the purpose of the meeting was to discuss FY 2004 budget challenges. They were surprised that, instead, it was set up to review with them the National Park Service budget proposal for the United States Park Police for FY 2005. (See Appellant's Affidavit at Paragraph 17.)

19. During this June 5, 2003, meeting, Chief Chambers and her team learned for the first time that the National Park Service budget proposal for the United States Park Police for FY 2005 had gone forward to the DOI Budget Office without any conversation with Ms. Blyth or the Chief. (See Appellant's Affidavit at Paragraph 17.) The United States Park Police $42 million enhancement submission had been reduced to approximately a $3 million enhancement request to the Department of the Interior.

20. On June 6, 2003, Patricia Armstrong of the Department of the Interior Office of the Solicitor, contacted Deputy Director Murphy's office and alerted him to the existence of the Office of Special Counsel investigation referenced in Paragraph 13 and about OSC's request for "documentation showing that Beam and Pettiford passed the physical and psychological tests" in the course of their being hired. In this written communication to Deputy Director Murphy's secretary, Ms. Armstrong wrote that "Due to Chief Chambers' involvement in this case, she believed that Mr. Murphy ought to make the decision for the Agency." (See Appellant's Hearing Exhibit "II," Page 5, memorandum from Patricia Armstrong to Janice Brooks [secretary to Deputy Director Donald Murphy], June 6, 2003.)

21. On June 11, 2003, Chief Chambers learned from the Office of the Solicitor that the psychological tests for Deputy Chiefs Beam and Pettiford had not been waived. During the evening of June 11, 2003, Chief Chambers called Deputy Director Murphy and asked for his assistance in resolving this matter. He seemed disturbed that the tests had not been waived, and he told her he would be meeting with someone from the Solicitor's Office the following day to discuss this matter. (See Agency's Response to Removal Appeal Exhibit "4 L 33," Appellant's written reply to the notice of proposed removal

submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 33, Paragraph 4.)

22. On the evening of the following day, June 12, 2003, Chief Chambers called Deputy Director Murphy to see if he had been able to resolve the psychological testing issue involving the deputy Chiefs. Deputy Director Murphy advised Chief Chambers that he had discussed the matter with the Office of the Solicitor representative and had decided to require the deputy Chiefs to take these tests, even though they had been hired more than one year earlier. (See Agency's Response to Removal Appeal Exhibit "4 L 34," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 34, Paragraph 3.)
23. During this conversation, Deputy Director Murphy told Chief Chambers that he thought it would be best if he (Deputy Director Murphy) called both Deputy Chief Beam and Deputy Chief Pettiford to his office to explain his decision and rationale to them. (See Agency's Response to Removal Appeal Exhibit "4 L 34," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 34, Paragraph 3.)
24. On June 13, 2003, Chief Chambers notified Deputy Chiefs Beam and Pettiford that Deputy Director Murphy had decided that they should take the entrance-level psychological examination and that he would be meeting with each of them to explain his rationale. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 148, Lines 9 – 13, and Page 187, Line 22, through Page 188, Line 17.)

25. On June 13, 2003, Chief Chambers alerted Deputy Director Donald Murphy and Director Fran Mainella via email about the rise in traffic accidents on and a safety study of the Baltimore-Washington Parkway. Chief Chambers suggested that it would be beneficial to schedule a briefing for Deputy Director Murphy and Director Mainella regarding this topic. (See Agency's Response to Removal Appeal Exhibit "4 m 19.") Neither Deputy Director Murphy nor Director Mainella responded to this email. (See Appellant's Affidavit at Paragraph 18.)
26. Rather than having a meeting with Deputy Chiefs Beam and Pettiford, Deputy Director Murphy had a memorandum prepared for each individual and had the letters placed in two separate sealed envelopes. While Chief Chambers was at NPS Headquarters, on or about June 16, 2003, Deputy Director Murphy's secretary, Janice Brooks, handed Chief Chambers the two memoranda and a third envelope addressed to Chief Chambers. The memoranda are dated June 16, 2003. (See Agency's Response to Removal Appeal Exhibits "4 m 136, 137" and "4 m 138.")
27. As she handed the envelopes to Chief Chambers, Ms. Brooks advised her that Deputy Director Murphy had asked that Chief Chambers ensure that the letters were given to the deputy Chiefs. (See Agency's Response to Removal Appeal Exhibit "4 L 34," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 34, Paragraph 4.)
28. As requested, Chief Chambers returned immediately to Headquarters and gave Deputy Chief Beam his envelope. Deputy Chief Pettiford was not in his office at the time, and Chief Chambers provided the envelope addressed to Deputy Chief Pettiford to Deputy Chief Beam for delivery. Deputy Chief Beam later confirmed that he had handed Deputy

Chief Pettiford his envelope that same day. (See Agency's Response to Removal Appeal Exhibit "4 L 34," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 34, Paragraph 5.)

29. On June 23, 2003, Deputy Chief Beam evidenced the steps he took that day to comply with Deputy Director Murphy's direction as provided him by Chief Chambers. (See Appellant's Hearing Exhibit "II," Page 1, email from Barry Beam to Robin Brown, June 23, 2003.)

30. As evidence that the Chief complied with the instructions, Deputy Chief Beam sent an e-mail to Chief Chambers and Assistant Chief Benjamin J. Holmes on June 29, 2003, acknowledging receipt of the directive from Deputy Director Murphy and stating that he had, as directed, scheduled the psychological examination. (See Agency's Response to Removal Appeal Exhibit "4 m 139.")

31. In this same email, notified Chief Chambers and Assistant Chief Benjamin J. Holmes that he (Deputy Chief Beam) would be filing a formal grievance and EEO complaint in "reference to the directive and other work related issues," which he subsequently did. (See Agency's Response to Removal Appeal Exhibit "4 m 139 and 140 - 141.")

32. This grievance was later denied by Deputy Director Murphy, and Deputy Chief Beam dropped his EEO complaint. (See Agency's Response to Removal Appeal Exhibit "4 m 142 - 143.")

33. Contrary to Deputy Director Murphy's assertion that he gave instructions to Chief Chambers on June 12, 2003, to have Deputy Chiefs Beam and Pettiford undergo psychological testing and that she failed to follow his direction, the evidence shows that she immediately complied by hand carrying the written directives of June 16, 2003, to

them. This occurred after she informed Deputy Chiefs Beam and Pettiford of Deputy Director Murphy's direction and the requirement to comply on June 13, 2003, the first working day following Deputy Director Murphy's informing Chief Chambers of his decision. Any delay in testing was due to scheduling by the psychologist and others involved and not due to action or inaction by Chief Chambers. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 148, Lines 9 – 13, and Page 187, Line 22, through Page 188, Line 17; see also Agency's Response to Removal Appeal Exhibit "4 L 34," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 34, Paragraph 5; See also Appellant's Hearing Exhibit "II," Page 1, email from Barry Beam to Robin Brown, June 23, 2003; See also Agency's Response to Removal Appeal Exhibit "4 m 139.")

34. Throughout the time between Deputy Director Murphy's direction regarding this matter and the actual completion of the steps involved, Chief Chambers kept Deputy Director Murphy and Director Mainella updated as to the progress via email. (See Agency's Response to Removal Appeal Exhibits "4 m 158, 159, 160, and 161.")

35. The only notes produced by Deputy Director Murphy regarding the psychological testing issue involving Deputy Chiefs Beam and Pettiford and, according to the Agency, the only item relied upon in placing the administrative charge against Chief Chambers regarding this matter is a four-paragraph typed document constructed by Deputy Director Murphy six months after this issue came to his attention. (See Agency's Response to Removal Appeal Exhibit "4 m 163.") The document is signed by "Donald W. Murphy" and is dated in handwriting "12/04/03."

36. Deputy Director Murphy's document described in Paragraph 35 mistakenly states "June 1st" as the date he was notified by the Office of the Solicitor and that, in turn, he notified Chief Chambers. Documents in evidence support Chief Chambers' assertion that it was she who notified Deputy Director Murphy about this matter on June 5 and that he received additional information from Patricia Armstrong of the Solicitor's Office the following day, June 6, 2003. (See Agency Response to Removal Appeal, Exhibit "4 m 129," a faxed handwritten note, fax machine stamped June 5, 2003, from Patricia Armstrong to Chief Chambers following a conversation they had earlier in the day, and Appellant's Hearing Exhibit "II," Page 5, memorandum from Patricia Armstrong to Janice Brooks [secretary to Deputy Director Donald Murphy], June 6, 2003.)
37. Deputy Director Murphy provided even more erroneous and misleading information to Deputy Assistant Secretary Paul Hoffman when he was interviewed by him in February of 2004. (Note that Chief Chambers was not informed of this and other interviews conducted by Deputy Assistant Secretary Hoffman nor was she provided copies of the transcripts nor any additional documents considered by Deputy Assistant Secretary Paul Hoffman in the course of this investigation he conducted until the Department of the Interior was preparing its case for the Merit Systems Protection Board.) (See Agency's Response to Removal Appeal Exhibit "4 j 1 – 27," transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004.)
38. During the referenced interview, Deputy Director Murphy told Deputy Assistant Secretary Hoffman that six months had passed since he directed Chief Chambers to have the deputy Chiefs participate in a psychological test. (See Agency's Response to

Removal Appeal Exhibit 4 j 13, transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 88, Lines 6 – 11.) This would have meant that, as of December 16, 2003, nearly two weeks after Chief Chambers' police powers were suspended and she was placed on administrative leave, neither of the deputy Chiefs had complied, an assertion that evidence proves otherwise.

39. Evidence in the record shows the exact date that Deputy Chief Beam took his first steps to schedule the psychological testing – that being June 23, 2003, seven calendar days after being directed to do so. (See Appellant's Hearing Exhibit "II," Page 1. Further evidence shows the date that both Deputy Chief Beam and Deputy Chief Pettiford notified Chief Chambers that they had completed all requirements (See Agency's Response to Removal Appeal Exhibit "4 m 159" and "4 m 161.")

40. Later in the interview, Deputy Director Murphy told Deputy Assistant Secretary Hoffman that he met with Chief Chambers about this matter "four or five months, maybe even more" after he had directed the psychological testing of Deputy Chiefs Beam and Pettiford and told Deputy Assistant Secretary Hoffman that, at that time, Chief Chambers had failed to follow his (Deputy Director Murphy's) instructions regarding the psychological evaluations. (See Agency's Response to Removal Appeal Exhibit "4 j 13, transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 90, Lines 3 – 17.) This would have meant that, as of October 16, 2003 ("four months"), November 16, 2003 ("five months"), or later neither of the deputy Chiefs had complied, an assertion that

evidence proves otherwise. (See Agency's Response to Removal Appeal Exhibit "4 m 159" and "4 m 161.")

41. Deputy Director Murphy also told Deputy Assistant Secretary Hoffman that is was Deputy Chiefs Beam and Pettiford themselves, and not Chief Chambers, who provided updates to Deputy Director Murphy regarding the status of their compliance. Evidence in the record, however, shows that it was Chief Chambers who consistently kept Deputy Director Murphy updated. (See Agency's Response to Removal Appeal Exhibit "4 m 158," "4 m 159," "4 m 160," "4 m 161," and "4 m 162.")
42. On July 10, 2003, Chief Chambers met with members of the Organization of American States (OAS) following a letter dated June 19, 2003, that James Harding, Assistant Secretary for Management, OAS, sent to Chief Chambers asking for the opportunity to meet about the "Shelter in Place" program, which Assistant Secretary Harding described as "very positive." (See Agency's Response to Removal Appeal Exhibit "4 l 39," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 39, Paragraph 2; and Agency's Response to Removal Appeal Exhibit "4 m 165 – 166," letter from OAS to Chief Chambers dated June 19, 2003.)
43. During this meeting, OAS representatives provided Chief Chambers with a copy of a document outlining the working relationship between OAS and the United States Park Police. Chief Chambers thanked the OAS representatives for the document and the meeting which was in all respects cordial. At no time did anyone complain about any incident, and no one asked for a follow-up meeting or conversation as a result of this gathering. (See Agency's Response to Removal Appeal Exhibit "4 l 39," Appellant's

written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 39, Paragraph 2.) (See also Appellant's Hearing Exhibit "OO," Deposition of Assistant Chief Benjamin J. Holmes [retired], August 19, 2004, Page 148, Lines 1 – 14, and Appellant's Hearing Exhibit "PP," Deposition of United States Park Police Lieutenant Phillip Beck, August 26, 2004, Page 14, Lines 10 – 21.)

44. Lieutenant Phillip Beck, Executive Officer for the Office of the Chief, United States Park Police, confirmed in his sworn deposition that this meeting was set up as "a meet and greet" as a result of a "contact" Lieutenant Beck had personally made. (See Appellant's Hearing Exhibit "PP," Deposition of United States Park Police Lieutenant Phillip Beck, August 26, 2004, Page 14, Lines 10 – 21.)

45. Sometime after July 10, Randolph J. Myers, Senior Attorney, Branch of National Parks, Office of the Solicitor, scheduled a meeting with someone on Chief Chambers' staff to meet with Chief Chambers on July 30, 2003. (See Agency's Response to Removal Appeal Exhibit "4 l 39," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 39, Paragraph 4, and Agency's Response to Removal Appeal Exhibit "4 m 167," a computer print out of Chief Chambers' calendar for July 30, 2003, including the words at the 2 pm location, "Meeting with Randy Myers – Canceled, Location: Chiefs [sic] office.)

46. The July 30 meeting did not occur, and an entry on Chief Chambers' calendar for that date shows the notation "Canceled" with no further explanation. (See Agency's Response to Removal Appeal Exhibit "4 m 167" a computer print out of Chief

Chambers' calendar for July 30, 2003, including the words at the 2 pm location, "Meeting with Randy Myers – Canceled, Location: Chiefs [sic] office.)

47. Chief Chambers' Executive Officer, Lieutenant Phillip Beck, recalled as he testified in his sworn deposition that either he or Chief Chambers' secretary, Sharon Stephenson, made "subsequent tries" to reschedule the meeting with Mr. Myers but that the meeting was never rescheduled. (See Appellant's Hearing Exhibit "PP," Deposition of United States Park Police Lieutenant Phillip Beck, August 26, 2004, Page 30, Line 21, through Page 31, Line 16.)

48. Lieutenant Phillip Beck also stated in his sworn deposition that he recalled seeing a document from Randolph Myers withdrawing his request for a meeting with Chief Chambers. (See Appellant's Hearing Exhibit "PP," Deposition of United States Park Police Lieutenant Phillip Beck, August 26, 2004, Page 30, Lines 13 – 20.)

49. During his interview with Deputy Assistant Secretary Paul Hoffman, Deputy Director Murphy told Deputy Assistant Secretary Hoffman, "I [Deputy Director Murphy] don't recall speaking with her [Chief Chambers] directly about this instance." This response was in answer to Deputy Assistant Secretary Hoffman's question, "Would you describe for me the instructions that you gave Teresa Chambers about the OAS matter?" (See Agency Response to Removal Appeal Exhibit "4 j 14," transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 93, Line 22, through Page 94, Line 4.)

50. In answer to the follow-up question from Deputy Assistant Secretary Hoffman, "So you don't recall telling Chief Chambers to meet with Randy Myers?" Deputy Director Murphy answered, ". . . I'm almost sure I did . . ." (See Agency Response to Removal

Appeal Exhibit "4 j 14," transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 94, Lines 5 – 11.)

51. With regard to issues involving the budget, Chief Chambers was again called by Deputy Assistant Secretary Larry Parkinson to meet with him on July 11, 2003. In that meeting, she reviewed with him budget shortfalls that would be facing the United States Park Police in FY 2004 and 2005. Present with Deputy Assistant Secretary Larry Parkinson was a member of the DOI's budget office, Bob Baldauf. Chief Chambers' team members were asked to quickly pull together additional information to present at a future meeting. The National Park Service Comptroller, Bruce Sheaffer, was not in attendance at this meeting nor was any other employee from his office. (See Appellant's Affidavit at Paragraph 23.)
52. In the early morning hours of July 16, 2003, Chief Chambers provided a copy of the draft staffing study the United States Park Police Executive Team had completed to Director Fran Mainella and Deputy Director Donald Murphy via email (See Agency's Response to Removal Appeal Exhibit "4 m 100 - 106.")
53. Also in the early morning hours of July 16, 2003, Chief Chambers responded in writing to Bruce Sheaffer, the Comptroller for the National Park Service, to five written statements he had provided her and to which he had asked her to respond. The document she prepared was emailed to Mr. Sheaffer and copied via email to Director Fran Mainella and Deputy Director Donald Murphy. (See Appellant's Affidavit at Paragraph 26.)
54. Among other topics, this four-page document detailed some of the erosion of the United States Park Police base funding increase and explained the importance of replacing the

United States Park Police aging helicopter, the critical status of sworn staffing, and costs associated with staffing the icons (described therein as "Code Yellow" expenses). Chief Chambers does not recall nor can she locate any response from Mr. Sheaffer regarding this information nor any reaction from Director Mainella or Deputy Director Murphy. (See Appellant's Affidavit at Paragraph 26.)

55. On July 16, 2003, Chief Chambers attended an additional meeting with Deputy Assistant Secretary Larry Parkinson and Bob Baldauf. This time, the Comptroller for the National Park Service, Bruce Sheaffer, was also present. Again, the shortfalls facing the United States Park Police in FY 2004 and FY 2005 were discussed. (See Appellant's Affidavit at Paragraph 27 and 28.)

56. Additional detailed information was requested of the United States Park Police staff by Bob Baldauf, including the information provided in the draft staffing study previously forwarded to Director Fran Mainella and Deputy Director Donald Murphy. Mr. Baldauf asked that, within a very short timeframe, Chief Chambers provide information regarding what services normally provided by the United States Park Police would be cut in FY 2004 in order to work within their budget. Knowing that those decisions would be outside Chief Chambers' authority, she asked for the opportunity to speak with Director Fran Mainella. A subsequent meeting was scheduled at which Chief Chambers was to provide more detailed information to Mr. Baldauf. (See Appellant's Affidavit at Paragraph 28.)

57. Following the July 16th meeting, Chief Chambers immediately reported to Director Fran Mainella's office to let her know that the DOI Budget Office, through Bob Baldauf, was requesting additional information, including a prioritization of services and/or patrol

locations that could be cut at the start of FY 2004. The Director agreed that Chief Chambers was correct to not provide that information to Bob Baldauf, and she and Chief Chambers made arrangements to talk over the following few days. (See Appellant's Affidavit at Paragraph 29.)

58. On July 18, 2003, Chief Chambers had a lengthy telephone conversation with Director Fran Mainella regarding the budget shortfalls that were facing the United States Park Police at the start of FY 2004. (See Appellant's Affidavit at Paragraph 30.)

59. During this conversation, Chief Chambers informed Director Mainella of the dwindling staffing numbers in the United States Park Police and an attrition rate that was far surpassing their hiring authority. Director Mainella's response was an angry outburst regarding the size of the United States Park Police overtime budget. (See Appellant's Affidavit at Paragraph 31.)

60. During the July 18th conversation with Director Mainella, Chief Chambers further discussed with her the strain that the mandated staffing at the icon parks was putting on the ability of the United States Park Police to effectively accomplish its mission in the other parks for which it was responsible. Director Mainella asked who had mandated the staffing level at the icon parks. (See Appellant's Affidavit at Paragraph 32.)

61. Chief Chambers informed Director Mainella that the mandate for icon staffing had come from Secretary Norton through Deputy Assistant Secretary Larry Parkinson following a study and recommendations by the Department of Homeland Security. Director Mainella's reaction was another angry outburst during which she reminded Chief Chambers that she (the Chief) worked for her (the Director) and that Chief Chambers did not work for Deputy Assistant Secretary Larry Parkinson or the Secretary and that the

Secretary could not tell Chief Chambers how to staff. (See Appellant's Affidavit at Paragraph 32.)

62. During this conversation, Director Mainella expressed surprise to have heard that, during the July 16th budget meeting with Deputy Assistant Secretary Larry Parkinson and others, one of the United States Park Police staff members had used the example of the Baltimore-Washington Parkway as a "dangerous and deadly highway." (See Appellant's Affidavit at Paragraph 33.)

63. Chief Chambers alerted Director Mainella to the staffing shortages on the Baltimore-Washington Parkway and to the increased number of traffic accidents and deaths there. Chief Chambers also told Director Mainella that other National Parks and areas for which United States Park Police officers were responsible were suffering reductions in police services as a result of staffing shortages and mandated icon staffing. (See Appellant's Affidavit at Paragraph 34.)

64. Chief Chambers alerted Director Mainella to the lack of funds to pay for overtime staffing and that just hiring officers does not make it possible to immediately reduce the need for overtime since it takes nearly one year to get a newly hired officer trained, on the street, and qualified for "solo" patrol. Chief Chambers also informed Director Mainella that, throughout Fiscal Year 2003, she (the Chief) had informed both Deputy Director Donald Murphy and the National Park Service Comptroller, Bruce Sheaffer, of these matters and had urged them to secure a supplemental appropriation for the United States Park Police and that the Comptroller had refused to do so. (See Appellant's Affidavit at Paragraph 34.)

65. On July 19, 2004, Chief Chambers again wrote an email to Director Mainella regarding the issue of traffic safety on the Baltimore-Washington Parkway. (See Agency's Response to Removal Appeal Exhibit "4 m 20 - 21.") Director Mainella did not respond to this email. (See Appellant's Affidavit at Paragraph 36.)

66. On July 24, 2003, Deputy Director Murphy telephoned Chief Chambers and directed that she have the United States Park Police Budget Officer, Ms. Shelly Thomas, report to his office the following morning, July 25, 2003, and further directed that neither Chief Chambers nor Ms. Thomas's supervisor, Ms. Pamela Blyth, were to accompany Ms. Thomas. (See Appellant's Affidavit at Paragraph 37.)

67. Deputy Director Murphy also told Chief Chambers during this telephone call that he decided to ask a National Park Service employee, Ms. Dottie Marshall, to meet with him and Ms. Thomas and to get immersed in the United States Park Police budget process. (See Appellant's Affidavit at Paragraph 37.) Chief Chambers later learned that National Park Service Comptroller Sheaffer also attended the meeting. (See Appellant's Affidavit at Paragraph 37.)

68. Later in the day on July 24, 2003, Ms. Dottie Marshall came to Chief Chambers' office and told her that, in preparation for the meeting the following morning with Deputy Director Murphy, Chief Chambers was to prepare budget documents that would show how the Chief recommended that the United States Park Police could work within its budget in Fiscal Year 2004 despite the anticipated $11.6 Million shortfall. (See Appellant's Affidavit at Paragraph 39.)

69. Ms. Blyth, Ms. Thomas, Ms. Marshall, and Chief Chambers worked into the late evening hours on July 24, 2003, identifying potential service cuts to balance the books for FY 2004. (See Appellant's Affidavit at Paragraph 40.)

70. During the late evening hours of July 24, 2003, after completing a series of budget reduction documents for FY 2004 for Deputy Director Murphy's meeting the following day, Chief Chambers faxed these items to his home at his request so that he could review them. He promised that, after his review, he would call Chief Chambers on her way home and discuss the recommendations. Deputy Director Murphy did not contact Chief Chambers as promised and did not discuss these documents or information with her further. (See Appellant's Affidavit at Paragraph 41.)

71. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "YY," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: Okay. Thank you. Taking us to YY.
>
> MR. HARRISON: Thank you, Your Honor.
>
> JUDGE BOGLE: Another budget document.
>
> MR. HARRISON: Yes, Your Honor, and this one shows proposed cuts by Ms. Chambers of a type which her supervisors asserted she was unwilling to make and which others criticized her for not implementing NAPA's recommendations in regard to; for example, cutting Wolftrap and other activities considered to be beyond the immediate mission of the Park Police; also shows Ms. Chambers was forced to cut counter-terrorism efforts by a half-million dollars.
>
> JUDGE BOGLE: This concerns the '04 budget.
>
> MR. HARRISON: Well, that's an issue in this case, Your Honor.

> The budget shortfall in '04 was carried over in the sense that those same expenses would carry over into '05, and it's why Ms. Chambers said she needed $27 million instead of 8 or 3 million dollars for the next year.
>
> JUDGE BOGLE: But I don't need the history of why. I mean the comments that she allegedly made concerned the '05 budget. Taking us to ZZ.
>
> MR. HARRISON: Your Honor, if I could just note for the record, Mr. Schaefer testified that he knew nothing about a shortfall in '04, and this speaks to that.
>
> JUDGE BOGLE: Okay. I don't know that a shortfall in '04 is relevant, though. So –
>
> MR. HARRISON: Well, it is to his credibility.
>
> JUDGE BOGLE: Taking –
>
> MR. HARRISON: I would offer it for impeachment.
>
> JUDGE BOGLE: Okay. Taking us to ZZ.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 45, Line 20 – Page 46, Line 24.)

72. These recommended service cuts, described in Paragraphs 70 and 71, which would have reduced overtime and narrowed the mission of the United States Park Police, were apparently never shared with Congressional Staffer Debbie Weatherly, which, according to information she provided to Deputy Assistant Secretary Paul Hoffman in an interview he conducted of her on February 18, 2004, caused her to believe that Chief Chambers had taken no steps to fulfill this expectation of the Congressional committee for which Ms. Weatherly works. (See Agency's Response to Removal Appeal Exhibit "4 g 16," Line 20, through "4 g 17," Line 8.)

73. During the meeting Deputy Director Murphy held with Ms. Marshall and Ms. Thomas on July 25, 2003, he made independent decisions regarding the final budget reductions for

the United States Park Police. (See Appellant's Affidavit at Paragraph 42, referencing an email from Comptroller Sheaffer dated July 25, 2003, to DOI Budget Officer, John Tresize, stating, "The priorities for 2005 are listed at the bottom, but not quite in the order Don [Murphy] and I agreed on . . .")

74. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "ZZ," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: Okay. Taking us to ZZ.
>
> MR. HARRISON: I just need a moment, Your Honor.
>
> JUDGE BOGLE: See, the problem is you've offered a lot of budget documents, but they all seem to come from a different point in time, and so, the figures change, and all they do is confuse the issue in my mind --
>
> MR. HARRISON: Well, Your Honor --
>
> JUDGE BOGLE: -- and this is some sort of --
>
> MR. HARRISON: This one is not confusing.
>
> This one is a document that shows that Mr. Murphy was given an explanation of the budget shortfall that he claims he had no knowledge of -- pardon me -- Mr. Schaefer, not Mr. Murphy, and the last page, which is a document co-authored by Mr. Schaefer and Mr. Murphy, in the middle, reflects $11.5 million as the budget shortfall for 2004 and a plan for making cuts to deal with it.
>
> This shows that Mr. Schaefer was not testifying credibly in this proceeding, and I note, Your Honor, that my client reminds me that her communications with The Washington Post included communications about what was happening in 2004, not just 2005.
>
> JUDGE BOGLE: Once again, all of these documents are part of budget discussions that took place over many, many months, and they're just not helpful in looking at these charges.

> MR. HARRISON: Well, if I may make one specific proffer on this regarding Mr. Schaefer, Mr. Schaefer was called as a rebuttal witness over our objection on matters he should have been called in the Agency's case in Chief. He testified to two points, really.
>
> One was he said he had seen a document with an 8-point-something-million-dollar figure in it that the Agency is going to assert supports their position that Ms. Chambers disclosed something she shouldn't have.
>
> He didn't produce the document. His credibility is at issue on that matter.
>
> He then testified, in response to my question, that he had no knowledge of a $12 million shortfall. This document shows just the opposite and shows that he is not to be believed.
>
> That is a significant point of impeachment which we're allowed to make a record on.
>
> JUDGE BOGLE: Thank you. Your comments are noted. Let's go to AAA.
>
> MR. HARRISON: So, Your Honor is refusing that document in the record?
>
> JUDGE BOGLE: I'm refusing the document.
>
> MR. HARRISON: And I respectfully note my exception to that.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 46, Line 24 – Page 48, Line 21.)

75. Among the decisions Deputy Director Murphy made during this July 25, 2003, meeting was one that reduced the amount of overtime funding needed to staff the icons at the levels mandated by Secretary Norton following a study by the Department of Homeland Security. (See Appellant's Affidavit at Paragraph 43, referencing an email from Ms. Dottie Marshall to Chief Chambers stating in part, "[Deputy Director Murphy] directed us to . . . reduce code yellow funding." Ms. Marshall further stated that "I asked that [Deputy Director Murphy] discuss that directly with you . . . He said that he would follow-up on that.")

76. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "AAA," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: Thank you. Your comments are noted. Let's go to AAA. …
>
> JUDGE BOGLE: I have no idea what it is. AAA. Again with the budget shortfall.
>
> MR. HARRISON: Now this is, again, regarding Mr. Schaefer being informed about the budget shortfall by financial officers for the U.S. Park Police, so he couldn't have really been ignorant of the matter, as he testified in this proceeding.
>
> JUDGE BOGLE: Okay. I will not accept that document. BBB.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 48, Line 16 – Page 49, Line 6.)

77. Chief Chambers was greatly concerned about the ability of the United States Park Police to maintain safety and security at the icons as a result of the reductions made by Deputy Director Murphy and by the fact that Director Mainella had directed Chief Chambers to <u>not</u> reduce police services to the parks in order to increase staffing at the icons. (See Appellant's Affidavit at Paragraph 44.)

78. On July 28, 2003, Chief Chambers wrote an email to Ms. Marshall thanking her for her involvement (and in response to her July 25, 2003, email, referenced in Paragraph 76 above.). In that email, Chief Chambers wrote:

> I noticed on the schedule that comes from the Director's Office that she and both Deputy Directors are out all week. Did Mr. Murphy give any indication as to who was going to break the bad news to the Secretary that we were disregarding the staffing numbers for 'yellow' icon park protection which have been mandated? I can't imagine that he and the

> Director want me broaching that subject without their involvement, but how long will it take until the word is out? Did you and Shelly get any direction to pass on to me? I have not heard from Mr. Murphy since he told me Thursday of your involvement.

(See Appellant's Affidavit at Paragraph 45.)

79. Later in the day on July 28, 2003, Chief Chambers again wrote to Ms. Marshall. In that email, Chief Chambers told Ms. Marshall that she (the Chief) felt badly that Ms. Marshal was put in a position of having to communicate between the Chief and the Chief's chain of command and the Chief and Comptroller Sheaffer. Nonetheless, Chief Chambers asked Ms. Marshall to "Please pass on my concerns described in the next paragraph to whomever receives the revised spreadsheet that Pamela has shipped to you." That paragraph reads as follows:

> When you, Shelly, Pamela, and I worked in my office last week to balance the books for FY 2004, I understood the task and also understood that I did not have the authority to change my Code Yellow staffing numbers. However, since there was no other manner by which to bring the numbers down, I went through the exercise. In doing so, I looked at each icon and area of responsibility under Code Yellow and thoughtfully reduced the numbers to those that I could defend and that would still allow us to protect those areas. With any additional reduction, however, I can no longer do that. In addition to the seven positions I eliminated from Code Yellow staffing in the proposed reductions I prepared, the additional $877,112 we have been mandated to take away from Code Yellow projected costs equates to five fewer officers on a 12-hour shift for an entire year. I cannot in good conscience say that I can adequately protect these parks with such scarce resources.

(See Appellant's Affidavit at Paragraph 46.)

80. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "CCC," into evidence but was denied the opportunity to explain the relevance by the Administrative Law Judge who was moving so quickly through the documents that she was unwilling to allow counsel 60

seconds to refresh his memory on this document. (See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 52, Line 4 – Page 53, Line 2.)

81. Approximately one hour later, Ms. Marshall sent Chief Chambers an email informing her that she had forwarded the Chief's message, referenced in Paragraph 80 above, to National Park Service Comptroller Bruce Sheaffer (See Appellant's Affidavit at Paragraph 47.)

82. Sometime after normal business hours on either July 31 or August 1, 2003, Chief Chambers was stopped in a hallway of the Main Interior Building by Deputy Secretary Steve Griles who asked her detailed questions about what he had heard was a significant budget shortfall for the United States Park Police for FY 2004. Deputy Secretary Griles did not reveal the source of his information. (See Appellant's Affidavit at Paragraph 48.)

83. Chief Chambers explained to Deputy Secretary Griles that she was uncomfortable speaking with him about National Park Service matters without the National Park Service Director or Deputy Director present; however, he insisted that she do so and assured her that she should never fear retribution for speaking with him and that he needed to rely on employees to be candid with him when he reached out to them. Chief Chambers reluctantly answered his questions about the projected shortfalls. (See Appellant's Affidavit at Paragraph 48.)

84. Chief Chambers shared with Deputy Secretary Griles her concerns of being unable to adequately protect the icon parks if she and her executive team were not permitted to either reduce services in other areas or if they did not receive a supplemental budget for FY 2004. Deputy Secretary Griles directed Chief Chambers not to mention their conversation to Deputy Director Murphy or Director Mainella and promised that he

would arrange a meeting with Chief Chambers and DOI budget officials the following week. He again reiterated that Chief Chambers had nothing to "worry about" by talking with him and that it was he who had reached out to her. (See Appellant's Affidavit at Paragraph 49.)

85. The following workday, Deputy Secretary Griles contacted Chief Chambers by telephone and told her that he had changed his mind about involving the Department's budget office at this point and, instead, had asked Assistant Secretary Craig Manson, who is in the chain of command for the United States Park Police and to whom Director Mainella directly reports, to intervene. He directed Chief Chambers to reach out to him (Deputy Secretary Griles) "if things don't go right" and again stated that Chief Chambers should not fear retribution for doing so. (See Appellant's Affidavit at Paragraph 50.)

86. On August 5, 2003, Chief Chambers met with Deputy Director Donald Murphy to review with him, step-by-step, the budget challenges for FY 2004. She alerted him to the fact that it would be impossible to continue to meet the mandated staffing at the icon parks in all three cities under the current budget projections. (See Appellant's Affidavit at Paragraph 51.)

87. Deputy Director Murphy's response was to tell Chief Chambers that it was "okay to go anti-deficient" and that he would assist the United States Park Police if that occurred. With no additional conversation or input from him, Deputy Director Murphy acknowledged that "I know it's going to be hard," and he walked out of his office. (See Appellant's Affidavit at Paragraph 51.) (See also Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 11, 2004, Page 256, Lines 2 – 14, an additional reference by Deputy Director Murphy that "people

sometimes go anti-deficient.") (See also Merit Systems Protection Board Hearing Transcript, September 8, 2004, Page 228, Line 24, through Page 229, Line 7, testimony of Deborah Weatherly, Staff Director of the Interior Appropriations Subcommittee of the House of Representatives, during which she decries the act of going "anti-deficient.")

88. Later in that same day, August 5, 2003, Deputy Assistant Secretary Larry Parkinson hosted another meeting regarding budget challenges. At this meeting, Chief Chambers and her budget staff learned what the Department of the Interior's "pass-back" for the United States Park Police would be for Fiscal Year 2005. (See Appellant's Affidavit at Paragraph 52.)

89. In addition to the usual attendees at this meeting was Assistant Secretary Craig Manson. Assistant Secretary Manson confirmed that, despite any challenges or shortfalls, the United States Park Police must continue to staff at Department-mandated levels at the icon locations. He assured Chief Chambers that he would make certain that both Deputy Director Murphy and Director Mainella understood this mandate. (See Appellant's Affidavit at Paragraph 52.)

90. Later in the afternoon on the same day, August 5, 2003, Chief Chambers met one-on-one with Director Fran Mainella to review the details of the United States Park Police budget numbers. During this five-hour meeting, they reviewed the history of the pre- and post-9-11 budget numbers for the United States Park Police and how mandates had changed since that time. Director Mainella asked a number of questions but offered no solutions or advice. (See Appellant's Affidavit at Paragraph 53.)

91. Director Mainella's only response to these challenges during the August 5 meeting was to inform Chief Chambers that the United States Park Police Executive Command Staff

member responsible for pulling them through these fiscal challenges, Pamela Blyth, was going to be transferred (or "detailed") by Deputy Director Donald Murphy in the near future. (See Appellant's Affidavit at Paragraph 54.)

92. Director Mainella said that people in the Main Interior Building, especially in the National Park Service, "didn't like Pamela" because she wore a "badge," Director Mainella's description of a name placard that civilian commanders in the United States Park Police wear when representing the United States Park Police at meetings and events. Director Mainella also said Ms. Blyth was being detailed because people resented the fact that Ms. Blyth attended meetings with Chief Chambers. Chief Chambers attempted to point out that Ms. Blyth attends those meetings that deal with issues within her span of control, and that the Deputy Chiefs do likewise for matters within their purview. (See Appellant's Affidavit at Paragraph 54.)

93. Chief Chambers asked for Director Mainella's consideration of the key role Ms. Blyth played as a member of the Executive Team and especially with regard to working with the Chief as they addressed these budget and staffing challenges. Director Mainella stated that she would defer to Deputy Director Murphy and allow him to decide how to handle Ms. Blyth's assignment. (See Appellant's Affidavit at Paragraph 55.)

94. Also on August 5, 2003, Chief Chambers wrote a third time to Deputy Director Donald Murphy with a copy to Director Fran Mainella regarding the Baltimore-Washington Parkway Safety Study. (See Appellant's Affidavit at Paragraph 56.) This time, Chief Chambers attached a copy of the slide presentation to the email. In that email, Chief Chambers asked Deputy Director Murphy the following:

> Would you like Captain Hay to make this presentation to you and the Director? This information was presented to Mr. Carlstrom and members

> of his team about one year ago. This was before the most recent data included in Captain Hay's presentation included herein and prior to the report coming back from the Federal Highway Administration. Shall I set something up that works for yours and the Director's calendars?

95. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "DDD," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: Well, we need to go a little bit faster through these. DDD, again, talks about –
>
> MR. HARRISON: Your Honor, could I have a chance to respond on CCC?
>
> JUDGE BOGLE: Well, we're not going to take that much longer with these. They appear to be not -- to me, to be not relevant.
>
> MR. HARRISON: I beg your pardon, Your Honor.
>
> JUDGE BOGLE: DDD is an e-mail concerning highway accidents.
>
> MR. HARRISON: Are we on DDD?
>
> JUDGE BOGLE: Yes, we are, and it does not appear to be relevant.
>
> EEE –
>
> MR. HARRISON: This is about highway accidents, and I don't understand how parkway safety, being one of the protected disclosures Ms. Chambers allegedly made, is not relevant to this proceeding.
>
> JUDGE BOGLE: EEE, code yellow staffing, not relevant.
>
> MR. HARRISON: Your Honor --
>
> JUDGE BOGLE: FFF –

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 52, Line 15 – Page 53, Line 11.)

96. Deputy Director Murphy and Director Mainella did not respond to this email, and Deputy Director Murphy later denied that he had any knowledge that there was a problem with traffic accidents on the Baltimore-Washington Parkway. (See Appellant's Affidavit at Paragraph 57.)

97. On August 6, 2003, the United States Park Police Budget Officer received a fax from the National Park Service Budget Office with the FY 2005 Policy Guidance, which required a response the following week. (See Appellant's Affidavit at Paragraph 58.)

98. The FY 2005 Policy Guidance document described in Paragraph 98 and included as an exhibit with Appellant's Affidavit makes clear that the staffing levels at the icon parks for which the United States Park Police is responsible were mandated by the Department of the Interior:

> Regarding Threat Level Yellow, the National Park Service shall ensure that the staffing of the Code Yellow monuments are covered in 2004 and 2005, in accordance with the Department's approved security plans for the USPP Yellow posts, including the use of newly sworn United States Park Police officers, contract guard services, and National Park Service rangers, as necessary. The cost of Code Yellow in 2003 at USPP Yellow posts is estimated at $8.3 million in overtime. NPS, working with USPP, and OLES shall also include a plan for OMB that shows how USPP Code Yellow posts will be staffed in 2004 and 2005 to fully implement the Department's Code Yellow requirements. (Emphasis added.)

(See Appellant's Affidavit at Paragraph 59.)

99. On August 7, 2003, Director Mainella and Chief Chambers met over lunch and further discussed issues of budget, staffing, and communication. (See Appellant's Affidavit at Paragraph 60.)

100. On August 8, 2003, Deputy Director Murphy informed Chief Chambers for the first time of his intent to "detail" Ms. Blyth and assured Chief Chambers that Ms. Blyth would work directly for him and that he would mentor her. This explanation was quite

different than that which Chief Chambers received from Director Mainella. (See Paragraph 93.) (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 251, Line 20, through Page 252, Line 7.) Deputy Director Murphy provided no anticipated date that this assignment would begin. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 91, Line 1, through Page 100, Line 5, and Page 117, Lines 11 - 20.) (See also Merit Systems Protection Board Hearing Transcript, testimony of Appellant, Teresa Chambers, September 9, 2004, Page 86, Line 23 through Page 87, Line 5.)

101. Chief Chambers expressed her concern to Deputy Director Murphy that the United States Park Police would likely fail if Ms. Blyth were moved from her regular position at that particular time. While Chief Chambers did not understand the rationale in his and Director Mainella's wanting to move Ms. Blyth, Chief Chambers respected their authority to do so. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 114, Line 17, through Page 115, Line 22, and Page 118, Lines 2 – 8.) (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 87, Line 10, through Page 88, Line 4.)

102. While discussing the issue of Ms. Blyth's transfer, Chief Chambers suggested to Deputy Director Murphy that, perhaps, it would be appropriate for him to speak directly with Ms. Blyth in an effort to assure her that the move was temporary and that, as he had assured Chief Chambers he would work with her to accommodate her continuing involvement in United States Park Police projects in which she was involved. He agreed to do so, reiterating his commitment to work with the Chief Chambers and Ms. Blyth in

determining her schedule. (See Appellant's Affidavit at Paragraph 62.) (See also Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 88, Lines 6 – 10.) (See also Agency Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 117, Line 19, through Page 121, Line 12; Page 118, Lines 2 – 8; and Page 147, Line 20, through Page 148, Line 10.)

