2007-3050

United States Court of Appeals

for the

Federal Circuit

TERESA C. CHAMBERS,

Petitioner,

vs.

DEPARTMENT OF THE INTERIOR,

Respondent.

Petition for Review of the Merit Systems Protection Board in DC-1221-04-0616-W-1 and DC-0752-04-0642-I-1

BRIEF FOR PETITIONER

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CERTIFICATE OF INTEREST

Counsel for the Petitioner, Teresa C. Chambers, certifies the following:

1. The full name of every party or amicus represented by me is:

Teresa C. Chambers

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Teresa C. Chambers

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. X There is no such corporation as listed in paragraph 3.

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There are no related cases.

JURISDICTIONAL STATEMENT

The Merit Systems Protection Board had jurisdiction to entertain Appellant Chambers IRA and removal action appeals pursuant to 5 U.S.C. §§ 7701, 7513(d), 1221, and 2302. This Court of Appeals has jurisdiction to review the final decision issued by the Merit Systems Protection Board in this case pursuant to 5 U.S.C. § 7703.

STATEMENT OF THE ISSUES

I Whether the Board and AJ decisions to sustain Agency charges 2, 3, 5 and 6 against Appellant Chambers were contrary to law, arbitrary and unsupported by substantial evidence.

II Whether the Board and AJ decisions to sustain the penalty of removal were contrary to law, arbitrary and unsupported by substantial evidence.

III Whether the Board and AJ's holding that the admitted 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 was not a violation of Appellant Chambers' due process and statutory rights recognized in *Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368 (Fed. Cir. 1999) and *Cleveland Board Of Education v. Loudermill,* 470 U.S. 532 (1985), was contrary to law, arbitrary and not supported by substantial evidence.

IV Whether the Board and AJ's holding that the undisputed Agency's concealment from Appellant of the findings of fact made by the final Agency decision-maker did not violate constitutional and statutory mandates, including 5 U.S.C. § 7513(b), 5 C.F.R. § 752.404(b), 5 C.F.R. § 1201.25, and the Constitution's Fifth Amendment, was contrary to law, arbitrary and not supported by substantial evidence.

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

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

VII 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

VIII Whether the Board and AJ's holding that the Department of Interior (Agency) did not engage in a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(12) and 5 U.S.C. § 7211 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 was contrary to law, arbitrary and not supported by substantial evidence.

IX Whether the AJ made numerous procedural errors that went uncorrected by the Board that denied Appellant due process and were contrary to law and arbitrary.

I. STATEMENT OF THE CASE

This is an appeal from a decision of the Merit Systems Board (MSPB). A majority of the Board affirmed the decision of the Administrative Judge (AJ). One member dissented. The AJ sustained four of six of the Department of Interiors charges of misconduct against Petitioner Teresa Chambers and upheld the agency's decision to remove Chambers from her position.

II STATEMENT OF THE FACTS

On February 10, 2002, following a national search, Teresa Chambers was selected to serve as the first female Chief of the United States Park Police (USPP) in our Nation's history. (A435). The USPP force is a component of the National Park Service (NPS), which is a sub-agency of the U.S. Department of the Interior (DOI).

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. (A2538; A1177; A1185; and A219 - A220)

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, Chambers kept her superiors updated on the progress of

the situation and, in fact, was called in by DOI Secretary Gale Norton for a personal briefing. (A71)

In March 2003, the USPP, under Chambers' direction, submitted their "budget call" information for Fiscal Year 2005 (FY '05) in the amount of approximately $42 million. (A1614.1) It became clear to Chambers in the Summer of 2003 that the USPP 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. (A71 - A73)

On June 5, 2003, Larry Parkinson, DOI Deputy Assistant Secretary for Law Enforcement and Security in the Department of the Interior, asked Chambers to meet with him regarding budget matters. (A74)

During this June 5, 2003, meeting, Chambers and her team learned for the first time that the NPS budget proposal for the USPP for FY 2005 had gone forward to the DOI Budget Office without any conversation with Pamela Blyth (a member of the Chief's command staff responsible for budget oversight) or the Chief. (A74) The USPP $42 million enhancement submission had been reduced to approximately a $3 million enhancement request to the DOI.

