# UNITED STATES OF AMERICA
## MERIT SYSTEMS PROTECTION BOARD

**WASHINGTON REGIONAL OFFICE**

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| **TERESA C. CHAMBERS,** | ) | **DOCKET NUMBER** |
| | ) | **DC-1221-04-0616-W-1** |
| **Appellant,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | Date: July 9, 2004 |
| **DEPARTMENT OF INTERIOR,** | ) | |
| | ) | |
| **Agency.** | ) | |
| | ) | |
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**APPELLANT TERESA C. CHAMBERS MOTION**
**FOR STAY OF PERSONNEL ACTION**

Pursuant to 5 U.S.C. § 1221(c) and 5 C.F.R. § 1209.9, Appellant, Teresa C. Chambers, by and through undersigned counsel, hereby requests that the Board Stay the personnel actions taken by the Department of Interior (DOI) and its National Park Service (NPS) (together "the Agency") against Appellant Chief Teresa C. Chambers, Chief of the United States Park Police (USPP), until such time as the Board makes a final determination relative to the ultimate issues of this appeal. As described more fully below, Appellant made a number of protected disclosures to Department of Interior

officials, to the media, and to Congress, which constitute protected whistleblowing as defined in 5 U.S.C.§ 2302(b)(8). These disclosures raised concerns of great public importance regarding the ability of the USPP to protect public safety, the national parks and national treasures, including the Statue of Liberty and the White House, given budget and staffing limitations. In direct retaliation for making these disclosures, and in close proximity in time to these disclosures, the Appellant was subjected to a number of adverse personnel actions as defined by 5 C.F.R. § 1209.4(a), including a gag order and involuntary placement on administrative leave, culminating in a notice of proposed removal. Chief Chambers respectfully requests that each of these actions be stayed – that the gag order be lifted so that Chief Chambers may speak freely to the media and Congress and agency officials, that Chief Chambers be taken off administrative leave and returned to her normal position and duties, and that the Agency be prohibited from acting to finalize and effectuate its proposed removal of Chief Chambers.

The Appellant has appealed this action alleging whistleblower retaliation, first to the Office of Special Counsel, and now, after the expiration of 120 days, to the Board. *See* Exhibits A and B. As the facts and legal argument herein make clear, the Appellant has a substantial likelihood of success on the merits and there would be no extreme hardship to the agency from a stay, but rather the agency and public would benefit from Appellant's reinstatement to full duties. Accordingly, she requests that the agency personnel actions against her, whether threatened, proposed or taken, be stayed and that an order be issued directing the Agency to allow her to return to work as Chief of the U.S. Park Police immediately.

Pursuant to 5 C.F.R. § 1209.9, the Appellant submits the information and argument provided below, and attached documentary evidence, in support of her request for a stay.

**(1) The Name, Address, And Telephone Number Of The Appellant, And The Name And Address Of The Acting Agency**

Appellant:

Teresa C. Chambers
Post Office 857
Huntingtown, MD 20639
301-868-6844

Acting agency:

U.S. Department of Interior
National Park Service
1849 C Street, NW
Washington, D.C. 20240

**(2) The Name, Address, And Telephone Number Of The Appellant's Representative Appellant's representatives:**

Richard E. Condit, Esq.
General Counsel
Public Employees for Environmental Responsibility
2001 S Street, NW, Suite 570
Washington, D. C. 20009
202-265-7337 ext. 3011

Mick G. Harrison, Esq.
Environmental Center
116 ½ S. College Ave.
Bloomington, IN 47401
859-321-1586

**3) The Signature Of The Appellant Or, If The Appellant Has A Representative, Of The Representative**

Provided below.

**(4) A Chronology Of Facts, Including A Description Of The Appellant's Disclosure And The Action That The Agency Has Taken Or Intends To Take**

Attached hereto and incorporated herein by reference is the Affidavit of Chief Chambers which presents a verified detailed chronology of facts including the disclosures made by the Chief and the actions taken, proposed and threatened by the Agency. Because the Affidavit fact chronology includes over 200 paragraphs, those facts and the chronology are incorporated here by reference rather than being restated here in order to avoid extensive duplication.

The proximity in time between the Chief's disclosures and the actions taken against her is strikingly demonstrated by the detailed chronology presented in Chief Chambers' Affidavit, attached. The heart of the chronology, however, is brief and can be stated conveniently here.

On December 2, 2003, a news article appeared in the Washington Post newspaper quoting statements made by Chief Chambers, some accurately and some not, during an interview with the Post conducted on November 20, 2003. This Post article, quoting the

Chief, paraphrasing the Chief, and indirectly attributing statements to the Chief, stated in pertinent part:

> 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."**
>
> In the long run, **Chambers said, her 620-member department needs a major expansion**, perhaps to about 1,400
>
> 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**.
>
> **"My greatest fear is that harm or death will come to a visitor or employee** at one of our parks, **or that we're going to miss a key thing at one of our icons," Chambers said**.

Washington Post, Dec. 2, 2003, Exhibit 3 (emphasis added).

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 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.

It is apparent from this chronology that 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 DOI 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.