103. Deputy Director Murphy provided Chief Chambers no effective date of Ms. Blyth's "detail" or transfer during the August 8, 2003, meeting or at any date or time before or after that meeting. (See Appellant's Affidavit at Paragraph 62.) (See also Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 87, Lines 3 – 6; Page 89, Lines 3 – 7; Page 98, Lines 2 – 4; Page 162, Lines 5 –9; and Page 163, Lines 10 - 13.) (See Agency Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 149, Lines 15 – 16. and Page 185, Lines 4 – 22.)

104. On August 11, 2003, in response to an email from Ms. Dottie Marshall, Chief Chambers replied with an email that, in part, said:

> With regard to Code Yellow, it seems as though you have hit my point exactly. While we cannot maintain the Code Yellow levels, I have been directed that I MUST maintain the Code Yellow levels. Which begs the question, "What parks and parkways will we choose not to patrol in '04?"

(See Appellant's Affidavit at Paragraph 63.)

105. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "EEE," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: EEE, code yellow staffing, not relevant.
>
> MR. HARRISON: Your Honor –
>
> JUDGE BOGLE: FFF –
>
> MR. HARRISON: Could I note a proffer? The document reflects that Ms. Chambers was obliged to staff at mandatory levels for code yellow for the icons, for protecting the monuments, which forced her to make other cuts which put the public in danger in other areas. It also shows -- if you tie it to the other budget documents which Your Honor has not allowed into this record -- that her supervisors were cutting code yellow funding notwithstanding the mandate, which is part of the motive for her protected activity and shows why it was reasonable and why it was a specific and substantial danger.
>
> JUDGE BOGLE: All right. FFF is also a staffing document, staffing e-mail, e-mail about staffing. GGG –

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 52, Line 25 – Page 53, Line 24.)

106. On August 12, 2003, in response to Chief Chambers' email to Dottie Marshall as described in Paragraph 104 above, Ms. Marshall sent Chief Chambers an email suggesting that the Chief "discuss the Code Yellow stipulation," which Ms. Marshall wrote "can't be remedied in a budget document." (See Appellant's Affidavit at Paragraph 64.) Ms. Marshall did not suggest with whom Chief Chambers should discuss this matter.

107. Chief Chambers' response to Ms. Marshall (See Appellant's Affidavit at Paragraph 65) states in part:

> Actually, I've talked with everyone up my chain who will listen – to no avail (although Judge Manson is the first to seem to "get it"). I have been directed that the staffing numbers are NOT negotiable. We will staff those positions whether anything else is staffed or not.

108. During the MSPB hearing, Counsel for Appellant attempted to enter the written communications described in Paragraphs 106 and 107, marked as Appellant's Hearing Exhibit “FFF,” into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: FFF – …
>
> JUDGE BOGLE: All right. FFF is also a staffing document, staffing e-mail, e-mail about staffing. GGG –
>
> MR. HARRISON: You're going faster than I'm going, Your Honor.
>
> JUDGE BOGLE: Well, we have to pick up the speed here.
>
> MR. HARRISON: I don't understand our rush, Your Honor.
>
> JUDGE BOGLE: You're attempting to enter a lot of e-mails into this record that no witness has ever addressed and a lot of budget documents that I can't make heads or tails out of.
>
> They're not final documents; they're just working documents.
>
> It will just complicate the record in a way that -- that can't be straightened out.
>
> MR. HARRISON: Well, Your Honor, I apologize, because I did not understand that there was any procedure in the Merit Systems Protection Board for having a witness talk about every document offered, because the Agency certainly hasn't done that with the documents in its record, and both parties should have the same opportunity.
>
> JUDGE BOGLE: If the document is clearly comprehensible, a witness doesn't have to address it, but you're -- you're loading up the record with e-mails and staffing documents and budget documents that I can't understand, that don't make any sense –
>
> MR. HARRISON: Well –
>
> JUDGE BOGLE: -- outside -- without a witness to explain them.
>
> MR. HARRISON: Well, FFF is not one of those, for example.

JUDGE BOGLE: Well, we're past that. I'm on GGG, and it's --

MR. HARRISON: Well, Your Honor --

JUDGE BOGLE: -- a budget document, e-mails about budget.

MR. HARRISON: I'd like to make a proffer on FFF. May I?

JUDGE BOGLE: You know, all of this -- maybe this will help.

All of this will be retained for the record.

MR. HARRISON: That is helpful.

JUDGE BOGLE: If you're unhappy with the outcome of this case, you can argue that I erred in failing to accept these into evidence.

MR. HARRISON: I appreciate that.

I was thinking Your Honor might actually reconsider on FFF.

JUDGE BOGLE: No.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 53, Line 8 – Page 55, Line 22.)

109. On August 18, 2003, Chief Chambers hand carried to Bruce Sheaffer, the Comptroller of the National Park Service, a two-page document entitled "Response to National Park Service FY 2005 Policy Guidance." (See Appellant's Affidavit at Paragraph 66.) Copies were also hand carried to Director Fran Mainella and Deputy Director Donald Murphy with a handwritten note from Chief Chambers attached to each copy. (See Appellant's Affidavit at Paragraph 66.)

110. Although it was in draft form, this document explained to Mr. Sheaffer, Director Mainella, and Deputy Director Murphy the minimum number of recruit classes necessary to sustain the United States Park Police sworn strength through FY 2005. It would require one more recruit class than the number for which the United States Park Police

force was, at that time, expected to be funded. It also explained that it would not be possible in FY 2005 to staff the icon security posts with new officers without compromising community and officer safety. (See Appellant's Affidavit at Paragraph 67.)

111. On Thursday, August 21, 2003, Deputy Director Murphy met with Pamela Blyth and introduced her to a person who was to be her new supervisor, Michael Brown. At some point in the conversation, Deputy Director Murphy stepped out of his office, and Mr. Brown told Ms. Blyth that her assignment would be full time and that she would not be permitted to continue to work on United States Park Police projects. Ms. Blyth told Chief Chambers later that Mr. Brown informed her that Chief Chambers was no longer Ms. Blyth's "boss." (See Appellant's Affidavit at Paragraph 68.) (See also Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 88, Line 6, through Page 90, Line 5.)

112. Ms. Blyth returned from this meeting and reported to her supervisor, Chief Chambers, what she had learned. Ms. Blyth also told Chief Chambers that she had not yet been informed of a date or time that the assignment would begin. (See also Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 90, Lines 1 - 5.)

113. On August 21, 2003, Chief Chambers prepared a lengthy email to Deputy Director Murphy detailing the top 20 projects in which Ms. Blyth had significant involvement and responsibility. (See Agency's Response to Removal Appeal Exhibit "4 m 120 – 121.")

114. In the email referenced in Paragraph 113, Chief Chambers thanked Deputy Director Murphy for the willingness he had expressed to her to consider these assignments in deciding how many hours or days Ms. Blyth would devote each week to her "detail" within the National Park Service. Chief Chambers did not reference in this email when Ms. Blyth would begin this assignment since, as far as she knew, Deputy Director Murphy had not yet identified a date for it to begin. (See Agency's Response to Removal Appeal Exhibit "4 m 120 – 121.")

115. Deputy Director Murphy responded with an email back to Chief Chambers that simply said, "Thanks." (See Agency's Response to Removal Appeal Exhibit "4 m 122 - 124.".) Again, Deputy Director Murphy failed to identify a date that Ms. Blyth's assignment would begin, leaving Chief Chambers to believe that he would consider the many projects in which Ms. Blyth was involved before developing a schedule for Ms. Blyth.

116. On August 22, 2003, Ms. Blyth emailed Deputy Director Murphy and said that she would like to discuss some concerns and questions she had about her "detail." Deputy Director Murphy wrote back and advised Ms. Blyth that he was not in the office but that they could talk on the telephone Saturday, August 23, 2003. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 90, Lines 1 - 5.)

117. On Saturday, August 23, 2003, Ms. Blyth and Deputy Director Murphy spoke via telephone. Ms. Blyth learned for the first time that she was to report to Michael Brown's office on Monday, August 25, 2003, and that he was her new supervisor and that she would be working for him for up to 120 days. Ms. Blyth contacted Chief Chambers and

informed her of the direction she had received from Deputy Director Murphy. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 90, Line 8, through Page 91, Line 10.)

118. At no time did Deputy Director Murphy provide Chief Chambers an effective date for Ms. Blyth's "detail." (See also Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 87, Lines 3 – 6; Page 89, Lines 3 – 7; Page 98, Lines 2 – 4; Page 162, Lines 5 –9; and Page 163, Lines 10 - 13.)

119. At no time did Deputy Director Murphy direct or order Chief Chambers to transfer or detail Pamela Blyth. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 98, Lines 10 – 15; Page 148, Lines 4 – 8; and Page 187, Lines 16 - 21.)

120. When Chief Chambers learned of Deputy Director Murphy's decision, either she or Ms. Blyth alerted Officer Jeff Capps (United States Park Police FOP Labor Committee Chairman) that certain projects involving the FOP in which Ms. Blyth had been involved would not move forward as planned. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 91, Line 21, through Page 92, Line 2.)

121. Sometime after learning that information, Officer Capps, who had developed a positive working relationship with Deputy Secretary Griles, telephoned Deputy Secretary Griles on August 23, 2003, without prior notification to Chief Chambers, and left a voice mail advising Deputy Secretary Griles that things were awry within the United States Park Police regarding the relationship with the National Park Service and urging Deputy

Secretary Griles to call Chief Chambers. Officer Capps then telephoned Chief Chambers and alerted her that he had contacted Deputy Secretary Griles to have him call Chief Chambers regarding an urgent matter. (See Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Secretary J. Steven Griles, September 14, 2004, Page 6, Lines 6 – 19.)

122. Sometime after receiving this information from Officer Capps, Chief Chambers attempted to contact Assistant Secretary Manson, who is in the chain of command for the United States Park Police, in order to alert him that Officer Capps had reached out to Deputy Secretary Griles and to tell him what had occurred regarding Ms. Blyth's transfer. It was also Chief Chambers' intent to alert Assistant Secretary Manson of the potential outcomes of having Ms. Blyth pulled from the command staff at this critical time. (See Appellant's Affidavit at Paragraph 74.)

123. Assistant Secretary Manson was on travel and did not answer his cell phone. Chief Chambers left a message asking Assistant Secretary Manson to call her. Although Assistant Secretary Manson did not return the call for several days, he testified in sworn deposition and confirmed the message Chief Chambers left him and confirmed that he was on travel and had turned off his cellular telephone. (See Appellant's Hearing Exhibit "QQ," Deposition of Assistant Secretary Harold Craig Manson, August 20, 2004, Page 100, Line 21 – Page 102, Line 6.)

124. Aware and concerned that the detail of Ms. Blyth was due to start the following morning on August 25, 2003, and unable to reach Assistant Secretary Manson, Chief Chambers telephoned Deputy Secretary Griles herself with the intent of leaving him a brief message to explain why Officer Capps had called. Officer Capps had previously

alerted Chief Chambers that Deputy Secretary Griles was on travel and would not be back until much later Sunday night. (See Appellant's Affidavit at Paragraph 75.)

125. When Chief Chambers telephoned Deputy Secretary Griles, she expected to receive his voice mail and was surprised to get Deputy Secretary Griles himself. It is unclear to Chief Chambers whether the conversation continued at that moment or whether Deputy Secretary Griles called her back soon thereafter. In his sworn deposition and testimony, Deputy Secretary Griles also expresses uncertainty whether he initiated the telephone call to Chief Chambers. (See Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Secretary J. Steven Griles, September 14, 2004, Page 6, Line 16 – Page 7, Line 1.) (See also the Deposition of Deputy Secretary J. Steven Griles, August 24, 2004, Page 37, Line 21 – Page 38, Line 7 and Page 39, Lines 12 - 16.)

126. When Deputy Secretary Griles and Chief Chambers did talk, Deputy Secretary Griles began the conversation by acknowledging that Officer Capps had left an urgent message for him to call Chief Chambers He indicated he was concerned about this "detailing of Ms. Blyth" and asked Chief Chambers to explain what was going on. (See Appellant's Affidavit at Paragraph 76.)

127. Chief Chambers explained to Deputy Secretary Griles the circumstances surrounding Ms. Blyth's "detail" and appealed to him to overturn it. She reminded Deputy Secretary Griles of the staffing and budgetary challenges she and the United States Park Police were facing and the potential catastrophic impact they could have on the protection of the icon parks for which United States Park Police officers are responsible. (See Appellant's Affidavit at Paragraph 77.)

128. Chief Chambers explained her concern that these staffing and funding decisions had the potential to result in future problems that would discredit the Administration and the entire Interior Department. In fact, Chief Chambers suggested that Deputy Secretary Griles consider moving the United States Park Police out from under the National Park Service. She explained that, not only were there philosophical differences between the two entities regarding law enforcement, but that she also feared that, upon the Director and Deputy Director learning that he and Chief Chambers were talking, the relationship and ability to get the job done would worsen. (See Appellant's Affidavit at Paragraph 77.)

129. During the conversation, Chief Chambers informed Deputy Secretary Griles that she had appealed to Director Mainella in earlier conversations regarding Ms. Blyth's "detail" and that Director Mainella had made it clear that she was leaving the decision on how to handle Ms. Blyth's "detail" in Deputy Director Murphy's hands. (See Appellant's Affidavit at Paragraph 78.)

130. Chief Chambers also explained to Deputy Secretary Griles that, although Deputy Director Murphy had originally agreed to allow Ms. Blyth to work on her assignments with the United States Park Police while also participating in her assignment in his office, he had most recently told Ms. Blyth that she would be working fulltime for Michael Brown of the National Park Service Strategic Planning Office and that Ms. Blyth was to report Monday, August 25, 2003, to begin this assignment. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 196, Lines 2 - 6, through Page 197, Line 3 - 17.)

131. At no time did Deputy Secretary Griles suggest that Chief Chambers' call was inappropriate or that she should go back through any other member of her chain of command. To the contrary, when she expressed concerns of retaliation at the point when Deputy Director Murphy would learn of the conversation, Deputy Secretary Griles assured her that no such retaliation would ever occur. He told Chief Chambers that she should not fear retribution. He thanked her for making him aware of the situation. (See Appellant's Affidavit at Paragraph 78.)

132. Later that same evening or the following morning, Deputy Secretary Griles called Chief Chambers and reversed Ms. Blyth's transfer. He assured Chief Chambers that Assistant Secretary Manson would get involved in working to resolve these issues of public safety and security and protection of the icons raised by her. (See Appellant's Affidavit at Paragraph 79.)

133. During that phone call, Deputy Secretary Griles directed Chief Chambers to notify Ms. Blyth that she was to report to United States Park Police Headquarters Monday, August 25, and not to the location Deputy Director Murphy had directed her to report. He told Chief Chambers that he would ensure that Deputy Director Murphy and Director Mainella were notified of his (Deputy Secretary Griles') decision. (See Appellant's Affidavit at Paragraph 79.)

134. On Monday evening, August 25, just prior to midnight, Deputy Director Murphy sent an email to Chief Chambers. (See Agency's Response to Removal Appeal Exhibit "4 m 179.") In that email, Deputy Director Murphy acknowledged that he was aware that Chief Chambers had spoken with Deputy Secretary Griles and that Deputy Secretary Griles had overturned Deputy Director Murphy's decision to transfer Ms. Blyth.

135. In the email, Deputy Director Murphy referred to Chief Chambers' "intentions" as being "nefarious" and stated that her actions were "unacceptable" and "insubordinate," and that, since he (Deputy Director Murphy) was out of town at the time, the "insubordination [was] all the more egregious." (See Agency's Response to Removal Appeal Exhibit "4 m 179.")

136. The email further advised Chief Chambers that Deputy Director Murphy's "assistant" would be contacting Chief Chambers to set up a meeting with him and Director Mainella where Chief Chambers would be expected to "explain [her] actions" which he said he "deem[ed] totally inappropriate." (See Agency's Response to Removal Appeal Exhibit "4 m 179.")

137. Chief Chambers was never contacted by Deputy Director Murphy's assistant nor was Chief Chambers asked to appear before him and Director Mainella (or any other person) to explain her actions. (See Appellant's Affidavit at Paragraph 80.)

138. Once back in cell phone range on August 26, 2003, Assistant Secretary Manson called Chief Chambers and advised her that Deputy Secretary Griles had left a voice mail for him, as had she. He advised her that he would be informing Deputy Director Murphy, who was out of town, that the Blyth detail had been rescinded. (See Appellant's Affidavit at Paragraph 81.)

139. During the phone conversation with Assistant Secretary Manson, Chief Chambers alerted him to the e-mail Deputy Director Murphy had sent her criticizing her for contacting the Deputy Secretary and classifying her actions as "nefarious." In response, Assistant Secretary Manson commented to Chief Chambers that, "I told him not to do that. I will take care of Mr. Murphy." (See Appellant's Affidavit at Paragraph 81.)

140. Assistant Secretary Manson directed Chief Chambers to provide him with a copy of the email she described to him. Chief Chambers hand carried a copy of the email to Assistant Secretary Manson's office the following day.

141. On August 27, 2003, Director Mainella telephoned Chief Chambers via her secretary at approximately 3 p.m. Director Mainella asked Chief Chambers if she had spoken with Deputy Secretary Griles and whether she had put anything in writing to him. Chief Chambers confirmed to her that Deputy Secretary Griles and she had spoken and that nothing was in writing. Director Mainella told Chief Chambers that she (Director Mainella) and Deputy Director Murphy were on their way to meet with Assistant Secretary Manson at his request. (See Appellant's Affidavit at Paragraph 82.)

142. On Wednesday, August 28, 2003, the first in what became a series of meetings on the mission and budget of the United States Park Police was held with Deputy Assistant Secretary Larry Parkinson, Deputy Assistant Secretary Paul Hoffman, Deputy Director Donald Murphy, Chief Chambers and others. That first meeting focused entirely on the beat patrol structure of the Washington Metropolitan area. Discussions included clear dialogue regarding staffing shortages and stretched resources. (See Appellant's Affidavit at Paragraph 83.)

143. Later in that same day, August 28, 2003, Deputy Secretary Steve Griles held a meeting with Chief Chambers, Director Fran Mainella, Deputy Director Donald Murphy (who left after about five minutes), and Assistant Secretary Craig Manson. Prior to Chief Chambers being invited into the meeting, Deputy Secretary Griles met with these individuals and others about the issue of his reversing Ms. Blyth's transfer and about the United States Park Police budget shortages. (See Merit Systems Protection Board

Hearing Transcript, Testimony of Deputy Secretary J. Steven Griles, September 14, 2004, Page 10, Line 17 – Page 12, Line 12.)

144. Deputy Secretary Griles himself came out into the hallway after approximately one and one-half hours to invite Chief Chambers into the conference room where the meeting was being held. Before entering the room, however, Deputy Secretary Griles told Chief Chambers firmly, "Nothing bad is going to happen to you." She acknowledged in a manner that apparently made him believe that she thought he was referring to the meeting. He stopped her and told her that he was not referring to the meeting but, instead, was referring to any retaliation or retribution of any kind as a result of his intervening and reversing Ms. Blyth's transfer. Chief Chambers told him she appreciated that assurance. (See Appellant's Affidavit at Paragraph 85.)

145. Soon after Deputy Secretary Griles and Chief Chambers entered the conference room, Deputy Director Murphy told Deputy Secretary Griles that he had "a train to catch" and would have to leave. As Deputy Director Murphy was standing up, he looked at Deputy Secretary Griles and said, "And, no, I am not mad." (See Appellant's Affidavit at Paragraph 86.)

146. In the meeting that followed, the participants reviewed, among other things, the general issue of budgetary and staffing challenges the United States Park Police was facing. Chief Chambers shared with Deputy Secretary Griles, Director Mainella, and Assistant Secretary Manson that she believed that the icon parks were in danger due to limited resources and that, while she respected Director Mainella and Deputy Director Murphy, she had a greater obligation to the Secretary, the President of the United States,

and the American people to not stand silently by and watch something catastrophic occur. (See Appellant's Affidavit at Paragraph 87.)

147. On September 3, 2003, in response to a request Chief Chambers made through the chain of command to meet with Assistant Secretary Manson, he and she met to review budget and staffing challenges. He assured her that he would begin conducting monthly meetings with her and Director Mainella and that he would ask Director Mainella to meet with her on a regular basis. (See Appellant's Affidavit at Paragraph 88.)

148. No meetings were ever established with Assistant Secretary Manson, Director Mainella, and Chief Chambers; and the bi-weekly meetings that were to be established between Chief Chambers and Director Mainella only occurred on one occasion, October 6, 2003. (See Appellant's Affidavit at Paragraph 88.)

149. Among the exhibits included with the Agency's Prehearing Submission is a document dated September 3, 2004, purportedly prepared by Deputy Director Donald Murphy. (See Agency's Prehearing Submission Exhibit 3.) (See also Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald W. Murphy , September 8, 2004, Page 99, Line 11 – Page 105, Line 12.)

150. The date on the document included as Agency's Prehearing Submission Exhibit 3 matches the date of Chief Chambers' meeting with Assistant Secretary Craig Manson, as corroborated by an email she sent to Assistant Secretary Manson thanking him for taking the time to meet with her. (See Appellant's Affidavit at Paragraph 88.)

151. During the MSPB hearing, Counsel for Appellant attempted to enter the email to Assistant Secretary Manson described in Paragraph 150, marked as Appellant's Hearing

Exhibit “BBB,” into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: Okay. I will not accept that document. BBB.
>
> MR. HARRISON: Same exception on that.
>
> JUDGE BOGLE: Just the documentation that she met with Mr. Manson –
>
> MR. HARRISON: Now, this, Your Honor, is critically important, and I'll tell you why.
>
> There is Agency Hearing Exhibit number 3, I believe it is, that is a two-page document Mr. Murphy testified about at some length in this proceeding. It's dated the very same date as this memo, September 3rd. It's a document in which Mr. Murphy claimed he was talking to himself and sending documents to himself.
>
> Now, our position is that what he was doing when he said, "You might want to know this when you meet with Ms. Chambers" -- the "you" he was talking about was not himself but was Craig Manson, who met with Ms. Chambers on the very same day that that memo was taken.
>
> That memo was prepared to communicate with Mr. Manson, and Mr. Manson and Mr. Murphy were contemplating action against Ms. Chambers outside the chain of command, excluding Ms. Mainella, which is exactly what Mr. Murphy doesn't want to admit to in this proceeding, because he is saying that Ms. Chambers should be fired for going outside the chain of command.
>
> JUDGE BOGLE: That's a very convoluted argument based on, apparently, an e-mail that says "Thank you for meeting with me."
>
> I do not need that e-mail.
>
> MR. HARRISON: Your Honor, I just can't express my dissatisfaction on that ruling, because this is the key witness, Mr. Murphy, in this proceeding, as proposing official.
>
> His credibility was significantly put in issue by his even characterizing his own document as talking to himself when he used the third person at least 15 times, and this document explains why he is being dishonest about that. I think we're entitled –

JUDGE BOGLE: This document does not even mention Mr. Murphy.

It's an e-mail from the Appellant to Mr. Manson.

MR. HARRISON: That's precisely my point, Your Honor.

JUDGE BOGLE: No, we're not -- I'm not taking the document, doesn't mean anything to me --

MR. HARRISON: Well, I'm sorry to hear that, Your Honor, and I note my exception.

JUDGE BOGLE: -- which is why, you know, these documents should have been offered through your witnesses. I'm giving you this opportunity because you apparently did not realize that the attachments to the affidavit were not already in the record, but you didn't --

MR. HARRISON: That's right.

JUDGE BOGLE: If you thought they were in the record, you would -- and that they were relevant to your -- your witness testimony, you obviously would have referred to them during their testimony.

You did not do that.

MR. HARRISON: Your Honor --

JUDGE BOGLE: So, we'll go through these, but --

MR. HARRISON: I beg your pardon. I did not know that Mr. Murphy was going to say on the stand that he was talking to himself --

JUDGE BOGLE: Okay.

MR. HARRISON: -- when this memo was clearly written to a third person.

JUDGE BOGLE: Well, this is not an opportunity to rebut everything you heard in the witness testimony with documents. That's not what this is about.

MR. HARRISON: Your Honor –

JUDGE BOGLE: This is only an opportunity because you apparently did not realize the stay and its attachments were not in this regard.

MR. HARRISON: Well, I did not.

JUDGE BOGLE: Taking us to CCC, another e-mail.

MR. HARRISON: Your Honor, I do not comprehend your ruling, and I note my exception.

JUDGE BOGLE: Noted.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 49, Line 5 – Page 52, Line 7.)

152. During the National Football League kick-off events on the National Mall on Thursday, September 4, 2003, Secretary Norton had a member of her staff seek out Chief Chambers and invite her to her (Secretary Norton's) private VIP tent with Deputy Secretary Griles and others. While there, Chief Chambers was approached by Deputy Secretary Griles. He asked her how things were "going" since his meeting with her, Deputy Director Murphy, Director Mainella, and Assistant Secretary Manson the previous week. (See Appellant's Affidavit at Paragraphs 89 – 91.)

153. In response to Deputy Secretary Griles' inquiry, Chief Chambers described the atmosphere to Deputy Secretary Griles as being "tense" and, yet, positive in that it had forced them to engage in meaningful conversation about the status of the United States Park Police budget and the challenges Chief Chambers and the United States Park Police were facing. Once again, in a <u>firm</u> voice, Deputy Secretary Griles assured Chief Chambers that she had done "nothing wrong" and that he would ensure that "nothing bad" happened to her. He reiterated that he had to rely on key employees, such as Chief Chambers, to be candid with him and let him know what was going on, and he invited her once again to let him know if things started "going badly." Chief Chambers thanked him

for his leadership and his assurance of protection against any possible retaliation. (See Appellant's Affidavit at Paragraph 91.)

154. On September 8, 2003, Assistant Secretary Manson met with Chief Chambers a second time to get a sense of how things were going with regard to the events that had occurred a few weeks earlier. Assistant Secretary Manson again committed to meet with Chief Chambers and Director Mainella on a monthly basis. (See Appellant's Affidavit at Paragraph 92.)

155. On September 12, 2003, Mr. Terry Carlstrom, the Regional Director for the National Capital Region of the National Park Service, wrote a memo to Chief Chambers expressing his concern over anticipated cuts in service to which she had alerted him with regard to the upcoming fiscal year, Fiscal Year 2004. (See Appellant's Affidavit at Paragraph 97.)

156. In this memorandum, Mr. Carlstrom stated that "the proposed elimination of these police services will have an alarming impact on our park programs." His memo indicates that copies were sent to National Park Service Comptroller Bruce Sheaffer and National Park Service Director Fran Mainella. (See Appellant's Affidavit at Paragraph 97.)

157. On September 16, 2003, Deputy Director Murphy emailed Chief Chambers and informed her that "NAPA" consultants would be returning to conduct a follow-up assessment of the United States Park Police in the near future and that he needed an update as to Chief Chambers' progress prior to an upcoming meeting he, Chief Chambers, and others would be attending with members of the NAPA team. (See Appellant's Affidavit at Paragraph 99.)

158. Also on September 16, 2003, Chief Chambers learned via an email from Dottie Marshall that the previous NAPA update that she assisted the United States Park Police in preparing was changed by the National Park Service Comptroller's office prior to the document being transmitted to Congress. (See Appellant's Affidavit at Paragraph 100.) The email states that Ms. Marshall "was never able to get a final copy of the document." Chief Chambers was also unable to obtain a final copy of the document nor was she advised of the changes made by the Comptroller's office to the original document.

159. On September 29, 2003, Chief Chambers attended a meeting with members of NAPA's consulting team who were clearly pleased upon learning from her of the progress she had made toward the implementation of 20 recommendations they had made regarding the United States Park Police in 2001. (See Agency's Response to Removal Appeal Exhibit "4 m 12" and "4 m 13.")

160. In that meeting, in the presence of Director Mainella and Deputy Director Murphy, the NAPA team leader suggested strongly that Chief Chambers contact Ms. Debbie Weatherly, a Congressional staff member of the House Interior Appropriations Committee, to let her know how successful Chief Chambers had been up to that point in time. Neither Director Mainella nor Deputy Director Murphy reacted in any manner to that comment. The NAPA team leader told Chief Chambers that Ms. Weatherly was the person who had asked the NAPA team to return. (See Appellant's Affidavit at Paragraph 104.)

161. On September 30, 2003, both a meeting to prepare for an OMB meeting and the OMB meeting itself were held regarding the FY 2005 budget. Both of these meetings included an overview of FY 2004 shortfalls that were projected. (See Appellant's

Affidavit at Paragraph 105.) Deputy Director Murphy and Comptroller Bruce Sheaffer were among the attendees at both meetings, as was Chief Chambers.

162. On October 10, 2003, Chief Chambers attended the second in a series of mission and budget meetings with Deputy Assistant Secretary Larry Parkinson, Deputy Assistant Secretary Paul Hoffman, Deputy Director Donald Murphy, and others. (See Appellant's Affidavit at Paragraph 109.)

163. On October 17, 2003, the third in the series of United States Park Police mission / budget meetings with Deputy Assistant Secretary Larry Parkinson and others was held, and on October 31, 2003, the fourth meeting was held. Each of these meetings addressed the budget and staffing challenges in meeting the obligations for which each of the components of the United States Park Police was responsible. (See Appellant's Affidavit at Paragraph 111.)

164. None of the meetings described in Paragraph 164 was held during the month of November 2003. The next meeting, and the last meeting Chief Chambers was permitted to attend, was held on December 1, 2003 as described in Paragraphs 231 and 232. (See Appellant's Affidavit at Paragraph 111.)

165. On October 23, 2003, Chief Chambers sent an email to Director Fran Mainella and Deputy Director Donald Murphy alerting them to an incident that had occurred the previous day in which an unknown person sprayed a blast of OC spray (pepper spray) on Deputy Chief Pettiford's office door. (See Appellant's Hearing Exhibit "JJ.") Deputy Assistant Secretary Larry Parkinson, Deputy Assistant Secretary Paul Hoffman, Assistant Secretary Craig Manson, and Inspector General Earl Devaney were copied on this email.

166. The email described in Paragraph 165 also detailed a series of incidents perpetrated against Chief Chambers and members of her executive team during 2002 and 2003, including "a series of office break-ins, computer tamperings, refrigerator tampering, nails under their vehicle tires, and used condoms on and around their vehicles." (See Appellant's Hearing Exhibit "JJ.")

167. These incidents were described by Chief Chambers and Assistant Chief Benjamin J. Holmes (retired) during their depositions. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa C. Chambers, August 18, 2004, Page 150, Line 17, - Page 165, Line 7.") (See also Appellant's Hearing Exhibit "OO," Dposition of Assistant Chief Benjamin J. Holmes [retired], August 19, 2004, Page 64, Line 10 through Page 68, Line 12; and Page 102, Line 1, through Page 111, Line 15.)

168. On October 27, 2003, Mr. Larry Poe, a member of the National Park Service Budget Office working for National Park Service Comptroller Bruce Sheaffer, sent Chief Chambers an email in which he attached a Word document and spreadsheets "analyzing the FY 2004 funding situation for the USPP." Mr. Poe asked for feedback from Chief Chambers and the United States Park Police Budget Officer, Ms. Shelly Thomas. (See Appellant's Affidavit at Paragraph 112.)

169. This analysis produced by Larry Poe concluded that, if the United States Park Police returned to "FY 2001 levels for travel, equipment, supplies, and contracts," they would be within budget in Fiscal Year 2004 and have nearly $1 Million to cover these expenses. Chief Chambers knew based on the work she had personally done and the close scrutiny she had given to the budget documents that it was unrealistic that the United States Park Police could return to a Fiscal Year 2001 spending level in most areas.

Chief Chambers also recognized that there were a number of assumptions made, based upon the explanations and data Mr. Poe provided in the package, that were inaccurate and that would distort the results. (See Appellant's Affidavit at Paragraph 112.)

170. On October 30, 2003, Ms. Dottie Marshall emailed Chief Chambers after giving a "quick look" to the analysis provided by Mr. Poe. She said, in part, that she was "somewhat uncomfortable using an average salary" as Mr. Poe had done, and she stated that "the equipment costs are way below even a minimum replacement level." (See Appellant's Affidavit at Paragraph 115.)

171. On November 3, 2003, Chief Chambers sent an email to Bruce Sheaffer and copied, among others, Director Fran Mainella, Deputy Director Donald Murphy, Deputy Assistant Secretary Paul Hoffman, and Deputy Assistant Secretary Larry Parkinson. Chief Chambers alerted Mr. Sheaffer and others in that email that a document prepared by a member of his staff regarding the funding for the United States Park Police was based on "several faulty assumptions" which would "greatly skew the outcome." (See Appellant's Affidavit at Paragraph 121.)

172. In that same email, Chief Chambers mentioned the averaging of salaries and the assumption that "Code Yellow" overtime in FY 2003 would be sufficient for the anticipated cost of overtime in FY 2004 were incorrect. A significant paragraph in that email states:

> I do not know whether a specific request to your office prompted the analysis that has been provided. These documents were, however, the topic of discussion during a regularly scheduled briefing last week as part of a series of briefings with Deputy Assistant Secretaries Hoffman and Parkinson and Mr. Murphy during which the overall mission of the United States Park Police, the specific functions of each component of the USPP, and the dollars necessary to maintain each function are being reviewed. I would sincerely hope that the documents prepared by your office have not

> been submitted in any formal fashion since it would appear to the reader, based upon the headings on each page, that they were prepared by the United States Park Police. Further, the assumptions made could lead one to erroneous conclusions.

(See Appellant's Affidavit at Paragraph 122.)

173. Chief Chambers concluded that same email by saying, "We look forward to discussing these analyses further with you and your staff as we delve further into the figures and assumptions presented by your team." (See Appellant's Affidavit at Paragraph 123.)

174. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "KKK," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> MR. HARRISON: Did Your Honor deny GGG?
>
> JUDGE BOGLE: Yes, I did. III is another e-mail, not relevant. JJJ is another e-mail, not relevant. KKK, another e-mail.
>
> MR. HARRISON: I just object to not being able to make a proffer, Your Honor.
>
> JUDGE BOGLE: Well, we're taking more time than should be necessary with this.
>
> MR. HARRISON: Your Honor, this was a totally unanticipated demand that I believe was due to error of Your Honor in not considering these part of the record in the first place.
>
> I don't believe I'm properly criticized for taking two minutes per document.
>
> JUDGE BOGLE: Did you ever file these in connection with either one of these cases that I'm hearing today? You did not.
>
> MR. HARRISON: Yes. I did in the order to show cause.

JUDGE BOGLE: You made an assumption that the stay file was part of this file. That was a bad assumption. There was no basis for making it.

MR. HARRISON: Pardon me, Your Honor. I --

JUDGE BOGLE: I'm attempting to let you remedy that.

MR. HARRISON: I don't see that, Your Honor, actually, the way this is playing out. I see it as just the opposite.

JUDGE BOGLE: Okay. I don't -- you know, unless you can pick -- some of this that's left -- we've got a lot of like two-line e-mails here.

Here's the -- I'm up to NNN.

MR. HARRISON: Well, if I can begin in a moment, I'll try to respond to you.

JUDGE BOGLE: This is -- this is all -- this is in the record somewhere.

This is Ms. Norton's response to the --

MR. HARRISON: Which one is Your Honor --

JUDGE BOGLE: -- letter that Capps wrote.

MR. HARRISON: Which document is Your Honor on at the moment?

JUDGE BOGLE: It is NNN, and it's already in the record somewhere.

OOO is back to an e-mail.

MR. HARRISON: Your Honor, I --

JUDGE BOGLE: PPP, another e-mail.

MR. HARRISON: I need to make a proffer on LLL.

JUDGE BOGLE: All right. Go ahead.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 56, Line 11 – Page 58, Line 8.)

175. Chief Chambers received no response to the email described in Paragraphs 172, 173, and 174; and, within weeks (November 26, 2003), she learned that the OMB passback was returned to the Department of the Interior and ultimately to the United States Park Police with $5 Million cut from the United States Park Police budget compared to that which was proposed by the Department of the Interior. (See Appellant's Affidavit at Paragraph 124.)

176. On November 3, 2003, Deputy Director Murphy's secretary, Ms. Janice Brooks, contacted Chief Chambers and, on behalf of Deputy Director Murphy, asked Chief Chambers to provide an account number with regard to where the NAPA study should be charged. (See Agency's Response to Removal Appeal Exhibit "4 m 3" and its duplicate "4 m 5," top email from Chief Chambers to Janice Brooks responding to an earlier request by Ms. Brooks.)

177. Upon receiving this request, Chief Chambers reached out to her budget officer, Ms. Shelly Thomas, in an effort to learn which organization pays for something like this when Congress decides to have a study conducted. Ms. Thomas was not immediately available to speak with Chief Chambers. Chief Chambers sent an email to Ms. Thomas to obtain the account number. (See Agency's Response to Removal Appeal Exhibit "4 m 3 – 4" and its duplicate, Exhibit "4 m 5 - 6.")

178. After an hour or two had passed during which Chief Chambers did not hear back from Ms. Thomas and, in an effort to get an answer, Chief Chambers telephoned Ms. Debbie Weatherly, a staff member of the House Interior Appropriations Committee, as Chief Chambers had done in the past (and as she previously had been encouraged to do by Director Fran Mainella and Deputy Director Donald Murphy). Chief Chambers

intended to ask Ms. Weatherly for clarification regarding who was to pay for the upcoming NAPA report. Chief Chambers left a brief telephone message for Ms. Weatherly since she, too, was unavailable. (See Appellant's Affidavit at Paragraph 126 [referenced paragraph in Appellant's Affidavit indicates the incorrect date of November 5, 2003, for this telephone call, which actually occurred on November 3, 2003.])

179. Prior to Ms. Weatherly returning Chief Chambers' call, Ms. Thomas spoke with Chief Chambers and also responded to her email. (See Agency's Response to Removal Appeal Exhibit "4 m 3" and its duplicate Exhibit "4 m 5.") Ms. Thomas explained in the telephone call to Chief Chambers that the United States Park Police would, in fact, have to pay for the NAPA study, and she provided Chief Chambers an Account Number.

180. In turn, Chief Chambers forwarded Ms. Thomas' email with the account number to Ms. Brooks and copied Deputy Director Murphy on the email (See Agency's Response to Removal Appeal Exhibit "4 m 3" and its duplicate Exhibit "4 m 5.") This was all accomplished on November 3, 2003, the same day Chief Chambers was asked for this information by Deputy Director Murphy through Ms. Brooks.

181. When Ms. Weatherly returned Chief Chambers' call, they had a pleasant conversation. Chief Chambers first explained to Ms. Weatherly why she had originally called and told her that, in the meantime, she (Chief Chambers) had received an answer to her question. (See Chief Chambers' notes to file, Agency's Response to Removal Appeal Exhibit "4 m 7 – 8" and its duplicate Exhibit "4 m 14 – 15.")

182. Ms. Weatherly then asked Chief Chambers "What's going on over there?" and inquired as to the progress (or what Ms. Weatherly believed was a <u>lack</u> of progress) regarding the NAPA recommendations of 2001. Chief Chambers provided Ms.

Weatherly with a general overview of the progress that had been made toward the implementation of the NAPA goals. (See Chief Chambers' notes to file, Agency's Response to Removal Appeal Exhibit "4 m 7 – 8" and its duplicate Exhibit "4 m 14 – 15.")

183. Ms. Weatherly seemed unaware and generally surprised by this information and even shared with Chief Chambers a story about a Federal employee who "bucked" a Congressional mandate similar to the NAPA study and that, according to Ms. Weatherly, Congressman Regula had this employee fired. Ms. Weatherly and Chief Chambers agreed to meet informally once each month to share insights and information. (See Chief Chambers' notes to file, Agency's Response to Removal Appeal Exhibit "4 m 7 – 8" and its duplicate Exhibit "4 m 14 – 15.")

184. On November 6, 2003, Chief Chambers was summoned to Deputy Director Murphy's office with no explanation as to the topic. He asked if she had called Debbie Weatherly and, upon Chief Chambers' confirmation, told her that he found it "highly inappropriate" and asked for a detailed explanation as to the content of the conversation. After explaining to Deputy Director Murphy the substance of her conversation with Ms. Weatherly, Deputy Director Murphy simply left his office to go to another meeting without reacting to what Chief Chambers had told him and without providing any direction as to his expectations in the future. (See Appellant's Affidavit at Paragraph 127; See also Agency's Response to Removal Appeal Exhibit "4 l 7," Appellant's written reply to the notice of proposed removal submitted to Deputy Assistant Secretary Paul Hoffman January 9, 2004, Page 7, Paragraph 4.)

185. Deputy Director Murphy did not indicate in any manner that he was dissatisfied with Chief Chambers' explanation nor did he indicate that he intended to take any further action regarding this incident. Chief Chambers returned to her office and wrote an email "to file" detailing her conversation with Ms. Weatherly and her conversation with Deputy Director Murphy regarding this matter. (See Chief Chambers' notes to file, Agency's Response to Removal Appeal Exhibit "4 m 7 – 8" and its duplicate Exhibit "4 m 14 – 15.")

186. Just prior to Deputy Director Murphy walking out of his office, he told Chief Chambers that Associate Solicitor Hugo Teufel needed to talk with her. She acknowledged this and assured him that she would contact Mr. Teufel immediately. Chief Chambers attempted to contact Mr. Teufel within the next two minutes, but he was not available. Chief Chambers left a voice message for Mr. Teufel. (See Appellant's Affidavit at Paragraph 128.)

187. On the afternoon of November 6, 2003, Chief Chambers emailed Deputy Director Murphy and informed him that, per his direction, she had reached out to Associate Solicitor Teufel via his private line and had left a message for him to call her. (See Appellant's Affidavit at Paragraph 129.) This direction to talk with Mr. Teufel is the only direction Chief Chambers ever received from Deputy Director Murphy during the time they worked together wherein Deputy Director Murphy directed her to talk with or meet with a member of the Solicitor's Office.

188. During the MSPB hearing, Counsel for Appellant attempted to enter the email described in Paragraph 187 into evidence but was denied the opportunity to even make a proffer by the Administrative Law Judge regarding this item, which had been marked as

Appellant's Exhibit "MMM." (See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 56, Line 11 – Page 58, Line 8.)