On June 12, 2003, Chambers called her supervisor, Donald Murphy, to see if he had been able to resolve a psychological testing issue involving USPP Deputy Chiefs Beam and Pettiford. Murphy advised 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. (A2390)

On June 13, 2003, Chambers notified Beam and Pettiford that 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. (A498; A1616.1; A2390; and A2561.4)

On July 10, 2003, 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 Chambers asking for the opportunity to meet about the "Shelter in Place" program, which Harding described as "very positive." (A2395) 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. (A2395; A1764; and A1788)

Sometime after July 10, Randolph J. Myers, Senior Attorney, Office of the Solicitor, scheduled a meeting with someone on Chambers' staff to meet with Chambers on July 30, 2003. (A2395)

The July 30 meeting did not occur. Chambers' Executive Officer, Lieutenant Phillip Beck, recalled that either he or Chambers' secretary, Sharon Stephenson, made "subsequent tries" to reschedule the meeting with Mr. Myers but that the meeting was never rescheduled. (A1804 - A1805)

During his interview with Hoffman, Murphy stated, "I don't recall speaking with her [Chambers] directly about this instance." (A2536 - A2537)

On August 5, 2003, Chambers attended meetings with Murphy, Parkinson, and NPS Director Fran Mainella to discuss budget challenges. During the meeting with Parkinson, DOI Assistant Secretary Manson confirmed that, despite any challenges or shortfalls, the USPP must continue to staff at Department-mandated levels at the icon locations. (A87 - A88; and A1415)

On August 8, 2003, Murphy informed Chambers for the first time of his intent to "detail" Pamela Blyth and assured Chambers that Blyth would work directly for him and that he would mentor her. Murphy provided no anticipated date that this assignment would begin. (A436 - A437; A2654 - A2663; and A2680)

Chambers expressed her concern to Murphy that the USPP would be unable to cover Blyth's duties if she were moved from her regular position at that particular time. (A2677 - A2678; A2681; and A437-438)

Sometime after learning about the Blyth detail, Officer Jeff Capps (USPP FOP Labor Committee Chairman), telephoned DOI Deputy Secretary Griles without prior notification to Chambers, and left a voice mail advising Griles that things were awry within the USPP and urging Griles to call Chambers. Capps then telephoned Chambers and alerted her that he had contacted Griles to have him call Chambers regarding an urgent matter. (A563)

When Chambers and Griles spoke, she explained that, although Murphy had originally agreed to allow Blyth to work on her assignments with the USPP while also participating in her assignment in his office, he had most recently told Blyth that she would be working full time for Michael Brown of the NPS Strategic Planning Office and that Blyth was to report Monday, August 25, 2003, to begin this assignment.

Later, Griles called Chambers and reversed Blyth's transfer. He assured Chambers that Assistant Secretary Manson would get involved in working to resolve the issues of public safety and security and protection of the icons raised by her. (A95 - A96)

On August 28, 2003, Griles held a meeting with Chambers, Mainella, Murphy (who left after about five minutes), and Assistant Secretary Manson. Prior to Chambers being invited into the meeting, Griles met with these individuals and others about the issue of his reversing Blyth's transfer and about the USPP budget shortages. (A567 - A569) In the meeting, the participants reviewed, among other things, the general issue of budgetary and staffing challenges the USPP was facing. Chambers shared with Griles, Mainella, and Manson that she believed that the icon parks were in danger due to limited resources and that, while she respected Mainella and 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. (A98)

On September 29, 2003, Chambers attended a meeting with members of the National Academy of Public Administrations's (NAPA) consulting team who were clearly pleased upon learning from her of the progress she had made toward the implementation of 20 recommendations NAPA had made regarding the USPP in 2001. In that meeting, in the presence of Mainella and Murphy, the NAPA team leader suggested strongly that Chambers contact Deborah Weatherly, a senior Congressional staff member of the House Interior Appropriations Committee, to let her know how successful Chambers had been up to that point in time. The NAPA

team leader told Chambers that Weatherly was the person who had asked the NAPA team to return. (A103)

On November 3, 2003, Chambers telephoned Weatherly. Chambers intended to ask Weatherly for clarification regarding who was to pay for the upcoming NAPA report. Chambers left a brief telephone message for Weatherly. (A109)

When Weatherly returned Chambers' call, they had a pleasant conversation. Chief Chambers first explained to Weatherly why she had originally called and told her that, in the meantime, she (Chambers) had received an answer to her question. (A2561.2 - A2561.3) Weatherly then asked Chambers "What's going on over there?" and inquired as to the progress (or what Weatherly believed was a lack of progress) regarding the NAPA recommendations of 2001. Chief Chambers provided Weatherly with a general overview of the progress that had been made toward the implementation of the NAPA goals. (A2561.2 - A2561.3)

On November 6, 2003, Chambers was summoned to Murphy's office with no explanation as to the topic. He asked if she had called Weatherly and, upon 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 Murphy the substance of her conversation with Weatherly, Murphy simply left his

office to go to another meeting without reacting to what Chambers had told him and without providing any direction as to his expectations in the future. (A109 - A110; and A2363)

On Thursday, November 20, 2003, Chambers was interviewed by a reporter from *The Washington Post* regarding information he had been provided by the Chairman of the USPP FOP Labor Committee, Officer Jeff Capps. The reporter asked Chambers to react and respond to various data he had with regard to USPP staffing and budget. (A114 - A115)