**(5) Appellant First Sought Corrective Action From The Special Counsel More Than 120 Days Prior, and the OSC Has Not Terminated Its Investigation or Made Findings, Making the Stay Request Timely Filed**

Under the Whistleblower Protection Act and the implementing regulations at 5 C.F.R. § 1209, an employee alleging that a personnel action was taken because of her whistleblowing activity may request the Board to stay the personnel action if 1) the personnel action at issue is one that is directly appealable to the Board under a law, rule, or regulation, or 2) if the personnel action being challenged is not such an "otherwise

appealable action" but the appellant has first sought corrective action from the Office of Special Counsel. 5 U.S.C. § 1221; 5 C.F.R. § § 1209.5(d), 1209.6, 1209.14(a); *Kramer v. General Services Administration*, 47 M.S.P.R. 349 (1991).

After corrective action has been sought from the OSC, a request for stay of a personnel action by an employee may be filed no later than 60 days after the OSC notifies the employee that it was terminating its investigation or, if the OSC has not terminated its investigation or notified the employee that it will seek corrective action, no earlier than the 120th day after the employee sought corrective action from the Special Counsel. *Kramer v. General Services Administration*, 47 M.S.P.R. 349 (1991).

Appellant Teresa Chambers filed a complaint of possible prohibited personnel practices and sought corrective action from the Office of Special Counsel (OSC) on January 29, 2004 alleging that the agency had placed her on administrative leave and proposed to remove her from her position and federal service in retaliation for protected disclosures and complaints she made to the press, Congress and DOI officials which disclosed specific and substantial dangers to public safety, and gross waste of funds, gross mismanagement and abuse of authority concerns. *See* Exhibit A (complaint to the OSC). More than 120 days have elapsed since that request by Appellant to the OSC was made and the OSC has neither sought corrective action on Appellant Chamber's behalf nor closed its investigation and determined not to seek corrective action. Chambers Affidavit at 279. Pursuant to 5 U.S.C. § 1221; 5 C.F.R. §§ 1209.5(d), 1209.6, 1209.14(a), Appellant now has the right to appeal to the Board, which appeal was in fact filed on June 28, 2004, see Exhibit B (appeal cover letter and form, without attachments), and now has the right to request a stay. *Kramer v. General Services Administration*, 47 M.S.P.R. 349 (1991).

**(6)(i) The Actions Threatened, Proposed, And Taken, Are Personnel Actions, As Defined In § 1209.4(A)**

5 C.F.R. § 1209.4(a) provides:

Definitions.

(a) Personnel action means, as to individuals and agencies covered by *5 U.S.C. 2302:*

(1) An appointment;

(2) A promotion;

(3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;

(4) A detail, transfer, or reassignment;

(5) A reinstatement;

(6) A restoration;

(7) A reemployment;

(8) A performance evaluation under chapter 43 of title 5, United States Code;

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;

(10) A decision to order psychiatric testing or examination; or

(11) Any other significant change in duties, responsibilities, or working conditions.

5 U. S. C. §2302 (a) states, in pertinent part:

(a)(1) For the purposes of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section –

> (A) "personnel action" means –
>
> . . .
>
> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
>
> . . .
>
> any other significant change in duties, responsibilities, or working condition: with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31.

Appellant has alleged to the OSC, and alleges to the Board, supported by her affidavit and exhibits 1-98 attached thereto, and supported by the attached affidavits of other Park Police officers and officials, that she was the victim of reprisal for her whistleblowing disclosures to the press and Congress, as well as to government officials who had the power to act on her concerns regarding specific and substantial dangers to public safety, gross mismanagement, gross waste of funds and abuse of authority. Thus, Appellant Chambers is an individual covered by, *inter alia*, 5 U.S.C. § 2302(b)(8) and (b)(9).

The Agency's December 5, 2003 placement of Appellant Chambers on administrative leave and removing her from all duties and prohibiting her from acting in any official capacity (including wearing her uniform, badge or firearm) is a "significant change in duties, responsibilities or working conditions" and thus a personnel action within the meaning of 5 U. S. C. § 2302(A)(2)(A)(xi). The December 17, 2003 proposal to remove her is a threat to take "an action under chapter 75" within the meaning of 5 U.S.C. § 2302(a)(2)(A)(iii).

Complainant is a competitive service employee of the Department of the Interior entitled to the protection of 5 U.S.C. §§2301-2302 and not excluded from appeal to the Merit Systems Protection Board as an employee or agency listed in 5 U. S.C. §7511(b).

The December 2, 2003 gag order issued by the agency against Appellant Chambers, which prohibited and continues to prohibit Appellant from speaking with Congress or the Press (or any agency or official) without getting prior Agency approval case by case, including approval over the content of what would be said, was also a significant change in duties, responsibilities and working conditions and thus a covered personnel action.

**(6)(ii) The Actions Taken by the Department of Interior and National Park Service Against Chief Chambers, Including the Gag Order, Administrative Leave (Suspension) Order, and Proposed Removal, Which Are the Subject of this Appeal, Were Based On Whistleblowing, As Defined In 5 C.F.R. § 1209.4(b)**

> (b) Whistleblowing is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

5 C.F.R. § 1209.4(b).

The Whistleblower Protection Act protects employees who (reasonably) disclose, *inter alia*, "a substantial and specific danger to public health or safety." 5 U. S. C.