189. At some point after receiving her message, Mr. Teufel contacted Chief Chambers and asked for an opportunity to meet with her on a number of topics. Chief Chambers immediately accommodated that request by finding time on her schedule to meet with Mr. Teufel. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 224, Line 14, through Page 225, Line 20.)

190. On November 7, 2003, Chief Chambers met with Mr. Teufel who was accompanied by Randy Myers of his staff and whom he supervised. Among the topics discussed was a draft agreement from the Organization of American States which Chief Chambers' staff had, at her request, sent to Mr. Myers for his review. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 224, Line 14, through Page 225, Line 20.)

191. Chief Chambers told Mr. Teufel that she had been surprised to see Mr. Myers characterize in a written document a meeting she had with members of the Organization of American States as a "complaint" and explained to Mr. Teufel the tenor of the meeting, which was a "meet and greet" and in which this document had been presented to Chief Chambers. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 224, Line 14, through Page 225, Line 20.)

192. Chief Chambers again asked Mr. Myers to review the document and work with the staff of the United States Park Police Planning Section on this matter. Following this meeting with Mr. Teufel and Mr. Myers on November 7, 2003, Chief Chambers considered this matter closed and received no further request during that meeting or at

any time thereafter from either Mr. Teufel or Mr. Myers (nor from Deputy Director Murphy) for additional meetings regarding the Organization of American States. (See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 224, Line 14, through Page 225, Line 20.)

193. During the MSPB hearing, Counsel for Appellant attempted to recall Appellant to have her testify as to this meeting after the Agency's witness, Randall Myers, denied that he had ever met with Chief Chambers about this matter. The Administrative Law Judge denied Counsel for the Appellant the opportunity to recall the Appellant as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: Now, you mentioned there were two matters.
>
> What's the other matter going to be?
>
> MR. HARRISON: The other matter, Your Honor, is that, at least as I understand the progress of this case, which involves an appeal -- two appeals -- one is an IRA appeal and one is a Chapter 75 appeal -- there are two points of testimony from Ms. Chambers that I would like to offer in rebuttal on the IRA appeal only. It would take about 10 minutes.
>
> JUDGE BOGLE: And what is the reason she was not asked that when she was called before?
>
> MR. HARRISON: The reason is, Your Honor, that it responds to Mr. Schaefer's testimony and Mr. Myers' testimony, which were the Agency's rebuttal witnesses.
>
> JUDGE BOGLE: Well, they were, but you knew long in advance that they were going to be called as rebuttal witnesses.
>
> Frankly, I -- I generally do not allow a witness to be recalled unless there's some reason you could not have reasonably expected that the matter you want to take testimony on would have come up --
>
> MR. HARRISON: I think that's fair, Your Honor.

JUDGE BOGLE: -- and after working with this case over the last many weeks, I can't imagine there's anything that you could not have reasonably anticipated --

MR. HARRISON: Well, Your Honor --

JUDGE BOGLE: -- would come up.

MR. HARRISON: I reasonably anticipated quite a bit, but there are two points I have in mind which I would offer as precisely the points for Ms. Chambers' testimony.

One is Mr. Schaefer said something unanticipated, which was that he could not remember of a $12 million shortfall for the U.S. Park Police for fiscal year '04. Ms. Chambers can identify documents, which are part of our offerings, which show that Mr. Schaefer was directly informed and actually participated in preparing a response to that shortfall, which shows his testimony was not correct, at best.

The second point is that Mr. Myers testified that he -- as I recall his testimony -- that he had never met with Ms. Chambers regarding the Organization of American States matter, and Ms. Chambers -- and that is incorrect and was not anticipated.

He did meet at some point in time with Ms. Chambers on that matter, and it was prior to Mr. Murphy raising the charge against Ms. Chambers on that issue.

Those are two points that may take maybe five minutes, but those are why I'm calling her.

JUDGE BOGLE: Well, with respect to the first one, if there's a document that contradicts a witness' testimony, I would expect you to point that out in your closing comments.

MR. HARRISON: I can do that.

JUDGE BOGLE: And with respect to the meetings, I think the record will -- will show what -- what occurred and what did not occur, and I will assure you I will review all of it, but I don't believe we need to recall Ms. Chambers to go back over it.

MR. HARRISON: Your Honor, could I have just one second to confer with my client as to whether the record reflects her meeting with Mr. Myers that I was hoping to offer her testimony for?

It may, but if it doesn't, I would like to take exception to your ruling.

JUDGE BOGLE: All right. Go ahead.

MR. HARRISON: It appears, Your Honor, that Ms. Chambers' affidavit does not address her meeting with Mr. Myers, and it may not be elsewhere in the record. On that one point, I would take exception to Your Honor's ruling. I will live with your ruling on the -- the documents regarding the shortfall, because I believe those documents do establish it.

JUDGE BOGLE: Okay.

So, with that, except for the exhibits that you have offered, we are ready for closing comments, are we not?

MR. HARRISON: I believe so.

JUDGE BOGLE: All right.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 21, Line 23 – Page 24, Line 25.)

194. On November 18, 2003, Chief Chambers completed an assignment given her by a member of Director Fran Mainella's staff, Mr. Leonard Stowe. (See Agency's Response to Removal Appeal Exhibit "4 m 51.") That assignment asked Chief Chambers to prepare a response for Director Mainella's signature to a letter United States Park Police FOP Labor Committee Chairman Jeff Capps had written to DOI Secretary Gale Norton on October 22, 2003, about his concerns regarding staffing at the icon parks. (See Agency's Response to Removal Appeal Exhibit "4 m 52 - 54.")

195. In response to the assignment described in Paragraph 194, Chief Chambers prepared a draft letter (See Agency's Response to Removal Appeal Exhibit "4 m 56 – 57") and attached it to an email on which Director Mainella and Deputy Director Murphy were copied. (See Agency's Response to Removal Appeal Exhibit "4 m 55.") The draft

letter prepared by Chief Chambers and shared with Director Mainella and Deputy Director Murphy acknowledged, among other things, the following:

> Recognizing the drain to personnel the icon staffing mandates have imposed, Chief Chambers has taken steps to expand the existing contract for security guards and to expand the number of guards employed by the United States Park Police. These guards will take the place of some of the officers working at these posts, allowing those officers to return to other patrol functions. Some of those officers could potentially be used in a special enforcement component as you have described in your letter or in an undercover capacity.
>
> An ongoing review is currently being conducted at the direction of the Assistant Secretary for Fish and Wildlife and Parks, Judge Craig Manson, in order to better understand the role and funding challenges of the United States Park Police.

196. Chief Chambers received no feedback from either Director Mainella or Deputy Director Murphy regarding the draft response she had prepared; however, from the member of Director Mainella's staff who reviewed the letter, Chief Chambers received the following feedback: "The draft is very good . . . The letter will be taken over to the Director for signature by COB today (11/19/03). Thank you very much for all of your help!" (See Agency's Response to Removal Appeal Exhibit "4 m 55.")

197. Officer Capps told Chief Chambers as recently as August 2004 that he never received this or any written response to his letter to Secretary Norton. (See Appellant's Affidavit at Paragraph 140.)

198. On Thursday, November 20, 2003, Chief Chambers was interviewed by a reporter from The Washington Post regarding information he had been provided by the Chairman of the United States Park Police FOP Labor Committee, Officer Jeff Capps. The reporter asked Chief Chambers to react and respond to various data he had with regard to United States Park Police staffing and budget. (See Appellant's Affidavit at Paragraph 142.)

199. The information the reporter had, which was largely unknown up to that time by the general public, dealt with issues of staffing and community and motorist safety. Impacting these issues was, of course, the matter of the United States Park Police budget, of which the Washington Post reporter had already been provided a great deal of detail by the United States Park Police FOP Labor Committee Chairman. (See Appellant's Affidavit at Paragraph 143.)

200. Chief Chambers' responses to the reporter were candid and, yet, supportive of the National Park Service leadership and the Administration. During the interview, given the lack of success in remedying the situation through internal efforts, Chief Chambers felt it was important to inform the public through the media that there were public safety implications and consequences of the budget and staffing limitations facing the United States Park Police. (See Appellant's Affidavit at Paragraph 143.)

201. Immediately upon concluding the interview, Chief Chambers telephoned Deputy Director Murphy and notified him of the detailed information the reporter had and the type of questions she had been asked. (See Appellant's Affidavit at Paragraph 144.)

202. During this telephone conversation, Deputy Director Murphy asked Chief Chambers to notify Deputy Assistant Secretary Larry Parkinson and told her he would notify Director Fran Mainella. Chief Chambers notified Deputy Assistant Secretary Parkinson via email, copying Deputy Assistant Secretary Paul Hoffman, Director Mainella, and Deputy Director Murphy. (See Agency's Response to Removal Appeal Exhibit "4 m 17" and its duplicate, Exhibit "4 m 72.")

203. Deputy Director Murphy also asked that Chief Chambers have the United States Park Police Press Officer, Sergeant Scott Fear, notify Lisa Harrison (National Park

Service Communications Director), David Barna (National Park Service Press Officer) and John Wright (DOI Press Officer) about the interview that had just taken place with The Washington Post. This, too, was accomplished via email. (See Agency's Response to Removal Appeal Exhibit "4 m 75.")

204. When Chief Chambers described the interview to Deputy Director Murphy during this telephone conversation, Deputy Director Murphy characterized the interview as "no big deal" and stated that National Park Service Ranger FOP representatives had recently done the same thing as the United States Park Police FOP Chairman had done. (See Appellant's Affidavit at Paragraph 144.)

205. Deputy Director Murphy at no time asked for any additional information regarding this interview nor did he send any written communication to Chief Chambers asking for additional information regarding this matter. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 153, Line 25 – Page 154, Line 7.)

206. On November 21, 2003, National Park Service Press Officer, David Barna, emailed Deputy Director Donald Murphy and others informing them that the United States Park Police Fraternal Order of Police had contacted the Washington Post "about funding short falls" and that Chief Chambers had been interviewed by the Post the previous day. (See Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Director Donald W. Murphy, September 8, 2004, Page 141, Line 21 – Page 142, Line 24.)

207. Mr. Barna also indicated in this email that either Director Fran Mainella or Deputy Director Murphy would have an opportunity to be interviewed by the Post

reporter. Mr. Barna recommended, however, that, since Chief Chambers had already been interviewed, that neither Director Mainella nor Deputy Director Murphy should agree to an interview. (See Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Director Donald W. Murphy, September 8, 2004, Page 141, Line 21 – Page 142, Line 24.)

208. In his testimony during the Merit Systems Protection Board hearing, Deputy Director Donald Murphy identified this email and confirmed that he had been notified that the Fraternal Order of Police "had spoken with the Post reporter" and that he "and other officials of the Park Service had an opportunity to be interviewed by The Washington Post, had [they] chosen to do so, regarding that same article before it came out." (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald W. Murphy, September 8, 2004, Page 141, Line 21 – Page 142, Line 24.)

209. On Monday, November 24, 2003, Chief Chambers received a telephone call from Mr. John Wright, the press officer for Secretary Norton. He asked her about the interview with The Washington Post and about the type of questions she was asked, the type of answers she provided, and the extent of the information with which the reporter was armed. After hearing from Chief Chambers, Mr. Wright informed her that she was to remain the sole contact and spokesperson for the Department of the Interior on this matter. (See Appellant's Affidavit at Paragraph 147.)

210. On Tuesday, November 25, 2003, while attending an unrelated event with Director Mainella, Director Mainella asked Chief Chambers if she had recently been interviewed by The Washington Post. Chief Chambers confirmed that she had and

provided Director Mainella a brief summary of what occurred. (See Appellant's Affidavit at Paragraph 148.)

211. During that same conversation, Director Mainella reminded Chief Chambers that she (Director Mainella) would have preferred to have learned about the interview immediately after it occurred. Chief Chambers explained to Director Mainella that she had anticipated that Director Mainella would want to know immediately and that, as a result, she had notified Deputy Director Murphy immediately who said he would notify Director Mainella himself. (See Appellant's Affidavit at Paragraph 148.)

212. Chief Chambers told Director Mainella about the subsequent telephone call from John Wright. Director Mainella asked if Chief Chambers was "careful" with what she said to the Post. Chief Chambers assured her that she had been. (See Appellant's Affidavit at Paragraph 148.)

213. On Wednesday, November 26, 2003, a scheduled day off for Chief Chambers, a nationwide conference call was conducted within the National Park Service that included Director Mainella, both deputy directors, all regional directors and their budget officers, all associate directors, the United States Park Police Assistant Chief of Police (the #2 position in the organization), and the United States Park Police Budget Officer. The conference call was in reference to OMB's FY 2005 passback. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 m.")

214. During that conference call, according to Assistant Chief Benjamin J. Holmes (now retired) and Budget Officer Shelly Thomas, in response to a Regional Director's concern over limited funding for the United States Park Police, Deputy Director Murphy went "into a tirade" blaming Chief Chambers for the United States Park Police not having

sufficient funds. Deputy Director Murphy publicly accused Chief Chambers of never responding when asked about budget matters nor cooperating in the budget process. (See Appellant's Affidavit at Paragraph 150.) (See also Appellant's Hearing Exhibit "OO," deposition of Assistant Chief Benjamin J. Holmes [retired], August 19, 2004, Page 14, Line 2 through Page 20, Line 4; and Page 71, Line 12, through Page 80, Line 11.)

215. None of these concerns had ever been conveyed to Chief Chambers and, frankly, are simply untrue. (See Appellant's Affidavit at Paragraph 150.)

216. This incident was document by Assistant Chief Benjamin J. Holmes in two emails he forwarded to Chief Chambers on November 27, 2004. (See Agency's Response to Removal Appeal Exhibit "4 m 73 – 74.") Key parts of the first email include the following:

> Mr. Murphy then went into what I consider a tirade about the fact that this situation came about because early on in the process, the Chief did not cooperate in providing information to them and some other things along this line which I can't remember verbatim. However, it was very clear that in responding to Terry's concerns, Mr. Murphy was laying the blame for USPP only getting $3 million squarely at your feet. Neither the Director nor Bruce said anything to confirm or deny the validity of Mr. Murphy's statements and they certainly did not come to your defense.
>
> When I spoke with Mr. Parkinson about Mr. Murphy's comments, he was shocked, first that he would say such a thing since he remembers that when the 05 budget was originally being worked up, National Park Service has done the USPP portion without any input from the Force (by the way, he stated that what they had proposed then was $3 million – Hmmm); and second that Mr. Murphy would make such statements in the forum that he did. I did advise him that they (either the Director or Bruce [Sheaffer, the NPS Comptroller]) stated that regarding law enforcement (NPS and USPP) matters in the passback they would be looking to him for guidance. He thanked me for the heads up.

217. Also on November 26, 2003, Deputy Assistant Secretary Larry Parkinson telephoned Chief Chambers, told her what the United States Park Police passback was for

Fiscal Year 2005, and read her the relevant language. He also asked Chief Chambers if Assistant Chief Holmes had told her what had occurred during the conference call regarding Deputy Director Murphy. (See Appellant's Affidavit at Paragraph 151.)

218. On Friday, November 28, 2003, at 9:38 a.m., in response to Chief Chambers' email to him of November 27, 2003, Deputy Assistant Secretary Larry Parkinson sent Chief Chambers an email in which he typed the language that appeared in the FY 2005 passback as it pertained to the United States Park Police. (See Appellant's Affidavit at Paragraph 153 and 154.)

219. In that same email, Deputy Assistant Secretary Parkinson wrote, "I'm in the office today – trying to figure out what the Department wants to appeal. I've gotten no feedback from National Park Service . . ." (See Appellant's Affidavit at Paragraph 155.)

220. Based upon that information, Chief Chambers' contacted Director Mainella soon after receiving the email on November 28, 2003, to ask what, if anything, Director Mainella needed from her (Chief Chambers) regarding the OMB passback, since Chief Chambers had been informed by Deputy Assistant Secretary Parkinson that morning that bureau passback appeals were due that afternoon. (See Appellant's Affidavit at Paragraph 156.)

221. In that phone conversation, Director Mainella indicated she had not decided whether to appeal the law enforcement budget for the National Park Service and she asked Chief Chambers to put together her thoughts and fax them to her home. Director Mainella mentioned that she would be seeing Assistant Secretary Lynn Scarlett, (Policy, Management, and Budget) over the weekend and would possibly discuss it with her. (See Appellant's Affidavit at Paragraph 158.)

222. While Director Mainella and Chief Chambers were talking, Chief Chambers asked Director Mainella if their Monday morning meeting (one of the bi-weekly meetings that Director Mainella had committed to but had only actually scheduled on one occasion) was still scheduled. Director Mainella said they would either meet that morning or later in the week and that she definitely wanted the opportunity to meet with Chief Chambers. She told Chief Chambers that, if she (Director Mainella) had to cancel Monday's meeting, Chief Chambers should tell her (Director Mainella's) secretary to schedule a time later in the week. (See Appellant's Affidavit at Paragraph 156.)

223. Chief Chambers thanked Director Mainella for that commitment and told her that, among any other topic that Director Mainella had for discussion, Chief Chambers was interested in speaking with her about what two witnesses had described as inappropriate behavior by Deputy Director Murphy during the nationwide conference call two days earlier. (See Appellant's Affidavit at Paragraph 157.)

224. Director Mainella, who was present in the same room with Deputy Director Murphy and witnessed Deputy Director Murphy's comments during the conference call, assured Chief Chambers that she (Director Mainella) had spoken with Deputy Director Murphy immediately after the conference call and that she told him that what he had done was improper. Chief Chambers thanked her for taking that stance and asked Director Mainella for the opportunity to discuss with her the fact that this action on the part of Deputy Director Murphy was just the latest, and one of the most serious, events that had occurred over the previous few weeks and that Chief Chambers was interested in their talking about how they could keep something like this from happening again. (See Appellant's Affidavit at Paragraph 157.)

225. On Friday, November 28, 2003, at approximately 7 p.m., Chief Chambers submitted a memorandum to Director Fran Mainella as Director Mainella requested regarding Chief Chambers' comments on the Fiscal Year 2005 OMB passback so Director Mainella could review them as she considered whether she would appeal the National Park Service passback. (See Appellant's Hearing Exhibit "SSS.")

226. Page Two of the referenced Friday, November 28, memorandum includes two key paragraphs alerting those who read and received it to the crisis the United States Park Police was facing:

> As you know the fiscal challenges of FY '04 make it uncertain as to whether any recruit classes will be hired during this fiscal year. The FY '05 passback does not provide funding for hiring during that fiscal year, which could potentially bring our sworn staffing to its lowest point since 1987 and more than 250 officers below the level recommended by the Director of the National Park Service in his report to Congress in March 2000 – one and one-half years before the horrific events of September 11, 2001, that tremendously increased the staffing needs of law enforcement agencies across the country.
>
> Given our current lack of adequate staffing, I must alert you that the National Park Service's ability to protect these precious historical icons – the Statue of Liberty, the White House, the Washington Monument, the Lincoln Memorial, the Jefferson Memorial, the grounds that support the Golden Gate Bridge – or our guests who visit them is increasingly compromised. The continuing threat to the future of these American symbols becomes even more acute with any additional loss of personnel. My professional judgment, based upon 27 years of police service, six years as Chief of police, and countless interactions with police professionals across the country, is that we are at a staffing and resource crisis in the United States Park Police – a crisis that, if allowed to continue, will almost surely result in the loss of life or the destruction of one of our nation's most valued symbols of freedom and democracy.

(See Appellant's Hearing Exhibit "SSS," Page 2.)

227. Chief Chambers faxed a copy of her memo to Director Mainella's home (See Appellant's Hearing Exhibit "TTT") and also included it as an attachment in an email to her. (See Appellant's Affidavit at Paragraph 158.) Copied on the email were Deputy Assistant Secretary Larry Parkinson and National Park Service Comptroller Bruce Sheaffer.

228. Chief Chambers received no response from Director Mainella regarding this memorandum or any of the information supplied therein. (See Appellant's Affidavit at Paragraph 159.)

229. Prior to the start of the workday on Monday, December 1, 2003, Director Mainella's secretary, Ms. Deb Smith, telephoned Chief Chambers and told her that her (Chief Chambers') meeting with Director Mainella that morning would have to be canceled. Chief Chambers told Ms. Smith that Director Mainella had told her that, if that occurred, she was to schedule something later in the week. Ms. Smith said that Director Mainella had told her that Chief Chambers might mention that and to let Chief Chambers know that they would not be meeting at all. No explanation was provided to Chief Chambers by Ms. Smith. (See Appellant's Affidavit at Paragraph 160.)

230. During the afternoon of December 1, 2003, a two-page document Chief Chambers had prepared was hand carried to and distributed at a "Mission/Budget Meeting" hosted by Deputy Assistant Secretary Larry Parkinson. A copy of this document was provided to Deputy Director Donald Murphy at that meeting as well. This document included two attachments, a "Proposed Budget Reductions" sheet and a "United States Park Police FY 2003 Recurring Operational Costs to FY 2004 Operational Budget Reductions and FY 2005 Immediate Budget Needs" sheet, which Chief Chambers' notes indicate had been

modified by Deputy Director Murphy on July 28, 2003. (See Appellant's Affidavit at Paragraph 161.)

231. The "Mission / Budget" two-page document clearly detailed that, in addition to other steps, in order to balance the budget for FY 2004, the United States Park Police would need to cut three of the four scheduled recruit classes, cut all speed enforcement overtime on the Baltimore-Washington Parkway, add contract guards into the icon staffing plans, cut a great deal of the patrol overtime budget, and make a number of other significant cuts. The document also listed some of the impacts of these budget reductions, including a staffing level more than 250 officers below the level recommended by the National Park Service to Congress in March of 2000. It provided information about criminal offenses that were already on the rise in the Washington area National Parks and indicated that many of the parks had already been "stripped of patrol officers." (See Appellant's Affidavit at Paragraph 162.)

232. During the MSPB hearing, Counsel for Appellant attempted to enter the documents described in Paragraphs 230 and 231 into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004. In fact, Judge Bogle hurriedly went through a series of items Counsel for Appellant was attempting to enter into evidence; and, in doing so, Judge Bogle did not pause to consider or allow Counsel for Appellant to speak fully to these items, which had been marked as Appellant's Exhibit "UUU," "VVV," and "WWW," respectively.

JUDGE BOGLE: And UUU is more budget –

MR. HARRISON: It is --

JUDGE BOGLE: -- discussion. There are no figures here.

MR. HARRISON: It shows, Your Honor, that the impact, on the second page, of having to make the cuts, which were the motivation and the substance of Ms. Chambers' protected activities.

It's dated December 1st, just before the action started against her.

JUDGE BOGLE: You know, again, it's -- it's talking about the budget, but there are lots of these documents. VVV is another one. What is -- VVV is the '04 budget, not relevant.

WWW is -- you offered this earlier.

I've seen this document just in the material that we're going through.

MR. HARRISON: I believe it has different numbers in a different version.

There was one very similar that shows the budget shortfall.

I don't believe Your Honor received it, but I would like it for Mr. Schaefer's credibility.

JUDGE BOGLE: This is exactly why I didn't receive it.

I think one of these witnesses gave us the best explanation we could get about this.

This is ongoing information on the computer. I am sure changes are made as -- made as discussions go along, but to --

MR. HARRISON: Your Honor, that witness --

JUDGE BOGLE: -- pick up something and offer it -- I don't know how I can --

MR. HARRISON: That witness was dishonest on the stand, and we have a right to prove it.

JUDGE BOGLE: All right.

Tell me what XXX is.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 61, Line 17 – Page 63, Line 3.)

233. After returning home from work the evening of Monday, December 1, Chief Chambers reduced to writing some of the incidents regarding Deputy Director Murphy's behavior that she had wanted to discuss with Director Mainella at the meeting that Director Mainella had cancelled and directed not be rescheduled. Included in this two-page typewritten letter to Director Mainella were the previously described outburst of Deputy Director Murphy during the nationwide conference call on November 26, 2003, as well as an incident involving a possible criminal violation, the release of Chief Chambers' protected personnel information by Deputy Director Murphy and another employee of the National Park Service Personnel Office, Steve Krutz. (See Appellant's Hearing Exhibit "XXX.")

234. In that letter, Chief Chambers asked Director Mainella to have an investigation conducted and told her that she (Chief Chambers) was available to provide additional examples and documentation. (See Appellant's Hearing Exhibit "XXX.")

235. Sometime during the evening of Monday, December 1, 2003, Chief Chambers learned that the story for which she was interviewed by The Washington Post on November 20, 2003, would be printed in the December 2nd edition of the Post. Chief Chambers immediately sent an email to Director Mainella, Deputy Director Murphy, and Deputy Assistant Secretary Larry Parkinson and copied Deputy Assistant Secretary Paul Hoffman and National Park Service Press Officer David Barna regarding this information. (See Agency's Response to Removal Appeal Exhibit "4 m 77.")

236. In the early morning hours of December 2, 2003 (1:20 a.m.), Chief Chambers wrote to the same Congressional staff member to whom she had reached out on a number of occasions, Ms. Debbie Weatherly, to seek her counsel on how to better inform

members of Congress and OMB about the progress of the United States Park Police with regard to NAPA recommendations. Chief Chambers also alerted her to the dangerous situation that currently existed and would continue to grow if the United States Park Police continued to be without adequate funding. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 i 1 – 2" and its duplicate Appellant's Hearing Exhibit "YYY.")

237. As a result of The Washington Post story in the December 2nd paper (See Agency's Response to Appellant's Individual Right of Appeal [IRA] Exhibit "4 e 1 – 4" and its duplicates, although formatted differently, Agency's Response to Removal Appeal Exhibit "4 m 66 – 69" [page sequence out of order]), numerous radio and film media contacted the United States Park Police press officer to set up interviews beginning early Tuesday morning, December 2, 2003. (See Appellant's Affidavit at Paragraph 166.)

238. Chief Chambers participated in a live interview with WTOP News Radio during her commute to work that morning. Soon after arriving at Police Headquarters (shortly after 9 a.m.), Chief Chambers participated in a number of taped film interviews with various news stations, and she engaged in at least one live "talk back" with a local television station. Most, and perhaps all, of these taped interviews were used during noon newscasts and again during the evening newscasts. (See Appellant's Affidavit at Paragraph 166.)

239. Despite the flurry of media activity that day and the presence of The Washington Post article, no one in Chief Chambers' chain of command and no one from either the National Park Service or Department of the Interior press offices contacted Chief Chambers during that day to caution her about anything that she had said in the print

story or in any of the radio or film interviews. Chief Chambers engaged in approximately one dozen media interviews that day. (See Appellant's Affidavit at Paragraph 167.)

240. On Tuesday, December 2, 2003, at approximately 3 p.m., the same day that The Washington Post article appeared and the media interviews described above were conducted, Lieutenant Phil Beck, the Executive Officer for the Office of the Chief, hand delivered to Director Mainella's office a sealed envelope which contained the typewritten complaint Chief Chambers had prepared the previous evening regarding the conduct of Deputy Director Donald Murphy and National Park Service employee Steve Krutz. (See Appellant's Affidavit at Paragraph 168 and Appellant's Hearing Exhibit "PP," Deposition of Lieutenant Phillip Beck, August 26, 2004, Page 10, Line 1 – 16.)

241. Chief Chambers received no reply from Director Mainella concerning Chief Chambers' letter of complaint regarding Deputy Director Murphy's misconduct, and Director Mainella took no action to see that the alleged misconduct was investigated. (See Appellant's Affidavit at Paragraph 168 and the Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Director Fran Mainella September 8, 2004, Page 285, Lines 4 – 17 and Page 302, Line 22, through Page 305, Line 9.)

242. At approximately 6 p.m. on Tuesday, December 2, 2003, Chief Chambers was ordered by Deputy Director Murphy to cease all interviews of any kind and to not discuss the "President's budget." These orders were issued electronically while Chief Chambers was conducting a meeting with officers at the United States Park Police District 4 substation. (See Appellant's Affidavit at Paragraph 169.)

243. Deputy Director Murphy first left two voice messages on Chief Chambers' cell phone at 6 p.m. and 6:10 p.m. He followed that with an email to Chief Chambers at 6:20 p.m. (See Agency's Response to Removal Appeal Exhibit "4 m 47" and "4 m 48" respectively and their duplicates, Appellant's Hearing Exhibit "BBBB" and "CCCC.") Chief Chambers did not receive the voice mail messages until after the meeting had concluded (approximately 9 p.m.) and did not receive the email message until she arrived at her home at approximately 10 p.m. (See Appellant's Affidavit at Paragraph 169.)

244. Immediately upon receiving the voice mail messages from Deputy Director Murphy, Chief Chambers called him at home. During the brief conversation that followed, Deputy Director Murphy, told her that he and Director Mainella would meet with her the following morning, Wednesday, December 3, to discuss the media interviews. Chief Chambers was never contacted further by Deputy Director Murphy, Director Mainella, or anyone on their staff regarding this meeting, and no meeting has ever been held with Chief Chambers about this matter. (See Appellant's Affidavit at Paragraph 170.)

245. On Wednesday, December 3, 2003, Chief Chambers sent an email to Deputy Director Murphy in an attempt to verify that the prohibition on interviews would not apply to a positive piece she was scheduled to do the following morning for the Pageant of Peace and the lighting of the National Christmas Tree by President Bush that was to occur that evening. (See Appellant's Hearing Exhibit "EEEE.")

246. Deputy Director Murphy responded back with an email that extended the prohibition to "all interviews." His email did not limit the prohibitions to only media

interviews or to only those interviews pertaining to Chief Chambers' employment with the National Park Service. (See Appellant's Hearing Exhibit "EEEE.")

247. Approximately three hours later, Deputy Director Murphy sent another email alerting Chief Chambers that he and Director Mainella wanted to meet with Chief Chambers and Assistant Chief Holmes on Friday, December 5, 2003, at 4 p.m. to discuss what he described as "general United States Park Police issues." (See Appellant's Affidavit at Paragraph 173.) The exact content of that directive was as follows:

> The director and I want to meet with you and Assistant Chief, Ben Holmes, on Friday afternoon. I understand that you are scheduled to be at the FBI academy on Friday, however the meeting on Friday is mandatory and we ask that you reschedule or cancel your FBI engagement. Friday, late afternoon would be best for the director. Please be in the director's office at 4 PM on Friday. The subject of the meeting will be general USPP issues.
>
> Donald Murphy

248. During the MSPB hearing, Counsel for Appellant attempted to enter this written communication, marked as Appellant's Hearing Exhibit "FFFF," into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> MR. HARRISON: FFFF is the -- what we consider to be disingenuous communication from Donald Murphy to Ms. Chambers after he was already planning disciplinary action against Ms. Chambers.
>
> JUDGE BOGLE: Okay. But it isn't -- doesn't need to be in the record.
>
> MR. HARRISON: Well, I believe it's irregular procedure, Your Honor, and dishonesty with an employee about planned actions is evidence of retaliatory motive. I would --
>
> JUDGE BOGLE: Taking us to GGG.
>
> MR. HARRISON: Note my exception.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 67, Line 16 – Page 68, Line 2.)

249. On that same day, December 3, 2003, Deputy Director Murphy participated in an interview with a Washington Post reporter. His comments, recorded below, appeared in an article that was printed on Saturday, December 6, 2003, "Park Police Chief Placed on Leave After Remarks," but were made prior to the action he took against Chief Chambers on December 5, 2003. (See Agency's Response to Removal Appeal Exhibit "4 m 58 – 59.") The relevant section was recorded as follows in the Post article:

> On Wednesday, Murphy was asked whether Chambers had been suspended, fired or otherwise disciplined. He said that officials were "not even contemplating that."

250. On December 3, 2003, after receiving Deputy Director Murphy's directive to attend the December 5th meeting, Chief Chambers wrote an email to him asking what files to bring and what issues she should be prepared to discuss. (See Appellant's Affidavit at Paragraph 175.) This email went unanswered.

251. During the MSPB hearing, Counsel for Appellant attempted to enter the email described in Paragraph 250 into evidence but was denied the opportunity to do so by the Administrative Law. (See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 69, Lines 3 – 21.)

252. On Thursday, December 4, 2003, Chief Chambers worked in her official capacity at the Pageant of Peace events. Soon after arriving, Assistant Chief Holmes approached Chief Chambers and told her that he had seen Director Mainella earlier that day and that she approached him and gently shook his hand. He said that she asked him quietly and in a sad voice how he was doing. He told Chief Chambers that, in a surprised voice, he said

to Director Mainella, "Fine." He said that Director Mainella then shook her head and said, "It's so sad. It didn't have to come to this." She did not elaborate. (See Appellant's Affidavit at Paragraph 177.)

253. Shortly after Assistant Chief Holmes told Chief Chambers this, Sergeant Sandra Hammond approached Chief Chambers and said that she had encountered Director Mainella in the Main Interior Building that same day. She said that Director Mainella approached her, although she does not know her (Sergeant Hammond was in uniform), shook her hand gently, and quietly asked her how everyone was holding up. Sergeant Hammond said that she was surprised by this and answered "Fine." (See Appellant's Affidavit at Paragraph 178.)

254. A short time before the Pageant of Peace began, Chief Chambers encountered both Director Mainella and Secretary Norton exiting the United States Park Police mobile command post. Director Mainella gave a quick acknowledgement to Chief Chambers and walked past; and Secretary Norton, normally pleasant and affable in Chief Chambers' company, was noticeably uncomfortable, shook Chief Chambers' extended hand, and kept walking. (See Appellant's Affidavit at Paragraph 179.)

255. When the event concluded, Deputy Secretary Griles walked past Chief Chambers as he was exiting the seating area. After a quick professional greeting, Chief Chambers, knowing that something was odd in how she was being treated by both Director Mainella and Secretary Norton and not knowing what she could have done wrong, asked Deputy Secretary Griles somewhat facetiously, "So, am I going to survive this?" Deputy Secretary Griles, with a sad look in his eyes, shook his head slowly and said, "I don't know. I just don't know." (See Appellant's Affidavit at Paragraph 181.)

256. Surprised by Deputy Secretary Griles' response, Chief Chambers asked him what she had done. Deputy Secretary Griles walked behind her and with his hands on her shoulders said, "You've got to get to Fran [Mainella]. You know I love ya', kid, but you've GOT to get to Fran. That's the only thing that will help now." Chief Chambers asked him what she needed to "get to Fran" about, but he did not answer. (See Appellant's Affidavit at Paragraph 181.)

257. Late in the evening on Thursday, December 4, 2003, following the Pageant of Peace, Chief Chambers emailed Director Mainella, congratulated her on a successful event, and asked her if it would be possible for the two of them to meet prior to the 4 p.m. meeting the next day so that they would have a chance to talk about the written complaint Chief Chambers had Lieutenant Beck deliver to Director Mainella's office Tuesday afternoon. (See Appellant's Affidavit at Paragraph 182.)

258. During the MSPB hearing, Counsel for Appellant attempted to enter the email described in Paragraph 257 into evidence but was denied the opportunity to have this document marked as Appellant's Exhibit "IIII" admitted.

> MR. HARRISON: Your Honor, what happened with IIII?
>
> JUDGE BOGLE: They're just e-mail exchanges about unrelated things.
>
> MR. HARRISON: Well, if I could have a moment, maybe they're not so unrelated.
>
> Okay, Your Honor.
>
> This is another in the series of misleading communications where Ms. Chambers is not being told what was clearly known was being planned against her.
>
> JUDGE BOGLE: Okay. I'm all the way up to LLLL.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 69, Lines 6 – 21.)

259. Early on Friday, December 5, 2003, Chief Chambers sent a second email to Director Mainella, this time asking her about the nature of the 4 p.m. meeting scheduled for that afternoon and alerting her to rumors that were abounding regarding the nature and purpose of that meeting. As with the email Chief Chambers had sent to Deputy Director Murphy, she asked Director Mainella what files she should bring and what issues she should be prepared to discuss. Like Chief Chambers' similar inquiry to Deputy Director Murphy, this email to Director Mainella went unanswered. (See Appellant's Affidavit at Paragraph 183.)

260. During the MSPB hearing, Counsel for Appellant attempted to enter the email described in Paragraph 259 into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the transcript during Day 3 of the hearing, September 14, 2004. Judge Bogle hurriedly went through a series of items Counsel for Appellant was attempting to enter into evidence; and, in doing so, Judge Bogle did not pause to consider or allow Counsel for Appellant to speak fully to Appellant's Exhibit "JJJJ."

> JUDGE BOGLE: Okay. I'm all the way up to LLLL.
>
> MR. HARRISON: Well, I'm at JJJJ. So, does Your Honor wish me to skip making a proffer on the --
>
> JUDGE BOGLE: Yeah. They're -- they're just e-mails --
>
> MR. HARRISON: And I note my objection for --
>
> JUDGE BOGLE: -- about unrelated things.
>
> MR. HARRISON: -- not being able to make a record.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 69, Line 12 – Page 70, Line 5.)

261. Just prior to noon on Friday, December 5, 2003, Director Mainella responded to Chief Chambers' email of the previous evening in which Chief Chambers had asked for the opportunity to meet with Director Mainella prior to the 4 p.m. meeting already scheduled with her and Deputy Director Murphy. Director Mainella wrote, "I have received your letter and we meet [sic] with [sic] in the future on this. Today will not work for me." (See Appellant's Affidavit at Paragraph 184.)

262. During the MSPB hearing, Counsel for Appellant attempted to enter the email described in Paragraph 261 into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the transcript during Day 3 of the hearing, September 14, 2004. As noted above, Judge Bogle hurriedly went through a series of items Counsel for Appellant was attempting to enter into evidence; and, in doing so, Judge Bogle did not pause to consider or allow Counsel for Appellant to speak to Appellant's Exhibit "KKKK."

263. Sometime in the early afternoon on Friday, December 5, 2003, Chief Chambers' Executive Officer, Lieutenant Phil Beck, received a telephone call from Deputy Director Murphy's secretary, Janice Brooks. Ms. Brooks told Lieutenant Beck that, according to Deputy Director Murphy, Chief Chambers was to bring "nothing" in preparation for the 4 p.m. meeting but that she was not to park on "C" Street, where she and other visitors would normally park. Instead, Chief Chambers was to park in the garage accessed via the "B" ramp, a garage reserved for officials in the Department of the Interior. (See Appellant's Affidavit at Paragraph 185 and Appellant's Hearing Exhibit "OO," the

Deposition of Assistant Chief Benjamin J. Holmes [retired], August 19, 2004, Page 122, Lines 3 – 16.)

264. Chief Chambers and Assistant Chief Holmes arrived in Director Mainella's office suite as instructed and were told by Deputy Director Murphy that he would be with them in a few minutes. A few minutes later, DOI attorney Hugo Teufel arrived along with three armed special agents. Mr. Teufel and one of the armed special agents went into Deputy Director Murphy's office and the two other armed special agents stationed themselves outside of Deputy Director Murphy's doorway (one on either side) as if to guard the door. (See Appellant's Affidavit at Paragraphs 188 and 189 and Appellant's Hearing Exhibit "OO," Deposition of Assistant Chief Benjamin J. Holmes [retired], August 19, 2004, Page 123, Line 1 – Page 126, Line 4.)

265. Chief Chambers was told to come into the office. Assistant Chief Holmes was told to wait outside of the office. Chief Chambers asked where Director Mainella was and was told by Deputy Director Murphy that Director Mainella would not be present and that Chief Chambers could not see her. (See Appellant's Affidavit at Paragraphs 190 and 191.)

266. Deputy Director Murphy handed Chief Chambers a memo and told her she was being placed on administrative leave. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 b.") She was directed to turn over her badge and gun to one of the armed special agents. (See Appellant's Affidavit at Paragraphs 192, 202, and 203.)

267. Neither Deputy Director Murphy nor Mr. Teufel would inform Chief Chambers of the charges against her nor would they tell her why this action against her was being

taken but that, if they found enough to charge her, she would learn at the time of proposed discipline that with which she was being charged. (See Appellant's Affidavit at Paragraphs 193 – 197.)

268. Chief Chambers questioned why she had been lured into this meeting under false pretenses, having been told by Deputy Director Murphy that "the meeting" was to discuss "general USPP issues" with Deputy Director Murphy and Director Mainella – and why she had not been notified that she should consider bringing her own attorney to the meeting. Deputy Director Murphy denied that Chief Chambers had been told that this was to be a meeting or that Director Mainella was to be present. (See Appellant's Affidavit at Paragraphs 197 and 198.)

269. Before leaving Deputy Director Murphy's office, Chief Chambers asked Mr. Teufel, in the presence of Deputy Director Murphy, if he was aware of the written complaint she had submitted "on Tuesday" regarding Deputy Director Murphy's and Steve Krutz' conduct. Deputy Director Murphy nodded affirmatively. Mr. Teufel responded verbally, "Yes, I have seen it." (See Appellant's Affidavit at Paragraph 201.)

270. Chief Chambers was escorted back to her office by two of the armed special agents (even after her gun and badge had been taken from her) and paraded in front of National Park Service employees, including numerous United States Park Police officers and the media who filmed this event. She was directed by Deputy Director Murphy that she should not remove her personal property from her office since, according to him, "that would not be necessary." (See Appellant's Affidavit at Paragraph 199 and 205.)

271. After being returned to her office by the two special agents, turning over her cell phone, pager and other communication devices, she was left to find her own way home –

in uniform and without a weapon – placing her in grave personal danger and risk to her life. (See Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 140, Line 22, through Page 141, Line 20.)

272. This disregard for Chief Chambers' personal safety was confirmed by Mr. David G. Davies during his sworn deposition on August 26, 2004, in the following exchange with Counsel for Appellant:

> Q Mr. Davies, when the decision was made to place Chief Chambers on administrative leave, was there any discussion between you and Mr. Murphy or other non-lawyer officials as to the potential risk to Chief Chambers as a pretty well-known police official in this area if she were to be removed of her badge and her gun on short notice without planning, for example? That she might be put in a vulnerable position during her? For example, her travel home on that particular day?
>
> A Yes.
>
> Q And apparently the decision was made to relieve her of her badge and gun nonetheless?
>
> A Yes.

(Deposition of David G. Davies, August 26, 2004, Page 125, Lines 1 – 14.) Mr. Davies is a division Chief for the branch division of Labor and Employee Relations for National Park Service in the Washington office who was consulted by Deputy Director Donald Murphy regarding various aspects of the actions taken against Chief Chambers.