Immediately upon concluding the interview, Chambers telephoned Murphy and notified him of the detailed information the reporter had and the type of questions she had been asked. In response, Murphy characterized the interview as "no big deal." (A115 and A503 - A504)

On Monday, November 24, 2003, Chambers received a telephone call from John Wright, the press officer for DOI 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 Chambers, Wright informed her that she was to remain the sole contact and spokesperson for the DOI on this matter. (A116)

On Wednesday, November 26, 2003, a scheduled day off for Chambers, a nationwide conference call was conducted within the NPS that included Mainella, both deputy directors, all regional directors and their budget officers, all associate directors, the USPP Assistant Chief of Police (the #2 position in the organization), and the USPP Budget Officer. The conference call was in reference to OMB's FY 2005 passback. (A2561.1)

During that conference call, according to Assistant Chief Benjamin J. Holmes and Budget Officer Shelly Thomas, in response to a Regional Director's concern over limited funding for the USPP, Murphy went "into a tirade" blaming Chambers for the USPP not having sufficient funds. Murphy publicly accused Chambers of never responding when asked about budget matters nor cooperating in the budget process. (A117; A1630 - A1636; and A1687 - A1696)

None of these concerns had ever been conveyed to Chambers and are simply untrue. (A117)

Mainella, who was present in the same room with Murphy and witnessed Murphy's comments during the conference call, assured Chambers that she (Mainella) had spoken with Murphy immediately after the conference call and that she told him that what he had done was improper. (A119)

In the early morning hours of December 2, 2003 (1:20 a.m.), Chambers wrote to Weatherly to seek her counsel on how to better inform members of Congress and OMB about the progress of the USPP with regard to NAPA recommendations. Chambers also alerted her to the dangerous situation that currently existed and would continue to grow if the USPP continued to be without adequate funding. (A692 - A693)

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.), Chambers also 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. (A123 - A124)

On 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, LT. Beck, the Executive Officer for the Office of the Chief, hand delivered to Mainella's office a sealed envelope which contained a typewritten complaint Chambers had prepared the previous evening regarding the conduct of Murphy and another NPS employee, Steve Krutz. (A124 and A1784)

Chambers received no reply from Mainella concerning her letter of complaint regarding Murphy's misconduct, and Mainella took no action to see that the alleged misconduct was investigated. (A124)

At approximately 6 p.m. on Tuesday, December 2, 2003, Chambers was ordered by Murphy to cease all interviews of any kind and to not discuss the "President's budget." These orders were issued electronically while Chambers was conducting a meeting with officers at the USPP District 4 substation. (A124 - A125; A2223; and A2224)

The following day, Murphy sent another email alerting Chambers that he and Mainella wanted to meet with Chambers and Holmes on Friday, December 5, 2003, at 4 p.m. to discuss what he described as "general USPP issues." (A125)

On December 5, 2003, Chambers and Assistant Chief Holmes arrived in Mainella's office suite as instructed and were told by Murphy that he would be with them in a few minutes. A few minutes later, DOI attorney Teufel arrived along with three armed special agents. Teufel and one of the armed special agents went into Murphy's office and the two other armed special agents stationed themselves outside of Murphy's doorway (one on either side) as if to guard the door. (A130 and A1739 - A1742)

Chambers was told to come into the office. Holmes was told to wait outside of the office. Chambers asked where Mainella was and was told by Murphy that Mainella would not be present and that Chambers could not see her. (A130 - A131)

Murphy handed Chambers a memo and told her she was being placed on administrative leave. (A687) She was directed to turn over her badge and gun to one of the armed special agents. (A131 and A133)

After being returned to her office by two special agents, turning over her cell phone, pager and other communication devices, Chambers was left to find her own way home – in uniform and without a weapon – placing her in personal danger. (A490 - A491)

On December 12, 2003, Chambers attended a meeting at the request of Murphy and attorney Teufel. When the parties met on that date, the Agency indicated that they were willing to withhold placing charges of any kind against 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 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). (A135 - A136)

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) and because it would impede Chambers' lawful right and obligation to communicate with Congress. No other prior Chief of the USPP had ever had such a gag order imposed upon them. (A136 - A137)

On December 18, 2003, six days after refusing to agree to these stipulations, Chambers received a memorandum from Murphy dated December 17, 2003, placing charges against her and recommending her termination. (A679 - A686)

On January 9, 2004, Chambers formally responded to the proposed termination. (A2357-A2412)

On July 9, 2004, DOI issued its decision terminating Chambers. (A2552 - A2561) The challenges to this decision followed leading to this appeal.

III. SUMMARY OF ARGUMENT

The DOI failed to establish that Teresa Chambers engaged in misconduct during her tenure as Chief of the U.S. Park Police. The Agency also failed to meet

its burden of proof on four of the six charges sustained by the Administrative Judge and MSPB. The AJ and Board erred in failing to properly apply the burden of proof as the record does not support their conclusions.