2302 (b)(8)(A)(ii). Chief Chambers made the bulk of the statements to the Washington Post reporter reflected in the quote above, and engaged in the communications with Congress and officials of the National Park Service and Department of Interior noted and quoted above, and in the attached detailed verified and documented chronology of facts presented in the attached Affidavit of Chief Chambers. These communications regarding insufficient funding and inadequate staffing and the consequential reduction in the ability to protect national icons and public safety fall squarely within the above-cited section of the Act and are clearly protected activities. *See, e.g., Salinas v. Department of Army*, 94 M.S.P.R. 54 (2003).

The law allows an employee alleging reprisal for whistleblowing to prove that the Agency actions taken against her were based on whistleblowing by showing that the employee's whistleblowing disclosures were a "contributing factor" in the agency action.

> (c) Contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

5 C.F.R. § 1209.4(c).

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; 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; 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 . . ." Exhibit 80.

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, 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; 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; 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; 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; 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; 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; 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; 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; 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.

**(6)(iii) There Is A Substantial Likelihood That Appellant Chief Chambers Will Prevail On The Merits Of Her Appeal, and the Direct Evidence in Appellant's Case Entitles Appellant Chambers to Prevail as a Matter of Law**

*Gergick* (43 M.S.P.R. at 662) represents an analogous case, although the instant case is more blatant as noted. As *Gergick* points out, once the employee has established that her whistleblowing was a contributing factor in the agency actions taken against her, the employer has the burden of proving by clear and convincing evidence, which is a very

demanding standard, that the agency would have taken the same action even in the absence of the whistleblowing. Also as *Gergick* points out, the presence of direct evidence in the form of an agency reference to the whistleblowing in the record of the action taken against the employee will, when combined with facts showing protected activities prior to the action and agency knowledge of those protected activities, as here, preclude the agency from meeting its burden of showing it would have taken the same action absent the whistleblowing.

> 4. There is a substantial likelihood that the agency will fail to present clear and convincing evidence that it would have threatened to take a personnel action against the appellant in the absence of the appellant's whistleblowing activity.
>
> [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).

The record of inquiry at issue in this case includes the following statement of the reasons for the inquiry:

You have continually refused to follow the directions given you by your immediate supervisor and higher level supervisors regarding the role and scope of the Credit and Finance program.. [sic] You have made repeated slanderous and defamatory comments, accusations, and statements against your immediate supervisor, other members of GSA's regional management, and the Inspector General's office. You have continued to make these allegations even though the agency, the IG's office and the office of Special Counsel have found no substantial evidence to warrant further investigation. …

The last possible basis for disciplinary action against the appellant [FN30] concerns the allegation that the appellant's "relationship with [his] immediate supervisor and [his] subordinate employees ha[d] been strained and ha[d] contributed to a climate of mistrust, low morale and uncertainty within the Credit and Finance section." The agency has not contended that this relationship had been strained as a result of improper actions on the appellant's part. Furthermore, to the extent that any difficulties in the relationship resulted from protected whistleblowing activity on the appellant's part, the agency's basing an action on those difficulties would violate 5 U.S.C. § 2302(b)(8). …

In view of the vagueness of the allegations described above, in view of the insufficiency of the evidence presented in support of these allegations, in view of the evidence that the appellant engaged in whistleblowing activities before the record of inquiry was issued, and in view of the fact that those activities were specifically mentioned in the record of inquiry, we find that the agency has failed to present clear and convincing evidence that it would have issued a record of inquiry to the appellant in the absence of his whistleblowing activities. We therefore conclude that the appellant is entitled to a stay. [FN31]

*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). These criteria are evauluated herein. On each the Agency is lacking.

The strength of the agency's case is extremely weak. Four of the charges (1-4) are based squarely on disclosures to Congress and to the press with irrelevant, and inapplicable citations to a manual provision, a circular, and a regulation (and to none at all in one charge). While the action could still be lawful if the agency demonstrated an independent justification through clear and convincing evidence, 5 U.S.C. §§ 1214(B)(4)(B)((ii) and 1221(e)(2), that is not realistic here. The only timely accusations cited as a basis for termination are her disclosures. The agency contends that her disclosures violated an Office of Management and Budget Circular No. A-11. Charge 3. But even if true, it has been established since passage of the Civil Service Reform Act of 1978 that only a statutory prohibition can cancel whistleblower free speech rights, not a rule or regulation. 5 USC 2302(b)(8). The citations by the Agency in its proposed removal to a manual provision, a circular, and a regulation are legally inapplicable, and even if applicable would have to give way to the superior legal authority of the First Amendment of the Constitution and the Whistleblower Protection Act with which they would directly conflict in this case if they were applicable.