273. During the MSPB hearing, Counsel for Appellant attempted to enter the deposition of David G. Davies into evidence but was denied the opportunity to do so by the Administrative Law Judge, as detailed in the following narrative exchange during Day 3 of the hearing, September 14, 2004:

> JUDGE BOGLE: So, that should be that.

MR. HARRISON: Well, except, Your Honor, I have two transcripts that we didn't have available until today to offer, which are Mr. Davies and Mr. Krutz, the personnel officers who were involved in advising the decision-makers.

They do offer evidence not otherwise in the record, and I can explain what it is, including the timing of Mr. Murphy's decisions, his bases, and I would offer them for the record.

JUDGE BOGLE: Now, what, again, are these?

MR. HARRISON: These are the transcripts of the depositions of the two human resource officers advising Mr. Murphy and Mr. Hoffman on the decisions against Ms. Chambers, Mr. Krutz and Mr. Davies.

JUDGE BOGLE: Were these offered before?

MR. HARRISON: We had raised in the pre-trial hearing, Your Honor, that we had transcripts we had not yet received, we intended to offer them, and these are just physically available.

JUDGE BOGLE: I guess I don't recall those -- those two.

Mr. L'Heureux, any Agency objection?

MR. L'HEUREUX: I object on the grounds of relevance, Your Honor.

These witnesses could have been called if they had anything relevant to present.

MR. HARRISON: Your Honor, we were -- we were prohibited from calling these witnesses. They were on our list.

JUDGE BOGLE: Well, how is their deposition testimony going to be relevant?

MR. HARRISON: I can help you with that. Mr. Krutz testified that, on December the 2nd, before noon, he was called to Mr. Murphy's office and was directed to write up a disciplinary action regarding Ms. Chambers. Mr. Murphy had the Washington Post article on his desk. He had concerns -- Mr. Murphy had concerns about statements in the Washington Post article.

He gave Mr. Krutz a detailed list of his complaints regarding Ms. Chambers.

> Mr. Krutz then worked into the night on that particular disciplinary document, which turns out to be not an administrative leave document given to Ms. Chambers three days later but a proposed removal which Ms. Chambers was never told about until a couple weeks later.
>
> Mr. Davies testified to different points, and I have them written here, Your Honor, but I don't have them in my memory, if I could have just a moment.
>
> Mr. Davies indicates that removal of Ms. Chambers, not her administrative leave, was discussed before December the 5th.
>
> Mr. Davies indicates that the decision to place Ms. Chambers on administrative leave was because Mr. Murphy did not believe that Ms. Chambers would heed his order to not communicate with the media.
>
> Mr. Davies' testimony shows an ongoing investigation that continued past the time of Ms. Chambers being placed on administrative leave, that Mr. Murphy discussed with Mr. Davies disciplinary action prior to December 2003 regarding Ms. Chambers, and that there was a discussion between Mr. Davies and Mr. Murphy regarding sending Ms. Chambers home in uniform unarmed, and they decided to do it notwithstanding their concern.
>
> So, we would offer those depositions for those points.
>
> JUDGE BOGLE: Okay. I don't find any of the things you just stated to be relevant, and those two deposition transcripts were not among those that you offered earlier and that I agreed to take.
>
> So, I will not accept them.
>
> MR. HARRISON: I note my exception.

(See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 72, Line 9 – Page 75, Line 4.)

274. Chief Chambers' personal property which was in her office was unavailable to her from the evening of December 5, 2003, until mid-July 2004 but was accessible by specific persons in the United States Park Police and the National Park Service. (See Appellant's Affidavit at Paragraph 199 and 207.)

275. The week following Chief Chambers' police authority being suspended and her being placed on administrative leave, Associate Solicitor Hugo Teufel contacted Chief Chambers' attorneys and asked for the opportunity for him and Deputy Director Donald Murphy to meet with them and Chief Chambers at an off-site location on Friday, December 12, 2003, in an attempt to settle this matter. (See Appellant's Affidavit at Paragraph 209.)

276. When the parties met on that date, the Agency indicated that they were willing to withhold placing charges of any kind against Chief Chambers and would also be willing to bring her back to work immediately provided she was willing to agree to adhere to a number of stipulations including her agreement that she would obtain prior approval from Deputy Director Murphy or his designee before engaging in any contact with the media or with a member of Congress or any Congressional staff member (both the contact and the content of the proposed conversations had to be approved ahead of time). (See Appellant's Affidavit at Paragraphs 210 and 213.)

277. Chief Chambers declined to agree to this stipulation since that would have made it impossible for her to function effectively as a Chief of Police (for example, response to the media's inquiries about crime scenes such as in the Chandra Levy case) as well as impeded Chief Chambers' lawful right and obligation to communicate with Congress. No other prior Chief of the United States Park Police had ever had such a gag order imposed upon them. (See Appellant's Affidavit at Paragraphs 214 and 215.)

278. Another stipulation to which Chief Chambers would have been required to agree was the transfer of Ms. Pamela Blyth for a specified period of time. After Deputy Secretary Griles intervened and reversed Ms. Blyth's transfer in August, Director

Mainella told Ms. Blyth and Chief Chambers that the "detail" or transfer would not be necessary. (See Appellant's Affidavit at Paragraph 216.) (See also Affidavit of Pamela Blyth, Paragraph 7.)

279. Chief Chambers believed that this intended transfer as well as the stipulation of Ms. Blyth's transfer as part of the conditions of her return to active duty were in retaliation for protected activities engaged in by both Ms. Blyth and Chief Chambers in persistently raising concerns about the consequences of inadequate staffing and funding on public safety and protection of the national icons. (See Affidavit of Pamela Blyth, Paragraphs 3 and 4.) Had Chief Chambers transferred Ms. Blyth in August 2003 or had Chief Chambers agreed to this stipulation on December 12, 2003, she believed that she would have been an accessory to a prohibited personnel practice. (See Appellant's Affidavit at Paragraph 216.)

280. On December 18, 2003, six days after refusing to agree to these stipulations on December 12, 2003, Chief Chambers received a memorandum from Deputy Director Donald Murphy dated December 17, 2003, placing charges against her and recommending her termination. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 1 - 8.")

281. Charge 1 placed against Chief Chambers was entitled "Improper budget communications" in that a conversation Chief Chambers had with a Congressional staffer was alleged by Deputy Director Murphy to have "constituted a violation of Part 112, Chapter 7, of the Departmental Manual." (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 1 – 2.")

282. The paragraph from Part 112, Chapter 7, of the Department of the Interior Manual, on which Deputy Director Murphy relied, however, is a descriptive and not a proscriptive paragraph:

> POB [Office of Budget] has primary staff responsibility for directing and coordinating the development, presentation, execution, and control of the Department's Budget. This includes formulation within the Department and the Office of Management and Budget and presentation to the Congress, press, interest groups and the public, and budget execution and control. Among other things, POB is the liaison on all matters dealing with budget formulation and presentation with the Office of Management and Budget, the House and Senate Appropriations Committee, and other Federal agencies.

(See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 1."

283. During his deposition, Deputy Director Murphy, was asked, with regard to Charge 1, " . . . what was the rule or the law or procedure that you felt was violated or circumvented by Ms. Chambers that made her communications to Ms. Weatherly on November the 3rd improper, in your view?" In his response, Deputy Director Murphy made no reference to a violation of any Departmental rule, regulation, policy, or procedure nor did he opine that Chief Chambers' communications with the Congressional staffer were "improper." Instead, he answered, "Well, it's primarily her failure to follow instructions. We had past conversations with respect to the budget and what she was supposed to be communicating. So, that's all that referred to, was really her failure to follow my instruction." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 373, Line 19 – Page 374, Line 7.)

284. Charge 2 placed against Chief Chambers was entitled, "Making public remarks regarding security on the Federal mall, and in parks and on the Parkways in the Washington, D.C., metropolitan area," in that statements Chief Chambers was accused of having made to a Washington Post reporter were alleged by Deputy Director Murphy to have "constitute[d] public remarks about the scope of security present and contemplated for these areas under [Chief Chambers'] jurisdiction." (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 2.")

285. The proposed removal document signed by Deputy Director Donald Murphy makes no reference in narrative format or formal citation to a violation of any Departmental rule, regulation, policy, or procedure with regard to Charge 2, the charge described in Paragraph 284. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 2.")

286. During his deposition, Deputy Director Murphy, was asked, with regard to Charge 2, "Was there something, a rule, a law, a written procedure that you felt had been violated by Ms. Chambers in the remarks she made to the Washington Post regarding the security matter?" In his response, Deputy Director Murphy made no reference to a violation of any Departmental rule, regulation, policy, or procedure. Instead, he answered, "Again, it really had to do with failure to follow instructions and the document from which that information came from, which was labeled law enforcement sensitive." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 374, Line 19 – Page 375 Line 4.)

287. In response to a follow up question from Appellant's Counsel, "My question, sir, is was there a law that you're saying was violated?" Deputy Director Murphy answered,

"No." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 376, Lines 14 – 16.)

288. In response to his being asked if he could point to a written procedure that was "violated by [Chief] Chambers' remarks regarding security to the Washington Post," Deputy Director Murphy was unable to cite a written procedure. Instead, he made reference only to a document labeled "law enforcement sensitive" which, among a great deal of other information, included information similar to some of what was reported in the Washington Post. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 376, Line 17 – Page 377, Line 3.)

289. Deputy Director Murphy reluctantly admitted, however, that not everything in a document labeled "law enforcement sensitive" would necessarily be law enforcement sensitive. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 378, Line 3 – Page 379, Line 6.)

290. When asked additional questions regarding whether he could point Appellant's Counsel to any rule of law or policy statement regarding "what categories or specifics of police staffing information would or would not be law enforcement sensitive," Deputy Director Murphy answered "No." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 389, Lines 2 – 15.)

291. Finally, when asked by Counsel for Appellant, ". . . is there any other document you believe reflects a rule, procedure, or policy that Ms. Chambers may have violated in

making comments regarding security to the Washington Post," Deputy Director Murphy answered "Not that I know of, no." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 389, Line 19 – Page 390, Line 1.)

292. Charge 3 placed against Chief Chambers was entitled "Improper disclosure of budget deliberations" in that Deputy Director Murphy's accusation that Chief Chambers said to the Washington Post reporter that she had "asked for $8 million more for next year" was alleged by Deputy Director Murphy to have been "an improper disclosure of 2005 Federal budget deliberations to the media, in violation of OMB Circular No. A-11, Section 22.1" (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 2 – 3.")

293. The paragraph from Section 22.1 of the Office of Management and Budget's Circular No. A-11 (2003), states:

> The nature and amounts of the President's decisions and the underlying materials are confidential. Do not release the President's decisions outside of your Agency until the budget is transmitted to Congress. Do not release any materials underlying those decisions , at any time, except in accordance with this section . . . Do not release any Agency justifications provided to OMB and any Agency future plans or long-range estimates to anyone outside the executive branch, except in accordance with this section.

(See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 2 - 3.")

294. Deputy Director Murphy's responses to a series of questions about this passage from OMB Circular A-11 (detailed and cited in subsequent paragraphs) indicate clearly that the language in this section of A-11 does not apply to Chief Chambers, yet this was the only section on which Deputy Director Murphy relied in placing Charge 3 against

Chief Chambers. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 390, Lines 11 – 14; Page 391, Lines 6 – 22; and Page 392, Lines 4 – 16.)

295. When Deputy Director Murphy was asked by Counsel for Appellant if he knew "what it means by 'the President's decisions and underlying materials,'" Deputy Director Murphy answered, "Yes." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 390, Lines 11 - 14.)

296. When Deputy Director Murphy was asked by Counsel for Appellant, "So, you think the President's decisions includes what Ms. Chambers would have decided was needed by the U.S. Park Police budget-wise?" Deputy Director Murphy answered "No." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 391, Lines 18 - 22.)

297. Deputy Director Murphy further defined "the President's decisions" as being those "decisions with respect to the budget and the development of the budget" made by the President's "administration," which Deputy Director Murphy defined as "all of those people that are responsible for budget development in the President's administration." Deputy Director Murphy admitted that what Chief Chambers "would have decided was needed by the U.S. Park Police budget-wise" would <u>not</u> have been considered part of "the President's decisions" for purposes of the paragraph in OMB Circular A-11 on which Deputy Director Murphy relied. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 391, Lines 6 - 22.)

298. In response to Counsel for Appellant's question, "So, is there anything Ms. Chambers would do that would be included in the term 'President's decisions,'" Deputy Director Murphy answered, "No." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 392, Lines 4 - 7.)

299. Deputy Director Murphy further clarified that nothing he or the Comptroller of the National Park Service would do "would be included in the term 'President's decisions'" ; and, when asked "How about anyone other than the President of the United States," Deputy Director Murphy answered "No." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 392, Lines 8 - 16.)

300. Deputy Director Murphy did not produce any budget document, nor were any such documents produced by the Agency as exhibits, that indicated an $8 Million figure for the United States Park Police relating to the FY 2005 budget process. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 397, Lines 1 – 14; see also Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Comptroller Bruce Sheaffer, September 9, 2004, Page 226, Lines 25, through Page 231, Line 19; see also Merit Systems Protection Board Hearing Transcript, Testimony of Appellant, Teresa Chambers, September 9, 2004, Page 161, Line 8, through Page 164, Line 13.)

301. Charge 4 placed against Chief Chambers was entitled "Improper Lobbying" in that Chief Chambers' comments to a Washington Post reporter about needing additional staff was alleged by Deputy Director Murphy to have "constitute[d] improper lobbying,

in violation of 43 C.F.R. 20.506(b)." (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 3 – 4.")

302. The section on which Deputy Director Murphy relied in placing this charge states: "When acting in their official capacity, employees are required to refrain from promoting or opposing legislation relating to programs of the Department without the official sanction of the property [sic] Departmental authority." (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 3 .")

303. When asked by Counsel for Appellant if "that regulation state[s] that a statement to a newspaper is improper lobbying," Deputy Director Murphy answered, "Not that I recall." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 405, Lines 10 - 12.)

304. Charge 5 placed against Chief Chambers was entitled "Failure to carry out a supervisor's instructions." (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 4 – 5.")

305. The proposed removal document signed by Deputy Director Donald Murphy makes no reference in narrative format or formal citation to a violation of any Departmental rule, regulation, policy, or procedure with regard to Charge 5, the charge described in Paragraph 304. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 4 – 5.")

306. Specification 1 for Charge 5 purports that Chief Chambers "failed to detail Ms. Blyth to the Office of Strategic Planning" as she was alleged to have been "instructed" to do by Deputy Director Murphy. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 4.")

307. It was made clear, though, during the Merit Systems Protection Board hearing that Deputy Director Murphy never "instructed" Chief Chambers to "detail" Pamela Blyth. The Administrative Judge asked Deputy Director Murphy what he actually said to Chief Chambers "that communicated to her that she was supposed to accomplish this detail." Deputy Director's response to the Judge was, "I said specifically to her that this detail with Mrs. Blyth, Ms. Blyth, is going to – to take place and I expect you to communicate to Ms. Blyth that – that this detail is going to be effected with the Office of – of Strategic Planning." (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald Murphy, September 8, 2004, Page 60, Lines 13 – 21.)

308. According to Deputy Director Murphy's response to the Administrative Judge, the only instruction he gave to Chief Chambers was to inform Ms. Blyth that a change in her assignment would be taking place. He gave no indication that he provided Chief Chambers a date, time, or place for Ms. Blyth to report or any specific action that Chief Chambers was to take. (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald Murphy, September 8, 2004, Page 60, Lines 13 – 21.)

309. Specification 2 for Charge 5 purports that Chief Chambers "failed to carry out" Deputy Director Murphy's instructions "to direct [Deputy Chiefs] Beam and Pettiford to undergo the required [psychological] evaluations." (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 4.")

310. With regard to this matter, however, Deputy Director Murphy testified during the Merit Systems Protection Board that Chief Chambers never indicated that she would not

follow his instruction, that the deputy Chiefs both took their tests, and that Deputy Director Murphy had no reason to believe that Chief Chambers delayed those tests in any way. (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald Murphy, September 8, 2004, Page 65, Line 25, through Page 66, Line 7.)

311. Specification 3 for Charge 5 purports that Deputy Director Murphy instructed Chief Chambers to meet with Randolph Myers of the Solicitor's Office regarding "the OAS complaint against the Park Police" and that Chief Chambers failed to do so. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 5.")

312. During his testimony, however, Deputy Director Murphy recalls that he told Chief Chambers that he "had received this call from the solicitor's office" and asked that Chief Chambers "telephone the office and – and cooperate fully with them." He added, "That's all I said." (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald Murphy, September 8, 2004, Page 65, Line 25, through Page 66, Line 7.) Deputy Director Murphy later admitted that he did not recall telling Chief Chambers to "meet" with Mr. Myers. (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Deputy Director Donald Murphy, September 8, 2004, Page 193, Lines 18 – 23.)

313. Charge 6 placed against Chief Chambers was entitled "Failure to follow the chain of command" and alleges that Chief Chambers "failed to follow the chain of command regarding lawful and proper instructions given to [her] by [Deputy Director Murphy]" involving the "detailing" of an employee of Chief Chambers', Ms. Pamela Blyth. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a – 5.")

314. Deputy Director Murphy's own testimony, however, as detailed in the subsequent paragraphs, makes it clear that Chief Chambers did follow the chain of command by discussing this matter with those persons in her chain of command whom she was able to reach and leaving an urgent phone message for the one member of her chain of command who was unavailable. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 405, Line 21 through Page 406, Line 7; Page 407, Lines 2 – 8; and Page 408, Line 6, through Page 409, Line 14; see also Appellant's Hearing Exhibit "QQ," Deposition of Assistant Secretary Harold Craig Manson, August 20, 2004, Page 100, Line 21 – Page 102, Line 6, and Page 110, Line 16, through Page 111, Line 5.)

315. The proposed removal document signed by Deputy Director Donald Murphy makes no reference in narrative format or formal citation to a violation of any Departmental rule, regulation, policy, or procedure with regard to Charge 6, the charge described in Paragraph 313. (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 5.")

316. In his deposition, Deputy Director Murphy stated that he was aware that Chief Chambers and he had talked about his intent to detail Pamela Blyth and that Chief Chambers had also spoken with Director Fran Mainella about the matter. When asked if he was aware that "Director Mainella had communicated to Ms. Chambers that she would defer to [him], Mr. Murphy, on any decision on that detail," Deputy Director Murphy answered "Yes." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 405, Line 21 – Page 406, Line 7, and Page 407, Lines 2 - 8.)

317. Evidence produced in this case has made it clear that Chief Chambers did take steps to discuss this matter with Assistant Secretary Craig Manson. (See Appellant's Hearing Exhibit "QQ," Deposition of Assistant Secretary Harold Craig Manson, August 20, 2004, Page 100, Line 21 – Page 102, Line 6.)

318. Deputy Director Murphy, when asked by Counsel for Appellant, "Was it one of your basis for proposing to remove Ms. Chambers on Charge 6 that Ms. Chambers had not communicated with Mr. Craig Manson prior to going to Mr. Griles on the detailing issue," Deputy Director Murphy answered, "Yes. I took that into consideration, yes." (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 407, Line 21, through Page 408, Line 5.)

319. When asked if he was aware that Chief Chambers had "called Mr. Craig Manson prior to approaching Mr. Griles on that matter," Deputy Director Murphy answered, "I just don't recall when I knew that." He did, however, recall "making an inquiry with Mr. Manson to determine what Mr. Manson may have received in communication from Chief Chambers before the Chief contacted Mr. Griles." Deputy Director Murphy confirmed that he knew this information before he proposed Chief Chambers' removal and before placing this charge. (See Appellant's Hearing Exhibit "J," Deposition of National Park Service Deputy Director Donald Murphy, August 30, 2004, Page 408, Line 6 – Page 409, Line 14.)

320. There has been no evidence produced that shows that any investigation was conducted regarding any of the charges placed against Chief Chambers at any point up to the time the charges were placed. No one in Chief Chambers' chain of command or

investigative arm of the Department of the Interior has ever talked with her at any time about any of the allegations or specifications set forth in the written charges filed against her. (See Appellant's Affidavit at Paragraph 218.)

321. Although some of the charges surround incidents involving Ms. Pamela Blyth, Deputy Chief Barry Beam, and Deputy Chief Dwight Pettiford, none of those employees has ever been interviewed by anyone other than the Office of Special Counsel with regard to Chief Chambers' case. Neither the former Chairman of the United States Park Police FOP Labor Committee, Officer Jeff Capps, nor the United States Park Police Press Officer, Sergeant Scott Fear, has been interviewed except by the Office of Special Counsel investigator. (See Appellant's Affidavit at Paragraph 218.)

322. In February of 2004, Deputy Assistant Secretary Paul Hoffman, who was designated by someone in the Department of the Interior as the "deciding official" in this case, conducted taped interviews of selected people involved in these personnel actions. (See Agency's Response to Removal Appeal Exhibit "4 e 1 – 21," "4 f 1 – 23," "4 g 1 – 22," "4 h 1 – 23," "4 i 1 – 43," and "4 j 1 – 27.")

323. Those persons who, as described in Chief Chambers' appeal of January 9, 2004, to Deputy Assistant Secretary Paul Hoffman, could have provided exculpatory information and testimony, were not invited by Deputy Assistant Secretary Hoffman to be interviewed by him. (See Appellant's Hearing Exhibit "I," Deposition of Deputy Assistant Secretary Paul Hoffman, August 12, 2004, Page 43, Line 19, through Page 44, Line 19, and Page 129, Line 5, through Page 130, Line 7.)

324. Deputy Assistant Secretary Paul Hoffman also considered a written declaration of Department of the Interior Press Officer John Wright (See Agency's Response to

Removal Appeal Exhibit "4 d 1 – 2") and written memoranda supplied by Randolph J. Myers, an attorney in the Department of the Interior Office of the Solicitor (See Agency's Response to Removal Appeal Exhibit "4 k 1 – 11.")

325. Chief Chambers was not informed of these documents nor was she provided copies of them nor any additional documents considered by Deputy Assistant Secretary Paul Hoffman in the course of the investigation he conducted until the Department of the Interior was preparing its case for the Merit Systems Protection Board and submitted these documents as part of the Agency's Response to Appellant's Removal Appeal. (See Appellant's Hearing Exhibit "I," Deposition of Deputy Assistant Secretary Paul Hoffman, August 12, 2004, Page 75, Lines 1 – 8, and Page 144, Line 19, through Page 145, Line 6; see also Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Assistant Secretary Paul Hoffman, September 9, 2004, Page 21, Line 18, through Page 24, Line 15.)

326. Chief Chambers has in her possession hundreds of examples of persons in the National Park Service and the Department of the Interior, including former United States Park Police Chief Robert Langston, who have engaged in behavior similar to that which is alleged of her and which has been deemed by her superiors as inappropriate. To the best of her knowledge, no adverse action has been taken or threatened in any of those cases other than hers. (See Appellant's Affidavit at Paragraph 219, Agency's Response to Removal Appeal Exhibit "4 m 36," "4 m 37," "4 m 38," "4 m 39 – 42," "4 m 43 – 44," "4 m 45 – 46," "4 m 78 – 85," "4 m 86 – 87," "4 m 88," "4 m 89," "4 m 90," "4 m 91," "4 m 92," "4 m 93 – 94," "4 m 95 – 98," "4 m 107 – 108," "4 m 109 – 116," "4 m 171,"

"4 m 172," "4 m 173 – 174," "4 m 175," "4 m 176 - 177," "4 m 178," and "4 m 180 – 214.")

327. Chief Chambers' written complaint regarding the behavior of Deputy Director Donald Murphy has never been investigated. This matter was brought to the attention of the Inspector General for the Department of the Interior, Earl Devaney, by Chief Chambers' attorney via letter received by Mr. Devaney on March 31, 2004. (See Merit Systems Protection Board Hearing Transcript, Testimony of National Park Service Director Fran Mainella , September 8, 2004, Page 302, Lines 22 through Page 305, Line 9.)

328. The Inspector General stated that, until that time, he had never seen the complaint Chief Chambers submitted on December 2, 2003 regarding the conduct of Deputy Director Donald Murphy and National Park Service employee Steve Krutz. (See Appellant's Hearing Exhibit "OOOO.")

329. The Inspector General also confirmed that his policies required that Chief Chambers' complaint should have been forwarded to his office upon receipt by Director Fran Mainella but that it had not been. (See Appellant's Hearing Exhibit "OOOO.")

330. Nonetheless, Mr. Devaney declined to involve himself in investigating the matters about which Chief Chambers complained. He did say, however:

> . . . shortly following Chief Chambers' suspension, Director Mainella and Deputy Director Murphy asked me if the OIG should get involved in this matter.

He furthered:

> I told them then, and reiterate to you now, that the OIG does not involve itself in adverse action matters that fall within the jurisdiction of the MSPB.

(See Appellant's Hearing Exhibit "OOOO.")

331. Mr. Devaney does not state in his letter the exact date when he had this conversation with Director Mainella and Deputy Director Murphy. Based upon his description of this meeting being "shortly" after Chief Chambers' "suspension," as Mr. Devaney described it, it is likely that this occurred before any charges were placed against Chief Chambers or proposed discipline initiated. (See Appellant's Hearing Exhibit "OOOO.")

332. Mr. Devaney's next paragraph is troubling in that Mr. Devaney recuses his office from investigating the complaint of misconduct and, perhaps, illegal action by Deputy Director Donald Murphy and National Park Service employee Steve Krutz because of the "adverse action matter pending" against Chief Chambers:

> The substance of Chief Chambers' complaint, although not explicitly set forth in her letter, appears to be inextricably intertwined with the underlying adverse action matter pending against her. Therefore, it would have been inappropriate for the OIG to become involved in this matter, even if the letter had been referred according to policy."

(See Appellant's Hearing Exhibit "OOOO.")

333. Chief Chambers' complaint against Deputy Director Murphy's conduct was submitted on December 2, 2003. (See Appellant's Hearing Exhibit "XXX.") The charges placed against her were included in a memorandum to her from Deputy Director Murphy dated December 17, 2003, which she received on December 18, 2003 (See Agency's Response to Appellant's Individual Right of Appeal (IRA) Exhibit "4 a 1 – 8"), sixteen days after she submitted her complaint to Director Mainella.

334. If Mr. Devaney is correct that Chief Chambers "complaint" against Deputy Director Murphy is "inextricably intertwined with the underlying adverse action matter

pending against" her, he could only conclude that if Director Mainella or Deputy Director Murphy shared that as their own retributive motive with him since the actions to be taken against Chief Chambers were not yet known to her at the time she submitted the complaint to Director Mainella.

335. Deputy Director Donald Murphy confirmed his broad gag order to Chief Chambers on June 1, 2004, through her attorney of record at the time, Peter Noone. (See Appellant's Hearing Exhibit "NNNN.")

336. In that letter, Deputy Director Murphy reiterated that Chief Chambers was "not to grant anymore [sic] interviews without clearing them with me or the director." He in no way described or defined this directive as pertaining only to interviews with the media or regarding only those interviews that dealt with Chief Chambers' employment with the National Park Service. (See Appellant's Hearing Exhibit "NNNN.")

337. In that same letter, Deputy Director Murphy added additional illegal prohibitions on Chief Chambers, this time directing that she "cannot represent herself as a member or representative of the U.S. Park Police or National Park Service and she cannot discuss issues related to her employment." (See Appellant's Hearing Exhibit "NNNN.") The effect of this prohibition prevented Chief Chambers from telling anyone by whom she was employed or mention in any manner any matter that occurred during her more than two years with the National Park Service / United States Park Police.

338. Finally, in this same letter, Deputy Director Murphy documented his illegal prohibition regarding certain communications by Chief Chambers with a member of Congress, by saying that Chief Chambers "could not respond to any questions concerning

either the USPP or homeland security." (See Appellant's Hearing Exhibit "NNNN," Page 2.)

ARGUMENT WITH CITATIONS TO LEGAL AUTHORITY

Note that references to the Statement of Facts above in the argument below will use the abbreviation "SF#" for reference to specific paragraphs in the Statement of facts above.

I. APPELLANT CHAMBERS WAS REMOVED IN RETALIATION FOR HER PROTECTED WHISTLEBLOWING DISCLOSURES, AND THE AJ ERRED IN HOLDING OTHERWISE.

To establish a *prima facie* case of prohibited retaliation, an employee must show (1) that the employee made a disclosure protected by 5 U.S.C. § 2302(b)(8), and (2) that the disclosure was a contributing factor in (3) a covered personnel action. The employee may show that the disclosure was a contributing factor through circumstantial evidence, including evidence that "the official taking the action knew of the disclosure," 5 U.S.C. § 1221(e)(1)(A), and that the "action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor," 5 U.S.C. § 1221(e)(1)(B). The "knowledge/timing test" is one of many possible ways to show that the whistleblowing was a contributing factor. If an employee establishes a *prima facie* case, the Board may take corrective action unless the Agency proves, with clear and convincing evidence, that the Agency would have taken the personnel action in the absence of the protected disclosures.

Congress designed the Whistleblower Protection Act of 1989 to encourage federal government employees to disclose wasteful, dangerous or illegal practices. *Marano v. Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993). Congress sought to further this policy by providing for a "substantially reduced burden that must be carried by the whistleblower," *id.*, as opposed to the rather difficult burden required by courts under the WPA's

predecessor, the Civil Service Reform Act of 1978. Whereas the CSRA, as interpreted, required a whistleblower to establish that a disclosure constituted a "significant" or "motivating" factor in a personnel action, *see Clark v. Department of the Army*, 997 F.2d 1466, 1469 70 (Fed. Cir. 1993), the WPA requires only a showing that the disclosure was a "contributing factor" in the action. *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). The whistleblowing employee may establish her fact allegations with preponderant evidence.

In contrast, Congress imposed the highest possible burden of proof on agencies charged by employees with wasteful, dangerous or illegal practices. An Agency may overcome evidence of prohibited personnel practices only by showing clear and convincing proof that it would have taken the action in the absence of such disclosures. The Agency does not benefit from a presumption of good faith, *see Shockro v. FCC*, 5 M.S.P.R. 113, 117 (1981), and bears the responsibility of proving that its actions were justified.

A. Appellant Chambers' Disclosures To The Media, Congress, And Agency Officials Of An Imminent Danger To The Public And An Imminent Danger Of Destruction By Terrorists Of One Or More Of The "Icon" National Monuments, Were Disclosures Protected By The Whistleblower Protection Act (WPA), And The AJ Erred In Holding Otherwise.

1. Appellant's disclosures revealed a specific and substantial danger to the public and our national monuments, and the AJ erred in holding these disclosures were not protected because they did not identify a danger to "any particular person, place or thing."

The AJ held that Chief Chambers' disclosures to the press of the danger of loss of life and destruction of an icon national monument were not protected because they did not disclose s specific and substantial danger to "any particular person, place or thing." Initial decision at 13. Due to the AJ's error discussed infra, the AJ failed to address whether Chief Chambers disclosures to Congress in her December 2, 2003 email and to Director Mainella in her November 28, 2003 memo and fax, both of which communications were very explicit in laying

out the perceived danger, were protected disclosures of a specific and substantial danger to a particular person, place or thing (see section I.A.4. below). Regardless of which of Chief Chambers' disclosures is focused on, there is simply no logical or fact basis for concluding that these disclosures did not identify a danger to a particular place or thing. Clearly Chief chambers in each of these disclosures was expressing a clear concern about the danger of terrorist destruction of one of our few icon national monuments in Washington, D.C., New York, and San Francisco. While Chief Chambers was not in a position to name civilians who might become victims in such an attack, no one could do that other than a true psychic in regard to a terrorist attack on a public place.

If we have the ability to know the specific details of a terrorist threat in advance, then the threat can be averted by law enforcement or military intervention. The employee disclosures that most need to be protected are those regarding dangers that we do not know enough about in terms of the attacking force to prevent by police or military intervention, but which must be addressed by defensive precautions at the potential targets. The AJ's ruling here is a dangerous one because it requires, in order to invoke the protection of the law for an employee, that that employee have detailed foreknowledge of a terrorist event, knowledge of a kind which simply is never available in the modern world of global mobile high tech well funded terrorism in which we live.

Not withstanding the unpredictability of this new danger, the terrorist threat remains one of the biggest dangers to public safety in the world today. Demanding details such as the names and precise locations of the potential victims and targets is unrealistic to the point of being irrational. The result of the Board adopting the AJ's proposed rule on protected activity would be a substantial circumvention of the intent of the Whistleblower Protection Act for an entire

category of employees who disclose terrorist related dangers – perhaps the category of employees in most need of protection at this time in history. It is clearly contrary to the intent of Congress that the WPA be read to exclude protection for employees who disclose vulnerabilities in security in the face of a known terrorist threat simply because these employees cannot provide details that only the terrorists know. Holding that Ms. Chambers' disclosures were protected would be consistent with the Board's prior decision issuing a stay in another case involving a terrorist threat issue. *See Office Of Special Counsel, Ex Rel. James P. Hopkins v. Department Of Transportation,* No. CB-1208-02-0004-U-1 (MSPB October 17, 2001).

2. Appellant's disclosures revealed a specific and substantial danger to the public and our national monuments, and the AJ erred in holding these disclosures were not protected because Appellant had not identified "any management action or inaction that created the alleged safety risk" which Appellant disclosed.

The AJ held that Chief Chambers' disclosures were not protected because Appellant had not identified "any management action or inaction that created the alleged safety risk" which Appellant disclosed. Initial Decision at 13. The analysis of this error is short and simple. There is no basis in 5 U.S.C. sec. 2302(b)(8) or any other law including case law for imposing a requirement on whistleblowing employee to show that a specific and substantial danger she disclosed was created by management action or inaction, or created by any other specific cause or source. The plan language of section 2302(b)(8) makes this clear. For this reason, the AJ's initial decision finding Appellant's disclosures not protected on this basis must be reversed.

3. Appellant's disclosures revealed a specific and substantial danger to the public and our national monuments, and the AJ erred in holding these disclosures were not protected because Appellant had not explained, even if the danger disclosed resulted from "management action or inaction," that the management action or inaction "was anything other than debatable, simple negligence or wrongdoing with no element of blatancy."

The AJ held that Chief Chambers' disclosures were not protected not only because Appellant had not identified "any management action or inaction that created the alleged safety risk" but also because, had Appellant made such a showing, that Appellant had nonetheless still not shown that the management action or inaction was anything other than debatable, simple negligence or wrongdoing with no element of blatancy. Initial Decision at 13. The analysis of this error is as short and simple as the one prior. Again, there is simply no basis in 5 U.S.C. sec. 2302(b)(8) or any other law including case law for imposing a requirement on whistleblowing employee to show that a specific and substantial danger she disclosed was created by management action or inaction that went beyond simple negligence or had an element of blatancy. The plan language of section 2302(b)(8) makes this clear. For this reason, the AJ's initial decision finding Appellant's disclosures not protected on this basis must be reversed.

4. Appellant Chambers' December 2, 2003 e-mail to Congress which disclosed an imminent danger of loss of life and destruction of a national monument was a protected disclosure, and the AJ erred in failing to even address this disclosure and determine whether it constituted protected activity.

Under the Board's regulations, the AJ has an obligation to include in the Initial Decision findings on each issue of material fact and conclusions on each issue of law raised in the appeal(s). 5 C.F.R. sec. 1201.111 provides:

> § 1201.111 Initial decision by judge.
>
> (a) The judge will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right.
>
> (b) Each initial decision will contain:
>
> (1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;
>
> (2) The reasons or bases for those findings and conclusions.

The AJ did not comply with this requirement when she omitted any findings and conclusions regarding a key protected disclosure made by Chief Chambers regarding a substantial and specific danger to the public and icon national monuments.

The AJ erred as a matter of law, having first explicitly chosen to not decide in the AJ's analysis of the IRA appeal whether Appellant's December 2, 2003 e-mail to Congress was protected activity because of an exhaustion of OSC remedies requirement, in then ignoring this same e-mail, which disclosed an imminent danger of loss of life and destruction of a national monument, when analyzing Appellant's protected activities for the affirmative defense of whistleblowing in Ms. Chambers' appeal of the agency removal action, even though the law imposes no OSC exhaustion requirement for a whistleblowing defense in such a removal appeal. In addressing this December 2, 2003 email from Chief Chambers to Congress in the first portion of the Initial Decision which addresses the Individual Right of Action (IRA) whistleblower claim brought by Ms. Chambers the AJ noted, at page 8 note 3, that this email contained information regarding the effect of a staffing and resource crisis on the ability of the U.S. Park Police to prevent loss of life and destruction of one of the national monuments, citing to the email at Agency file (AF) 1221 tab 9, subtab 4i. Notwithstanding this observation of the contents of the email memo from Chief Chambers to Congress, the AJ held that she need not determine whether that email was a protected disclosure because the AJ concluded that Appellant had not exhausted her OSC remedies in regard to that particular disclosure. Initial Decision at page 8 note 3. Whether or not the AJ erred on the OSC exhaustion question, the AJ clearly erred when later in the Initial Decision, at page 41, the AJ stated:

> The Appellant's affirmative defense of reprisal for whistleblowing activity does not appear to raise any allegedly protected disclosures that have not been considered in my analysis of the IRA appeal. For the reasons given in that analysis, I find that the Appellant did not engage in whistleblowing activity …

The December 2, 2003 email was an "allegedly protected disclosure" raised as part of Appellant's affirmative defense of reprisal for whistleblowing that had explicitly not been considered in the AJ's analysis of the IRA appeal. Chief Chambers in this email was very explicit in the concern she disclosed. This email stated:

> My professional judgment, based upon 27 years of police service, six years as Chief of police, and countless interactions with police professionals across the country, is that we are at a staffing and resource crisis in the United States Park Police – a crisis that, if allowed to continue, will almost surely result in the loss of life or the destruction of one of our nation's most valued symbols of freedom and democracy. With our current lack of adequate staffing, the National Park Service's ability to protect these precious historical icons – the Statue of Liberty, the White House, the Washington Monument, the Lincoln Memorial, the Jefferson Memorial, the grounds that support the Golden Gate Bridge – or our guests who visit them or any of our other parks is increasingly compromised. The continuing threat to the future of these American symbols becomes even more acute with any additional loss of personnel.

The AJ clearly erred in failing to make findings and conclusions regarding whether this very explicit email, which on its face discloses a specific and substantial danger to the public and the national monuments as well as a reasonable basis for the belief, was a protected whistleblowing disclosure. Had the AJ addressed the question, it is clear that the outcome of that analysis would have been, and should now be, in Appellant's favor.

In the context of the facts of the terrorist attacks of September 11, 2001, which are known nationwide and do not need to be restated here (or in the Chief's December 2nd email), and given the information known to the Chief at the time including the IG report which emphasized the vulnerability of the monuments due to U.S. Park Police staffing and funding limitations and the other existing demands on the resources of the U.S. Park Police, there can be no reasonable doubt that Chief Chambers reasonably believed at the time that she was disclosing a specific and substantial danger to the public and the icon national monuments.

The 9/11 attacks prove the threat in question is specific and substantial, as does the declaration of war on both sides of the terrorist conflict. Likewise, the expenditure of such vast sums of public funds and the imposition of considerable inconvenience on the air traveler establishes clearly that this nation believes that the terrorist threat is specific and substantial.

The only question that remains is how much security is enough to counterbalance that real and substantial threat in a particular context. Given the indisputably real nature of the on-going terrorist threat, a true vulnerability in security at a prime target translates to a specific and substantial danger to the public and national resources such as the icon monuments. When an employee reasonably perceives that defensive measures in place are inadequate, a disclosure of that reasonable perception should be protected, just as it was in the case of the Patriot missile system. *See Roman v. Department of Army*, 121 F.3D 728 (Fed. Cir. 1997)(citing findings in the underlying MSPB decision) ("Mr. Roman had proved by a preponderance of the evidence that his disclosures were protected under the Whistleblower Protection Act because he was reasonable in his belief that performance deficiencies in the Patriot missile system adversely affected its ability to defend itself and to interact adequately with the Hawk missile system, thereby presenting a substantial and specific danger to public health or safety;"). The law and our legal institutions must acknowledge the changing, and in this case unfortunate, reality of our times, just as our political, military and emergency response institutions have already been forced to do

Given the terrorist's ability to travel to prime targets in this free and open nation, a significant security shortfall at a given facility will translate to a specific and substantial danger -- a danger that can only be ameliorated by an effective defensive posture at the target site. Defensive systems such as those implemented by the U.S. Park Police at the monuments are

deployed not against a specifically predictable threat but against a general unpredictable threat. But the danger is no less real and substantial for being unpredictable. If it were, the nation would not have spent the millions it has spent on security for the President, the courtrooms, the airports and any number of other sensitive potential targets.

Chief Chambers is by virtue of her position a subject matter expert on security of the monuments, and one of the best persons in a position to know what circumstances would or would not represent a danger to the monuments and the public that visit them. The Chief was in a position to know the protective force's strength, resources, and posture and received briefings on the terrorist threat as well as briefings on audits of her own forces. If one of Chief Chamber's U.S. Park Police officers had blown the whistle and ended up in a litigation such as this, there is little question that a reviewing court would have qualified Chief Chambers as an expert to testify on the reasonableness of the danger perceived by the officer, and the reviewing court may well have accepted her testimony as the dispositive evidence on that question. Given these circumstances, there is simply no basis for the AJ finding that Ms. Chambers disclosures to congress, the press and her superiors of a danger to the icon national monuments and the public, resulting from inadequate staffing and funding in the face of a known terrorist threat, were not protected under the Whistleblower Protection Act.

5. Appellant reasonably perceived and disclosed specific and substantial dangers to the public based on the information of which she was aware, including a key Inspector General's report which corroborated her perception of an imminent danger of loss of life and destruction of a national monument resulting from a known terrorist threat.