The AJ and Board erred by failing to properly apply the requirements of 5 U.S.C. §§ 1221, 2302(b)(8) (whistleblower provisions). The Board erred in determining that Chambers failed to state a proper whistleblower claim. The law and evidence strongly contradict the determinations of the AJ and Board on this issue.

Finally, the DOI violated Chambers' pre-termination due process rights in failing to comply with the requirements set forth in the Supreme Court's decision in *Loudermill* and this Circuit's decision in *Stone*. The AJ and Board erred in failing to find any violation of Chambers' rights to pre-termination due process.

IV. ARGUMENT

A. Standard of Review

The standard of review that this Circuit applies when reviewing decisions of the Merit Systems Protection Board (MSPB or Board) is stated in 5 U.S.C. § 7703(c).

> The Federal Circuit's statutory review of the substance of Board decisions is limited to determining whether they are unsupported by

> substantial evidence or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7703(c).

United States Postal Serv. v. Gregory, 534 U.S. 1, 6 (2001).

B. The Board and AJ Erred in Sustaining Charge 2 alleging Chief Chambers made public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area because DOI Failed to Prove Misconduct

When an agency takes action to remove an employee from federal service for alleged misconduct, it has the burden of proving the charges against the employee. *Hale v. Department of Transp., Federal Aviation Admin.*, 772 F.2d 882, 885 (Fed. Cir. 1985). It is the agency's burden not only to prove the charges of misconduct, but to also establish a nexus between the conduct complained of and the efficiency of the service and establish that the penalty was reasonable. *Id*. With these principles in mind, we address the charges leveled against Teresa Chambers.

The AJ and Board erroneously sustained DOI's 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 DOI policies and no rule or order classified in any manner the information attributed to

Chambers in the *Post*. No such purported rule or order was identified or produced by DOI. The Agency 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.

In support of its position, the DOI offered only a report (not an order, policy or a rule) that had been stamped "law enforcement sensitive" by one of Chief Chambers' subordinates, for reasons that were not established by the DOI in the record. 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.[1]

DOI offered no evidence beyond self-serving conclusory opinions demonstrating that Chief Chambers' interview with the Washington Post

[1] MSPB Member Sapin, who filed a dissenting opinion in this case, noted that the statements about icon staffing attributed to Chambers were substantially different from the type of information in the purported "law enforcement sensitive" document. "Because of the sensitive nature of the document, and because the document is under seal, I will not describe its contents specifically. However, it does include far more detailed information which is substantially different from that included in the appellant's statements concerning "icon" staffing. Sealed Document at 10-11, 13, 15-20." A58.

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. A1761-1762.

DOI press officer John Wright was unaware of any written Agency policy prohibiting the release of any categories on information including so-called "Law Enforcement Sensitive" information. Wright stated that he is not aware of any policy definition regarding "law enforcement sensitive," has received no training on it, and would not know what information was "LES" unless someone told him. A1913-1916. 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, promptly thereafter. The policy does not limit the content or substance of what is to be said to the media. A1851-1852.

Moreover, the DOI failed to confirm what Chambers actually stated to the *Washington Post* about purported "security sensitive" or other information. The

AJ and Board erred when they sustained the charges involving Chambers' alleged statements to the Post without following Board precedent requiring that communications to the media be confirmed. See, *e.g.*, *George M. Barresi, et al. v. United States Postal Service*, 65 M.S.P.R. 656; 1994 MSPB LEXIS 1771 (1994).

> 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. [footnote omitted]

Barresi, 65 M.S.P.R. 656; 1994 MSPB LEXIS 1771 , *7 - *8.

Most of the cited portions of the *Washington Post* interview were paraphrases by the reporter, not direct quotes from Chief Chambers. Quotes, of course, may be erroneous. DOI officials did not confirm with Sgt. Scott Fear, who was present for the *Post* interview, or Chambers, what was actually said and by whom before taking action against Chambers to place her on administrative leave and propose her removal.

DOI's final decision maker, Paul Hoffman, relied on the affidavit of Agency press officer John Wright. A1001-1002. However, Hoffman's reliance on Wright is misplaced. 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, A1895-1896. Wright asked the *Post* only what he was given to ask by an agency attorney(s). A1887. 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. A1931. 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. A1943-1945.

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. A1895-1896.

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. A1903-1904. 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.

Finally, the dissenting Member of the MSPB provided a similar analysis of charge 2 and determined that "the agency has not shown by preponderant evidence that the appellant disclosed the number of unarmed security guards that would 'begin serving around the monuments in the next few weeks.' " A47. Overall, the Dissent found that the record did not establish that Chief Chambers had engaged in the misconduct stated in the charge.