The illegal motivation to retaliate on the part of the proposing official, Mr. Donald Murphy, in response to Appellant Chamber's filing of her complaint against him with the Director on December 2, 2003 is apparent from the proximity in time and the irregular procedure adopted by the agency in handling the complaint (they informed Murphy about it then took no further action). Murphy acknowledged awareness of the complaint's existence in the December 5, 2003 meeting with the Chief as he was placing her on administrative leave. Thus, even in the absence of a remarkably strong case of prohibited personnel practices under 2302(b)(8), Chief Chambers is likely to prevail under section (b)(9). A (b)(9) violation is apparent on the face of the proposed removal document issued by the Agency. The facts reveal that basic merit system training may be badly needed at the Park Service. 5 USC 2302(b)(9)(A) prohibits taking or failing to take a personnel action "because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." The Park Service proposes to fire Chief Chambers in part, because she "appealed to Deputy Secretary Griles and convinced him to cancel instructions that [a key aide] be detailed to the Office of Strategic Planning." (Charge 6 Specification) The charge is worded to constitute a literal admission of violating section 2302(b)(9).

In Charge 5 of the proposed removal, the National Park Service accuses Chief Chambers of refusing to carry out an order to detail aide Pamela Blyth. Since the detail would have been involuntary and the aide had made whistleblowing disclosures along with Chief Chambers about budget improprieties, Chambers Affidavit at 15, 27, 28, 40, 46, and 52 and Blyth Affidavit at 3 and 4, the Agency is in effect charging Chief Chambers with refusing to violate the law by retaliating against another whistleblower on her staff. Under 5 U.S.C. § 2302(B)(9)(D), it is a prohibited personnel practice to take a

personnel action against an employee "for refusing to obey an order that would require the individual to violate a law." This provides another basis on which the Chief is likely to prevail on the merits of her appeal.

Likewise, Chief Chambers, if she did not prevail under (b)(8) or (b)(9), she would prevail under (b)(12) because her proposed removal and administrative leave actions are based on her communicating with Congress, an illegal basis. 5 U.S.C. § 7211 states: "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." This provision implements merit system principles as the congressional right to know law. It does not have any qualifiers or restrictions, because the free flow on information is necessary for Congress to uphold its legislative oversight function and make informed, responsible spending decisions on behalf of the taxpayers. The agency's charges specifically accuse Chief Chambers of communicating with Congress, as a basis to propose termination. (Charge 1) The charges cannot coexist with section 2302(b)(12).

Moreover, in the Lloyd Lafollette Appropriations Statute Congress annually passes an enforcement mechanism banning spending on salary for any employee who acts to interfere with communications with Congress. Section 620 of the Treasury, Postal and General Government Appropriations Law. On their face, the Park Service charges against Chief Chambers constitute a literal violation of section 620, and should result in personal salary accountability for violators. That means not only is the proposed termination a merit system violation, but the agency is illegally spending federal funds in its effort to fire Chief Chambers.

If that ground under (b)(12) failed, the Chief would prevail in any case under (b)(12) due to violation of her First Amendment rights. Since 1968, public employees have enjoyed clearly recognized first amendment rights. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under civil service law, constitutional rights are enforced through 5 U.S.C. § 2302(b)(12), which makes it a prohibited personnel practice to "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." *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).

Yet another (b)(12) grounds on which the Chief is likely to prevail on the merits of her appeal is that the agency action in issuing the gag order is a violation of the anti-gag statute. Since 1988, a related provision of the Treasury, Postal and General Government bill has become known as the "anti gag statute." It forbids spending to implement or enforce any nondisclosure policies not accompanied by an addendum upholding the supremacy of the Whistleblower Protection Act, Lloyd Lafollette Act, and other good government laws, over administrative restrictions on speech. By continuing resolution of the Congress, Sec. 622 remained in effect until recent passage of the Transportation and Treasury Appropriations Act of 2004, which contains substantially similar language to Section 622. See H.J. Res. 82 (Jan. 7, 2003). None of the nondisclosure policies cited by the National Park Service in Charges 1-3 of the proposed removal have the legally required addendum. Due to this procedural omission, the National Park Service has illegally spent federal funds trying to fire Chief Chambers.

Another compelling basis for finding that the Agency simply cannot meet its burden of showing by clear and convincing evidence that it would have taken the same actions against the Chief in the absence of her whistleblowing is disparate treatment. Other DOI NPS employees, including the managers who took the actions against Chief Chambers themselves, engaged in conduct similar to the conduct the Chief is accused of, such as speaking to the press or Congress, but were not subjected to any disciplinary action. Chambers Affidavit at 219. "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).

Further, the charges are discredited by inherently impossible allegations of misconduct, such as accusing Chief Chambers of not attending a meeting that was canceled, or lobbying for legislation that had not been introduced. Further, the Agency gave a completely non-inspiring explanation of its reasons for placing the Chief on administrative leave when the Chief challenged Murphy to explain himself on December 5, 2003. Chambers Affidavit at 192 - 197. Murphy as much as admitted that he would be searching in the future, while the Chief was suspended, to find a reason to retroactively justify what he had already decided to do (for illegal retaliatory reasons that have herein been established). Chambers Affidavit at 195 and 196.