At the hearing, Appellant offered into evidence as Appellant's Hearing Exhibit X a report from the Inspector General which provided a basis for her reasonable belief that she was disclosing, via her December 2, 2003 email memo to Congress, her November 28, 2003

memorandum to Director Mainella, and her interview with the Washington Post, a substantial and specific danger to the public and the icon national monuments in Washington, D.C., New York and San Francisco. This Inspector General's report of August 2003 can also be found on the web at http://www.oig.doi.gov/ under the "Reports" button. The report states in pertinent part:

> Results in Brief
>
> The National Park Service (NPS) has failed to successfully adapt its mission and priorities to reflect its new security responsibilities and commitment to the enhanced protection of our nation's most treasured monuments and memorials from terrorism. Our assessment revealed a lack of continuity, consistency, and creativity in the planning and execution of protection practices for the national icon parks. Necessary security enhancements have been delayed, postponed, or wholly disregarded while management attempts to equally balance security needs with other park programs and projects. More than once, we were told by park superintendents that they continue to do everything they did prior to September 11, in addition to their new security responsibilities. While it is commendable that NPS wishes to continue providing pre-9/11 services and improvements throughout its parks, this approach fails to recognize and accept the need to discard the status quo and place a higher priority on the timely implementation of new security measures. Unfortunately, we believe that current funding and staffing will not permit the desired "equal" balancing of all programs and projects. In short, it is imperative that icon park protection take precedence over all other park concerns. . . .
>
> In short, the parks have not felt the pressure to perform, nor have they been held accountable for their noncompliance. The NPS and the Department must address these serious deficiencies within the security and law enforcement programs in order to adequately protect our national icons. Greater effort and guidance are needed in order to properly meet current security demands. Coordination and communication—two key characteristics of any well-functioning organization—are lacking. Specifically, we uncovered an over-reliance on small numbers of protection rangers and Park Police officers. Reliance on overworked and understaffed protection rangers and Park Police officers to provide satisfactory protection at icon parks is unwise. The park security workforce requires augmentation, and both current and incoming rangers and officers should receive more intense training in order to strengthen their skills and to enhance their ability to execute protection duties. Furthermore, technological solutions should be pursued, as well as the use of contract security personnel, where appropriate.

> . . . After 9/11, however, security and law enforcement factions received considerable and sudden attention; nevertheless, the pre-9/11 funding and staffing deficit has greatly impacted the parks' capability to respond swiftly to today's call for enhanced security measures. With limited resources, the Department and NPS have been challenged in their efforts to carry out their protective mission.
>
> . . . Experience has shown that terrorists are interested in attacking symbols of America, and intelligence information suggests that no attack will take place without first scrutinizing a target for its weaknesses and vulnerabilities. If proper security measures are in place when this scrutiny occurs, there is a good chance that the terrorists will seek some other, less protected target. Simply stated, a well-protected, adequately staffed facility will help deter terrorists from attacking it.
>
> . . . most protection rangers and Park Police officers assigned to icon parks have been forced to work 12-hour shifts for extended periods of time, with little time off since September 11, 2001. It was reported that officers were working 12-hour shifts seven days a week for several months and with no days off. These officers only recently began receiving one day off per week. We have a concern about the long-term effectiveness of the protection staff and the officers who operate under these intense conditions. Fatigue and waning morale often impede an officer's perspicacity. . . At one of the most prominent of the icon parks, a single officer working a 12-hour shift was responsible for monitoring 101 different security cameras on eight different security monitors. Despite occasional breaks, this is an arduous and taxing assignment for any officer, let alone for an officer required to put in so many unassisted hours. . . .
>
> Suggested Actions
> . . . 4. The Department and NPS should ensure, through senior management discussions, directives, and in-service training, that organizational commitments and responsibilities for key asset security are widely known and supported throughout the Department and NPS.

Appellant also disclosed to the media and Congress that a danger to the public on parkways and in parks was created by the limited resources available to the U.S. Park Police which resulted from the inadequate funding and staffing provided by DOI and NPS, particularly in light of the new anti-terrorism demands. Appellant also disclosed to the media and Congress that the icons (the famous national monuments such as the Lincoln and Jefferson Memorials, the Statute of liberty, and the White House) themselves and the public who visited them were at risk. Appellant's view was corroborated by, and to some extent motivated by, the reports issued by

the Inspector General. The Inspector General has recognized that not only are the monuments vulnerable to such an attack, but also that this vulnerability is directly correlated with the funding and staffing limitations of the U.S. Park Police. *See* Appellants Hearing Exhibit X. In light of the well documented threats and vulnerabilities noted in the OIG reports, it is clear error for the AJ to hold that Appellant's disclosures did not qualify as protected given that Appellant had a reasonable belief that she was disclosing a specific and substantial danger to the public. An objective independent review of the information available to Appellant Chambers including Exhibit X, and the other reports of the Inspector General, Congress, NAPA, the NPS and other agencies addressing the terrorist threat and security vulnerabilities, makes clear that Chief Chambers belief that she was disclosing a real, specific and substantial danger was more than reasonable – it was correct.

6. Appellant disclosed a potential violation of law, which was protected activity under 5 U.S.C. sec. 2302(b)(8), and the AJ erred in holding otherwise.

The AJ erred in ignoring Appellant's disclosure of a potential violation of law in the Initial Decision. Appellant asserted that her complaint to Director Mainella of December 2, 2003 regarding the mishandling of her personnel files by Murphy and Krutz was a disclosure of a potential violation of law. *See* Agency File Tab B, Chambers Affidavit at para.s 149-152, 157, 163, 168, 201, Affid. Ex. 74. In this case the law involved, although not cited in the complaint letter per se is the Privacy Act. Notwithstanding that the AJ properly noted both the existence of this letter and other aspects of its contents, as well as properly noting the rule of law that to be protected such a disclosure need not cite to a specific law thought violated, the AJ nonetheless failed to address the issue of whether this letter of complaint qualified as a protected activity because it disclosed a potential violation of the Privacy Act. This omission was error.

7. Appellant Chambers made protected disclosures outside the Agency to the press and Congress, and to her non-immediate superiors inside the Agency, which disclosures were not made in the normal course of her duties, and the AJ erred in both misconstruing and misapplying Huffman v. Office of Personnel Management, 263 F.3d 1341 (Fed. Cir. 2001) when the AJ found these disclosures to not be protected activities.

Huffman v. Office of Personnel Management, 263 F.3d 1341 (Fed. Cir. 2001) was relied on by the AJ in the Initial Decision as the apparent basis for the AJ determining that Ms. Chambers internal disclosures to DOI and NPS management of potential gross mismanagement and abuse of authority in regard to the handling (mishandling) of the U.S. Park Police budget was not protected. However, the Board on remand in *Huffman* clarified the holding in Huffman that disclosures outside the normal chain or disclosures within the normal chain of concerns that were not part of the employee's routine duties would still be protected. *See Huffman Office Of Personnel Management*, No. DC-1221-99-0178-M-1 (MSPB September 23, 2002). In the instant case, Ms. Chambers complained of Comptroller Sheaffer, not her superior, regarding his action in submitting a purported budget request in the name of the U.S. Park Police that was substantively wrong and was never approved or reviewed by the U.S. Park Police which was certainly not a routine concern. This disclosure would not be excluded from protection under the Huffman rule.

8. The AJ erred and applied a double standard in holding Appellant to be the author of the quoted and paraphrased statements attributed to her in the Washington Post on December 2, 2003 when the AJ sustained Agency charges based on Appellant having made such statements, but when analyzing whether Appellant made protected disclosures, the AJ refused to credit the Appellant with having made the same statements based on Appellant's allegation that some of the Post statements were not accurate.

Although the Initial Decision is ambiguous on this point, it appears that the AJ failed to give the Appellant credit for the purposes of determining protected activities for all of

Appellant's statements in the Post because of Appellant's testimony that some of the statements were not quoted or paraphrased accurately. The AJ definitely made a remark to this effect in the decision but given the remainder of the analysis presented it is ambiguous as to exactly what role this observation played in the Initial Decision. To the extent it prevented the AJ from crediting Appellant's statements to the Post as protected activities, it was error. It is clear from the record that the Agency, for better or worse, clearly held Appellant accountable for all statements attributed to her in the Post.

B. Even If Ms. Chambers' Disclosures Of Imminent Dangers Of Loss Life And Destruction Of A National Monument, And Other Disclosures, Were Found Not To Be Specific Or Substantial Enough To Be Protected, The AJ Nonetheless Erred In Denying Appellant Chambers' Affirmative Defense Of Whistleblowing Because The Agency Clearly Perceived Chief Chambers To Be A Whistleblower.

It is clear from the record that the Agency perceived Appellant as a whistleblower, whether or not her disclosures meet the technical legal requirements to be protected activities or not. Employees who are perceived as whistleblowers are entitled to the protection of the WPA. *See Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81 (1998) (one who is perceived as a whistleblower is still entitled to the protection of the Whistleblower Protection Act). Murphy's calling in Krutz to draft an adverse personnel action against Chambers on the very day the Post article came out, and Murphy issuing a gag order to Appellant on the same day make clear that the Agency perceived Appellant as a whistleblower. This fact should have led the AJ to find for Appellant on her IRA appeal and affirmative defense of whistleblowing notwithstanding that the Aj believed that Ms. Chambers' disclosures did not meet the legal criteria to be protected.

C. The Gag Order Issued By The Agency That Prohibited Appellant From Speaking With The Press Or Congress (Or Other Parties) Was A Covered Personnel Action That The Board Could Address, And The AJ Erred In Holding Otherwise.

The Administrative Judge erred as a matter of law in holding that the gag order the Agency placed on Chief Chambers was not a covered personnel action under the WBPA. The WPA defines prohibited personnel practices to include, "any . . . significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(xi). "[T]his definition of 'personnel action' must be interpreted broadly . . . ." *Singleton v. Ohio National Guard*, 77 M.S.P.R. 583, 587 (1998) (citing *Shivaee v. Department of the Navy*, 74 M.S.P.R. 383, 388 (1997); *see also Roach v. Department of the Army*, 82 M.S.P.R. 464, 482 (1999) ("[T]he Board has held that it will construe the WPA broadly . . . ."). These cases properly interpret Congress' intentions when it amended the list of personnel actions covered by the statute:

> Consistent with the Whistleblower Protection Act's remedial purpose, the provision adding "any other significant change in duties, responsibilities, or working conditions" to listed personnel actions should be interpreted broadly. This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.

140 Cong. Rec. H11,421 (daily ed. Oct. 7, 1994) (statement of Rep McCloskey). The Administrative Judge misconstrued the meaning of "significant change."

D. Appellant's Protected Disclosures Were Established As Contributing Factors In The Agency Removal Action And Other Actions Taken Against Her, And The AJ Erred In Holding That Some Of These Disclosures Were Not Contributing Factors.

In addition to requiring that the Appellant prove that she made protected disclosures, the WPA requires a showing that those disclosures were a contributing factor in the personnel action taken. 5 C.F.R. § 1209.6(a)(5)(ii). The Administrative Judge found, correctly, that two of Ms. Chamber's disclosures would have been contributing factors in her termination, had the Administrative Judge found that those disclosures were protected. Initial Decision at 15. Those two disclosures were Ms. Chamber's November 3, 2003 telephone conversation with

congressional staffer Weatherly and Ms. Chambers statements to the Washington Post which were reported in an article on December 2, 2003..

However, the AJ failed to conclude, partly by oversight, that Ms. Chambers other disclosures were not contributing factors. Those other disclosures included the December 2, 2003 email from Ms. Chambers to Congressional Staffer Weatherly, the November 28, 2003 memorandum from Ms. Chambers to Director Mainella, Ms. Chambers' December 2, 2003 letter of complaint regarding a potential privacy Act violation submitted to Director Mainella, and Ms. Chambers disclosures of potential gross mismanagement and abuse of authority regarding improper handling of the U.S. Park police budget which disclosures were made during the six months prior to the Agency's proposal to remove Chief Chambers.

In order to show that a protected disclosure contributed to a personnel action, an Appellant need only show that the official who took the action had actual or constructive knowledge of the disclosure, and that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1)).

Pursuant to the statutory timing test for whether a disclosure was a contributing factor, any personnel action following a disclosure is deemed to have been influenced by (contributed to) the disclosure if the acting official knew of the disclosure and acted within a reasonable period of time. *Smith v. Department of Agriculture*, 64 M.S.P.R. 46 (1994), defined "reasonable period" as including personnel actions taken "less than a year after [acting officials] became aware of the Appellant's protected activity." *Id*. at 65. As noted *supra*, the "knowledge/timing test" is one of many possible ways to show that the whistleblowing was a contributing factor. Under this test, it is apparent from the record that the four additional protected disclosures that

the AJ failed to explicitly find were, or would have been, contributing factors in the Agency actions were in fact contributing factors as a matter of law.

The federal Whistleblower Protection Act, applicable here, has taken the proximity in time rule, which allows a showing that whistleblowing was a contributing factor to be made by circumstantial timing evidence, from case law and codified that rule into the statute itself.

> (e) (1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. **The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that--**
>
> **(A) the official taking the personnel action knew of the disclosure; and**
>
> **(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.**

5 U.S.C. **§** 1221 (emphasis added).

The employee can prove that her whistleblowing was a contributing factor by 1) the statutory "timing test" by showing that the agency official taking action knew of the protected activity and showing close proximity in time between the protected disclosure and the agency action which followed; or 2) by other circumstantial evidence; or 3) by direct evidence; or 4) some combination of the first three approaches. 5 U.S.C. **§** 1221. In the instant case, Chief Chambers can meet her burden to show that her protected disclosures were a contributing factor in the Agency action via each and all of these methods.

It is clear that the Agency officials who issued the gag order, administrative leave order, and proposed removal, Don Murphy and Fran Mainella, knew of Chief Chambers' protected disclosures before taking the challenged adverse actions against her. See Chambers Affidavit at

144-146, 148, 156, 158, 159, 161, 162, 164, 166, 167, 169, and 170. Both were informed of the Chief's communication with the Washington Post and with Congress as well by Chief Chambers herself. Chambers affidavit at 144. Moreover, the Agency decision document on the proposed removal referenced the Chief's protected whistleblowing to Congress and the Press explicitly as bases for the proposed removal. Chambers Affidavit at 217; Affid. Exhibit 91. Likewise, the gag order explicitly referenced the Chief's disclosures to the media as a basis for the issuance of the gag order. Chambers Affidavit at 169; Affid. Exhibits 80 and 81 . The gag order was clearly issued jointly by Murphy and Mainella. The voice mail from Murphy communicating the gag order stated: "I just got off the phone with the Director, and we . . ." Affid. Exhibit 80. Murphy acknowledged in his testimony that he knew of Chambers' December 2, 2003 email to Congress by December 4, 2003 by way of his communications with congressional staffer Weatherly who faxed the email to him. Tr. 9-9-04 (Murphy, cross). This fax occurred the day before or day of Murphy placing Chief Chambers on administrative leave without any advance notice. *Id*.

There was an extremely close proximity in time between the Chief's protected disclosures to the Washington Post, to Congress, and to Director Mainella and DOI officials on the one hand, and the Agency issued Gag Order, Administrative Leave Order, and Proposed Removal of Chief Chambers on the other hand. On December 2, 2003, a news article appeared in the Washington Post newspaper quoting statements made by Chief Chambers. Chambers Affidavit at 166, Affid. Exhibit 77. The Chief did several media interviews on this same day. Chambers Affidavit at 166. Also on December 2, 2003, the same day as the Chief's media interviews and the publication of the Washington Post article in which she was quoted stating her concerns with the public safety consequences of DOI and NPS imposed budget and staffing limits, she received a gag order from her supervisor. Chambers Affidavit at 169; Affid. Exhibits

80 and 81. The Chief was told to have no further interviews with the press or Congress because the Director and Deputy Director had decided that the content of the message the Chief was putting out was not the message the Department wanted to be relayed. Chambers Affidavit at 169; Affid. Exhibits 80. Three days later, on December 5th, 2003, Chief Chambers was placed on administrative leave, Chambers Affidavit at 192, Exhibit 90, with numerous indications during the intervening 2 days that the administrative leave decision was actually made on December 3rd, the day immediately after the media interviews, Chambers Affidavit at 173, 175-179, 181, 183, and 184

The gag order also came on the heels of the Chief's November 28, 2003 memo to Director Mainella and December 2d email to Congressional staffer Weatherly. Chambers Affidavit at 158, 159, and 165; Affid. Exhibits 68 and 76. Both communications forcefully stated the Chief's concern that inadequate U.S. Park Police staffing and funding risked loss of life and destruction of a national monument or icon. Chambers Affidavit at 159 and 165; Affid. Exhibits 68 and 76. Deputy Director Murphy issued a proposed removal letter to Chief Chambers on December 17, 2003, 15 days after the Washington Post article and the Chief's memo to Congress, and 19 days after the Chief's November 28 disclosure to the Director. Chambers Affidavit at 217; Affid. Exhibit 91. The proposed removal cited charges the Chief had never been asked to discuss, was never interviewed regarding, and was never permitted to explain. Chambers Affidavit at 218; Affid. Exhibit 91.

This close proximity in time is legally sufficient, pursuant to plain language in the federal statute, to meet Chief Chambers' burden to show that her whistleblowing was a contributing factor in the Agency actions against her, even if the Board would find that other circumstances

weighed against such a finding. Once timing is shown to be close, all other contributing factor tests are irrelevant.

> Here, although the AJ acknowledged the knowledge/timing test set forth in the 1994 WPA amendment, …, she does not appear to have applied the test. Instead, after finding that Previte had knowledge of the appellant's disclosure prior to her decision to reassign him just a few months later, the AJ considered other circumstantial evidence and found that the appellant's whistleblowing was not a contributing factor in the agency's decision to reassign him. Once the knowledge/timing test has been met, however, an AJ 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 fact finder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. See Powers, 69 M.S.P.R. at 155-57. Thus, the appellant not only made a non-frivolous allegation of contributing factor, he proved it.

Carey v. Dept. of Veterans Affairs, 93 MSPR 676 (2003); *also see Jackson v. VA*, 95 MSPR. 152 . Thus, Chief Chambers, despite having an abundance of additional evidence that proves her point, has clearly met her burden to show that her whistleblowing was a contributing factor in the Agency decisions against her via the statutory timing test.

In the alternative, assuming that were not the case, Chief Chambers could make the contributing factor showing based on other evidence including blatant direct evidence. Her burden is not heavy in this regard as the Board has noted.

> We note that the "contributing factor" standard is a lower standard than the "substantial factor" standard that was in effect in whistleblower cases before the Whistleblower Protection Act became law, see, e.g., Gerlach v. Federal Trade Commission, 8 MSPB 599, 9 M.S.P.R. 268, 275-76 (1981), citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 285-86, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977). Statements made during the congressional floor debate on this legislation indicate that one of the primary purposes of the Act was to lower the burden that previously had been imposed on employees seeking to show that their agencies had proposed or effected actions because of their whistleblowing activities. [FN8] For example, Senator Levin made the following statement in connection with the contributing factor test:
>
> FN8. Rep. Schroeder stated that the reason for "reducing the [previous] burden of proof to the 'contributing factor' burden" was that Congress "recognize[d] that it

> [was] unrealistic to expect the whistleblower--or the special counsel acting on the whistleblower's behalf--to demonstrate improper motive." 135 Cong.Rec. H751 (daily ed. Mar. 21, 1989).
> By reducing the excessively heavy burden imposed on the employee under current case law, we will send a strong, clear signal to whistleblowers that we intend to protect them from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action; the new test will make this the rule of law. 135 Cong.Rec. S2780 (daily ed. Mar. 16, 1989). [FN9] The joint explanatory statement of the legislation's Senate and House floor managers, to which we have referred above, includes the following, similar statement:
>
> FN9. See also 135 Cong.Rec. S2792 (daily ed. Mar. 16, 1989) (Sen. Pryor's statement that "Congress intends that the standard of 'contributing factor' be far lower than the ... 'significant factor' " standard that existed previously); 135 Cong.Rec. S2787 (daily ed. Mar. 16, 1989) (Sen. Cohen's statement that, "[n]ow, the employee must show only that whistleblowing is a contributing factor in personnel actions taken against him or her, not a significant factor ..."); 135 Cong.Rec. H754 (daily ed. Mar. 21, 1989) (statements of Rep. Hoyer and Rep. Porter) ("[t]he burden of proof will now be lowered for a Government employee").
>
> The bill makes it easier for an individual (or the Special Counsel on the individual's behalf) to prove that a whistleblower reprisal has taken place. To establish a prima facie case, an individual must prove that the whistleblowing was a factor in the personnel action. This supersedes the existing requirement that the whistleblowing was a substantial, motivating or predominant factor in the personnel action. 135 Cong.Rec. S2784 (daily ed. Mar. 16, 1989) (statement of Sen. Levin, at whose request the joint explanatory statement was printed in the record). [FN10] See also 135 Cong.Rec. H749 (daily ed. Mar. 21, *661 1989) (statement of Rep. Sikorski, who requested that the joint explanatory statement in the record of the House floor debate). [FN11]

Gergick v. General Services Administration, 43 M.S.P.R. 651, 659-60 (1990).

Chief Chambers can prove that her whistleblowing was a contributing factor in the Agency actions against her by direct evidence alone or in combination with the circumstantial evidence of, *inter alia*, proximity in time.

> The record of inquiry the agency issued him on August 4, 1989, includes a specific reference to the appellant's complaints to OSC and to the agency's

> Inspector General. [FN12] It therefore is obvious that the official who issued that inquiry knew about at least some of the appellant's disclosures. …
>
> We also note that, although the agency has denied threatening to remove the appellant, and although it has denied other allegations made by the appellant, it has not denied that the complaints mentioned in the record of inquiry include whistleblowing complaints. See Appeal File, Tab 8.
>
> In addition, documents submitted by the agency indicate that the appellant's whistleblowing complaints were pending with OSC at least as recently as September 1988, Appeal File, Tab 12(6) (Letter from M. Wieseman to J. Alderson, Sept. 23, 1988), and that a complaint of retaliation for filing those complaints was pending with that office at least as recently as February 1989, id., Tab 12(6) (Letter from L. Dribinsky to P. Weiss, Mar. 6, 1989). While these dates may not be recent enough to show, by themselves, that disclosure was a factor in the threatened personnel action, we believe that, when considered along with the inquiry's specific mention of allegations made to the Special Counsel, they indicate that disclosure was such a factor.
>
> In light of the circumstances described above, we find that there is a substantial likelihood that the appellant can show that his whistleblowing complaints were a "contributing factor," as that term is used in the Whistleblower Protection Act, in his threatened personnel action.

Gergick, 43 M.S.P.R. at 662.

In Chief Chambers' case, the direct evidence is more blatant and the timing evidence, as discussed, is even more powerful, than in the precedent cited. The Agency decision document on the proposed removal referenced the Chief's protected whistleblowing to Congress and the Press explicitly as bases for the proposed removal. Chambers Affidavit at 217; Affid. Exhibit 91. Likewise, the gag order explicitly referenced the Chief's disclosures to the media as a basis for the issuance of the gag order. Chambers Affidavit at 169; Affid. Exhibit 80. Thus, there is no dispute about agency knowledge or a causal link between the Chief's disclosures and the challenged personnel action. The agency is accusing her of the disclosures as the basis for the actions against her (a clear example of what is meant by "direct evidence," s*ee e.g., Jones v. Dept. of Army*, 75 M.S.P.R. 115 (1997).

Given this blatant direct evidence, given the dramatic proximity in time evidence, and given that it is well settled that disclosures to Congress and to the news media are protected activities, *Horton v. Department of the Navy*, 66 F. 3d 282 (Fed. Cir. 1995); H.R. Rep. No, 100413, at 12-13 (1988). *See also Special Counsel v. Lynn*, 29 M.S.P.R. 666 (1986), Chief Chambers has clearly established that her whistleblowing was a contributing factor in the Agency actions against her.

The December 2, 2003 email from Ms. Chambers to Congressional Staffer Weatherly was as close in time to the Agency actions as a disclosure can get, occurring hours before the gag order, three days before Chief Chambers was placed on administrative leave, and 15 days before the Agency proposal to remove Chief Chambers. This email was acknowledged by proposing official Murphy in his testimony as an email of which he was aware via communications with Congressional staffer Weatherly on December 2, 3, ad/or 4, 2003 prior to his deciding to place Ms. Chambers on leave and to propose to remove her. Tr. 9-8-04 (Murphy, cross). The November 28, 2003 memorandum from Ms. Chambers to Director Mainella likewise was close in time to the actions taken by the Agency against Ms. Chambers in early to mid-December, and was submitted directly to Agency management. Ms. Chambers' December 2, 2003 letter of complaint regarding a potential privacy Act violation submitted to Director Mainella regarding Mr. Murphy is also very close in time to the Agency actions taken against Ms. Chambers and was also submitted directly to Agency management. Ms. Chambers disclosures of potential gross mismanagement and abuse of authority regarding improper handling of the U.S. Park Police budget, including complaints that comptroller Sheaffer submitted a budget request to the DOI for the U.S. Park Police without review and approval from the Chief or her staff, which disclosures and complaints were submitted directly to Agency management, were made over a

period of approximately six months prior to the Agency's proposal to remove Chief Chambers, still falling within the timeframe recognized in law as establishing the disclosures as contributing factors.

E. The Agency Failed To Establish By Clear And Convincing Evidence That It Would Have Removed Chief Chambers Absent Her Protected Disclosures To The Washington Post, Congress, And Agency Officials, And The AJ Erred In Holding Otherwise.

1. The Agency has a burden under the WPA to show by clear and convincing evidence that it would have removed Appellant even in the absence of her protected whistleblowing disclosures, as the AJ properly recognized.

After an Appellant shows that protected disclosures contributed to personnel actions, the Agency must defend its actions by showing clear and convincing evidence that it would have taken the action regardless of the disclosures. *Jones v. Department of the Interior*, 74 M.S.P.R. 666, 672-73 (1997). The meaning of "clear and convincing" eludes precise definition, allowing some degree of subjectivity to enter any analysis of evidence under that standard. The Supreme Court had, perhaps intentionally, left the standard without precise definition, but it has offered some guidance as to how a finder of fact should approach the analysis:

> The function of any standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." By informing the factfinder in this manner, the standard of proof allocates the risk of erroneous judgment between the lititgants and indicates the relative importance society attaches to the ultimate decision.

Colorado v. New Mexico, 467 U.S. 310, 315 (1984) (quoting *In re Winship*, 397 U.S. 358, 270 (1970) (Harlan, J., concurring), and citing *Addington v. Texas*, 441 U.S. 418, 423-25 (1979)).

The importance that society attaches to encouraging whistleblowers by protecting them from retaliation is reflected in Congress' choosing to require agencies to show clear and convincing evidence, the highest standard available in civil actions. Accordingly, an

Administrative Judge should have a very high degree of confidence in the veracity of evidence the Agency produces to show that it would have taken a personnel action in the absence of whistleblowing. This confidence should take into account that "when it comes to proving the basis for an Agency's decision, the Agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken" regarding other employees. 135 Cong. Rec. H747 (daily ed. Mar. 21, 1989) (statement of Rep. Sikorski). Because the Agency controls the evidence to such a large degree, "it behooves an Agency, when faced with a 'clear and convincing evidence' standard of proof, to fully explain all of its potentially questionable actions in order to meet that burden." *Cosgrove v. Department of the Navy*, 59 M.S.P.R. 618, 625 (1993).

In making the determination as to whether the Agency has shown by clear and convincing evidence that it would have taken the same action against Appellant in the absence of Appellant's disclosures, the Administrative Judge is required as a matter of law to consider three factors:

[1] the strength of the Agency's evidence in support of the action;

[2] the existence and strength of any motive to retaliate on the part of the Agency officials who were involved with the decision; and

[3] any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Jones v. Department of the Interior, 74 M.S.P.R. 666, 672-73 (1997).

> [9] The findings we have stated above do not end our inquiry into the merits of the appellant's request for a stay of the threatened personnel action. Under 5 U.S.C. § 1221(e)(2), the Board may not order corrective action "if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of [the employee's] disclosure [under 5 U.S.C. §

2302(b)(8)]." "Clear and convincing evidence" is, as the House and Senate noted in passing this legislation, [FN13] a higher quantum of evidence than "preponderant evidence." [FN14] It has been defined as meaning "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." Hobson v. Eaton, 399 F.2d 781, 784 (6th Cir.1968), cert. denied, 394 U.S. 928, 89 S.Ct. 1189, 22 L.Ed.2d 459 (1969).

FN13. 135 Cong.Rec. H749 (daily ed. Mar. 21, 1989) and S2784 (daily ed. Mar. 16, 1989) (joint explanatory statement, printed at requests of Rep. Sikorski and Sen. Levin).

FN14. Senator Levin noted, in the Senate floor debate on this legislation, that this standard of proof was intended to be high for the following two reasons:

First, this standard of proof comes into play only if the employee has proven by a preponderance of the evidence that whistleblowing was a contributing factor in the action against him or her--in other words, that the agency action was tainted. Second, this heightened burden of proof on the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards--the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bears a heavy burden to justify its actions.

135 Cong.Rec. S2780 (daily ed. Mar. 16, 1989). See also 135 Cong.Rec. H747 (daily ed. Mar. 21, 1989) ("Explanatory Statement of Senate Amendment," printed in record at request of Rep. Sikorski).

Gergick, 43 M.S.P.R. at 662-67.

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure, the Board will consider the strength of the agency's evidence in support of its action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, plus any evidence that the agency has taken similar actions against employees who are not whistleblowers but who are otherwise similarly situated. Carr v. Social Security Administration, 185 F.3d 1318, 1323 (Fed. Cir. 1999); Caddell v. Department of Justice, 66 M.S.P.R. 347, 351 (1995), aff'd, 96 F.3d 1367 (Fed. Cir. 1996).

Fulton v. Dept. of the Army, 95 MSPR 79 (2003).

2. The Agency's proffered evidence in support of its charges was legally insufficient to meet the clear and convincing evidence standard under the Act, and the AJ erred in holding otherwise.

In making the finding that, had Ms. Chambers' disclosures been protected, the Agency would nonetheless have shown by clear and convincing evidence that Ms. Chambers' termination was unrelated to her protected disclosures, the Administrative Judge failed to weigh the considerable evidence opposing the Agency's claims while sustaining Agency charges based on unsupported conclusory assertions of the Agency. When weighing evidence, a factfinder should consider the record in its entirety, and discount favorable evidence in light of facts that militate toward different conclusions. See Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). In the context of the full record, evidence that the Agency's removal of Ms. Chambers was proper does not meet the clear and convincing standard.

In sections V, VI, VII, VIII, IX, and X *infra*, the details regarding the weakness in the Agency evidence supporting the four charges against Chief Chambers that the AJ sustained are presented. Further, the evidence supporting chief chambers' rebuttal to those charges is likewise presented in this sections. That information and argument is not repeated here but is incorporated herein by reference. It is clear from the analysis presented in those sections below that the evidence presented by the Agency was not sufficient even to meet its burden in the chapter 75 appeal of preponderance of the evidence.

In regard to the IRA appeal and also in regard to the affirmative defense of reprisal for whistleblowing in the chapter 75 appeal, once the appellant has established that whistleblowing was a contributing factor in the agency action, the Agency then has a much greater burden to

show by clear and convincing evidence that it would have taken the same action even in the absence of the protected whistleblowing activity. As explained *infra*, the AJ found that for at least two of Chief Chambers' disclosures Appellant had established that they were contributing factors, and Appellant has shown herein that several more of her disclosures were also contributing factors (either under the statutory timing/knowledge test or considering the direct and circumstantial evidence of retaliatory motive discussed below).

3. Appellant presented compelling evidence of retaliatory motive in several categories including inadequate investigation of the charges against Appellant, Agency use of irregular procedure, direct evidence of illegal motive, and dramatic proximity in time evidence, and the AJ erred in ignoring this evidence.

Factors indicating a retaliatory motive include "[d]ifference[s] in treatment of the whistleblower before and after the disclosure[, and] [a]dmission or expression of disapproval of the disclosure by Agency officials." Office of Special Counsel, How to Avoid Committing Prohibited Personnel Practices in the Reagan Era: an OSC Seminar, quoted in Peter Broida, A Guide to Merit Systems Protection Board Law and Practice (Dewey Publications 2000) (citation omitted in Broida). For months prior to the December 2, 2003 Post article and December 2, 2003 email from Chambers to Congress, Deputy Director Murphy had been sitting on his concerns about Ms. Chambers alleged misconduct in regard to the medical tests for the two deputies, attorney Myers' attempts to meet with Chambers, and Ms. Chambers' (successful) appeal of his decision to detail Ms. Blyth. Suddenly, on December 2, 2003, after the email to congress gets delivered and the Post article comes out, Mr. Murphy has human resources staffer Krutz in his office (Washington post laying on Murphy's desk), demanding that Krutz work overtime that evening to draft a personnel action against Ms. Chambers based on these old issues that had been gathering dust for months, which now became charges 5 and 6 in the proposed

removal, and based explicitly on Murphy's concerns with Chambers' communications with the media and congress, which became charges 1-4. Of the hundreds, if not thousands, of whistleblower cases litigated to date, it would be hard to find one that had closer more dramatic proximity in time between the protected whistleblowing disclosure by the employee and the initiation of adverse personnel actions by the employer/Agency.

Temporal proximity is, of course, as a matter of law, circumstantial evidence at least sufficient to establish a prima facie case of causation in a retaliatory discharge. *See, e.g., Keys v. Lutheran Family and Children's Services of Missouri*, 668 F.2d 356, 358 (8th Cir. 1981); *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980); cert. denied, 450 U.S. 979, 101 S.Ct 1513, 67 L.Ed 2nd 814 (1981); *Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986); *Mitchell v. Baldrich*, 759 F.2d 80, 86 (D.C. Cir. 1985); *Dominic v. Consolidated Edison Co. of New York*, 822 F.2d 1249 (2d Cir. 1987) (considering retaliatory claim for firing that occurred three months after filing complaint). In an IRA case and in a chapter 75 appeal affirmative defense of reprisal for whistleblowing activity, temporal proximity is, as explained elsewhere in this Petition, incorporated into the statute as one means, when combined with management knowledge of the protected activity, of establishing that the whistleblowing was a contributing factor in the Agency action.

Also suddenly, on December 2-5, 2003, Ms. Chambers' superiors started lying to her and avoiding her, refusing to tell her in response to her inquiries that adverse actions were being planned and misleading her into thinking meetings would happen that would not and meetings for one purpose were for another. On December 2, 2003, Murphy, with Mainella's approval, issued a gag order to Chief Chambers, ordering her to have no further interviews with media or otherwise.

Further, an inadequate investigation by the employer of the allegations against the employee and of incidents for which the employee is allegedly responsible prior to taking action against the employee also is evidence of retaliatory motive. *Cotter v. Consolid. Edison Co. of N.Y.*, 81-ERA-6, slip op. of ALJ at 17 (July 7, 1981), adopted by the Secretary of Labor (Nov. 5, 1981), aff'd Consolidated Edison Co. of N.Y. v. Donovan, 673 F.2d 61 (2d Cir. 1982).

> To have proceeded with the suspension and lowered performance appraisal without investigating whether the appellant's allegations of disparate treatment were true would tend to indicate that the stated reasons for these personnel actions were a pretext for retaliation for whistleblowing. Cf. Russell v. Department of Justice, 76 M.S.P.R. 317, 323-24 (1997) (the Board will consider evidence regarding the conduct of an agency investigation when the investigation was so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity).

Fulton v. Dept. of the Army, 95 MSPR 79 (2003). Here, fast draw Deputy Director Murphy "fired" first and asked questions later. First he had Krutz draft the proposed removal on December 2, 2003 shortly after the Post article came out the same day, then on December 5, 2003 he placed Chief Chambers on administrative leave, then on December 17, 2003 he had delivered to Ms. Chambers a notice of proposed removal, and then in February or March of 2003, after Chambers had already submitted her response to the proposed removal and the meager one quarter inch stack of purportedly supporting documentation supplied at the time by the Agency, did the Agency set about doing an inquiry into the allegations against Chambers. It was then and only then, months after the proposed removal decision had been made, that Press officer John Wright was tasked by the Agency to find out if Chief Chambers had even made the statements to the Post attributed to her. Then, and only then, did the Agency inquire with Murphy to see if he had even issued the orders and instructions Chambers was accused of failing to follow.

That inquiry, however, as voluminous as the records resulting from it are, was not performed in good faith. When Mr. Wright's attempts to confirm with the Post that each of several statements attributed to Ms. Chambers was actually made by her was cut short by the reporter and editor terminating the conversations prematurely, Mr. Wright was instructed to prepare an affidavit that gave the misleading impression that all questions had been answered and all of Ms. Chambers' alleged statements had been confirmed. See discussion of Mr. Wright's deposition *infra*. When Mr. Hoffman asked Mr. Murphy during a deposition under oath if Murphy had given each of the orders and instructions to Chambers as charged in the proposed removal, Murphy's memory was substantially lacking. What should have been a fundamental obstacle with the Agency proceeding in acting on those charges was brushed aside by Hoffman and he simply invited Murphy to submit later after the deposition anything he wanted to try to prove the orders were given. Even when Murphy submitted nothing further, Hoffman pressed on to issue the final removal decision sustaining all the charges despite the uncertainties raised by Murphy's testimony.

An employer's failure to follow its normal procedures can, in an appropriate case, also suggest deliberate retaliation. *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). The Agency here engaged not only in abnormal procedure in regard to its actions towards Ms. Chambers, as discussed in more detail infra, the Agency engaged in blatantly illegal conduct. This conduct included deleting and concealing the extensive findings of fact made by Agency final decision maker Hoffman in the final removal decision document, and included Hoffman conducting numerous depositions and related inquiries and reviewing and considering the resulting voluminous information regarding Ms. Chambers and the allegations against her all *ex parte* – without any notice or opportunity for Chief Chambers to participate in the depositions,

review the information or respond to it before the Agency made its decision to remove her (and subsequent decision to hide its reasons). As explained elsewhere in this Petition, both the extensive *ex parte* communications. Disparate treatment, discussed below, is also evidence of retaliatory motive, as is pretext – the giving of dishonest reasons by the employer. If the AJ recognized that these types of circumstances and conduct are legally recognized as reflecting evidence of retaliatory motive, it is not apparent from her Initial Decision.

Further, there is substantial direct evidence of retaliatory motive on the part of Agency officials for taking the adverse actions against Chief Chambers. Here, the Agency's proposed removal and final decision documents themselves, on their face, make clear that Ms. Chambers' statements to the Washington Post and Congress were explicit reasons for the Agency's actions. The proposed removal document on its face, in the details of the charges, makes clear through direct, not circumstantial, evidence that Ms. Chambers' removal was motivated at least in part by Ms. Chambers' communications with Congress and the press. See, e.g., *Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997). *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999) (internal quotations and citations omitted). ("Direct evidence of discrimination is: evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption.. This evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question."); also see *Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999).

The "smoking gun" statements in the proposed removal charges that refer directly to Ms. Chambers' communication with Congress, combined with the very close proximity in time, inadequate investigation and irregular procedure establish a sufficiently strong showing of illegal motive to establish under the WPA both that Ms. Chambers' whistleblowing was a contributing

factor in her suspension and removal, and that the motive evidence is sufficiently strong to preclude the Agency from meeting its burden to show by clear and convincing evidence that it would have suspended and removed Chief Chambers even in the absence of her protected whistleblowing.

4. The Agency engaged in disparate treatment, and the AJ erred in holding otherwise.

In addition to examining the evidence of retaliatory motive and the strength of an Agency's evidence that it would have taken the action regardless of whistleblowing, an Administrative Judge should consider "any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Jones v. Department of Agriculture*, 74 M.S.P.R. 666, 672-73 (1997). "If the agency in fact punished the appellant alone for conduct that it knew was common practice among agency employees, it is hard to see how it could establish in a clear and convincing fashion that it would have so acted in the absence of the appellant's protected disclosure." *Fulton v. Dept. of the Army*, 95 MSPR 79 (2003). *Also* s*ee Russell v. Department of Justice*, 76 MSPR 317 (1997). "Whether other employees engaged in similar conduct and were not punished is relevant to the dispositive issue … whether the agency proved that it would have taken the same personnel actions in the absence of the appellant's whistleblowing disclosure. See *Carr*, 185 F.3d at 1323." *Fulton v. Dept. of the Army*, 95 MSPR 79 (2003).

The Administrative Judge held that there were no similarly situated employees to Appellant Chambers. Initial Decision at 49. This was error. Contrary to the Administrative Judge's conclusion, there are and have been similarly situated employees who were not similarly treated by the Agency, not the least of which is Chief Chamber's immediate predecessor as Chief of the U.S. Park Police, Chief Langston.

In the year 2000, Chief Robert Langston of the United States Park Police, Chief Chambers' predecessor, made remarks remarkably similar to those more recently made by Teresa Chambers. *See* Sf #326. There is an absence of any evidence in the Agency record that Chief Langston was disciplined for these disclosures to the press. This disparity in treatment evidences both the absence of any legitimate and pre-existing NPS or DOI restriction on communications by the Park Police with the media or Congress that would prohibit Appellant's disclosures and reflects current Agency official's retaliatory attitude and motive.

Chief Langston discussed staffing and funding needs with Congress as well as the press, see SF#326.. Chief Langston, unlike chief Chambers, was not disciplined for this conduct in any manner. *Id*. The Administrative Judge ruled pretrial that Appellant would not be allowed to call Chief Langston but then in the Initial Decision ruled against Appellant because Appellant had failed to offer any evidence of a similarly situated employee.

The difference in treatment received by Ms. Chambers versus Chief Langston far exceeds any difference between the two employees' situations. Second, the Agency bears the burden of proof on this issue, and should not benefit from a presumption of good faith. Contrary to the Administrative Judge's holding in the Initial Decision, other employees who serve as examples for comparison need not be identically situated:

> The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.

Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989). "Similar" means, "like; resembling; having a general resemblance but not exactly the same." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, 1691 (2d ed. 1983). Contrary to the view the AJ applied

below, precise equivalence in the situations of the employees being compared is not required.