The record lacks substantial evidence to support charge 2 and the AJ and Board misapplied the legal standard requiring that the agency establish by a preponderance of evidence that it prove the charge and also establish a nexus between the conduct complained of and the efficiency of the service . *Hale,* 772 F.2d at 885. For the reasons discussed, the Court should reverse the AJ's and Board's decisions to sustain charge 2.

C. The Board and AJ Erred in Sustaining Charge 6 alleging a failure to follow the chain-of-command because DOI Failed to Prove Misconduct

The AJ and Board erred in sustaining DOI's 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 Murphy of 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 previously, there must be an announced policy that was violated to support disciplinary action. *See* 43 C.F.R. § 20.503.

Deputy Secretary Griles did not object to Chambers approaching him on the matter (and in fact granted her request to stop the detail of Blyth). Griles had actually encouraged Chambers to speak directly with him regarding U.S. Park Police matters even after Chambers expressed she was uncomfortable speaking directly with the Deputy Secretary because of the possible reaction of her immediate superiors Murphy and Mainella. A***, See Chambers Affidavit. Further, Chambers made a good faith effort to exhaust the chain of command on the issue of Blyth's detail before appealing to Griles. A88-90.

Charge 6 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 Chambers' part. In fact, this issue regarding the Blyth detail and Chambers' use of the chain of command had already been resolved by Griles. Griles called a meeting shortly after the Blyth detail was cancelled that included the members of Chief Chambers' chain of command. See, A567-569. Griles testified that he

thought the meeting had resolved the issue. *Id*. The resolution emanating from that meeting called by 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, A570-571. Griles did not direct that any discipline be taken against 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. A569.

Thus, the Board's decision to affirm the AJ's decision sustaining charge 6 is unsupported by substantial evidence, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 7703(c). This Court must reverse the Board's decision with instructions to find that charge 6 is not sustained.[2]

[2] The dissenting opinion of Board Member Sapin also finds that the agency failed to prove that Chambers acted improperly in bringing her concerns to Griles. A52.

D. The Board and AJ Erred in Sustaining Charge 5 alleging a failure to carry out a supervisor's instructions because DOI Failed to Prove Misconduct

(1) The DOI failed to meet its burden regarding the specification of Charge 5 alleging Chief Chambers' failure to follow an instruction to have two deputy chiefs take medical exams

The AJ and Board erred in sustaining the specification of charge 5 regarding Chambers' alleged failure to follow an instruction from Murphy to have two deputy Chiefs take psychological examinations. The chronology of events and time frames established by DOI's documents and Murphy's own testimony establish that not only did the deputy Chiefs agree to take the exams in question, they did so shortly after the first direction from Murphy. A297-302.

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. A2750-2752. Chambers informed Agency counsel that she was concerned that she might not be the proper person to make the decision on the psychological exams which were, at the time, the subject of an OSC inquiry because of her prior involvement. The Agency counsel communicated Chambers' concern to Murphy's office. *Id*. Within 10 days after that communication, Murphy issued a directive to the deputies, which they promptly honored. A2757. There is nothing in the sequence of events established in the record that shows any actionable misconduct

by Chambers. 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 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 permit employees to state their concerns and disagreements while a matter is under consideration. *See* 43 C.F.R. § 20.502; *Berube v. GSA*, 30 M.S.P.R. 581, 592 (1986), *vacated on other grounds*, 820 F.2d 396 (Fed. Cir. 1987) (as long as senior executives perform their duties and do not engage in actionable misconduct, their disagreements with policy decisions may not form the basis for adverse actions against them).

There is simply no credible basis in the record to uphold this specification in support of charge 5.[3] The Court should reverse the Board's and AJ's decision on this issue as unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 7703(c).

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[3] This specification is thoughtfully analyzed by MSPB Member Sapin in her dissent. A52-53.

(2) The DOI failed to meet its burden regarding the specification of Charge 5 alleging Chief Chambers' failure to follow an instruction to detail Pamela Blyth

Next, the AJ and Board erred in sustaining the specification of charge 5 regarding Chief Chambers' alleged failure to follow an instruction from Deputy Director Murphy to detail Pamela Blyth. Blyth worked in the Chief's Executive Command Staff and at the time she was performing critical budget and other tasks for the Chief. DOI did not establish via record evidence that a clear communication from Murphy to Chambers was ever given to the effect that Chambers was to detail Blyth (rather than what the record shows which is that Murphy was himself going to detail Blyth).

Deputy Secretary Griles, Murphy's superior, countermanded Murphy's decision to detail Blyth when Chambers brought the matter to his attention. A313. The fact that Murphy's superior agreed to review the question and take it under consideration, eventually agreeing with Chambers and countermanding Murphy's decision, means that the matter was still under consideration by the Agency and thus pursuant to Agency regulation, Chambers was acting appropriately in voicing her opinion on the matter to Griles. Had 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.