> 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). Further, the employer's inconsistent and shifting reasons for its actions indicate pretext. *See e.g., Womack v. Munson,* 619 F.2d 1292, 1295-96, 1298-99 (8th Cir. 1980). In addition, the absence of any unfavorable performance appraisal in the Chief's record supports a finding of retaliatory motive. *Ellis Fischel State Cancer Hospital v. Marshall,* 629 F.2d 563, 567 (8th Cir. 1980). Thus, there are a number of reasons beyond the proximity in time and direct evidence of illegal motive as to why the Agency cannot meet its burden here to show by clear and convincing evidence that it would have taken the same actions against the Chief in the absence of the Chief's protected activities.

There are other unusual circumstances here corroborating the existence of hostility towards the Chief which support the inference of retaliation. Chief Chambers and top aides have been subject to harassment via tactics which included office break-ins, mass deletion of computer entries, stolen personal property, nails under tires, used condoms placed on or around vehicles; and pepper spray of a deputy's office door while he was conducting a meeting inside.

It should be noted that this is not a case where WPA protections do not apply to employees who are merely performing their job duties by making the disclosures. *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). That objection cannot apply in this case. In its charges, the agency specifically defines Chief Chambers' job

duties as excluding the congressional and media disclosures for which her firing is proposed. The National Park Service has waived this defense, by personally redefining the Chief's position to exclude normal communications with Congress and the public.

It is appropriate to grant a Stay of an employee's removal where the employee has established as here that she engaged in protected activity, that the agency actions were the direct result of this whistle blowing activity, and the agency's statement of reasons for appellant's removal was unsupported. *Williams v Dept of Defense*, 45 M.S.P.R. 146 (1990).

**(7) Every Day of the Agency's Unjustified Intrusion Into Chief Chambers' First Amendment and Statutory Rights Constitutes Irreparable Harm Both To Chief Chambers and to the National and Public Interest, and Consequently the Stay Should Remain In Effect Until the Board Decides the Merits of the Case and the Agency Complies with Any Relief Ordered**

The stay should remain in effect until the MSPB decides the merits of the instant appeal by Chief Chambers and, should the Board order relief, until the Agency complies. A failure to provide and maintain the stay would have a significant chilling effect on employees within the Department of Interior and beyond both because of the high profile and national notoriety of the case, and because of the blatant nature of the Agency conduct. The Agency's blatant disregard for Appellant's rights is clearly evidenced in the attached affidavits and exhibits which show, *inter alia*, an explicit and broad gag order issued by the NPS Deputy Director Don Murphy and since adopted by the silence and inaction of every official in the chain of command above Deputy Director Murphy including Director of the National Park Service Fran Mainella, Deputy Assistant Secretary Paul Hoffman, and Secretary of the Interior Gale Norton. This gag order was issued by the Agency the same day as disclosures by Chief Chambers to the Washington

Post of a specific and substantial danger to public safety and of gross mismanagement. Explicit reference was made by the Agency in its decision document proposing to remove the Chief to protected disclosures by the Chief to Congress and the media.

The affidavits and exhibits attached to this motion are incorporated herein by reference in support of the argument here that the stay should remain in effect until the Board decides the merits of the case and any Order for relief has been complied with by the Agency. Every day the stay is not in effect constitutes irreparable harm to Chief Chambers as well as to the public interest. The Whistleblower Protection Act does not require a balancing of harms or a showing of irreparable harm to justify issuance of a stay, unlike the traditional standards used by courts in determining whether to grant or deny a motion for temporary restraining order or preliminary injunction.

> FN4. In cases in which the interests of one party must be balanced against those of the other, the "substantial likelihood" standard has been said to vary according to the circumstances of the particular case in which it is applied. See, e.g., District 50, United Mine Workers of America v. International Union, United Mine Workers of America, 412 F.2d 165, 168 (D.C.Cir.1969) (the "likelihood of success on the merits that a movant for injunctive relief must demonstrate varies with the quality and quantum of harm that it will suffer from the denial of an injunction"). See also 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2947 (1973) ("[i]f plaintiff seems unlikely to win, a preliminary injunction will not be issued unless he demonstrates a strong probability that he will be injured if the court fails to act"). **We note, however, that the Whistleblower Protection Act provides for no such balancing test. See 5 U.S.C. § § 1213(b), 1214(b)(4)(B), 1221(e).**

*Gergick*, 43 M.S.P.R. at 658 (emphasis added). However, if a showing of irreparable harm were required, such a showing could easily be made here.

The gag order December 2nd and the administrative leave order that followed on its heels on the 5th, along with the proposed removal which came shortly after on the 17th of December, were intended to silence the Chief and are plain and unjustified intrusions into the Chief's First Amendment rights of free speech. Even in an average case, government intrusion into one's Free Speech rights constitutes irreparable harm to the individual as a matter of law. *Elrod, Sheriff, et al. v. Burns et al.,* 427 U.S. 347; 96 S. Ct. 2673; 49 L. Ed. 2d 547 (1976).