> Santa Fe contends that petitioners were required to plead with "particularity" the degree of similarity between their culpability in the alleged theft and the involvement of the favored co-employee, Jackson. This assertion, apparently not made below, too narrowly constricts the role of the pleadings. Significantly, respondents themselves declined to plead any dissimilarities in the alleged misconduct of Jackson and petitioners, and did not amend their pleadings even after an interim order of the District Court indicated it regarded petitioners' allegations of racial discrimination as sufficient to raise the legal problem of dissimilar employment discipline of "equally guilty" employees of different races. App. 94. Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other "employees involved in acts against [the employer] of comparable seriousness...were nevertheless retained..." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 U.S., at 804 (emphasis added).

McDonald v Santa Fe Trail Transportation Co., 427 U.S. 273, 283 n.11 (1976).

Beyond the situation involving former Chief Langston, additional disparate treatment is apparent from an examination of how the Agency treated similarly situated employees who acted outside the chain of command, as Chief Chambers was accused of doing. Deputy Director Murphy himself acted outside the chain of command in his communications with Mr. Manson, and/or another non-immediate superior, regarding actions planned to be taken against Appellant Chambers.

Another prime example of disparate treatment is Jeff Capps. Mr. Capps was, at the time of Chief Chambers' disclosures to the Washington Post and placement on administrative leave, the Fraternal Order of Police Lodge President. Mr. Capps directly provided budgetary and staffing information to the Washington Post, the same or more detailed information than Chief Chambers was charged with providing, but was not disciplined, counseled about possible misconduct, or even investigated.

In addition, no other Department of Interior employee, or federal employee, has been charged with offenses involving media and Congressional disclosures. Agency press officer Mr. John Wright is unaware of any other employee ever being fired for speaking with the press. Mr. Wright is unaware of any other employee ever having been given an order prohibiting them from discussing issues relating to their employment with the press. See John Wright Deposition. The Agency produced no evidence that any other employee had been fired for communicating with Congress, including former Chief Langston. The purported "rules" have been applied only against Chief Chambers.

The Agency bears the burden of showing that it would have taken the action in the absence of whistleblowing. Showing similar treatment of similarly situated employees is one means of meeting that burden. The Board has previously rejected Agency claims of justified personnel action where the Agency did not produce such evidence:

> The Agency failed to submit any evidence as to the qualifications of [employees who received favorable treatment]. Absent comparison evidence that would permit the Board to determine whether the Agency evaluated the Appellant's qualifications differently from those of the nonwhistleblowers . . . , the Agency's evidence is not strong enough to meet the clear and convincing test.

Costin v. Department of Health and Human Resources, 72 M.S.P.R. 525, 539-540 (1996).

In the Initial Decision, the Administrative Judge ignored considerable evidence supporting the existence of a retaliatory motive, and failed to require the Agency to produce clear and convincing evidence contradicting the existence of such a motive. The record includes substantial direct and circumstantial evidence of retaliatory motive, including proximity in time, direct reference to Appellant Chambers' protected activities in the Agency proposed removal and final decision documents, use of irregular procedure by the Agency, inadequate investigation by the Agency of the charges against Appellant, and hostility towards the Appellant's protected

activities including the issuance of gag orders.

Because of the strength of the Appellant's evidence that the Agency acted with retaliatory motive, and the evidence that the Agency has not taken the same type of actions against other similarly situated employees, the Agency has not met the clear and convincing evidence standard even if the Board accepted the Administrative Judge's conclusion that Appellant did act improperly in four of the six charged areas of misconduct. When an employee makes a *prima facie* whistleblowing claim, the fact "that the Agency proved, by substantial evidence, that the Appellant's performance [or conduct] was unacceptable . . . is insufficient by itself to establish, by clear and convincing evidence, that it would have taken the same action in the absence of his disclosures." *Braga v. Department of the Army*, 54 M.S.P.R. 392, 399 (1992). Here, the Agency has failed to meet its burden that it would have removed Appellant Chambers even if she had not made her protected disclosures to the Washington Post, Congress, and Agency officials.

II. THE AGENCY ENGAGED IN A PROHIBITED PERSONNEL PRACTICE IN VIOLATION OF 5 U.S.C. § 2302(B)(12) WHEN IT RESTRICTED MS. CHAMBERS' COMMUNICATIONS WITH CONGRESS, PLACED HER ON ADMINISTRATIVE LEAVE, AND REMOVED HER IN RETALIATION FOR HER COMMUNICATIONS WITH CONGRESS, IN VIOLATION OF FEDERAL LAW INCLUDING 5 U.S.C. § 7211, AND THE AJ ERRED IN HOLDING OTHERWISE.

The Administrative Judge (AJ) rejected the Appellant's claim that the Agency's removal action violated 5 U.S.C. § 2302(b)(12) by violating the Lloyd-La Follette Act, 5 U.S.C. § 7211. *Initial Decision* at 44 – 46. The AJ erred in her interpretation of the fact evidence and the legal protections afforded by Congress, largely by ignoring both, and the AJ's Initial Decision on this claim must be reversed.

The Lloyd-La Follette Act, 5 U.S.C. § 7211, provides the following protections:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

The AJ made the following determination of the record and the application of the Lloyd-La Follette Act: "Section 7211 protects an employee's right to petition Congress. The Appellant failed to present evidence or argument showing how this right was violated." *Initial Decision* at 44.

The AJ read the Lloyd-La Follette Act far too narrowly and has failed to consider the record of evidence and argument presented on this issue. Regarding the Lloyd-La Follette Act, the plain language of the statute makes clear that a public employee is protected for more than petitioning Congress. The Appellant was protected when she "furnish[ed] information" to a committee of Congress. 5 U.S.C. § 7211. The record is clear that the Appellant furnished information to Ms. Weatherly in her role as Staff Director of the Interior Appropriations Subcommittee.

On the question of whether the Appellant presented evidence and argument concerning how her rights under the Lloyd-La Follette Act were violated, the record does not support the AJ's statement that the "Appellant failed to present evidence or argument showing how this right was violated." *Initial Decision* at 44. Two of the three key protected activities of Chief Chambers analyzed *supra* regarding whistleblower retaliation prohibited under 5 U.S.C. **§** 2302(b)(8), the November 3, 2003 telephone call to Ms. Weatherly and the December 2, 2003 email to Ms. Weatherly, were communications with Congress protected also by 5 U.S.C. § 7211. The extensive evidence discussed *supra* that establishes whistleblower retaliation including proximity in time, irregular procedure, direct evidence from the Agency statements in the proposed removal and final decision documents, and disparate treatment, also establish that the

Agency removed Appellant in significant part because she furnished information to a committee of Congress.

The record also clearly reflects that the Appellant presented argument about this issue in her appeal, stay request, pre-hearing submission and at trial. See, *e.g.*, Trial Transcript, Sept. 14, 2004, at 98 – 110 (closing argument). In closing argument at the hearing, Appellant's counsel offered the following argument, for example:

> That was due strictly to Ms. Weatherly being curious, and perhaps properly so, about why she was getting information from Director Mainella and Deputy Director Murphy regarding the status of implementation of recommendations that the NAPA study committee had made, why that information she was getting was different than what she was hearing from Ms. Chambers.
>
> She was getting, as Ms. Weatherly said, disparate information, she was getting a disconnect, and she was trying to understand how can high-level officials from the same organization be giving me two different stories about the same fact?
>
> Well, Congress is entitled to inquire into those matters, and when they do, Agency officials are obligated to answer their questions and to answer truthfully. Agency officials are protected, by law, in communications with Congress. Congress has seen to that. Ms. Chambers might have been disciplined for refusing to answer Ms. Weatherly's questions, but she did answer Ms. Weatherly's questions, and now she's being punished for doing so, and that is against Federal law. …
>
> Ms. Weatherly's only concern, as she has testified, which did cause you [*sic* her] to be perhaps irritated, was she was getting two different stories on the same question and she didn't know why.
>
> She didn't blame Ms. Chambers, necessarily, anymore than she blamed Director Mainella or Deputy Director Murphy. She was just trying to get to the bottom of inconsistent information, something she's entitled to do, not a basis for disciplining an employee.
>
> There was no identified policy that Ms. Chambers had been given that said thou shalt not talk to Congress. Any such policy would have been illegal.
>
> If there was a policy from OMB or the Department of Interior that in some way attempted to interfere with, prohibit, or restrict Ms. Chambers' communications with Congress, it would have to give way to the superior authority of the Federal statutes which guarantee the right of communication.

Appellant, in her pre-hearing submission, also offered the following, for example:

Also on December 2, 2003, the same day as the Chief's media interviews and the publication of the Washington Post article in which she was quoted stating her concerns with the public safety consequences of the NPS imposed budget limits and resulting staffing limits, she received a gag order from her supervisor. The Chief was told to have no further interviews with the press or Congress because the Director and Deputy Director had decided that the content of the message the Chief was putting out on the budget issues was not the message the Department wanted to be relayed. Three days later, on December 5th, 2003, Chief Chambers was placed on administrative leave, with numerous indications during the intervening 2 days that the administrative leave decision was actually made on December 3rd, the day immediately after the media interviews.

The gag order also came on the heels of the Chief's November 28, 2003 memo to Director Mainella and December 2d email to Congressional staffer Weatherly, both of which forcefully stated the Chief's concern that inadequate U.S. Park Police staffing and funding risked loss of life and destruction of a national monument. The Chief's November 28 memo made the following disclosure to the Director:

> As you know, the fiscal challenges of FY '04 make it uncertain as to whether any recruit classes will be hired during this fiscal year. The FY '05 passback does not provide funding for hiring during that fiscal year, which could potentially bring our sworn staffing to its lowest point since 1987 and more than 250 officers below the level recommended by the Director of the National Park Service in his report to Congress in March 2000 – one and one-half years before the horrific events of September 11, 2001, that tremendously increased the staffing needs of law enforcement agencies across the country.
>
> Given our current lack of adequate staffing, I must alert you that the National Park Service's ability to protect these precious historical icons – the Statue of Liberty, the White House, the Washington Monument, the Lincoln Memorial, the Jefferson Memorial, the grounds that support the Golden Gate Bridge – or our guests who visit them is increasingly compromised. The continuing threat to the future of these American symbols becomes even more acute with any additional loss of personnel. My professional judgment, based upon 27 years of police service, six years as Chief of police, and countless interactions with police professionals across the country, is that we are at a staffing and resource crisis in the United States Park Police – a crisis that, if allowed to continue, will almost surely result in the loss of life or the destruction of one of our nation's most valued symbols of freedom and democracy.

The Chief sent virtually verbatim language to Congressional staffer Weatherly four days later on December 2, 2003.

Deputy Director Murphy issued a proposed removal letter to Chief Chambers on December 17, 2003, 15 days after the Washington Post article and the Chief's memo to Congress, and 19 days after the Chief's November 28 disclosure to the Director. The proposed removal cited charges the Chief had never been asked to discuss, was never interviewed regarding, and was never permitted to explain.

The series of adverse actions taken against U.S. Park Police Chief Teresa Chambers by the Department of Interior and its National Park Service officials, including the gag order on December 2nd, the administrative leave order on December 5th, and the December 17, 2003 proposed removal of the Chief, were a direct result of protected whistleblowing disclosures the Chief made during the preceding few days, weeks and months to Congress and NPS officials, culminating in the Chief's November 28, 2003 memo to Director Mainella, her December 2d email to Congressional staffer Weatherly, and the December 2d Washington Post story and related media interviews. All of these disclosures made clear Chief Chambers' profound concern that the Administration's budget and staffing limitations, which were being imposed on the U.S. Park Police through a budgeting process that had excluded meaningful input from Park Police leadership, were compromising public safety and making our precious national memorials and icons, the greatest symbols of our democracy, vulnerable to destruction by terrorist attack. …

Issues and Defenses

Ms. Chambers identifies the following issues and defenses (which are stated affirmatively as defenses):

(4) The Agency engaged in a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(12) when it restricted Ms. Chambers' communications with the press and Congress, placed Teresa Chambers on administrative leave and relieved her of her law enforcement credentials and authority, when it proposed and finally terminated Teresa Chambers' employment (removed her from her position and from federal service) because she communicated with the press and Congress, in violation of federal law (including the First Amendment, the LaFollette Act, 5 USC section 7211, and the Anti-Gag statute).

(10) The Agency's purported bases for the actions taken against Ms. Chambers were a pretext for taking action due to her protected whistleblowing.

(11) The Agency engaged in disparate treatment of Ms. Chambers as compared to similarly situated employees.

(16) The Agency performed an inadequate investigation of the charges against Appellant.

(17) The Agency used irregular procedure in deciding to remove Appellant.

(18) The Agency was motivated to retaliate against Appellant because of her protected activities as evidenced by proximity in time, irregular procedure, inadequate investigation of the charges against Appellant, pretext, disparate treatment, and hostility towards Appellant's protected activities and that of other employees, and direct evidence of illegal motive in bringing and sustaining the charges against Appellant.

See Appellant's Pre-hearing Submission.

The AJ did not allow for post-hearing briefs and allowed only 30 minutes for Appellants' closing arguments. Had the AJ provided for briefs or longer arguments, perhaps the evidence admitted into the record that supports the section 2302 (b)(12) defense of retaliation for communication with Congress in violation of 5 U.S.C. § 7211 would have been more apparent to the AJ. The evidence establishing the Agency's retaliation against Appellant Chambers for protected communications with Congress parallels the evidence laid out supra for the 2302(b)(8) claim of whistleblower retaliation.

That evidence includes irrefutable evidence that Appellant engaged in protected communications with Congress which evidence includes Appellants' testimony, Ms. Weatherly's testimony, Appellant's notes of her November 3, 2003 call to Weatherly, Appellant's December 2, 2003 email to Weatherly, testimony admissions at hearing and at deposition by Mr. Murphy, and admissions in the Agency proposed and final decision documents which reference those protected communications. The record also indisputably reflects that the Agency took adverse employment actions against Appellant Chambers in the form of a gag order, administrative leave, a proposed removal and a final removal decision. Thus, the only issue left to prove is the causal nexus between the protected communications of Appellant with Congress and the adverse employment actions by the Agency – i.e. that the Agency took the adverse actions because of

Appellant's protected communications with Congress. The evidence of that nexus, as for the (b)(8) whistleblowing, is abundant.

That evidence of the causal nexus begins, as with the (b)(8) whistleblower analysis, with the dramatically close proximity in time between Chief Chamber's communications with Congress and the Agency actions taken against her. The AJ properly concluded that under the statutory timing/knowledge test applicable to section 2302(b)(8) whistleblower claims, that Ms. Chambers November 3, 2003 communication with Congressional staffer Weatherly would have been a contributing factor in the Agency's actions including her removal. The AJ explicitly, and erroneously (as explained *supra*), failed to decide whether Ms. Chambers' December 2, 2003 email to Congressional staffer Weatherly would also have been a contributing factor under this test but clearly, as explained *supra*, it would have been. Although the specific statutory timing/knowledge test applicable for section 2302(b)(8) claims is not *per se* applicable as a matter of law to a claim under section 2302(b)12) based on Agency retaliation for an employee's communications with Congress in violation of 5 U.S.C. § 7211, the decades of discrimination case law that established the principle of proximity in time as strong circumstantial evidence of retaliatory motive, which principle was codified in the statutory timing/knowledge test, applies to the 2302(b)(12) claim.

It is well-settled that temporal proximity is, as a matter of law, circumstantial evidence at least sufficient to establish a prima facie case of causation in a retaliatory discharge. *See, e.g.*, *Keys v. Lutheran Family and Children's Services of Missouri*, 668 F.2d 356, 358 (8th Cir. 1981); *Womack v. Musen*, 618 F.2d 1292, 1286 & N. 6 (8th Cir. 1980); cert. denied, 450 U.S. 979, 101 S.Ct 1513, 67 L.Ed 2nd 814 (1981); *Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986); *Mitchell v. Baldrich*, 759 F.2d 80, 86 (D.C. Cir. 1985); *Dominic v. Consolidated*

Edison Co. of New York, 822 F.2d 1249 (2d Cir. 1987) (considering retaliatory claim for firing that occurred three months after filing complaint).

Further, there is no real question in the instant case as to whether the Agency took the challenged action(s) because of the Ms. Chambers' statements to Congress. Here, the Agency's proposed removal and final decision documents themselves, on their face, make clear that Ms. Chambers' statements to the Washington Post and Congress were explicit reasons for the Agency's actions. The proposed removal document on its face, in the details of the charges, makes clear through direct, not circumstantial, evidence that Ms. Chambers' removal was motivated at least in part by Ms. Chambers' communications with Congress.

> As we have explained in the age discrimination context, the quintessential example of direct evidence would be "a management memorandum saying, "Fire Earley--he is too old.' " Earley, 907 F.2d at 1081; see also, e.g., Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n. 6 (11th Cir.1987) (giving virtually identical example). …
>
> The direct nature of the evidence the alleged statement in this case provides can be illustrated another way. Substitute for the explanatory introductory clause "Your deposition was the most damning to Dillard's case" the following: "You are black." Is there any doubt that the statement "You are black, and you no longer have a place at Dillard Paper Company" would be considered direct evidence of discrimination? We think not. It is immediately obvious that the second clause "you no longer have a place at Dillard Paper Company" is linked by the conjunction "and" to the first clause "You are black" in such a way as to communicate cause and effect.

Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997). If there is direct evidence of illegal motive, the burden shifting and pretext analysis steps in the discrimination analysis do not apply.

> If the employee presents direct evidence of discrimination, there is no need to resort to "burden-shifting" analysis under *McDonnell Douglas v. Green*, *TWA v. Thurston*, 469 U.S. 111, 121 (1985). Direct evidence of discrimination is: evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption... This evidence must not

> only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.

Pitasi v. Gartner Group, Inc., 184 F.3d 709, 714 (7th Cir. 1999) (internal quotations and citations omitted). Such direct evidence eliminates the need for the employee to show that the employer's reasons were pretext. *Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657 (4th Cir. 2003).

> In Price Waterhouse, a plurality of the Supreme Court first annunciated the mixed-motive proof scheme. See Price Waterhouse, 490 U.S. at 228. Stated simply, under this proof scheme, once a plaintiff in a Title VII case shows that a factor made illegal under Title VII played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not allowed the illegal factor to play such a role.7 See id. at 244- 45.
>
> We have subsequently explained that a Title VII plaintiff qualifies for application of the mixed-motive proof scheme if the plaintiff presents "`direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion.'" 8 Fuller, 67 F.3d at 1142 (quoting Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring)). We have further explained that such a showing requires "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." Id. The determination of whether a plaintiff has satisfied this evidentiary threshold is a decision for the district court after it has reviewed the evidence, see id. at 1142, which "ultimately hinges on the strength of the evidence establishing discrimination," id. at 1143. Absent the threshold showing necessary to invoke the mixed motive proof scheme, however, a plaintiff must prevail under the less advantageous standard of liability applicable in pretext cases in which the plaintiff always shoulders the burden of persuasion. See id. at 1143.
>
> Thus, the broad issue before this court is whether the district court erred by concluding that Kubicko failed to make the threshold evidentiary showing ... our sister circuits have unanimously applied the mixed-motive proof scheme to retaliation claims. See Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 549-551 (10th Cir. 1999); Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 202-203 (D.C. Cir. 1997); Tanca, 98 F.3d at 685; Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039-41 (2d Cir. 1993)… . At a more focused level, the issue before this court is whether the following statements and conduct constitute evidence "that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision," Fuller, 67 F.3d at 1142: (1) Stuckrath's statements, made at a meeting between OLS's human resource manager and administrative branch head approximately two days prior to

> Stuckrath's termination of Kubicko, to the effect that OLS's internal investigation of Joyner's sexual harassment allegations should be terminated, and that if anyone should be terminated over Joyner's sexual harassment allegations it should be Kubicko, because he believed that "this was all bogus," and Kubicko "just fabricated all this up," (J.A. 144B); (2) Mann's request at the end of the meeting for Kubicko's file, "because Ed Stuckrath wanted it," (J.A. 144); (3) Stuckrath's statement to Kubicko in the course of discussing why Kubicko was being terminated, that he (Kubicko) initiated Joyner's complaint of sexual harassment against Franck; and (4) Stuckrath's statement at the same time "that it would have made a `hell of a difference' to him had[Kubicko] gone to him instead of Human Resources about Joyner's complaint," (J.A. 448) (Affidavit of Kubicko).
>
> We conclude this evidence considered in toto both reflects directly the alleged retaliatory attitude against Kubicko and bears directly on OLS's decision to terminate Kubicko. Numerous factors support our conclusion. First, Stuckrath made the final decision to terminate Kubicko. Second, Stuckrath made some of the statements at issue only approximately two days prior to Kubicko's termination and the remainder at the time he informed Kubicko that he was terminated. Three, Stuckrath requested Kubicko's personnel file at the end of the meeting where he said that Kubicko should be terminated because of all of his involvement in Joyner's sexual harassment allegations against Franck. And four, Stuckrath's comments on their face reflect a direct connection between Kubicko's protected activity under § 704 and his termination. In short, Kubicko presented sufficient evidence, when viewed in the light most favorable to Kubicko, that both reflects directly Stuckrath's alleged retaliatory attitude and that bears directly on Kubicko's termination to permit a reasonable jury to find that Stuckrath placed substantial negative reliance in terminating Kubicko on the fact that Kubicko opposed Franck's sexual harassment of Joyner and participated in the HRC's investigation of Joyner's sexual harassment complaint. See Fuller, 67 F.3d at 1142.

Kubicko v. Ogden Logistics Services, 181 F.3d 544 (4th Cir. 1999).

The “smoking gun” statements in the proposed removal charges that refer directly to Ms. Chambers communication with Congress, combined with the very close proximity in time, inadequate investigation and irregular procedure referenced *supra* in the whistleblower claim analysis, establish a sufficiently strong showing of illegal motive to establish a dual motive case which places the burden on the Agency to separate out its legal and illegal motives and prove that it would have taken the same removal action against Chief Chambers in the absence of the Chief’s protected communications with Congress. As explained supra in the section 2302(b)(8)

claim analysis, the proximity in time evidence, direct evidence in the Agency proposed removal documents, and the pattern of circumstantial evidence combined make it impossible for the Agency to meet this burden and show that it would have removed Chief Chambers even had she not engaged in protected communications with Congress. The AJ's dismissal off hand of Appellant's 5 U.S.C. § 7211 based claim under section 2302(b)(12) on the asserted basis that Appellant offered no evidence and argument is simply specious.

III. THE AGENCY FAILED TO PROVIDE APPELLANT NOTICE AND AN OPPORTUNITY TO RESPOND TO THE EXTENSIVE *EX PARTE* COMMUNICATIONS THE PROPOSING OFFICIAL AND OTHER AGENCY PERSONNEL HAD WITH THE FINAL AGENCY DECISION MAKER, AND THE AJ ERRED IN HOLDING THIS FAILURE WAS NOT A VIOLATION OF APPELLANT CHAMBERS' DUE PROCESS AND STATUTORY RIGHTS.

A. The Agency Officials' Extensive And Material Ex Parte Communications With The Final Agency Decision-Maker Violated The Rule Against Such Ex Parte Communications Established In Binding Legal Precedent, And The AJ Erred In Holding Otherwise.

It is undisputed and apparent from the Agency files in the record that after providing Chief Chambers the proposed removal and inviting her to review the information on which the Agency relied, which amounted to about a one quarter inch thick stack of papers which Ms. Chambers did receive and review, Tr. 9-9-04 (Chambers), the Agency final decision maker Mr. Hoffman, along with agency attorneys and human resource personnel, then began an additional substantial inquiry into the allegations against Ms. Chambers to create a much more voluminous Agency record on which the Agency then relied to support its decision to remove Ms. Chambers. This all was done completely without Ms. Chambers' knowledge. Tr. 9-9-04 (Chambers); Tr. 9-9-04 (Hoffman). Ms. Chambers was given no notice that these depositions would be taken, was not told what additional documents were being created, obtained and reviewed, was not given a copy of any of these depositions or additional documents including the Affidavit of John Wright

and the memoranda from attorney Meyers, and was not otherwise put on notice of or allowed to respond to any of this additional voluminous information. This Agency process was a blatant violation of Ms. Chambers' rights. *See, e.g., Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368 (Fed. Cir. 1999).

> The introduction of new and material information by means of ex parte communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond. When deciding officials receive such ex parte communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. Procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information. *fn4 It is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process. Our system is premised on the procedural fairness at each stage of the removal proceedings. An employee is entitled to a certain amount of due process rights at each stage and, when these rights are undermined, the employee is entitled to relief regardless of the stage of the proceedings. …
>
> If the Board finds that an ex parte communication has not introduced new and material information, then there is no due process violation. On the other hand, if the Board finds new and material information has been received by the deciding official by means of ex parte communications, then a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure. As we have explained previously, when a procedural due process violation has occurred because of ex parte communications, such a violation is not subject to the harmless error test. See Sullivan v. Department of the Navy, 720 F.2d 1266, 1274 (Fed. Cir. 1983); Ryder v. United States, 585 F.2d 482, 488 (Ct. Cl. 1978) (refusing to apply harmless error test: "[W]here a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal (or demotion) of legality, leaving the employee on the rolls of the employing agency and entitled to his pay until proper procedural steps are taken toward removing or disciplining him. In that situation, the merits of the adverse action are wholly disregarded."); Camero v. United States, 375 F.2d 777, 780 (Ct. Cl. 1967).

Stone v. Federal Deposit Insurance Corp., 179 F.3d 1368 (Fed. Cir. 1999).

5 C.F.R. 752.404(f) forbids the agency from considering any reason not specified in the advance notice of proposed action. The Agency procedure here, involving numerous depositions and documents being obtained and considered after the Appellant was given the proposed notice of removal and a meager quarter inch of allegedly supporting documentation, without any notice of or opportunity to respond to this additional voluminous information being provided to Appellant, see Tr. 9-9-04 at 20-85 (Hoffman), was a blatant violation of the procedure required by law.

B. The Agency Officials' Extensive And Material Ex Parte Communications With The Final Agency Decision-Maker, Without Notice To Appellant And Without An Opportunity For Appellant Chambers To Respond, Violated Appellant's Procedural Pre-Termination Due Process Rights, And The AJ Erred In Holding Otherwise.

The AJ erred in holding that the Agency officials' extensive and material *ex parte* communications with the final Agency decision-maker, without notice to Appellant and without an opportunity for Appellant Chambers to respond, did not violate Appellant's procedural pre-termination due process rights recognized in *Cleveland Board of Education v Loudermill*, 470 U.S. 532 (1985). It is irrefutable from the record that the Agency considered reasons and evidence beyond that provided to Appellant and referenced by the Agency at the time of the proposed removal, without noticing Appellant or giving her a chance to respond to this new evidence and these new reasons. This new information was material and was intended to be material. It included a new inquiry by press officer Wright with the Washington Post and extensive depositions of the Appellant's first, second, third and fourth level superiors involving substantial questioning on each charge against Appellant. It involved memoranda from attorney Myers related to one of the charges. None of this material was provided to Appellant to review or respond to before her removal. This was a violation of Appellant's rights.

> The proposing official and the deciding official are the agency's representatives in effecting adverse personnel actions. Thus, the Board will focus on the record that these officials have before them when the action is proposed and before it is effected. This will ensure that an employee receives his due process rights. See 5 C.F.R. sec. 752.404(b)(1), (c)(1) (an agency must inform the employee of the right to review "the material relied on to support the reasons" for its proposal and may not use material that cannot be disclosed to him).

George M. Barresi, et al. v. United States Postal Service, MSPB Case No.s BN0752910284-I-1, BN0752910287-I-1, BN0752910286-I-1, BN0752910289-I-1 (MSPB Dec. 22, 1994).

> In addition, the dissent's opinion on this point conveniently ignores the concept of fairness or due process. In accordance with Board precedent and the United States Supreme Court, the majority recognizes that fundamental due process requires that the tenured public employee have "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Stephen*, 47 M.S.P.R. at 680; *O'Connor*, 59 M.S.P.R. at 658; *Kriner v. Department of the Navy*, 61 M.S.P.R. 526, 531 (1994). In this regard, due process mandates that notice be sufficiently detailed to provide a meaningful opportunity to be heard. *See Goldberg Kelly*, 397 U.S. 254, 267-68 (1970). Because the agency's representatives in effecting the indefinite suspension in this case were unaware of the contents of the investigative report and the investigative report was not given to the appellants as a reason for the agency's possession of "reasonable cause to believe," the agency cannot use the investigative report to establish its charge in hindsight. To do so would be violative of the due process principles requiring the agency to provide an explanation of its evidence, and a fair opportunity to respond. …

Id.

> The process due a public employee prior to removal from office has been explained in Loudermill. The Supreme Court has stated:
>
> "An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case.". . . This principle requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. . . ."
>
> "[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . ."

> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. . . . The tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id. at 542-46 (emphasis added).
>
> The Supreme Court expressly noted that the need for a meaningful opportunity for the public employee to present his or her side of the case is important in enabling the agency to reach an accurate result for two reasons. First, dismissals for cause will often involve factual disputes and consideration of the employee's response may help clarify such disputes. In addition, even if the facts are clear, "the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." Id. at 543.

Stone v. Federal Deposit Insurance Corp., 179 F.3d 1368 (Fed. Cir. 1999).

IV. THE AGENCY'S CONCEALMENT FROM APPELLANT OF THE FINDINGS OF FACT MADE BY THE FINAL AGENCY DECISION-MAKER VIOLATED CONSTITUTIONAL AND STATUTORY MANDATES, AND WAS A BASIS FOR DEFAULT, AND THE AJ ERRED IN HOLDING OTHERWISE.

A. The Agency's Admitted Intentional Deletion Of The Agency Final Decision-Maker's Findings Of Fact From Its Decision Document, And Admitted Filing And Service Of A Version Of The Decision Document That Omitted These Still Referenced And Relied Upon Findings Of Fact, Violated 5 U.S.C. Sec. 7513, 5 C.F.R. Sec. 752.404, The AJ's Acknowledgement Order, 5 C.F.R. 1201.25, The Constitution's Fifth Amendment Due Process Guarantee, And Binding Legal Precedent, And The AJ Erred In Holding Otherwise.

Several laws and regulations require that the Agency provide to Appellant its "reasons" for taking the challenged action. Those sources of legal authority include: 5 U.S.C. sec. 7513, 5 C.F.R. sec. 752.404, the AJ's Acknowledgement Order, 5 C.F.R. 1201.25, and the Constitution's Fifth Amendment Due Process guarantee. Also see the binding legal precedent established by

the Federal Circuit via case decisions such as Stone v. Federal Deposit Insurance Corp., 179 F.3d 1368 (Fed. Cir. 1999).

5 U.S.C. sec. 7513(b)(4) requires that written agency decisions taking adverse actions must include "the specific reasons therefor." 5 C.F.R. 752.404(f) forbids the agency from considering any reason not specified in the advance notice of proposed action. The Agency admits that it deleted from the final decision document the extensive findings of fact made by final decision maker Hoffman as he weighed the competing evidence presented on the charges against Ms. Chambers. Tr. 9-9-04 (Hoffman); Hoffman Deposition. These findings were, of course, not included in the proposed removal notice given to Appellant, having been made by Hoffman and not proposing official Murphy, and were based on the numerous depositions and documents reviewed by Hoffman *ex parte*, without any notice to Appellant as explained *supra*.

Hoffman attempted to conceal the existence of these findings of fact from Appellant's Counsel Harrison during his deposition but eventually was forced to acknowledge that they existed in his original draft(s) of the final removal decision document. See Hoffman deposition. The Agency then broke the promise made by Agency counsel to produce these findings in the drafts to Appellant and asserted that the documents were attorney client privileged and refused to produce them. The AJ mistakenly agreed that these documents were somehow privileged, and even more mysteriously found that even the fact findings within the documents which are still referenced and relied upon in the final version of the decision document filed with the Board and served on Appellant were privileged and could not be provided to Appellant via redaction of the draft.

The Agency's "reasons" must mean more than the mere conclusion that adverse action is warranted. The reference to the Agency's reasons must refer to the why not the what. The

reference to ‘reasons” can logically mean nothing other than the Agency’s findings of fact, the Agency’s conclusions of law, and the Agency’s logic that together provide a rationale as to why the rules of law, policy and procedure the Agency has concluded exist, when applied to the facts found by the Agency, require or justify the action taken by the Agency against Appellant. If any of these three critical components -- the Agency’s findings of fact; the Agency’s conclusions of law, policy and procedure; and the Agency’s logic used to relate the law and facts – are not provided to Appellant, then the Appellant cannot reasonably be expected to truly understand why the Agency took the decision being challenged or to offer a meaningful legal defense to the proposed action. That is, if any of these three critical components of the Agency’s reasons are not disclosed, then the Agency has not complied with the legal requirements to provide to the Appellant the Agency’s reasons for its actions.

Hoffman admitted that the deleted findings were the reasons on which he relied for sustaining each of the six charges against Appellant. See Hoffman Deposition. The Agency improperly deleted and concealed the Agency decision maker’s findings of fact on which the Agency relied to sustain the charges against Appellant. It is apparent to Appellant, even without having the benefit of being able to read those findings, that the Agency chose to violate 5 U.S.C. sec. 7513(b)(4)’s requirement that the reasons be stated in the final decision document, in order to coverup the fact that those deleted reasons were different than and beyond those stated in the proposed removal document, in violation of 5 C.F.R. sec. 752.404. At a minimum, the Board should order those findings released to Appellant and allow Appellant to conduct discovery on those findings and present additional evidence and argument for the record before any final decision is made in this matter by the Board in order for the Agency process to comport with statutory and Due process requirements.

The Agency should be considered in default for not complying with the legal mandates that it provide to Appellant, and the Board, its actual reasons for the actions taken against Appellant. In the alternative, the Board should draw an adverse inference against the Agency that had its findings of fact been disclosed, as required by law, rather than withheld and concealed, that those findings would not have supported the charges against Appellant and would have evidenced that the Agency engaged in prohibited personnel practices when it removed Appellant. The law recognizes that it is appropriate for a judge or agency board to draw such an adverse inference. *International Union v. NLRB*, 459 F.2d 1329 (D.C.Cir. 1972); *Taylor v. U.S. Postal Service*, 75 MSPR 322 (June 19, 1997) (*citing inter alia Wigmore*). Also see, e.g., 3A J. *Wigmore, Evidence* § 1042 (Chadbourn rev. 1970). An adverse inference is appropriate when a party fails to produce or offer a document containing material facts under its control. *Evans v. Robbins*, 897 F.2d 966 (8th Cir. 1990). Evans was citing an old, well-established principle. *See Aetna Casualty & Surety v. Reliable Auto Tire Co.*, 58 F.2d 100 (8th Cir. 1932).

> The district court was entitled, as are we, to draw an adverse inference against the defendant for its failure to produce either pretrial or at trial [certain relevant earnings figures]. When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him. Wigmore has asserted that nonproduction is not merely 'some' evidence, but is sufficient by itself to support an adverse inference even if no other evidence for the inference exists:
>
> "The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference." 2 Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979).

Knightsbridge Marketing v. Promociones y Proyectos, 728 F.2d 572, 575 (1st Cir. 1984) (quoting *Nation-Wide Check Corporation, Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217-18 (1st Cir. 1982)).

> In this case Dennis failed to produce the documents that could have proved or disproved the allegations in the complaint. As a result, the effect of striking his answer to the complaint was nearly identical to simply drawing an adverse inference from his failure to produce those documents. The sanction applied by the district court was, therefore, eminently appropriate.

Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86 (1st Cir. 05/05/1988).

B. The Agency Officials' Concealment From Appellant Of The Findings Of Fact Made By The Final Agency Decision-Maker Violated Appellant's Procedural Pre-Termination Due Process Rights, And The AJ Erred In Holding Otherwise.

> The proposing official and the deciding official are the agency's representatives in effecting adverse personnel actions. Thus, the Board will focus on the record that these officials have before them when the action is proposed and before it is effected. This will ensure that an employee receives his due process rights. See 5 C.F.R. sec. 752.404(b)(1), (c)(1) (an agency must inform the employee of the right to review "the material relied on to support the reasons" for its proposal and may not use material that cannot be disclosed to him).
>
> In addition, the dissent's opinion on this point conveniently ignores the concept of fairness or due process. In accordance with Board precedent and the United States Supreme Court, the majority recognizes that fundamental due process requires that the tenured public employee have "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985); Stephen, 47 M.S.P.R. at 680; O'Connor, 59 M.S.P.R. at 658; Kriner v. Department of the Navy, 61 M.S.P.R. 526, 531 (1994). In this regard, due process mandates that notice be sufficiently detailed to provide a meaningful opportunity to be heard. See Goldberg Kelly, 397 U.S. 254, 267-68 (1970). Because the agency's representatives in effecting the indefinite suspension in this case were unaware of the contents of the investigative report and the investigative report was not given to the appellants as a reason for the agency's possession of "reasonable cause to believe," the agency cannot use the investigative report to establish its charge in hindsight. To do so would be violative of the due process principles requiring the agency to provide an explanation of its evidence, and a fair opportunity to respond. …

George M. Barresi, et al. v. United States Postal Service, MSPB Case No.s BN0752910284-I-1, BN0752910287-I-1, BN0752910286-I-1, BN0752910289-I-1 (MSPB Dec. 22, 1994).

C. The AJ Erred In Reviewing The Final Agency Decision-Maker's Deleted Findings Of Fact In-Camera And Then Refusing To Disclose Those Agency Findings Of Fact To Appellant, Notwithstanding That There Was No Legitimate Basis For These Agency Findings Of Fact Falling Under Any Attorney Client Or Other Privilege.

The AJ erred in denying Appellant's Motion to Compel Agency responses to document requests and interrogatories regarding the concealed Agency findings of fact, and erred in failing to make those findings available to Appellant after reviewing them in-camera. There is no basis in the law of privilege or otherwise in law to protect findings of fact drafted by an agency decisionmaker, even if intended to be reviewed by an attorney for legal advice, when those findings of fact continue to be relied upon by the decisionmaker and referenced in the final decision document even though deleted from it. The drafts of the decision document containing these findings of fact which are no longer draft findings because they are adopted and relied on in the final decision document filed in this matter by the Agency are not privileged at least to the extent that they contain these findings of fact which at a minimum could be provided to Appellant via a redacted version of the draft containing them.

Appellant is entitled to be provided, under numerous federal laws and regulations, the reasons relied on by the decisionmaker in taking action its removal against Appellant. Those laws include 5 U.S.C. sec. 7513(b); 5 C.F.R. sec. 1201.25 and 5 C.F.R. sec. 752.404(b). Appellant believes that the findings of fact reflect reliance by the decision maker on evidence and reasons not made available to her when she requested all material relied on by the Agency for her proposed removal prior to submitting her response to the Agency proposed removal. Under applicable law, Appellant is also entitled to be provided the final decision and all the

Agency reasons therefore, which on the face of the July 9 decision document include the findings of fact. The denial of Appellant access to these final findings of fact referenced and relied on in the final decision document is a denial of due process.

Similarly, the Agency privilege log shows that the Agency has withheld drafts of the other two key Agency decision documents, the proposed removal document written by Mr. Murphy and the administrative leave memo written by Mr. Davies and Mr. Murphy. The Agency seeks to withhold these draft decision documents on the basis of attorney client privilege apparently because attorney's advised the decision-makers, reviewed drafts, and commented on drafts. While the actual comments and advise from the attorneys may well be privileged, the work product of the decision-makers, even after edits based on legal advise, are simply not attorney-client communications or attorney work product and must be produced. If the Agency assertion of privilege for these type of documents was adopted, no agency document, draft or final, would be discoverable if the current Agency practice of getting legal advise on anything that might be controversial continues to be followed. An employee under this rule proposed by the Agency in its assertions of privilege would not be given the real statement of reasons for the Agency action that the law clearly requires to be produced pursuant to 5 CFR 1201.25, and what has been ordered to be filed in the Administrative Judge's Acknowledgement Orders.

D. The AJ Erred In Denying Appellant's Motion To Compel Agency Responses To Document Requests And Interrogatories Which Sought Agency Production Of The Concealed Findings Of Fact, And Erred In Denying Appellant's Request That These Findings Be Produced At Trial As "Prior Statements" Under 5 U.S.C. Sec. 1201.62.

The AJ denied Appellant's motion to compel the Agency to produce Agency final decision maker Hoffman's findings of fact which had been deleted from the final decision document noticing Appellant's removal served on Appellant and filed with the Board. The AJ

did apparently review the draft decision document(s) containing the deleted findings but refused to disclose the document or the findings (via for example redaction) on the basis that the findings disclosed in the view of the AJ no material evidence and the drafts were attorney client priviledged. See Summary of Prehearing conference. However, it is clear from Mr. Hoffman's deposition that he, a non-attorney decision making official of the Agency, is the author of the findings in the draft decision document(s) in question. See Hoffman Deposition. It is also clear that these withheld fact findings represent the Agency's decision maker's attempts to reconcile competing evidence and argument put forward on the various charges by the Appellant who opposed the proposed removal and the proposing official and other Agency officials who supported the proposed removal. Id.. It is clear under these circumstances that the attorney-client privilege does not apply to these Agency decision maker's findings of fact, which do not represent nor disclose the nature of the legal advice sought or obtained but are underlying facts, and the AJ erred in not granting Appellant's motion to compel. *See Gangi v. United States Postal Service*, No. BN-0752-03-0070-I-1 (MSPB September 1, 2004).

Appellant also requested during the hearing that the AJ require the Agency to produce the withheld findings of fact of Mr. Hoffman and the draft documents containing them pursuant to the Board's regulation 5 C.F.R. sec. 1201.62. That regulation provides:

> § 1201.62 Producing prior statements.
>
> After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual that is relevant to the evidence given. If the party refuses to furnish the statement, the judge may exclude the evidence given.

Because Mr. Hoffman had made and adopted these statements (the findings and documents containing them) and communicated them to others in his name, and because Mr.Hoffman had presented his direct exam testimony prior to Appellant's counsel requesting the production of

those prior statements, the AJ should have required the Agency to produce those findings so that they could have been used by Appellant to conduct a meaningful cross examination of Mr. Hoffman at the hearing as contemplated by the Board's rule. The AJ's denial of Appellant's request for these prior statements lacked any basis in law or fact and should be reversed. The issue of the deleted findings by the final Agency decision maker goes to the heart of the case and the failure of both the Agency and the AJ to make those findings available to Appellant was substantially prejudicial to Appellant who to this day has yet to know exactly what the Agency final decision maker's reasons were for sustaining the charges against her made by the proposing official.

V. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 2, AND THE AJ ERRED IN HOLDING OTHERWISE.

The AJ erroneously sustained Agency charge number 2. Charge 2 alleges that Chief Chambers disclosed to the Washington Post security sensitive information. However, this charge fails to state a legal basis for misconduct. Public remarks regarding "security" are nowhere prohibited in the Department of Interior policies and no rule or order classified in any manner the information attributed to Ms. Chambers in the Post. No such purported rule or order was identified or produced by the Agency. The Department of Interior does not have a definition of "law enforcement sensitive" information and Chief Chambers was authorized to decide what law enforcement material may be released to the public. There must be an announced policy that was violated to support Agency disciplinary action against an employee. *See* 43. C.F.R. § 20.503 ("Employees shall not engage in any conduct or activity which is in excess of his or her

authority, or is otherwise contrary to any law or **announced** Departmental policy." Emphasis added.).

In support of its position, the Agency offered only a report (not an order or a rule) that had been stamped "law enforcement sensitive by one of Chief Chambers' subordinates, for reasons that remain unknown, although the Agency, having the burden on this issue, could have asked that subordinate to testify as to his reasons for stamping the document. This report contains a lot of information, and it is unclear which information the subordinate officer desired to protect. Agency officials admitted that not all material in documents marked sensitive is sensitive.

Chief Chambers followed the written guidance provided to departmental spokespersons in answering questions in the Washington Post interview frankly. See Appellant's Hearing Exhibit W. Agency press officer Mr. John Wright acknowledged that the best policy when asked questions by a reporter is to answer truthfully. See Wright Deposition.

The Agency offered no evidence beyond self-serving conclusory opinions that Chief Chambers' interview with the Washington Post compromised any legitimate security interest. The information Chief Chambers disclosed referenced only facts that were in plain sight. Police staffing details were provided to the Post by the Fraternal Order of Police (FOP), not Chief Chambers, who simply responded honestly to questions from the Post regarding information the Post already possessed. Assistant Chief Holmes testified that numbers and placement of officers that are stationed at monuments in plain sight, which is what Chief Chambers is attributed as saying in the post article, is not a matter that is sensitive or prohibited from release. See Holmes Deposition.

Agency press officer Mr. John Wright is unaware of any written Agency policy prohibiting the release of any categories on information including "Law Enforcement Sensitive" information. Mr. Wright stated that he is not aware of any policy definition re "law enforcement sensitive," has received no training on it, and would not know what information was "LES" unless someone told him. Mr. Wright admitted that the policy requirement is that DOI officials contact the public affairs/ communications office before a press interview if possible, and if not possible, asap thereafter. The policy does not limit the content or substance of what is to be said to the media. See Wright Deposition.

The failure of the Agency to produce a written rule or policy that was allegedly violated by Ms. Chambers' conduct provides a clear basis for the Board drawing the adverse inference that no such rule or policy exists. See the discussion *supra* and *infra* regarding the law of adverse inference, and see, e.g. *International Union v. NLRB*, 459 F.2d 1329 (D.C.Cir. 1972); *Taylor v. U.S. Postal Service*, 75 MSPR 322 (June 19, 1997); *Bilokumsky v. Tod*, 263 U.S. 149, 68 L. ed. 221, 44 S. Ct. 54 (1923); 2 Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979); 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970); *McMahan & Company v. PO Folks, Inc.*, 206 F.3d 627, 632 (6th Cir. 2000); *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999); *Knightsbridge Marketing v. Promociones y Proyectos*, 728 F.2d 572, 575 (1st Cir. 1984); *Evans v. Robbins*, 897 F.2d 966 (8th Cir. 1990); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir.1983).

For this Agency charge to be sustained, the Agency has to show more than a document somewhere that overlaps with the information talked about in the Post. It has to show that the particular information disclosed had been classified, per se, as sensitive and was prohibited from release. The agency has come nowhere close to showing that in this record.

VI. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 3, AND THE AJ ERRED IN HOLDING OTHERWISE.

The AJ erroneously sustained Agency charge number 3. Charge 3 alleges that Appellant Chambers made an improper disclosure to the Washington Post of specific budget numbers submitted by the Agency in the President's budget in violation of an OMB Circular. However, the Agency failed to prove that Appellant Chambers stated a budget amount for a given purpose found in the President's budget documents in her statements to the Post. The Agency never offered such a President's budget document into evidence which contained any of the amounts for the purposes stated by Ms. Chambers to the Post. Ms. Chambers did not state to the Post that the Agency had requested $8 million dollars for a total USPP budget increase, but instead, as the record reflects, stated in response to questions from the Post reporter that she needed approximately a $27 million increase for FY 05 for the U.S. Park Police to properly perform its mission of protecting the public and icons. See Tr. 9-9-04 (Chambers), also see Chambers deposition.

The Agency charge does not assert the existence of or identify any budget document that contains the numbers Chambers is said by the Post to have mentioned. Because the Agency failed to produce any such document at trial which fell within the parameters of the policy prohibition in the charge against Chambers, i.e. the Agency failed to produce a President's budget document reflecting a request of $8 Million or any other amount that matched the number and purpose reflected in Ms. Chambers' statements to the Post, the AJ should have drawn an adverse inference against the Agency that no such document exists. See the discussion *supra* and *infra* regarding the law of adverse inference, and see, e.g. *International Union v. NLRB,* 459

F.2d 1329 (D.C.Cir. 1972); *Taylor v. U.S. Postal Service*, 75 MSPR 322 (June 19, 1997); *Bilokumsky v. Tod*, 263 U.S. 149, 68 L. ed. 221, 44 S. Ct. 54 (1923); 2 Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979); 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970); *McMahan & Company v. PO Folks, Inc.*, 206 F.3d 627, 632 (6th Cir. 2000); *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999); *Knightsbridge Marketing v. Promociones y Proyectos*, 728 F.2d 572, 575 (1st Cir. 1984); *Evans v. Robbins*, 897 F.2d 966 (8th Cir. 1990); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir.1983).

Comptroller Sheaffer was called to testify by the Agency and he alluded to the alleged existence of such a document but even he, the person in charge of the fiscal records for the Agency, could not produce such a document notwithstanding having control over all such documents. Absent production by the Agency of a specific document representing the President's budget decisions that references a specific budget amount for a specific purpose that matches the budget amount and purpose stated by Ms. Chambers to the Post, the Agency cannot establish a violation of the referenced OMB Circular. Appellant may not be punished for discussing the U.S. Park Police budget needs generally or in ways not restricted by OMB. As noted regarding Charge 2 above, there must be an announced policy that was violated to support Agency disciplinary action against an employee. *See* 43. C.F.R. **§** 20.503 ("Employees shall not engage in any conduct or activity which is in excess of his or her authority, or is otherwise contrary to any law or **announced** Departmental policy." Emphasis added.).

VII. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 5, AND THE AJ ERRED IN HOLDING OTHERWISE.

The AJ erroneously sustained Agency charge number 5. This charge alleges that Chief Chambers failed to follow her supervisor's instructions on three occasions. However, the three alleged instructions were never actually given to Ms. Chambers by Mr. Murphy, her supervisor. None of the three alleged orders or instructions from Murphy was ever produced in writing at trial or during the Agency's own depositions by decision-maker Hoffman. The failure of the Agency to produce any written order allegedly not followed by Ms. Chambers provides a clear basis for the Board drawing the adverse inference that no such order was given. See the discussion *supra* and *infra* regarding the law of adverse inference, and see, e.g. *International Union v. NLRB*, 459 F.2d 1329 (D.C.Cir. 1972); *Taylor v. U.S. Postal Service*, 75 MSPR 322 (June 19, 1997); *Bilokumsky v. Tod*, 263 U.S. 149, 68 L. ed. 221, 44 S. Ct. 54 (1923); 2 Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979); 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970); *McMahan & Company v. PO Folks, Inc.*, 206 F.3d 627, 632 (6th Cir. 2000); *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999); *Knightsbridge Marketing v. Promociones y Proyectos*, 728 F.2d 572, 575 (1st Cir. 1984); *Evans v. Robbins*, 897 F.2d 966 (8th Cir. 1990); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir.1983).

Deputy Director Murphy's assertion that Ms. Chambers failed to follow the purported instructions from him and that this failure is what motivated him to bring charge 5 against Appellant is belied by the fact that Murphy failed to act on any concern regarding the Appellant's alleged failure to follow these alleged orders for several months. Murphy raised these allegations for the first time on the very day of the Washington Post article, Tr. 9-8-04 (Murphy), which strongly supports the conclusion that charge 5 was brought in retaliation for Ms. Chambers protected whistleblowing and exercise of her First Amendment rights, not

because it had merit. The details of each of the three specifications under this charge are addressed below.

A. The Agency Failed To Meet Its Burden To Show Misconduct Regarding, And The AJ Erred In Sustaining, The Specification Of Charge 5 Regarding Chief Chambers' Alleged Failure To Follow An Instruction To Have Two Deputy Chiefs Take Medical Exams.

The AJ erred in sustaining the specification of charge 5 regarding Chief Chambers' alleged failure to follow an instruction from Deputy Director Murphy to have two deputy Chiefs take certain medical examinations. The chronology of events and timeframes established by Agency documents and Murphy's own testimony establish that not only did the deputy Chiefs agree to take the exams in question, they did so in such a short time frame from the first direction from Mr. Murphy to anyone that this be done that it would have been impossible for anyone to have intentionally delayed, let alone failed to follow, this instruction. See Tr. 9-8-04 (Murphy).

Further, Chief Chambers had sought to recuse herself from the decision process to have the two deputies take these exams and communicated this request to Agency counsel. See Tr. 9-9-04 (Chambers). Ms. Chambers told the agency counsel that she was concerned that she might not be the proper person to make the decision on the psychological exams which are subject of an OSC inquiry because of her prior involvement. The agency counsel communicated that on the 6th of June to Mr. Murphy's office. See Tr. 9-9-04 (Chambers). Within 10 days after that, Mr. Murphy himself issued a directive to the deputies, which they promptly complied with. See Tr. 9-9-04 (Chambers). There is nothing in that sequence of events that shows any actionable misconduct by Ms. Chambers regarding not following an order from Mr. Murphy. Thus, any delay that did occur would not have been the result of misconduct but rather an attempt to avoid a potential conflict of interest or biased decision, or the appearance of same.

The record does reflect that Chief Chambers expressed her opinion about the issue of the need for these deputy Chiefs to take these exams, or whether a waiver might be appropriate as had been done for the Chief herself, while the matter was under consideration. Agency regulations, quoted below, provide for employees to state their concerns and disagreements while a matter is under consideration. *See* 43 C.F.R. **§** 20.502.

B. The Agency Failed To Meet Its Burden To Show Misconduct Regarding, And The AJ Erred In Sustaining, The Specification Of Charge 5 Regarding Chief Chambers' Alleged Failure To Follow An Instruction To Detail Ms. Pamela Blyth.

The AJ erred in sustaining the specification of charge 5 regarding Chief Chambers' alleged failure to follow an instruction from Deputy Director Murphy to detail Ms. Pamela Blyth. Ms. Blyth worked in the Chief's Executive Command Staff and at the time Ms. Blyth was performing critical budget and other tasks for the Chief. The Agency did not establish via record evidence that a clear communication from Mr. Murphy to Ms. Chambers was ever given to the effect that Ms. Chambers was to detail Ms. Blyth (rather than what the record shows which is that Murphy was himself going to detail Blyth). See Hoffman deposition of Murphy. What Mr. Murphy was really concerned about was not that Ms. Chambers refused to follow his instruction to her that she detail Ms. Blyth, but that Ms. Chambers had questioned his proposal that he detail Ms. Blyth. There is a significant difference between the two.

The very Agency regulation that requires an employee to follow orders from a superior also allows for employees to voice their concerns and disagreements, and expects them to voice such concerns and disagreement, over proposed actions and decisions while those decisions are being formulated and while these decisions are being considered. *See* 43 C.F.R. **§** 20.502.

> Employees are required to carry out the announced policies and programs of the Department and to obey proper requests and directions or supervisors. **While policies related to one's work are under consideration employees may, and**

> **are expected to, express their professional opinions and points of view.** Once a decision has been rendered by those in authority, each employee is expected to comply with the decision and work to ensure the success of programs or issues affected by the decision. An employee is subject to appropriate disciplinary action, including removal, if he or she fails to:
>
> (a) Comply with any lawful regulations, orders, or policies; or
>
> (b) Obey the proper requests of supervisors having responsibility for his or her performance.

Id. (emphasis added).

Deputy Secretary Griles, Murphy's superior, countermanded Murphy's decision to detail Ms. Blyth when Chief Chambers brought the matter to his attention. See Tr. 9-14-04 (Griles). The fact that Murphy's superior Deputy Secretary Griles agreed to review the question and take it under consideration, eventually agreeing with chief Chambers and countermanding Murphy's decision, means that the matter was still under consideration by the Agency and thus pursuant to the Agency regulation cited above, Ms. Chambers was acting appropriately and according to Agency expectation in voicing her opinion on the matter to Mr. Griles. Had Mr. Griles said no I will not consider the issue and Murphy's decision is final, a different question would be presented. That is not the record in this case, however.

Further, following Mr. Griles countermanding the decision by Murphy, there was no longer any order or instruction to be followed as of several months before Murphy charged Chief Chambers with this violation in the proposed removal. This is admitted by the Agency in Charge 6, which asserts on its face that the Murphy's decision to detail Blyth was rescinded. See charge 6 in the Proposed Removal.

C. The Agency Failed To Meet Its Burden To Show Misconduct Regarding, And The AJ Erred In Sustaining, The Specification Of Charge 5 Regarding Chief Chambers' Alleged Failure To Follow An Instruction To Cooperate With DOI Attorney Myers.

The AJ erred in sustaining the specification of charge 5 regarding Chief Chambers' alleged failure to follow an instruction from Mr. Murphy to cooperate with Randy Myers, an attorney in the DOI, regarding an alleged complaint lodged against the U.S. Park Police by the Organization of American States (OAS). Officer Beck established in his testimony that there never was any such complaint by the OAS, that unsuccessful attempts were made to arrange a meeting with Myers and eventually the meeting was cancelled. *See* SF#45-49.

Mr. Murphy admitted in his deposition by Agency decision-maker Hoffman that Murphy could not recall giving Chief Chambers the order or instruction alleged to have been violated in this specification of charge 5. See Agency Response to Removal Appeal Exhibit "4 j 14," transcript of (*ex parte*) deposition interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 93, Line 22, through Page 94, Line 4-11.) Mr. Hoffman asked Mr. Murphy under oath if he recalled talking to chambers about the OAS matter and Mr. Murphy said he did not really remember if he had done that, and only when pressed about asking Chambers to meet with Myers replied that he was "almost sure" I did. Mr. Hoffman invited Mr. Murphy to supply information, after his deposition was over, into the record, if he could come up with an order, record or further testimony that would establish such an order was given. Mr. Hoffman was asked in his deposition by Appellant whether he ever received any follow-up information from Mr. Murphy after his deposition that Hoffman had invited him to provide on any of these issues that he was not remembering. Mr. Hoffman's answer was a simple no, he never received any additional information as follow-up to those depositions from Mr. Murphy. Notwithstanding, Mr. Hoffman sustained that charge without any basis to do so.

Further, Attorney Myers failed to disclose in his testimony that he eventually did meet with Chief Chambers and Agency attorney Hugo Tuefel well before Murphy made this charge against Ms. Chambers in the proposed removal. *See* SF#189-192. Appellant Chambers attempted to testify to this fact in rebuttal at the hearing after Meyers failed to disclose this fact in his testimony, but the AJ refused to allow Appellant to present this (or other) rebuttal testimony. *See* SF#193. This fact contradicts the AJ's finding in the initial decision based on Myers' testimony that the matter was not resolved while the Appellant held the Chief's position. This finding by the AJ is particularly troublesome given that Appellant at trial offered evidence and then proffered evidence via Ms. Chambers proposed rebuttal testimony that would have established that Myers did meet with Chief Chambers.

The AJ's reliance on Myers' testimony was misplaced because as a whole his testimony and prior statements were inconsistent, beyond his failure to admit his meeting with Chief Chambers. During his testimony as part of the Merit Systems Protection Board hearing, Day 2, Randolph Myers described the limited contact he had with Deputy Director Donald Murphy regarding the matter for which Chief Chambers was charged under Charge 5, Specification 3:

Q Did you take this issue to Mr. Don Murphy at some point?

A I did in the sense that I cc'ed Deputy Director Murphy in my memorandum to Chief Chambers dated September 15, 2003.

Q Not other than that?

A That's correct.

(See Merit Systems Protection Board Hearing Transcript, Testimony of Randolph J. Myers, September 9, 2004, Page 247, Line 10 – 16.) The memo to which Myers has referred includes the following sentence in the only paragraph that references the Organization of American States

(OAS): “We also note that the amended Report still fails to address the Organization of American States’ complaint dated July 10 that the Park Police violated the OAS Headquarters Agreement during the incident.” (See Agency’s Response to Removal Appeal Exhibit “4 k 7,” memorandum from Randolph J. Myers, to Chief Chambers, dated September 15, 2003.) The only correspondence from the OAS in the record is the Agency’s Response to Removal Appeal Exhibit “4 m 165 – 166,” a letter from OAS to Chief Chambers about the “shelter in place” program, the planning of which the writer describes as “very positive.”

Not only is there no “OAS complaint dated July 10,” Myers testified that he has never seen a written complaint, even though he wrote the September 15, 2003, memorandum as if he had seen a complaint dated July 10, 2003.

Q You didn't hear any complaint language from OAS representatives?

A I've never met with them nor did I talk with them; that's correct.

Q Have you seen a written complaint from OAS on this matter?

* * *

THE WITNESS: My understanding is there was no written complaint, sir.

(See Merit Systems Protection Board Hearing Transcript, Testimony of Randolph J. Myers, September 9, 2004, Page 244, Line 1 – 12.) Likewise, Assistant Chief Benjamin J. Holmes (retired) and Lieutenant Phillip Beck both testified in their depositions that they did not believe there was any type of complaint made by representatives of the Organization of American States. (See Deposition of Assistant Chief Benjamin J. Holmes [retired], August 19, 2004, Page 148, Lines 1 - 14 and Deposition of United States Park Police Lieutenant Phillip Beck, August 26, 2004, Page 14, Lines 10 – 21.)

On Page 2, Paragraph 3, of the January 13th memo, Myers wrote: "Mr. Noone's statement that Chief Chambers ' recalls' that I 'withdrew' my request for the meeting and that the Chief was never alerted to the need or the urgency of a meeting is demonstratively false." (See Agency's Response to Removal Appeal Exhibit "4 k 2," Paragraph 3.) Two paragraphs later, Myers contradicts himself when he incorporates the following note that he states he sent to Chief Chambers on August 13, 2003. The note indicates that he is "closing our inquiry."

> One month has elapsed since, on July 10, 2003, we requested a meeting to discuss the OAS complaint that the Park Police violated the OAS Headquarters Agreement during the Constitution Garden incident. In the absence of a meeting – which is necessary before our office can determine whether the Park Police violated the OAS Agreement or Park Police General Order 2125.08 and before we can recommend whether any policy changes are necessary – we are closing our inquiry. In the event our meeting occurs, we will be pleased to reopen our inquiry.

(See Agency's Response to Removal Appeal Exhibit "4 k 2," Paragraph 5.)

In this same memo of January 13, 2004, Myers incorporates the section from his September 15, 2003, memo to Chief Chambers referenced earlier that talks about "the Organization of American States' complaint dated July 10," even though no such complaint exists or has, according to Myers' testimony, ever been seen by him. (See Agency's Response to Removal Appeal Exhibit "4 k 3," Paragraph 1.) Myers concludes this January 13, 2003, memorandum by stating, "This conduct constitutes a failure to comply with National Park Service Deputy Director Murphy's instruction that she 'fully cooperate and work with the Solicitor's Office' in connection with any information and/or assistance we needed regarding the incident." (See Agency's Response to Removal Appeal Exhibit "4 k 5," Paragraph 4, through "4 k 6," Paragraph 1.) In complete contradiction of this conclusion, however, Myers, on the first page of this same January 13, 2003, memo, made it clear that he had no knowledge whatsoever as to whether Deputy Director Murphy had ever given such instruction: "MY COMMENTS: I

can offer no comments since I was not privy to Don Murphy's instruction to Chief Chambers." (See Agency's Response to Removal Appeal Exhibit "4 k 1," Paragraphs 2 and 3.)

The AJ further erred in regard to this specification of charge 5 in relying on an Inspector General's memo, Agency Exhibit 2, which was relied on by the AJ as circumstantial evidence of an alleged "pattern" of the Chief not cooperating with inquiries about the "Tractor Man" incident. This document was an exhibit the Agency did not offer into evidence and which would have been improper for the Agency to offer because the Agency knew the memo from the IG was based on a misunderstanding by the IG regarding a report submitted by Chief Chambers for one purpose which the IG misconstrued as a report sent for another purpose, as explained in Ms. Chambers' deposition. *See* Chambers Deposition at 220-224.

VIII. THE AGENCY FAILED TO MEET ITS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT IN CHARGE NUMBER 6, AND THE AJ ERRED IN HOLDING OTHERWISE.

The AJ erred in sustaining Agency charge number 6. Charge 6 alleges that Chief Chambers failed to follow the chain of command in appealing to the Deputy Secretary to stop the imminent detail by Mr. Murphy of Ms. Pamela Blyth out of the Chief's Executive Command Staff. The Agency had no policy prohibiting Chief Chambers from appealing to her second level of higher superiors including the Deputy Secretary, and thus the charge fails to state an offense – a violation of any rule. As noted *supra*, There must be an announced policy that was violated to support disciplinary action. *See* 43. C.F.R. **§** 20.503 ("Employees shall not engage in any conduct or activity which is in excess of his or her authority, or is otherwise contrary to any law or **announced** Departmental policy." Emphasis added.).

Deputy Secretary Griles did not object to Ms. Chambers approaching him on the matter (and in fact granted her request to stop the detail of Ms. Blyth). Mr. Griles had actually

encouraged Chief Chambers to speak directly with him regarding U.S. Park Police matters even after Ms. Chambers expressed she was uncomfortable speaking directly with the Deputy Secretary because of the possible reaction of her immediate superiors Murphy and Mainella. See Chambers Affidavit.. Thus Deputy Secretary Griles effectively "announced" a policy contrary to the purported chain of command policy Chief Chambers is charged with violating, a chain of command policy not reflected in any document produced at trial. Further, Ms. Chambers made a good faith effort to exhaust the chain of command on the issue of Ms. Blyth's detail before appealing to Mr. Griles. See Chambers Affidavit.

This charge 6 brought by Murphy in the proposed removal was yet another charge brought well after the fact of the events in question, reflecting retaliatory motive on Murphy's part rather than misconduct on Ms. Chambers' part. In fact, this issue regarding the Blyth detail and Ms. Chambers' use of the chain of command had already been resolved by Mr. Griles. Mr. Griles called a meeting shortly after the Blyth detail was cancelled that included the members of Chief Chambers' chain of command. See Griles testimony, Tr. 9-14-04. Mr. Griles testified that he thought the meeting had resolved the issue. *Id*. The resolution emanating from that meeting called by Mr. Griles was supposed to have been a series of follow-up meetings between Chief Chambers and her chain of command but these follow-up meetings never occurred due to inaction by Chambers' superiors. See Tr. 9-9-04 (Chambers). Mr. Griles did not direct that any discipline be taken against Ms. Chambers for having appealed to him on the Blyth detail and was unaware that action had been taken against Chambers on that basis by his subordinates. See Griles testimony, Tr. 9-14-04 (Griles).

In addition to the fact that the testimony of Deputy Secretary Griles established the existence of an Agency policy set at the top of the Agency hierarchy that is was <u>acceptable</u> to go

outside the chain of command, which alone should dispose of this Agency charge as unfounded, the fact that the Agency could not produce any policy statement written at any level that prohibited an employee going outside the chain of command supports the Board drawing the adverse inference that the alleged policy that Chief Chambers was accused of violating did not and does not exist. See the discussion *supra* and *infra* regarding the law of adverse inference, and see, e.g. *International Union v. NLRB*, 459 F.2d 1329 (D.C.Cir. 1972); *Taylor v. U.S. Postal Service*, 75 MSPR 322 (June 19, 1997); *Bilokumsky v. Tod*, 263 U.S. 149, 68 L. ed. 221, 44 S. Ct. 54 (1923); 2 Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979); 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970); *McMahan & Company v. PO Folks, Inc.*, 206 F.3d 627, 632 (6th Cir. 2000); *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999); *Knightsbridge Marketing v. Promociones y Proyectos*, 728 F.2d 572, 575 (1st Cir. 1984); *Evans v. Robbins*, 897 F.2d 966 (8th Cir. 1990); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir.1983).

IX. THE AGENCY CHARGES WERE PROPOSED AND DECIDED BY BIASED AGENCY DECISION-MAKERS AND THEREFORE NONE SHOULD HAVE BEEN SUSTAINED, AND THE AJ ERRED IN HOLDING OTHERWISE.

The AJ erred in sustaining four of the six charges notwithstanding that the charges were proposed and decided by biased Agency decision-makers. Proposing official Murphy and his HR advisor Krutz were the subject of a pending complaint by Ms. Chambers against them. See Chambers December 2, 2003 complaint letter delivered to Director Mainella.

Final decision-maker Hoffman had participated in and chaired numerous meetings on disputed U.S. Park Police budget issues in which Ms. Chambers also participated. Hoffman Deposition. Hoffman himself believed that his participation in these meetings could bias his objectivity regarding the decision on the removal of Ms. Chambers, so much so that he withdrew from any participation in those meetings upon being appointed deciding official. Hoffman

Deposition. Hoffman, however, failed to recuse himself on the same basis. This use of biased Agency decision makers was a violation of Appellant's Fifth Amendment Due Process rights. *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Svejda v. Dept. of Interior*, 7 M.S.P.R. 108 (July 9, 1981).

X. REGARDING CHARGES 2 AND 3, WHICH ARE RELATED TO MS. CHAMBERS' ALLEGED STATEMENTS TO THE WASHINGTON POST, THE AGENCY FAILED TO INDEPENDENTLY VERIFY EXACTLY WHAT STATEMENTS WERE MADE BY MS. CHAMBERS TO THE POST BEFORE TAKING ACTIONS AGAINST HER, AND CONSEQUENTLY THESE CHARGES SHOULD NOT HAVE BEEN SUSTAINED, AND THE AJ ERRED IN HOLDING OTHERWISE.

The AJ erred in sustaining charges 2 and 3, charges related to Ms. Chambers' alleged statements to the Washington Post. The Agency failed to adequately and successfully independently verify exactly what statements were made by Ms. Chambers to the Post before taking actions against her for making the statements reported by the Post. The Agency has a burden under law to independently verify that a statement reported in the media to have been made by an employee was in fact made by that employee as reported prior to taking adverse action against the employee based on that statement.

> The agency has responded in opposition to the petition for review. It argues that reasonable cause was established because the proposing official and the deciding official considered the totality of the circumstances. Specifically, the agency argues that in addition to being aware of the arrests and arraignments, agency officials were aware that the Postal Inspectors had been conducting an ongoing investigation, and were aware of news media publicity about the charged criminal misconduct and arrests.
>
> The deciding official testified further that the notoriety of the appellants' acts publicized through the local media was a factor he considered in sustaining the suspensions. See H.T. at 28.[4]. As noted above, the agency contends that the deciding official's knowledge of newspaper articles and televised news reports covering the charged criminal misconduct and arrests was part of the totality of the circumstances he considered that support the propriety of its action. Although the news stories in this case did purport to quote local law enforcement officials and court pleadings, there is no evidence that the accuracy of these reports was

> verified by the agency. It would not place an undue burden upon agency officials to require them to do more than read a newspaper before deciding to indefinitely suspend an employee. Accordingly, we find that in making a reasonable cause determination, an agency cannot rely on media reports alone, without some form of independent verification. …
>
> In sum, the deciding official relied on the arrests and arraignments of the appellants without investigating the underlying facts behind the arrests and arraignments. He relied on the fact that the agency was conducting an ongoing investigation, but had not read the investigative report before making his final decision. He further relied on news media reports without independent verification of their accuracy. Dunnington II requires that the agency take some affirmative action on its own to satisfy itself that there was reasonable cause to believe that a crime was committed for which imprisonment could be imposed. Because the agency did not take such an affirmative action before it effected the indefinite suspensions, the actions cannot be sustained.
>
> [5]: In Martin, 12 M.S.P.R. at 19, the Board suggested in dicta that in some cases reports in the news media would suffice to establish reasonable cause. To the extent that Martin suggests that a reasonable cause determination may be based solely on news media reports, we hereby modify that decision consistent with our holding in this case.

George M. Barresi, et al. v. United States Postal Service, MSPB Case No.s BN0752910284-I-1, BN0752910287-I-1, BN0752910286-I-1, BN0752910289-I-1 (MSPB Dec. 22, 1994).

Most of the cited portions of the Washington Post interview were paraphrases by the reporter, not direct quotes from Chief Chambers. Quotes of course also may be erroneous. Interior officials did not confirm with Sgt. Scott Fear, who was present for the Post interview, or Chief Chambers, what was actually said and by whom before taking action against Chief Chambers to place Ms. Chambers on administrative leave and propose her removal. Mr. Murphy himself claims to have been misquoted by the press, and thus should have been cautious about blaming Chief Chambers for every statement attributed to her in the Post article.

Agency final decision maker Hoffman relied on the affidavit of Agency press officer John Wright. Hoffman Deposition. This affidavit represents and gives the impression that Mr. Wright was able to confirm with the Post that each of the statements in the Post on which the

Agency relies in its charges as having been made by Ms. Chambers were confirmed with the Post by Mr. Wright as actually having been made by Ms. Chambers. See Wright Affidavit. Decision maker Hoffman clearly believed that Wright had verified each alleged statement by Ms. Chambers to the Post that Wright had been tasked to verify. Hoffman deposition. The AJ appears to have read and relied upon Wright's affidavit in the same manner. Initial Decision at 25. However, the affidavit gives a misimpression of what really happened.

Wright admitted in his deposition that the Post reporter and the editor to whom he spoke provided only limited information and, at some point before he could ask all the questions on his list, the conversations were unilaterally terminated by the Post staff. See Wright Deposition. Wright asked the Post only what he was given to ask by an agency attorney(s). Wright Deposition. Wright did not ask the Post whether Chief Chambers stated she was asking for $7 million for a new helicopter or stated she was asking for a total of $27 Million or more. Wright Deposition. Wright did not ask whether the FOP gave certain information to the Post and acknowledged (after initially not recalling and then being confronted with emails) that he had been put on notice months prior to his inquiry that the FOP had initiated the Post article by complaining to the Post of funding shortfalls. Wright Deposition. Wright did not ask what questions the Post reporter asked Chief Chambers that may have caused Chief Chambers to make, and set the context within which she made, certain statements attributed to her. Wright Deposition. Wright admitted that he would not know the Post's source for any statements in the December 2nd article which were not in quotes and attributed to Ms. Chambers.

Mr. Wright further admitted that there may be drafts of his affidavit that noted the qualification that several questions he intended to ask about statements in the Post article were never asked or answered because the Post reporter cut the interview short and refused to answer

further questions and referred Wright to the reporter's editor. The editor refused to answer those remaining questions as well and referred Wright to the Post's attorney who Wright declined to call. Wright Deposition.

Mr. Wright acknowledged that he had not made an inquiry with the Post regarding Chambers' statements until February or March, 2004, and no one had asked him to do so prior to that time. Wright Deposition. Thus, his inquiry for the Agency to attempt to verify Ms. Chambers' statements to the Post was initiated well after the Agency had already proposed Ms. Chambers' removal.

Wright's final affidavit, the one Agency decision maker Hoffman reviewed and relied on, does not disclose these facts regarding the limits of Wright's information gathering attempts with the Post but gives the impression that all went well with his conversations with the Post and that all he sought to confirm was in fact confirmed. Agency decision maker Hoffman never deposed Wright, unlike the several other Agency witnesses he did depose, so this misrepresentation and failure to disclose material facts in the affidavit, likely the result of editing by other Agency personnel who helped Wright prepare the Affidavit, was never revealed in the Agency record prior to the final decision to remove Appellant.

XI. AGENCY RETALIATION AGAINST A FEDERAL EMPLOYEE FOR MAKING PUBLIC STATEMENTS ON MATTERS OF PUBLIC IMPORTANCE IS A VIOLATION OF THE FIRST AMENDMENT, AND THE AJ ERRED IN CONCLUDING THAT THE AGENCY DID NOT VIOLATE CHIEF CHAMBERS' FIRST AMENDMENT RIGHTS AND DID NOT ENGAGE IN A PROHIBITED PERSONNEL PRACTICE IN VIOLATION OF 5 U.S.C. § 2302(B)(12).

The Administrative Judge (AJ) rejected the Appellant's arguments and record evidence establishing that the Agency's removal action violated 5 U.S.C. § 2302(b)(12) by violating the

First Amendment. *Initial Decision* at 44 – 46. The AJ erred in her interpretation of the facts and the legal protections afforded public employees, like the Appellant, and must be reversed.

The Appellant communicated with Deborah Weatherly, Staff Director of the Interior Appropriations Subcommittee of the House of Representatives On November 3, 2003 via telephone and again on December 2, 2003 via email. The Appellant's communications with Ms. Weatherly were not discouraged by Ms. Weatherly who worked for the subcommittee that controlled appropriations to the Agency and had been involved in oversight of the Park Police. The Appellant communicated with the subcommittee through Ms. Weatherly on November 3, 2003 regarding progress being made or delayed on the NAPA recommendations and shared her concerns about the impacts of budget limitations on the abilities of the Park Police to perform its duties. See, Statement of Facts ¶s 179 – 186, 237. Chief Chambers' December 2, 2003 email to Congress more explicitly stated:

> My professional judgment, based upon 27 years of police service, six years as Chief of police, and countless interactions with police professionals across the country, is that we are at a staffing and resource crisis in the United States Park Police – a crisis that, if allowed to continue, will almost surely result in the loss of life or the destruction of one of our nation's most valued symbols of freedom and democracy. With our current lack of adequate staffing, the National Park Service's ability to protect these precious historical icons – the Statue of Liberty, the White House, the Washington Monument, the Lincoln Memorial, the Jefferson Memorial, the grounds that support the Golden Gate Bridge – or our guests who visit them or any of our other parks is increasingly compromised. The continuing threat to the future of these American symbols becomes even more acute with any additional loss of personnel.

The December 2, 2003 news article that appeared in the Washington Post newspaper quoted the Chief, paraphrased the Chief, and indirectly attributed statements to the Chief as follows:

> The U.S. Park Police department has been forced to divert patrol officers to stand guard around mAJor monuments, **causing Chief Teresa C. Chambers to express worry about declining safety in parks and on parkways.**

Chambers said traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four. In neighborhood areas, **she said residents are complaining that homeless people and drug dealers are again taking over smaller parks.**

"It's fair to say where it's green, it belongs to us in Washington, D.C.," Chambers said of her department. **"Well, there's not enough of us to go around to protect those green spaces anymore." …**

Park Police said that this spring, after a survey by the U.S. Secret Service and endorsed by the Department of Homeland Security, the Department of the Interior adopted rules requiring four officers to be posted at all times outside the Washington Monument and the Lincoln and Jefferson memorials. Previously, the Washington Monument had one or two officers stationed, and the two memorials had one each. …

In many cases, **police said, more officers on the Mall mean fewer officers elsewhere.** Even the area that includes Anacostia Park and Suitland Parkway, **one of the most violent that the Park Police force patrols, now has two cruisers at most times, instead of the previous four.**

Police point to several statistics to show the impact of the cutbacks. On the Baltimore-Washington Parkway, where **patrols have been halved, 706 traffic accidents occurred from January to October, which was more than the annual total in the previous four years**.

Since April, **the number of arrests made by Park Police in the Washington area has declined** about 11 percent compared with the same period last year, police said.

Chambers and the head of the Park Police union, Jeff Capps, said that morale is low and that many officers may leave the force if conditions do not improve.

She said a more pressing need is an infusion of federal money to hire recruits and pay for officers' overtime. She said she has to cover a $12 million shortfall for this year and has asked for $8 million more for next year. She also would like $7 million to replace the force's aging helicopter.

In recent weeks, **the Park Police administration and the force's union have said they fear that the stationary posts on the Mall have hurt anti-terrorism efforts, because fewer officers are able to patrol** in the area. **Chambers said that she does not disagree with having four officers outside the monuments but that she would also want to have officers in plainclothes or able to patrol rather than simply standing guard in uniform**.

> **"Ms. Chambers'greatest fear is that harm or death will come to a visitor or employee** at one of our parks, **or that we're going to miss a key thing at one of our icons," Chambers said**.

Washington Post, Dec. 2, 2003 (emphasis added).

In discussing Appellant's First Amendment rights, the AJ correctly ruled that the Appellant's public statements were on matters of public concern. *Initial Decision* at 45. However, the AJ determined that "the interest of the Agency in promoting the efficiency of the service it performs outweighs any interest the Appellant may have had as a citizen making the statements." *Initial Decision* at 45 – 46.

The law is clear concerning the standards to apply in cases wherein public employees invoke their First Amendment rights.

> Although public employees do not relinquish their right to free speech by virtue of their employment, neither do they enjoy absolute *First Amendment* rights. *Waters v. Churchill, 511 U.S. 661, 671-74, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994)*; *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist., 149 F.3d 971, 977-78 (9th Cir. 1998)*. To determine whether . . . [the employee's] speech is protected by the *First Amendment*, we apply a two-step test that stems from the Supreme Court's holdings in *Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)*, and *Pickering v. Bd. of Educ., 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)*: (1) we ask whether the speech addresses a matter of public concern, and, if it does, (2) we engage in an inquiry, commonly known as the *Pickering* balancing test, to determine whether . . . [the employee's] interest in expressing himself outweighs the government's interests "in promoting workplace efficiency and avoiding workplace disruption." *Rivero, 316 F.3d at 865* (quoting *Hufford v. McEnaney, 249 F.3d 1142, 1148 (9th Cir. 2001))*.

Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004). Because, as mentioned, the AJ ruled in favor of the Appellant on the first part of the analysis (statements on matters of public concern), the question then turns on whether the Appellant's interests in making the public statements outweigh the Agency's interest in efficiency and avoiding disruption. It should be noted that there is no question in the instant case as to whether the Agency took the challenged action(s) because of the employee's public statements. Here, the Agency's proposed

removal and final decision documents themselves, on their face, make clear that Ms. Chambers' statements to the Washington Post and Congress were explicit reasons for the Agency's actions. Thus, the case turns on the *Pickering* balancing test.

The AJ sided with the Agency on the *Pickering* balancing component of the analysis because "the information she [the Appellant] provided should not have been made public because it exposed potential weaknesses in USPP security measures and violated the prohibition against premature release of budget information." *Initial Decision* at 45. However, neither the record nor the law supports these determinations by the AJ regarding Ms. Chambers's statements to the Post and alleged Agency rules regarding release of purported security sensitive information and information regarding the president's budget, as explained *supra*.

Once it has been determined that a public employee has spoken on matters of public concern, then the employer bears the burden of establishing that the balance of interests should be tipped in its favor.

> The employer bears the burden of proving that the balance of interests weighs in its favor. *Johnson, 48 F.3d at 426*. The "'more tightly the *First Amendment* embraces the speech the more vigorous a showing of disruption must be made.'" *Id.* (quoting *Hyland v. Wonder, 972 F.2d 1129, 1139 (9th Cir. 1992))*.

Ceballos, 361 F.3d at 1178. Thus, the Agency had to prove that the Appellant's statements to the media about the budget and Park Police staffing were somehow disruptive, or, at least, a violation of an important rule or regulation, and that this alleged disruption or violation outweighed Chief Chambers' interests in disclosing an imminent danger to the public and our national monuments.

The record shows that the Agency did not and cannot meet this burden. As discussed in preceding sections, no rule was broken when the Appellant discussed her concerns about

budgeting with the media. In addition, the Agency utterly failed to establish that any law, rule, or policy was violated by the Appellant when she addressed concerns about Park Police staffing.

Further, the AJ completely ignores the fact that in the Washington Post interview the Appellant was addressing issues already raised by the Fraternal Order of Police. In other words, much of what the Appellant discussed in the interview merely responded to data and information already provided to the media – i.e. she was not making a disclosure, but was commenting on a disclosure already made by someone else.

The Agency did not meet its burden to establish that the Appellant's discussions of matters of public concern with the media were so disruptive (or at all disruptive) as to outweigh the strong First Amendment interest Chief Chambers had to warn the public of an imminent danger. There was no basis in law or the record for the AJ to conclude that the Pickering balancing test favored the Agency. Further, the Agency here was not attempting to avoid real disruption in the workplace but rather was motivated by a desire to silence a whistleblower who was disclosing the Agency's failure to protect the public and the national monuments. The Pickering balancing test should give no weight to such Agency motives which are prohibited by statute and do not fall within the zone of legitimate governmental interests to be considered in a First Amendment balancing of interests analysis.

Further, in such a case the court must consider not only whether the governmental interest in promoting the efficiency of the public services it performs without disruption outweighs the employee's interest as a citizen, in commenting upon matters of public concern, but also whether the interest of potential audiences in hearing what the employee has to say tips the balance in favor of the employee's rights. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995). Considering that the public's interest in being warned by

conscientious public servants such as Chief Chambers of imminent dangers to their health and safety is substantial, there should be no question that the *Pickering* balancing of interests tips in favor of Chief Chambers' First Amendment rights.

Chief Chambers was put on notice by the Inspector General that she needed to improve in protecting the monuments, under very difficult circumstances, from a threat that everyone understands is real. No one has to repeat the details of September 11, 2001, to understand when someone makes reference to what is involved and the danger that continues to this day. Ms. Chambers took action to put her department in a position to protect those monuments without compromising the public, the parks and the parkways. She was not finding a way to achieve that goal but the Inspector General had gotten her attention when he told her that there were deficiencies that need to be addressed because of the real threat to these monuments and to the public, a threat exacerbated by the funding and staffing limitations.