Thus, Chambers did not violate any rule, policy, or order given by a superior. To the contrary, she voiced a legitimate concern about the timing of the detail proposed for Blyth and was supported by Deputy Secretary Griles. The record simply does not support this specification and the Court should reverse the decisions by the Board and AJ sustaining this portion of charge 5.[4]

(3) The DOI failed to meet its burden regarding the specification of Charge 5 alleging Chief Chambers' failure to follow an instruction to cooperate with DOI attorney Myers

As with the other two specifications, the AJ and Board erred in sustaining the specification of charge 5 regarding Chambers' alleged failure to follow an instruction from Murphy to cooperate with Randy Myers, an attorney in the DOI, regarding an alleged complaint lodged against the Park Police by the Organization of American States (OAS). 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. A1804-1805. LT. Beck also stated in his sworn deposition that he recalled seeing a document from Randolph Myers withdrawing his request for a meeting with Chambers. A1804.

[4] This specification is thoughtfully analyzed by MSPB Member Sapin in her dissent. A49-53.

Murphy admitted in the deposition conducted by Hoffman that Murphy could not recall giving Chambers the order or instruction alleged to have been violated in this specification of charge 5. A2536-2537.

Further, Myers failed to disclose in his testimony that he eventually did meet with Chambers and DOI attorney Hugo Tuefel well before Murphy made this charge against Chambers in the proposed removal. *See* A2787-2788. 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 Chambers. During his testimony during the MSPB hearing, Myers described the limited contact he had with Murphy regarding the matter for which Chambers was charged under Charge 5, Specification 3. A53-54.

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. Likewise, Assistant Chief Holmes and LT. Beck both testified in their depositions that they did not believe there was any type of complaint made by representatives of the OAS. A1764-1765, A1787-1788.

The AJ and Board 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 Chambers for one purpose which the IG misconstrued as a report sent for another purpose, as explained in Ms. Chambers' deposition. A2783-2787.[5]

E. The Board and AJ Erred in Sustaining Charge 3 alleging Chief Chambers improperly disclosed the President's budget deliberations because DOI Failed to Prove Misconduct

The Board and AJ erroneously sustained DOI's charge 3. Charge 3 alleges that 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 meet its burden of proof by failing to establish that Chambers stated a budget amount for a given purpose found in the President's budget to the *Post*. DOI never offered evidence of a President's budget document which contained any of the amounts for the purposes

[5] Dissenting Member Sapin similarly dispatches with this specification finding that the agency failed to meet its burden or proof. A53-54.

stated by Chambers to the *Post*. 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 Park Police to properly perform its mission of protecting the public and icons.[6]

The DOI's 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 Chambers' statements to the *Post*, there is no objective record evidence supporting the charge.

Absent production by the Agency of a specific document representing the President's budget decisions that references a specific budget amount for a specific

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[6] The dissenting opinion by Board Member Sapin finds that the DOI failed to prove that Chambers revealed budget information in violation of OMB Circular A-11 (2003). A48-49. Specifically, Member Sapin concludes that the record shows that during her interview with the Post Chambers was referring to her own wishes for a budget increase and not specific budget numbers provided in a budget document. A49.

purpose that matches the budget amount and purpose allegedly stated by Chambers to the *Post*, the Agency cannot establish a violation of the referenced OMB Circular. Chambers may not be punished for discussing the 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.

F. The Board Erred as a Matter of Law in Concluding That the DOI Pre-termination Decision Process Was Not Contrary to Law

1. The Extensive Material *Ex Parte* Communications with the DOI Final Decision Maker Violated Appellant's Rights

Appellant argued before the AJ and Board that DOI's removal decision process violated her pre-termination due process and procedural rights recognized in *Stone v. F.D.I.C.*, 179 F.3d 1368 (Fed. Cir. 1999) and *Cleveland Board Of Education v. Loudermill*, 470 U.S. 532 (1985). It is undisputed that Appellant is a federal employee who was not a term employee or at-will, and could only be discharged for cause. Thus, Appellant had a protected property interest in her federal employment.

The facts of DOI decisionmaker Hoffman's extensive *ex parte* interviews are beyond dispute. A2413-2551. The issue of whether Hoffman's *ex parte* interviews violated Appellant's due process rights, i.e. whether the AJ and Board

misconstrued and misapplied the rules of law set out in *Stone* and *Loudermill* to the record facts regarding these *ex parte* communications, is an issue of law. The standard of review is *de novo*.

The AJ rejected Appellant's due process arguments. A20-21. The Board ignored these issues, providing no analysis or decision on them beyond footnote 3:

> As to the appellant's remaining defenses, we see no error in the administrative judge's findin**gs that would affect the outcome of this case.** *See Panter v. Department of the Air Force, 22 M.S.P.R. 281, 282 (1984)* (**an adjudicatory error that is not prejudicial to a party's substantive rights** provides no basis for reversal of an initial decision).