> There remains the question whether the issuance of a preliminary injunction was properly directed by the Court of Appeals. The District Court predicated its denial of respondents' motion for a preliminary injunction on its finding that the allegations in their complaints and affidavits did not constitute a sufficient showing of irreparable injury and that respondents had an adequate remedy at law. The Court of Appeals held, however: "Inasmuch as **this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders**, we judge that injunctive relief is clearly appropriate in these cases." 509 F. 2d, at 1136. We agree.
>
> At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear, therefore, that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. **The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury**. See New York Times Co. v. United States, 403 U.S. 713 (1971). n29 Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District

> Court abused its discretion in denying preliminary injunctive relief. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).
>
> n29 **The timeliness of political speech is particularly important**. See Carroll v. Princess Anne, 393 U.S. 175, 182 (1968); Wood v. Georgia, 370 U.S. 375, 391-392 (1962).
>
> **"[T]he purpose of the First Amendment includes the need... 'to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.'"** Id., at 392 (quoting 2 T. Cooley, Constitutional Limitations 885 (8th ed. 1927)).

*Id*. at 373-74, n.29 (emphasis added).

The Agency may argue that there is no immediate harm to Chief Chambers that requires a stay to remedy because the Agency still has the Chief in a pay status on administrative leave. However, such an argument would be misplaced for several reasons, the first of which is that the Federal Circuit has pointed out to the Board that Congress has concluded there are significant benefits to putting the employee back to work in their position versus simply keeping them on administrative leave.

> The Postal Service did not fulfill the unmistakably clear statutory obligation. By excusing the Postal Service's failure to make an unduly disruptive finding as harmless error, the Board failed to enforce this statutory obligation. In so doing, the Board inappropriately equated compensation with employment. There are many benefits, both tangible and intangible, which may accrue to an employee who is actually present and working, instead of being away from the work place while on

> administrative leave. For example, the employee may gain valuable work experience; he may be eligible for performance awards; he may be assigned overtime duty; or he may benefit psychologically from earning his pay rather than merely receiving it. Thus, such failure to comply with the statute can hardly be harmless error. We are frankly astonished [**8] that the Postal Service maintained both in its brief as well as at oral argument that it was frivolous for Mr. DeLaughter to contest the Postal Service's willful disregard of the measures Congress instituted to enforce its stated preference for returning an employee to work.

*Delaughter v. United States Postal Service*, 3 F.3d 1522, 1524 (Fed. Cir. 1993). The Board has clearly heeded this ruling.

> We are also not persuaded by the agency's argument that the appellant will suffer "little or no harm" if a stay is granted because the agency will continue her in an administrative leave status with full salary and benefits. Stay file, Agency stay motion at 7. This argument overlooks the fact that the agency's continued refusal to comply with the Board's final order in this appeal may have the effect of depriving the appellant of important benefits. As the Federal Circuit has recently recognized, "[t]here are many benefits, both tangible and intangible, which may accrue to an employee who is actually present and working, instead [*8] of being away from work while on administrative leave." *DeLaughter v. U.S. Postal Service, 3 F.3d 1522, 1524 (Fed. Cir. 1993).*

*Briggs v. National Council On Disability,* 68 M.S.P.R. 296, 303 (1995).

Here, because the Chief in speaking out was not speaking merely for herself but for the nation and the safety of all of its people, and for the protection of the nation’s unique and precious national symbols of freedom and democracy, every day that passes is not just harm to the Chief, but harm to the nation and the public interest. This is no subtle intrusion narrowly tailored to meet a legitimate governmental interest but a broad, blatant

and nefarious attempt to silence a dedicated public servant who had the integrity to stand up and expose, at great risk to herself, a failure of the Department of Interior to provide the police staffing and budget support necessary to protect both the public safety and great national treasures entrusted to it by law, at one of the most dangerous times in the Nation's history. This failure resulted not from some excusable limitation of resources available to the Agency but from the Agency's own financial misconduct and mismanagement which it now seeks to sweep under the rug, just as it attempted to sweep under the rug its failure to protect the national icons by gagging its own Chief of Police. As one distinguished Administrative Law Judge with the Department of Labor's Office of Administrative Law Judges noted in another recent whistleblower case:

> Many administrations, beginning at the highest levels of the federal government and continuing with the current President, have consistently encouraged federal employees to report examples of waste, fraud or abuse, or to engage in so-called whistleblowing, and such employees have been told they may do so with impunity and without fear of reprisals, retaliation, harassment and/or disparate treatment. This "no fear" attitude is especially important today, given the events on "9/11". …
>
> After "9/11," the rights of whistleblowers have been greatly enhanced and, just recently, President George W. Bush, as our Chief Executive and Commander in Chief, directed all federal employees to bring to the attention of appropriate personnel their "suspicious" concerns about safety and, if ignored as were the suspicions of F.B.I. Special Agent Coleen Rowley, to bring those concerns to the Director of Homeland Security and even to the White House, if necessary. Thus, that constitutes a presidential directive to ignore the chain-of-command if necessary.

*David W. Hall v. U.S. Army Dugway Proving Ground*, 97-SDW-5 at pp. 8, 68 (ALJ Aug. 8, 2002).