The Chief set about dealing with the concerns of the IG and did her best to correct the identified problems. Correcting the problems, however, could not be done without certain resources, staffing and funding. She attempted to make certain cuts to solve the problem. She took her remaining concerns to her superiors through the budget process and through memoranda including the November 28, 2003 memo to Director Mainella. She took her concerns to Congress via the November 3 call and December 3, 2003 email to Congressional Subcommittee staffer Weatherly. When the Chief got to the point where she was put in a public forum, not of her choosing, and she was asked a direct question by The Washington Post, she felt an obligation to tell the truth. The truth was that the Chief of the United States Park Police could not assure the American people that her agency was in a position to protect the public parks, the public monuments, and the people who visit them, given the resources available. The Chief had a right

to tell the truth and the public had a right to hear it. The Board should reverse the AJ and rule that the Agency violated 5 U.S.C. § 2302(b)(12)

It should be noted that the AJ's remark in the Initial Decision. That she was not convinced that the First Amendment implements merit system principles is contrary to the view of Congress. *Saul v. United States*, 928 F.2d 829, 833 (9th Cir. 1991) ("Congress did expect 'prohibited personnel practices' to cover supervisors' violations of employees' constitutional and privacy rights," citing H.R. Conf. Rep. No. 95-1717 (1978), 1978 U.S. Code Cong. & Admin. News 2860, 2863).

XII. THE ADMINISTRATIVE JUDGE MADE SIGNIFICANT PROCEDURAL AND EVIDENTIARY ERRORS.

A. The AJ Erred In Refusing To Allow Appellant To Make An Evidentiary Record Regarding Evidence Excluded By The AJ.

The AJ erred in conducting the hearing when she insisted on speeding through Appellant's proposed exhibits and refusing to allow Appellant's counsel to make proffers describing the evidence being rejected by the AJ. *See* Statement of Facts supra. The AJ's procedure is contrary to the applicable regulations of the Board. *See* 5 C.F.R. § 1201.61:

> Exclusion of evidence and testimony.
>
> Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.

Id. This error of the AJ violated Appellant's rights under Board rules and was a denial of due process, preventing meaningful review of the evidentiary errors of the AJ by the Board and reviewing courts.

B. The AJ Erred In Ordering, Pre-Trial, That Appellant Would Not Be Allowed To Offer The Testimony Of Former Chief Langston To Show Disparate Treatment, And Then, Post-Trial, Ruling Against Appellant On The Basis That Appellant Had Not Offered Evidence Of Disparate Treatment.

The AJ erred in ordering, pre-trial, that appellant would not be allowed to offer the testimony of former Chief Langston to show disparate treatment, see Summary of Prehearing Conference at 10, and then, post-trial, ruling against Appellant on the basis that Appellant had not offered evidence of disparate treatment. See Initial Decision at 49. As explained supra, the AJ erred in her view of what must be shown to establish a similarly situated employee.

C. The AJ Failed To Assess or Even Acknowledge The Existence Of The Substantial Impeachment Of Agency Witnesses That Occurred During Trial Cross Examination And Depositions Admitted Into The Record, And Other Substantial Credibility Evidence Which Should Have Precluded The AJ's Substantial Reliance On Those Witnesses.

1. The AJ failed to recognize that the Agency proposing official Donald Murphy gave blatant self-serving testimony that was completely unbelieveable, and was established to lack any credibility.

The AJ failed to recognize that the Agency proposing official Donald Murphy, Deputy Director of the National Park Service, gave blatant self-serving testimony that was contradicted by his own testimony, the testimony of others, and his own documentary evidence, and was established both during his trial and deposition testimony, to be completely incredible and not worthy of belief. Murphy refers to his memo, Agency Hearing Exhibit 3 (also an exhibit to Murphy's deposition), as him talking to himself (in writing) despite the fact that he refers to the recipient of his communications in this memo repeatedly in the second and third person.

This memo which Murphy testified was simply him talking to himself uses phrases including "These are just a few of the highlights that I think are important for you to know before your conversation with the chief," "It is my belief," "I believe that you are fully informed on this issue," "You are familiar with this issue," "you might want to remind the chief," "As you

might imagine the chief was less than enthusiastic about my involvement. You might ask the chief for an update," and "I believe that I sent you a copy of that report." The memo also had Murphy's name and title typed at the bottom. It is as unlikely that Mr. Murphy had to remind himself of those two bits of information as it is that he was sending documents to himself and talking about himself in the first, second and third person not only in the same document but in the same sentences. Mr. Murphy was simply unbelieveable when he asserted that this memo was him talking to himself. Murphy had a motive to be dishonest regarding this memo.

The very day this memo was dated, Ms. Chambers was scheduled to meet with Craig Manson, Assistant Deputy Secretary, Mr. Murphy's second level superior (Director Mainella is Mr. Murphy's immediate superior). See Chambers Affidavit at Para. 28 ("On September 3, 2003, in response to a request I made through the chain of command to meet with Assistant Secretary Manson, he and I met to review budget and staffing challenges. He assured me that he would begin conducting monthly meetings with me and Director Mainella and that he would ask Director Mainella to meet with me on a regular basis); Also see Chambers Affidavit Exhibit 32.

Mr. Murphy blatantly misrepresented the nature and purpose of this memo to avoid admitting that he himself had gone outside the chain of command to Mr. Manson regarding Ms. Chambers performance and conduct, even though he proposed to have Ms. Chambers removed for going outside the chain of command regarding one of Murphy's decisions (the detail of Ms. Blyth). This testimony together with this memo exhibit establish simultaneously that Murphy lacks credibility and that the Agency and Murphy engaged in blatant disparate treatment regarding Chief Chambers (and that no policy against going outside the chain of command existed in the Agency).

2. The AJ failed to recognize that Agency final decision maker, Assistant Deputy Secretary of the Interior Paul Hoffman, was substantially impeached during his trial and deposition testimony, including via self-contradictory testimony, which should have precluded the AJ's substantial reliance on his testimony.

The AJ also failed to recognize that Agency final decision maker, Assistant Deputy Secretary of the Interior Paul Hoffman, was also substantially impeached during his trial and deposition testimony, which should have precluded the AJ's substantial reliance on his testimony. Under oath at trial, Mr. Hoffman first testified that he had not read the public comments submitted to the DOI regarding the Agency's proposed removal of Chief Chambers, then Hoffman later admitted on cross exam that in fact he had read many of those public comments. Tr. 9-9-04 (Hoffman).

Mr. Hoffman was also demonstrably evasive during his deposition and made what are now transparent efforts to avoid admitting that he had made detailed findings of fact in his draft of the final decision regarding Ms. Chambers' removal but that he had allowed other Agency personnel to delete those findings before the decision was provided to Appellant or the Board via the AJ. See Hoffman deposition at Page 132, Line 14, through Page 139, Line 16; Page 144, Lines 11 – 15; Page 157, Line 5, through Page 182, Line 15; Page 183, Line 7, through Page 184, Line 8; and Page 190, Line 5, through Page 195, Line 10.

3. The AJ failed to recognize that Agency comptroller Bruce Sheaffer gave false testimony and demonstrated that he was unworthy of belief.

The AJ likewise failed to recognize that Agency comptroller Bruce Sheaffer gave false testimony and demonstrated that he was unworthy of belief when he claimed under oath at trial that he was unaware of a $12 million shortfall in the U.S. Park Police budget. See Merit Systems Protection Board Hearing Transcript, Day 2, September 9, 2004, Testimony of National Park Service Comptroller Bruce Sheaffer, Page 232, Lines 1 - 8. The record reflects that Sheaffer

was put on notice by the U.S. Park Police of this shortfall. See Appellant's hearing Exhibit Z. Further, Appellant offered several agency fiscal documents at the hearing that the AJ refused to admit for purposes of impeaching Sheaffer. That decision by the AJ was clear error as Appellant is entitled to impeach an Agency witness she believes has given false testimony. Those proffered documents would establish that Sheaffer had full knowledge of this budget shortfall, contrary to his testimony. See Summary of Facts, Paragraphs 53, 54, 73, and 74.

4. The AJ failed to recognize that Agency witness Myers via his testimony demonstrated that he was unworthy of belief by his failure to disclose a key material fact.

The AJ likewise failed to recognize that Agency witness and attorney Myers via his testimony under oath demonstrated that he was unworthy of belief as well. Myers did not disclose in his testimony a key material fact. While testifying that he had requested a meeting with Chief Chambers but Chambers did not honor his request, Myers failed to disclose that he had actually met with Chambers and discussed OAS issues and had every opportunity to raise any unresolved concerns he had about any alleged OAS complaints well before Murphy brought the charge five specification forward against Chief Chambers. See, e.g., Chambers' deposition at 224-25. Myers had met with Chief Chambers and Agency attorney Tuefel in November, 2003 regarding the issue of the OAS. This failure to disclose this material fact on the part of Agency attorney Myers misled the AJ to erroneously conclude in the Initial Decision that the matter of the alleged OAS complaint and Myers need to meet with Chambers was left unresolved, due to Chambers failure to meet in the AJ's eyes, until after Chief Chambers had left the Agency upon being placed on administrative leave. Initial Decision at 37.

D. The AJ Erred In Denying Appellant's Motion To Compel Discovery Regarding Deputy Director Murphy's Private File On Appellant.

The AJ erred in denying Appellant's motion to compel discovery regarding item B, Deputy Director Murphy's private file on Appellant, based on the AJ's conclusion that Appellant's motion made no showing of relevancy or materiality. However, in regard to item B, Appellant stated in her motion that Mr. Murphy admitted maintaining a private file on Appellant related to his decisions to take disciplinary actions and had drafted a performance appraisal for Appellant. There should be no greater showing required for documents of such central relevance to the proposed decision maker's decisions regarding Appellant, which documents clearly would either be admissible as admissions of a party opponent or could lead to discovery of admissible evidence.

E. The AJ Erred In Denying Appellant's Motion To Compel Discovery Regarding U.S. Park Police Records Of Communications With Congress.

The AJ erred in denying Appellant's motion to compel discovery regarding items E and F in the motion which sought U.S. Park Police records of communications with Congress. The Appellant noted in her motion that document request number 15 sought communications with Congress regarding the U.S. Park Police and Chief Chambers, including former Chief Langston's communications with Congress which obviously relate to disparate treatment. Ms. Chambers' communications with Congress are one of the asserted Agency reasons for taking action against her and for that reason no further showing of relevance or materiality should be required for purposes of discovery.

F. The AJ Erred In Not Drawing An Adverse Inference From The Agency's Failure To Call As An Agency Witness Agency Employee Scott Fear Who Was Present During The Washington Post Interview Of Chief Chambers.

The AJ erred in not drawing an adverse inference from the Agency's failure to call as an Agency witness Mr. Scott Fear. Mr. Fear was present during the Washington Post interview of

Chief Chambers and could have testified as to exactly what Ms. Chambers said or did not say. Appellant intended to call Scott Fear as her witness but the AJ denied Appellant permission to do so in the pre-trial conference and resulting order. See AJ's Summary of Pre-trial Conference at 10. Then, later, at trial, the AJ changed her mind and told both parties that Mr. Fear could be called. Appellant Chambers declined because of the last minute nature of the AJ's decision and the fact that Appellant's counsel had not prepared for mr. Fear's exam or interviewed Mr. Fear in preparation for such testimony in light of the AJ's pre-trial ruling forbidding his testimony, and in light of the then multiple pressing other trial preparation tasks. Mr. Fear's testimony is conspicuous by its absence both as an Agency witness at trial and also as a witness who was not deposed (but easily could have been) by the Agency final decision maker Mr. Hoffman.

It is appropriate for the Board (and the AJ), based on well recognized legal principles of evidence, to draw an adverse inference against the Agency when a witness possessing material facts who is under the Agency's control is not called by the Agency to testify, particularly regarding an issue on which the Agency has the burden of proof. *Taylor v. U.S. Postal Service*, 75 MSPR 322 (June 19, 1997); *International Union v. NLRB*, 459 F.2d 1329 (D.C.Cir. 1972). In *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 68 L. ed. 221, 44 S. Ct. 54 (1923), the Supreme Court found that a suspected alien could be deported, even though he refused to testify during his deportation proceeding. The Court held that conduct which forms a basis of inference is evidence, and that silence is often evidence of the most persuasive character. Id. at 153-54. "The general rule is that where relevant information is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it." McMahan & Company v. PO Folks, Inc., 206 F.3d 627, 632 (6th Cir. 2000).

"An adverse inference may be given significant weight because silence when one would be expected to speak is a powerful persuader." LiButti v. United States, 178 F.3d 114, 120 (2d Cir. 1999).

> The unexplained failure or refusal of a party to a judicial proceeding to produce evidence that would tend to throw light on the issues authorizes under certain circumstances, an inference or presumption unfavorable to such party. For the rule to apply, it is essential that the evidence in question be within the party's possession or control. Further, it must appear that there has been an actual suppression or withholding of the evidence; no unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for.

Gumbs v. International Harvester, Inc., 718 F.2d 88, 96 (3d Cir.1983) (citations omitted). Silence, omissions, or negative statements, as inconsistent: (1) Silence, etc., as constituting the impeaching statement. A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact." 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970). Such failures can take several forms including "Failure to take the stand at all, when it would have been natural to do so." *Id*. *Also see Baxter v. Palmigiano,* 425 U.S. 308, 318-19, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (quoting Wigmore); *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5 (1st Cir. 1985); *Kostelec v. State Farm Fire & Cas. Co*., 64 F.3d 1220 (8th Cir. 1995); *In re Schwartz v. Kujawa*, No. 00-6067 EM (8th Cir. 2000); *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988).

Such an adverse inference is particularly appropriate here given the suspicious circumstances surrounding the Agency's inquiries (and lack thereof) into the key material facts as to who told the Washington Post exactly what. Neither of the two witnesses who were most knowledgeable about the answer to that question, Scott Fear and Jeff Capps, were called either at trial or during Hoffman's depositions relied on for the final Agency decision. Fear was present

during the Washington Post interview with Chambers and thus would have been logically where the Agency would have turned first to find the truth regarding what Chief Chambers did and did not say to the Post. Instead of deposing fear, Hoffman relies on an incomplete and misleading affidavit from press officer John Wright based on a telephone call after the fact to the Post which was cut short by the Post. Capps was not investigated, charged or disciplined concerning his role in communicating information to the Post (which actions would most certainly have led to Capps' side of the story being placed on the record.

This pattern reflects Agency officials who, rather than seeking to uncover the truth, are seeking to manufacture it. The issue of what Ms. Chambers said and did not say regarding the budget and regarding security issues was central to the Agency's charges. The Agency's failure to depose or call as trial witnesses Mr. Fear and Mr. Capps warrants an adverse inference that these witnesses would not have supported the Agency position on what Ms. Chambers was alleged to have said to the Washington Post.

G. The AJ Erred In Ruling That Although The Appellant's Extensive Affidavit Filed Pretrial Was In The Record, That The Numerous Exhibits Attached To The Affidavit Were Not In The Record.

The AJ erred in ruling that although the Appellant's extensive affidavit filed pretrial was in the record, that the numerous exhibits to the affidavit were not in the record. See Merit Systems Protection Board Hearing Transcript, Day 2, September 9, 2004, Page 202, Line 28, through Page 203, Line 14. There was no valid basis for the AJ to hold that the affidavit with exhibits physically attached submitted originally in support of Appellant's Motion for Stay, which was also incorporated into the later supplemental motion for stay, was not in the record but to hold that the later filed identical affidavit without the exhibits physically attached, but incorporated explicitly by reference to the prior stay filing affidavit and exhibits, which was filed

as part of the Appellant's response to the AJ's order to show cause on jurisdiction, was in the record – just without the exhibits.

The Board's regulations at 5 C.F.R. sec. 1201.53(e) provide that all papers filed in the case are part of the record. Although the AJ might be implying that there is a meaningful distinction between what was filed in the IRA appeal versus the chapter 75 appeal of the removal decision, that distinction should not matter because the two appeals were consolidated and tried together. The Appellant relied both on the Board's regulations and the AJ's pretrial order (entitled "Summary of Pre-hearing Conference") in concluding that the numerous exhibits to Appellant's affidavit were already in the record and did not need to be offered at the hearing. The AJ's pre-trial order stated "The purpose of the hearing is to take evidence on questions of fact and to hear arguments on questions of law. All submissions to date, except for replies to discovery requests which may have been sent to the Board, are already part of the record and do not have to be reintroduced." Summary of Prehearing Conference at 3.

Thus Appellant and her counsel were taken aback when the AJ announced at the hearing that a large volume of evidence that Appellant thought was already in the record was not, and Appellant's counsel had not prepared to offer each of these numerous documents at trial and explain the relevance and materiality of each on short notice to an obviously skeptical AJ. Although, after making that surprise ruling at the hearing, the AJ asserted that she was attempting to ameliorate any prejudice to Appellant from her decision that the exhibits to the affidavit of Appellant were not considered in the record by allowing Appellant to offer such exhibits (on short notice) at trial, the AJ then proceeded to refuse to admit into evidence virtually all of those exhibits, and at the speed at which the AJ insisted on proceeding through them it likely would have been impossible for counsel to make a meaningful proffer even had counsel

anticipated that each of those numerous exhibits would have to be reintroduced. See, e.g., Statement of Facts Paragraphs 71, 74, 76, 95, 105, 108, 151, 174, 188, 248, 251, 258, 260, and 262.

H. The AJ Erred In Presuming The Agency Acted In Good Faith.

The AJ made an error of law in presuming the Agency acted in good faith. The AJ in the Initial Decision held that the Board's analysis begins with the assumption that the Agency acted in good faith which presumption may only be rebutted by irrefragable proof. Initial Decision at 6. This was error because the Board, in *Shockro v. FCC,* 5 M.S.P.R. 113 (1981), instructs that the Agency does not benefit from a presumption of good faith. *See Id*. at 117 ("The presiding official by requiring the Appellant to show Agency bad faith by 'well-nigh irrefragable proof' erred."). While the AJ, having made this clear holding in the main text of the Initial Decision, mentioned in footnote 2 that Appellant would not be held to the irrefragable proof of Agency bad faith standard, the AJ's conduct of the trial and the AJ's analysis in the Initial Decision belie this statement. The Administrative Judge repeatedly accepted the testimony of Agency officials at face value, with no corroborating evidence, in spite of the clearly demonstrated conflicts between the testimony of those officials and the testimony of other Agency officials as well as Agency documents. Not only is a presumption of Agency good faith inappropriate and contrary to law, in this instance it was totally unwarranted.

The initial decision contains numerous instances of the Administrative Judge accepting unsupported testimony from Agency officials in spite of evidence or other findings that contradicted the Agency. For example, Comptroller Sheaffer's testimony that he had seen a

budget document using the exact figures Ms. Chambers purportedly mentioned to the press was accepted by the AJ despite Sheaffer's failure to produce such a document which, as comptroller, would certainly be under his control. Further, when Appellant sought to impeach Sheaffer by offering a document showing he had testified falsely about being unaware of a twelve million dollar U.S. Park police budget deficit, the AJ would not even allow the impeachment evidence to be admitted, apparently on the basis that the AJ believed the evidence unnecessary because the AJ had already determined that Sheaffer was credible. See Merit Systems Protection Board Hearing Transcript, September 14, 2004, Page 45, Line 20 – Page 46, Line 24 .

A presumption of good faith is again apparent in the treatment of Agency witnesses' credibility. The Administrative Judge accepted the Agency testimony in spite of obvious difficulties with the Agency officials' testimony which should itself have given the AJ pause to consider whether the officials testifying deserved a presumption of good faith. Deputy Director and proposing official Murphy's testimony that Agency hearing Exhibit 3, a memo he had written which repeatedly refers in the second and third person to another party to which the communications in the memo are clearly intended (see discussion of Murphy's credibility *supra*), was simply Murphy talking to himself (in writing) is a prime example of a red flag that should have been raised in the AJ's mind regarding presuming good faith by the Agency. Unquestionably, the record before the Administrative Judge establishes that Deputy Director Don Murphy gave false testimony. This should have destroyed or at least substantially diminished Mr. Murphy's credibility, yet, the Administrative Judge repeatedly extended him the benefit of the doubt.

In contrast, the Administrative Judge seemed inclined to believe Ms. Chambers only when documentary evidence supported her unrebutted testimony, making a point of noting

corroborating evidence or the lack thereof. Few, if any, Agency statements received such careful scrutiny by the Administrative Judge before the AJ formed the basis for the findings stated in the Initial Decision.

I. The AJ Erred In Excluding Pre-Trial Appellant's Defenses Under 5 U.S.C. 2302(B)(9) Other Than Allowing One Question Of One Particular Witness Regarding Appellant's Defense That She Was Removed Because She Had Exercised Appeal And Grievance Rights.

The AJ erred in excluding pre-trial Appellant's defenses under 5 U.S.C. § 2302(b)(9) other than allowing one question of one particular witness, see AJ Summary of Pre-trial Conference at 7, regarding Appellant's (b)(9) defense that she was removed because she had exercised appeal and grievance rights in filing a complaint alleging misconduct by Deputy Director Murphy and human resource staff person Steve Krutz, and because she exercised such rights in successfully appealing to Deputy Secretary Steve Griles regarding the proposed detail of Ms. Pamela Blyth. The AJ allowed Appellant, pursuant to her pre-trial rulings, to ask Director Mainella whether she perceived Appellant to be exercising an appeal or grievance right when Appellant filed with Mainella the December 2, 2003 complaint letter regarding Murphy and Krutz. Mainella predictably answered this one question at trial in the negative.

However, proposing official Murphy had given indications in the wording of the proposed removal document that he perceived Appellant to be "appealing" his decision regarding the Blyth detail to Deputy Secretary Griles. Ms. Chambers' appeal to Griles on that matter was successful, so successful that it was explicitly stated by Murphy in the notice of proposed removal as one of the bases for Ms. Chambers' removal. At a minimum, Appellant should have been allowed to examine Mr. Murphy regarding his view that Appellant was exercising an

appeal right when she sought to have Murphy's decision regarding the Blyth detail countermanded.

J. The AJ Erred In First Excluding Pre-trial The Testimony Of Former Fraternal Order Of Police President Jeff Capps, Whose Testimony Would Have Been Corroborative Of Appellant's Regarding What Appellant Did And Did Not Say To The Washington Post, And What Capps Did Say To The Post, And Then Ruling Post-Trial Against Appellant Chambers On The Basis That Appellant's Testimony On This Issue Was Not Corroborated.

The AJ erred in excluding the testimony of former FOP President Jeff Capps, see AJ Summary of Pre-trial Conference at 10 (noting allowed witnesses and omitting Capps) and compare to Appellants' pre-hearing submission (listing Capps as a proposed witness). Capps' testimony would have been corroborative of Appellant's regarding what Appellant did and did not say to the Washington Post, a matter on which the AJ made rulings post trial against Appellant on the basis that Appellant's testimony was not corroborated. See Initial Decision at 25-26. At a minimum it is improper for an AJ to preclude testimony that the AJ believes may be a basis for ruling for or against a party. Either the testimony is relevant and material and should be allowed, or the issue to which the testimony would have spoken should not be addressed as material in the ultimate decision. Here, the AJ found in her Initial Decision the issue of corroboration or lack thereof of Ms. Chambers' testimony about what was said to the Post to be material, but precluded pre-trial the right of Appellant to offer two corroborative witnesses on that very question – Mr. Capps and Mr. Fear.

XIII. THE PENALTY OF REMOVAL WAS UNDULY HARSH, AND THE AGENCY FAILED TO CONSIDER NUMEROUS SIGNIFICANT MITIGATING CIRCUMSTANCES AND IMPROPERLY CONSIDERED CERTAIN CIRCUMSTANCES AS AGGRAVATING FACTORS WHEN IT DETERMINED REMOVAL TO BE THE PENALTY, AND THE AJ ERRED IN HOLDING OTHERWISE.

For all the reasons stated *supra*, the Agency acted illegally and wrongly to charge Chief Chambers with misconduct and no penalty should have been applied because there was no offense and there was illegal retaliation. In the alternative, should the Board find that one or more of the Agency charges should be sustained, the penalty chosen by the Agency should be substantially mitigated. The AJ erred in failing to find that the Agency did not properly consider mitigating circumstances, and improperly considered certain circumstances as aggravating, when it determined a removal penalty for Chief Chambers which is not supported by the facts or applicable law, and is unduly harsh.

If the deciding official failed to appropriately consider the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), the Board need not defer to the agency's penalty determination. *See, e.g., Omites v. U.S. Postal Service*, No. CH-0752-00-0241-I-1, slip op. at p. 10-11 (MSPB Nov. 2, 2000); *Blake v. Department of Justice*, 81 M.S.P.R. 394 (1999).

Agencies must consider in preparing the advance notice required by Section 7513(b)(1) all of the factors on which they intend to rely in any consequent decision. 5 U.S.C. sec. 7513(b)(4) requires that written agency decisions taking adverse actions must include "the specific reasons therefor." 5 C.F.R. 752.404(f) forbids the agency from considering any reason not specified in the advance notice of proposed action. It has been found to be error for the deciding official to consider prior incidents in determining the penalty where the agency did not state in the proposal notice that these incidents would be considered. *See, e.g., Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 505-06 (1995) (it is improper to enhance a penalty based on misconduct that was not cited in the notice of proposed removal), aff'd 79 F.3d

1165 (Fed. Cir. 1996)(Table); *Carson v.Veterans Administration*, 29 M.S.P.R. 631, 633 (1986) (an agency should include in the proposal notice any aggravating factors it intends to rely on).

> Thus, the Supreme Court expressly recognized that the employee's response is essential not only to the issue of whether the allegations are true, but also with regard to whether the level of penalty to be imposed is appropriate. Even the leading Board decision regarding the evaluation of the appropriateness of disciplinary penalties explains that "aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official, and the decision notice should explain what weight was given to those factors in reaching the agency's final decision." Douglas v. Veterans Admin., 5 M.S.P.R. 280, 304 (1981) (emphasis added).

Stone v. Federal Deposit Insurance Corp., 179 F.3d 1368 (Fed. Cir. 1999).

Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in the individual case. *Douglas, supra*. The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it but rather, the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. *Id*.

Here, because the agency failed to weigh the relevant factors, because the Agency improperly considered certain factors, and because the Agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the Board to specify how the agency's penalty decision should be corrected to bring the penalty within the parameters of reasonableness. *Id*. For all the reasons stated herein, no penalty beyond warnings and training should have been applied, and under no circumstances would any penalty be appropriate to apply now beyond that which has already been effectively applied (12 months of suspension, with 6 months unpaid)

A. The Agency (Unwittingly) Admitted That The Nature And Seriousness Of The Charges Do Not Merit Termination When, On December 12, 2004, The Agency Offered To Forego Filing Any Of The Charges If Chief Chambers Would Agree To Allow Mr. Murphy To Screen All Of Her Future Media And Congressional Interviews, And The AJ Erred In Holding Otherwise.

Prior to the Agency decision maker Hoffman making the final decision which imposes a removal penalty, the Agency met with Appellant and offered to forego filing any of the charges if Chief Chambers would agree to allow Mr. Murphy to screen all of her future media and Congressional interviews. See See Appellant's Affidavit at Paragraphs 210 and 213. This was an admission by the Agency that it did not really perceive Appellant to have engaged in conduct serious enough to warrant removal, but that the Agency's real concern (an illegal one) was controlling Chief Chambers' communications with Congress and the media. The purported Douglas factors analysis reflected in Mr. Hoffman's final decision document was an after thought at best, not having been a part of the analysis done for the proposal to remove by proposing official Murphy, and not having been provided to Ms. Chambers for any response prior to the decision being made.

More likely, the Douglas factors analysis presented in the final decision document was worse than an after thought. It was a retaliatory act designed to justify a decision already made to remove Ms. Chambers in retaliation for not only for her having made her initial protected disclosures to Congress and the media, but also for her having refused to live under the on-going gag order that she was requested to agree to as a condition of her reinstatement during her administrative leave prior to the final decision document being written by Hoffman. The fact that the Agency offered to Ms. Chambers to drop all the charges if she would accept the on-going (illegal) gag order belies the Agency's statements in the final decision document which

purport to present a Douglas factors analysis justifying removal as the only penalty that could protect the Agency's interests.

B. Director Mainella, Appellant's Second Level Superior, Testified That, If It Were Her Decision, She Would Re-Instate Chief Chambers On An Agreement That Ms. Chambers Simply Follow The Rules, Which Also Constitutes An Agency Admission That The Agency Penalty of Removal Was Unduly Harsh, And The AJ Erred In Holding Otherwise.

During her deposition, Director Mainella, Appellant's second level superior, testified that, if it were her decision, she would re-instate Chief Chambers on an agreement that Ms. Chambers simply follow the rules. Mainella Deposition at Page 192, Line 14, through Page 194, Line 12. This is a condition to which Chief Chambers would agree (once the rules have been written and explained, and comply with federal law). This testimony by Mr. Murphy's boss, constitutes an Agency admission that the Agency penalty of removal was unduly harsh. For all the reasons stated herein, Director Mainella's approach is the proper one under all the circumstances, and the AJ erred in holding otherwise.

C. Chief Chambers Was Not Fairly Placed On Notice Concerning The Alleged Conduct Rules She Was Charged With Violating, And The AJ Erred In Holding Otherwise.

The AJ failed to consider the mitigating factor that Appellant, if she had violated some order or rule that actually existed, was not fairly placed on notice of the existence and nature of such rules and orders. A prime example is Agency charge 6 which accuses Chief Chambers of going outside the chain of command. The Agency did not produce any written Agency rule that prohibited an employee from going outside the chain of command to resolve an issue. Further, Deputy Secretary Griles testified that he welcomed employees coming to him and believed it to be helpful when they did. See Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Secretary J. Steven Griles, September 14, 2004, Page 7, Line 15 – Page 8, Line 15.

. If a rule existed that prohibited such conduct, not only was Ms. Chambers not informed, neither was the Deputy Secretary.

Another prime example of Ms. Chambers not being placed on notice regarding the purported rules allegedly violated relates to count 2. Press Officer John Wright testified in his deposition that he was unaware of any rule that prohibited any category of information from being discussed with the media and in particular was unaware of any rule prohibiting discussion (or defining) law enforcement sensitive information from being discussed. Wright deposition at Page 72, Lines 5 - 22. .

Yet another indication that Ms. Chambers was not fairly placed on notice of the rules allegedly violated is the failure of the Agency and its delegated staff to provide Ms. Chambers the training in Agency rules and procedures that was planned by the Agency upon Ms. Chambers' hire and delegated to Michael Fogarty to implement. See SF# 2.

Regarding Charge 3, which relates to discussing the President's Budget decisions with the media in alleged violation of an OMB circular, Agency press officer Scott Fear was present for Ms. Chamber's interview with the Washington Post and raised no objection to the content or manner of Ms. Chamber's disclosures to the Post at the time, nor was Fear called to testify later that he perceived anything wrong in what Ms. Chambers had done during her interview. If Ms. Chambers was violating some well established and well communicated rule about not disclosing to the press the President's budget decisions, Mr. Fear was certainly unaware of it.

While the Agency produced a memo from Ms. Chambers to Director Mainella that referenced an $8 million dollar figure related to the U.S. Park Police budget proposals, this memo did not state that the $8 million dollar figure that Ms. Chambers was recalling was perceived by her to be information falling within the OMB circular's prohibition (and this memo

was an internal not an external communication). Charge 3 has to do not with disclosures of what Ms. Chambers (or any other employee) may recall or perceive regarding the budget but has to do only with disclosures of what actually represent the President's budget decisions. The Agency failed to produce at trial an Agency, OMB or Presidential document that established that the amounts Ms. Chambers discussed with the press in fact represented information that fell within the OMB circular in question. If in fact Ms. Chambers was in a position to clearly understand that she was transgressing the rule stated in this OMB circular, the Agency should have had no problem bringing forth a President's budget decision document showing that the financial need numbers referenced by Ms. Chambers matched numbers in some such Presidential budget decision document and that those matching numbers were referenced as being for the same purposes in the Presidential budget document as in Ms. Chambers' statement to the press. Further, Mr. Murphy's deposition testimony made clear that his own view of the scope of the OMB circular's prohibition on disclosure of the President's budget decisions was such that it would have been virtually impossible for Ms. Chambers to have engaged in any conduct to have violated it, let alone to have understood what such violative conduct would have been.

Regarding Agency charge 5, none of the three alleged orders or instructions ostensibly given by Murphy to Chambers were ever produced in writing by the Agency, nor did the Agency assert that they were ever given in writing. Nor was any third party witness to any such purported verbal order communicated by Murphy to Chambers brought forward to testify as to the extent any such verbal communications that actually occurred were unambiguous. Mr. Murphy himself, in his deposition before Agency final decision maker Hoffman stated that he could not recall if he had actually given Chief Chambers the alleged instructions cited in charge

5 regarding detailing Ms. Blyth, and cooperating with attorney Myers. Murphy Deposition to Hoffman at ___.

The record is also clear that Ms. Chambers was not placed on notice regarding any of these purported violations at the time they allegedly occurred via any disciplinary warning, performance appraisal or performance improvement plan. Thus, there is abundant evidence in the record to support the existence of a substantial mitigating factor regarding Chief Chambers not having been fairly placed on notice by the Agency of the rules that were allegedly violated. *See, e.g., Cynthia G. Wallace vs. Department of Health and Human Services*, No. PH-0752-99-0302-I-1 (MSPB August 1, 2001).

> The clarity with which the appellant was on notice of any rules that were violated in committing the offense can also be viewed as a mitigating factor in this case. The appellant argued that the agency policy regarding the authority of DIS to order diagnostic tests was confusing, and she offered the testimony of two other agency employees to support her argument. Both witnesses suggested that it would be appropriate for a DIS to order the FTA test that the appellant ordered in this case under appropriate circumstances. IAF, Tab 24 (HT 1,2, 3, 4). Furthermore, in her statement concerning the event, the nurse practitioner who attended the patient for whom the appellant ordered the FTA test stated that the phlebotomist said, "She does this all the time, I was told not to make a big deal out of it." IAF, Tab 7(4g). Thus, there is record support for the appellant's argument that the ordering of diagnostic tests by DIS was an accepted practice at the clinic where she worked.

Id.

D. Undisputed Evidence Establishes That The Training The DOI Required The NPS To Provide Ms. Chambers Regarding Agency Regulations And Policies Upon Chief Chambers' Hire From Outside The Federal Service Was Never Provided, And The AJ Erred In Not Holding This To Be A Significant Factor Mitigating the Penalty.

Prior to Chief Chamber's arrival to begin work in her new position, key staff of the National Park Service identified tasks that needed to be completed related to Chief Chambers' assuming the position of Chief of the U.S. Park Police. One of those tasks was to provide Chief

Chambers training deemed necessary regarding Federal rules, laws, regulations, policies and procedures. *See* Appellant's hearing Exhibit GG. That task was assigned to Major Michael Fogarty of the United States Park Police, Id., but was never carried out, Tr. Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 137, Line 23, through Page 138, Line 5; and Page 186, Line 24, through Page 187, Line 15; and Page 200, Line 13, through Page 201, Line 10. . Ms. Chambers never received the promised training. Tr. See Agency's Hearing Exhibit 7, Deposition of Appellant, Teresa Chambers, August 18, 2004, Page 137, Line 23, through Page 138, Line 5; and Page 186, Line 24, through Page 187, Line 15. An email to various responsible parties documented the tasks that were to be accomplished including this training, and Deputy Director Murphy was copied on this email. *See* Appellant's Hearing Exhibit "GG."

The record in this case makes clear that Chief Chambers was not the only employee of the DOI, NPS and U.S. Park Police who was unaware of the existence of the alleged rules purportedly violated by the Chief. The Deputy Secretary, the press officers, and Chief Chambers immediate successor, among others, testified that they were unaware of rules and policies that Mr. Murphy and Mr. Hoffman allege Chief Chambers violated. Further, the only document produced related to any of the sustained charges that is even asserted to be a written statement of an applicable rule or order violated is the OMB circular, which if it does state a prohibition, is an ambiguous and technical one for which training would have been appropriate. For the remaining charges for which no document was produced purporting to state the rule allegedly violated, training would have been even more critical because the Agency was relying on verbal communication of an unwritten rule or order. The fact that the Agency planned to provide the Chief training on the agency rules and procedures upon her hire from outside the federal service

is an admission that such training was needed. The fact that the Agency failed to provide such training is a significant mitigating factor.

E. Chief Chambers Was Never Provided Specific Training Regarding The Alleged Rules Allegedly Violated, Specific Written Expectations In A Job Description, A Performance Appraisal, Performance Standards, Advance Notice Of The Perceived Violations Prior To Disciplinary Action, Or Written Or Unambiguous Instructions On The Matters Charged, And The AJ Erred In Not Holding These Circumstances To Be Significant Factors Mitigating the Penalty.

Beyond the failure of the Agency to provide the initial training it had planned for Chief Chambers upon her arrival, Chief Chambers was never provided any other training that specifically regarded the alleged rules allegedly violated in the sustained charges. See Appellant's Hearing Exhibit "GG" and Appellant's Affidavit at Paragraph 5. Further, no specific written expectations were provided to Chief Chambers in a job description, a performance appraisal, or performance standards. See Agency Response to Removal Appeal Exhibit "4 j 15," transcript of interview of National Park Service Deputy Director Donald Murphy by Deputy Assistant Secretary Paul Hoffman, February 6, 2004, Page 105, Lines 8 – 15; see also Appellant's Hearing Exhibit "J," Deposition of Deputy Director Donald W. Murphy, August 11, 2004, Page 18, Line 6 – Page 26, Line 13; see also Merit Systems Protection Board Hearing Transcript, Testimony of Deputy Director Donald W. Murphy, September 8, 2004, Page 109, Line 19 – Page 110, Line 1; see also Appellant's Hearing Exhibit "MM."

Ms. Chambers was not given any advance notice of the perceived violations prior to the issuance of the administrative leave memo and the proposed removal, even though for many of the alleged instances of misconduct the Agency had months to do so. Instead, the proposing official Mr. Murphy waited until the day of the Washington Post article and Ms. Chamber's email to Congress, December 2, 2003 to express his concerns about these alleged instances of

misconduct. Ms. Chambers was given no warnings, or other lesser disciplinary actions regarding the alleged misconduct involving events that had occurred over a period of many months. The AJ erred in not holding these circumstances to be also be significant additional factors mitigating the penalty.

F. The Penalty Of Removal Was Improper Because The Agency Decision Maker Hoffman, In Analyzing The "Notoriety' Of The Offenses, Cited "Numerous Newspaper Articles And Radio And Television News Stories" As Well As The Time That NPS Employees Spent Responding To "Letters And Telephone Calls" Concerning The Case, Matters For Which Chief Chambers Cannot Properly Be Held Responsible, And The AJ Erred In Not Holding This To Be A Factor Which Would Invalidate Or Mitigate the Penalty Of Removal Applied By Hoffman.

Agency decision maker Hoffman, in analyzing the "notoriety' of the offenses as a aggravating factor in his Douglas factors analysis in the final decision document, cited "numerous newspaper articles and radio and television news stories" as well as the time that the Agency employees spent responding to "letters and telephone calls" concerning the case. See Agency's Response to Removal Appeal Exhibit "4 b 1 - 7," Agency July 9, 2004 final removal decision, Page 6, Paragraph 1. These media stories and public letters and calls are matters beyond Ms. Chambers control, and involve events occurring after the date of the proposal to remove. These are matters for which Chief Chambers cannot properly be held responsible and should not have been considered as aggravating factors in Mr. Hoffman's penalty assessment. The AJ erred in not holding Mr. Hoffman's consideration of this information to be a factor which would invalidate or mitigate the penalty of removal applied by Mr. Hoffman.

G. The AJ Erred In Citing "Lack Of Remorse" As A Basis For Removal As A Penalty, Apparently Adopting Agency Decision Maker Hoffman's Rationale That Chief Chambers Should Be Removed Because Of Her "Inability To See That You Have Engaged In Misconduct And Your Lack Of Contrition," With The Only Basis In The Record For Such A Finding Being Appellant's Exercise Of Her Rights To Appeal And Respond To False Accusations.

The AJ erred in citing "lack of remorse" as a basis for removal as a penalty, as did the Agency. Agency decision maker Hoffman cited lack of remorse and contrition as a rationale supporting removal as the proper penalty for Chief Chambers. See Agency's Response to Removal Appeal Exhibit "4 b 1 – 7," Agency July 9, 2004 Final Decision at Page 7, Paragraph 3. . The AJ adopted the same rationale in her Initial Decision. Initial Decision at 51. Hoffman stated that Chief Chambers should be removed because of her "inability to see that you have engaged in misconduct and your lack of contrition." However, under the circumstances here, where Appellant has testified she would be willing to follow the rules specified to her if reinstated and where illegal retaliation is perceived and alleged by the Appellant, reliance on such a rationale is improper. Retaliation for disclosing a danger to the public is a serious violation of federal law. The only basis either Mr. Hoffman or the AJ could have in this record for such a finding of lack of remorse and contrition is that Appellant Chambers exercised her rights to appeal the Agency decision, and respond to perceived false and retaliatory accusations. It is improper to use the employee's exercise of appeal rights as an aggravating factor in a penalty assessment.

CONCLUSION AND REQUESTED RELIEF

For the aforementioned reasons, the Board should vacate the Initial Decision and either review the case and reverse the conclusions and findings of the AJ and find that all of the Agency charges should not be sustained and that Appellant's IRA appeal and affirmative defenses should be sustained, or remand to a new AJ for another hearing that comports with Due Process and proper procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Petition was served on the party(ies) identified below via First Class Mail, postage prepaid on this ___ day of December, 2004.

Agency Representative

_____
Richard E. Condit

Bennett v. Department of the Air Force, 84 M.S.P.R. 132, ¶ 19 (1999) (Agency employees are expected to follow the orders of supervisory officials) (then Vice Chair Slavet, concurring).