A24,57 (emphasis added). But procedural due process violations are not subject to a harmless error test.

> [W]hen 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: "... **the defect divests the removal (or demotion) of legality, leaving the employee on the rolls ... and entitled to his pay until proper procedural steps are taken ... . 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. F.D.I.C., 179 F.3d 1368, 1377 (Fed. Cir. 1999) (emphasis added). Thus, if the Board did find the AJ to be in error on this due process issue and found that a violation occurred, the Board could not properly find that such error would not "affect the outcome." Footnote three indicates the Board may have so erred.

The alternative reading is that the Board adopted the AJ's determination that the DOI's decision process did not violate the rules set out in *Stone* and *Loudermill*. In this instance, the Board's final decision would be still be arbitrary and contrary to law because the record reflects undisputed facts that demonstrate such violations.

The AJ did find that *ex parte* "interviews" were conducted by Hoffman *after* Appellant had responded to the DOI notice of proposed removal. A20. These *ex parte* interviews included proposing official Murphy and addressed alleged facts central to the charges against Appellant. A2413-2551. It is undisputed that these *ex parte* interviews were conducted without notice to Chambers and without opportunity for Chambers to be heard in response. A376-77,1031,1100-01,1110-11 (Hoffman).

The question to be resolved is whether these extensive *ex parte* communications involved new information material to Hoffman's removal decision. The undisputed record evidence requires an affirmative answer.

In *Stone*, Mr. Stone, a discharged F.D.I.C. employee, discovered after his discharge that an *ex parte* memorandum from the proposing official, and a second *ex parte* memorandum from another official urging Mr. Stone's removal, had been given to the deciding official. In addressing Stone's allegation that this violated his rights, the Federal Circuit held:

> 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 . . . ."
>
> "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. . . ."
>
> 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."

Stone v. F.D.I.C., 179 F.3d 1368, 1375-76 (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. **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 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.**

Id. at 1376-77 (emphasis added). The test set out in *Stone* requires a case by case analysis.

> In deciding whether new and material information has been introduced by means of *ex parte* contacts, the Board should consider the facts and circumstances of each particular case. Among the factors that will be useful for the Board to weigh are: whether the *ex parte* communication merely introduces "cumulative" information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type

> likely to result in undue pressure upon the deciding official to rule in a particular manner. Ultimately, the inquiry of the Board is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances.

Id. at 1377.

The AJ cited to *Blank v. Dept. of the Army*, 247 F.3d 1225 (Fed.Cir. 2001) for the proposition that investigatory interviews and communications that do no more than confirm or clarify pending charges do not introduce new and material information. The AJ implied that this was the situation in Chambers' case. A20-21. The AJ did not analyze the details of the *ex parte* interviews, however, or discuss the extent those interviews merely confirmed or clarified pending charges. The AJ's implied determination that Hoffman's *ex parte* interviews fit this description was conclusory, at best. The AJ and Board erred as a matter of law in finding that Hoffman's *ex parte* interviews did not violate Appellant's due process rights.

The facts in *Blank* are distinguishable from those in Chambers' case. In *Blank*, the Board determined:

> (1) the information obtained from the interviews was merely cumulative of the documentary evidence already assembled to support the Notice of Proposed Removal, (2) Mr. Blank was furnished with a copy of the questions

> asked and notes of the answers given during the interviews, and (3) the interviews were unlikely to result in undue pressure on the Chief of Staff to rule in any particular manner. ... [T]he Chief of Staff interviewed various agency employees merely to confirm and clarify information that was already contained in the record.

Blank at 1229. Unlike in *Blank*, here the Hoffman interviews contained material new, not cumulative, information; Chief Chambers was not provided a copy of, summary of, or notes from these interviews prior to her removal; and the interviews did put undue pressure on decisionmaker Hoffman to support Appellant's removal.

Appellant's reply to the proposed removal was submitted to Hoffman on January 9, 2004. A2357-2412. Shortly after Chambers submitted this reply, in February, and unbeknownst to Chambers, Hoffman conducted the *ex parte* interviews. This created a new one-sided record ten times as voluminous as the meager documentation identified to Appellant as supporting DOI's proposal (A511-13).

Agency attorneys and staff who had also advised proposing official Murphy assisted Hoffman in his interviews. A1096,1108. Hoffman relied on these interviews to support his decision to remove Chambers. A1085-1112,1127-30. This was done without Chambers' knowledge. A376-77. This was a blatant violation of Appellant's rights.