There is a lot at stake and much to be lost in terms of the public interest if the gag order and other actions against Chief Chambers are allowed to stand. The law enforcement manager is being fired for communicating with congressional staff about the effects of budget decisions and resource needs to adequately protect the public. Congress has a right -- nonnegotiable need -- to know this information. This is the normal dialogue for government to be functional. It is not realistic to make informed spending decisions for the taxpayers' money, if government officials are fired for talking with congressional staff. These issues go well beyond alleged violations of the Whistleblower Protection Act, or even good government disputes. The actions threaten to lock in blanket secrecy through sweeping gag orders that could undermine basic government service. The Park Service proposal threatens to create a chilling effect on other federal law enforcement managers throughout the Executive branch, as normal communications become potential firing offenses.

This case could set a precedent that immediately cancels public safety experts' right to make disclosures warning of substantial and specific threats to public health or safety. That interpretation likely would spread to shrink the scope of analogous statutes protecting employees in the corporate, state and local and international sectors. If the matter is not resolved in a responsible manner at the administrative level, this case could represent a crisis threatening the integrity of merit system rights in particular, and whistleblower rights more generally in all employment sectors.

Precedents the Park Service seeks through this termination would be incompatible with continued legitimacy not only for the Whistleblower Protection Act, but laws necessary for normal government operations. Examples include the Lloyd Lafollette Act (Congress right to know); and the anti-gag statute (supremacy of statutory good

government laws over agency gag orders). While there have been no findings of fact or third party investigations, the media has widely covered the details of Chief Chambers' proposed termination, including issues listed above. As a result, there is a severe danger of an abnormally broad chilling effect throughout the federal law enforcement profession if this termination is finalized.[1]

The Congress and the MSPB have provided whistleblower protections for government employees who conscientiously raise legitimate concerns and expose dangers to the public. These protections include the provision for stay of agency actions.

> [T]he Board's regulations provide that an employee may request a stay of a personnel action that the employee alleges was or will be based on his whistleblowing. 5 C.F.R. § 1209.14(a). See also 5 U.S.C. § 1221(c).

*Gergick*, 43 M.S.P.R. at 656. These are not the times or the circumstances when these protections should be sparingly or grudgingly dispensed. These are precarious times and as a nation we need to bring the full force of the law to bear to protect employees with integrity and to prevent retaliation from those who would allow their short sighted and self-serving goals to subvert the greater public and national interests at stake. For all the reasons stated herein, the stay requested should remain in force until the Board has decided the merits of this case and the Agency has complied with any relief ordered.

**(8) Documentary Evidence Strongly Supports The Stay Request**

Attached hereto, incorporated herein and referenced throughout this motion are the Affidavit of Chief Teresa C. Chambers and approximately 100 supporting exhibits.

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[1] Many of these arguments were made by the well-respected Government Accountability Project in its early filed Amicus in support of Chief Chambers. GAPs analyses in this and other important whistleblower cases has been liberally borrowed from in making several critical points herein.

These documents taken together present dramatic and compelling evidence of the need for a stay of the Department of the Interior's illegal actions against the Chief of the United States Park Police. *See* Chambers Affidavit, Exhibits 1-98. The documentary evidence attached is more than sufficient to meet Appellant's burden on a motion for stay of agency action. The burden on the Appellant to obtain the stay is not as great as for a decision on the merits of the appeal. *Cf. OSC ex rel Stephenson-Pino v Dept. of Navy,* MSPB Dkt. No. CB-1208-04-0014-U-1 (June 4, 2004), citing *Acting Special Counsel v. Department of Labor,* 93 M.S.P.R. 409 (2003) (a stay can be granted on the basis of little information; a stay proceeding is not intended to be a substitute for a complete hearing on the merits).

Also attached and incorporated by reference are the affidavits of current U.S. Park Police employees Lt. Jeff Wasserman and Pamela Blyth. The evidence provided in their affidavits supports many aspects of Chief Chambers' request for a stay.

**(9) A Stay Would Not Impose Extreme Hardship On The Agency but Rather Would Benefit the Agency in Fulfilling Its Mission**

The Board's regulations at 5 C.F.R. § 1209.10 (Hearing and order ruling on stay request) state in pertinent part:

> (2) The judge's ruling on the stay request must set forth the factual and legal bases for the decision. The judge must decide whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal, and whether the stay would result in extreme hardship to the agency.

If this regulation's standard in reference to extreme hardship to the agency applies to this case in its present status, which it may not as noted below, the stay should

nonetheless be granted because the stay requested by the Appellant would pose no meaningful hardship on the Agency. Chief Chambers is presently on administrative leave with pay. If she were to return to work there would be no additional expense or cost to the Agency. In addition, there is no legitimate basis for the Agency to claim that the return of Chief Chambers to work would result in any extreme harm to the efficiency or effectiveness of the Park Police. To the contrary, Chief Chambers' record prior to and during her tenure at the U.S. Park Police reflects her dedication, leadership and professionalism. *See* Affidavit of Lt. Jeff Wasserman; Affidavit of former-President of the Fraternal Order of Police Local, Jeff Capps; Affidavit of Chief Chambers. The greater hardship to the agency occurs in the Chief's continued absence.

Chief Chambers' "round-the-clock, constant dedication to this effort in the months before her suspension, and her ongoing – sometimes seemingly desperate – desire to meet the DOI and NPS's stated expectations of significantly enhanced officer presence at each Icon, far exceeded the efforts of any other USPP administration." Affidavit of Lt. Wasserman at 20. Key measures initiated by Chief Chambers to provide quality control oversight on security measures at the icons, and which in fact had the effect of improving such security, have been discontinued after the Chief was placed on administrative leave. Affidavit of Lt. Wasserman at 16 - 19.

Any hardship anticipated by the agency in returning the Chief to active duty is worsened by the delay in reinstating her. The progress of the U.S. Park Police in complying with the NAPA recommendations of the Summer of 2001 will resume on the Chief's return. That progress has been eroded in the Chief's absence, contrary to a Congressional mandate. Chambers Affidavit at 245 – 251 and 275.

The Agency will benefit from the Chief's reinstatement because she will bring a focus on professional development for United States Park Police employees, including critical supervisory and managerial training, and provide for input from all levels of the organization, especially the frontline officers. Waning morale, that officers across the country have described over the past seven months, will be revitalized. Chambers Affidavit at 276.

With the Chief's return will also come a sincere focus on homeland security, which will again be at the forefront of priorities in the United States Park Police. Currently, the Department of the Interior and NPS are suffering a hardship by not having a representative on key committees and anti-terrorist task forces across the county. The Chief's 26 years of municipal policing experience has allowed the Chief's involvement in nationwide organizations to facilitate current information, strategies and resources being made available to the Department of the Interior. Chambers Affidavit at 277.

The Chief is committed to, upon returning to active duty, doing everything within her power to mitigate any perceived or anticipated hardship on the part of the agency. Media accounts will show that, during those few interviews in which the Chief has been permitted to engage over the past seven months, she has been steadfast in her focus on working with the officials and staff of the United States Park Police to serve the American people and other visitors to the parks for which the USPP are responsible. The Chief recognizes that the role of the Chief of the United States Park Police is far too critical to homeland security to allow the Chief to dwell on a personnel incident or to let such an incident interfere in any manner in performance of the Chief's duties upon her return. Any tension which might exist among employees or officials will be mitigated by

the manner in which the Chief comports herself in effectively transitioning back into an active duty role. Chambers Affidavit at 2787.

In addition to the absence of any extreme hardship to the agency as a factual matter, it is not clear that this regulatory provision applies here in regard to allowing the agency to assert extreme hardship as a legal factor to consider in deciding a stay at this stage.

> Finally, the agency argues that an indefinite stay would constitute sanctions against the agency and impose an undue hardship. This argument is unpersuasive because an agency's claim of hardship cannot be allowed to override protection of the employee pending consideration of OSC's prohibited personnel practice claim. *Special Counsel v. Department of the Navy*, 66 M.S.P.R. 173, 175 (1995), citing *Matter of Tariela*, 1 M.S.P.R. 141, 144 (1979) (protection of the employee pending determination of whether there has been a prohibited personnel practice should override considerations of agency efficiency and managerial discretion during the time required to resolve the matter.)

*Special Counsel v. Department Of The Interior*, 68 M.S.P.R. 266 (1995). In the instant case, the OSC has yet to decide its course of action, and, of course, neither the Administrative Judge nor the Board have yet had an opportunity to determine whether the Agency has taken one or more prohibited personnel actions. Thus, pursuant to the case law cited, the agency "extreme hardship" factor referenced in the regulation may not yet be available here. If the regulation reference to extreme hardship as a factor in a stay decision were to apply at this stage, this factor may still not be appropriate to consider because the applicable statutory provisions appear to reflect a clear Congressional intent to not impose a traditional balancing of harms standard or approach. *See Gergick*, 43 M.S.P.R. at 658 (quoted *supra*) (Congress imposed no balancing of harms standard in the Whistleblower Protection Act). The regulation, to the extent it seeks to impose a burden

on an Appellant to show the absence of extreme hardship to the agency from a stay, or seeks to authorize denial of a stay if an agency shows such extreme hardship, may be invalid as contrary to the controlling statutes and Congressional intent.

**CONCLUSION AND REQUESTED RELIEF**

For all the foregoing reasons and those stated in the attached affidavits, Chief Chambers respectfully requests that the Merit Systems Protection Board and this Honorable Administrative Judge issue an immediate stay of the Agency actions to date against Chief Teresa Chambers and any additional adverse actions subsequently taken by the Agency against the Chief that may currently be unknown to Appellant Chambers. Chief Chambers respectfully requests that each of these actions be stayed – that the gag order be lifted so that Chief Chambers may speak freely to the media, to Congress and agency officials, that Chief Chambers be taken off administrative leave and returned to her normal position and duties as Chief of the United States Park Police, and that the Agency be prohibited from acting to finalize and effectuate its proposed removal of Chief Chambers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that the foregoing document was served on the party(ies) identified below via First Class Mail, postage prepaid on this _____ day of _____, 2004.

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