DOI clearly considered evidence beyond that provided to Appellant at the time of the proposed removal, without noticing Appellant or giving her a chance to respond. This new information was clearly material. It included a new inquiry by press officer Wright with the Washington Post and a new affidavit by Wright. A1001-34. It included interviews of the Appellant's first, second, third and fourth level superiors and substantial questioning on the charges against Appellant. A2413-2551. It also involved a new memoranda from DOI attorney Myers related to one of the charges. A1001,1085,1097-1100. Hoffman also received a new document regarding the charge relating to the OAS and Chambers failure to meet with Meyers. A1103. This material was not provided to Appellant to respond to or review. A1100-01,1110-11. Many persons who could have provided information in support of Chief Chambers and opposed to her removal were not invited to be interviewed. A138 (Chambers Affidavit para. 218); A999-1000,1085-86.

One example of material new information presented to Hoffman likely to influence his decision on the charges against Appellant is Murphy's misrepresentation to Hoffman that he met with Chambers "four or five months, maybe even more" after he had directed the psychological testing of Deputy Chiefs Beam and Pettiford and at that time Chambers had failed to follow his instructions

regarding the psychological evaluations. A2536. This would have meant that, as of October 16, 2003 ("four months" from the date Murphy handed Chambers his memos to deliver to Beam and Pettiford directing that they undergo the tests), November 16, 2003 ("five months"), or later neither of the deputy Chiefs had complied, an assertion that is false. *See* A2390.

Murphy also told Hoffman in this interview that it was the Deputy Chiefs and not Chief Chambers who provided updates to Murphy regarding the status of their compliance. A2536. The record, however, shows that Chambers kept Murphy updated. Agency File Exhibit 4m at 158-162.

In answer to Hoffman's question, "Would you describe for me the instructions that you gave Teresa Chambers about the OAS matter?" Murphy replied, "I don't recall speaking with her directly about this instance." A2536-37. However, Hoffman did not accept that obviously exculpatory answer that would have supported Chief Chambers' position, and pressed Murphy. In answer to the follow-up question, "So you don't recall telling Chief Chambers to meet with Randy Myers?" gave a new inconsistent answer: "My memory is just really sketchy on that. I'm almost sure I did." A2536-37 (Murphy at pp. 93-94).

In Congressional Staffer Weatherly's interview by Hoffman, she testified she believed Chambers had taken no steps to fulfill the expectations of Congress

regarding the NAPA report. A2451-52. Had Appellant known of this *ex parte* testimony, Appellant could have submitted information to disprove this. A103. Hoffman admitted he relied on the *ex parte* interview with Weatherly to resolve the discrepancy between Murphy's proposed removal notice and Chambers' reply regarding Chambers' communications with Congress. A1086-88. Clearly this was prejudicial because the AJ, after hearing both Weatherly and Chambers testify, found that charge one (regarding communications with Congress) should not be sustained.

Hoffman admitted that the *ex parte* interviews led him to conclude (incorrectly) that Murphy had not directed Chambers to cease further media interviews (the gag order). A999. Hoffman also admitted he relied on Murphy's *ex parte* interview testimony regarding the charge that Chambers refused to meet with attorney Meyers regarding the OAS issue. A1100. Thus, a detailed review of the Hoffman interviews reveals that they contain numerous witness statements that taken together make these *ex parte* communications so substantial and likely to cause prejudice that it was unfair for Chief Chambers to have been removed under such circumstances.

In addition to the Due Process violation, the DOI's conduct violated Appellant's other rights under federal law. 5 C.F.R. § 752.404(b)(1), (c)(1) (the

employee has a right to review "the material relied on to support the reasons" for its proposal and may not use material that cannot be disclosed to the employee); 5 C.F.R. § 752.404(f) (which forbids the agency from considering any reason not in the notice of proposed action).

As the Federal Circuit noted in *Stone*:

> [T]he Due Process Clause only provides the minimum process to which a public employee is entitled ... . Public employees are ... entitled to whatever other procedural protections are afforded them by statute, regulation, or agency procedure ... .

Stone at 1377-78. Thus, even if the DOI's conduct in conducting the extensive *ex parte* interviews and in deleting the final decisionmakers' findings of fact did not rise to a violation of the Constitution, this conduct still deprived Appellant of rights guaranteed her by federal law. Hoffman's numerous interviews and the documents obtained and considered after Appellant was given the proposal to remove and a meager quarter inch of supporting documentation, without notice or opportunity to respond to this additional information, was a blatant violation of the procedures required by federal regulations.

2. The Deletion and Concealment of the Findings of DOI's Final Decisionmaker Violated Appellant's Rights

The Board's decision was arbitrary and contrary to law because the Board failed to find that DOI violated the law and Appellant's rights when it concealed from Chambers the findings made by decisionmaker Hoffman. These findings, upon which Mr. Hoffman clearly relied to sustain the six charges, A2552 (see last paragraph, "After making determinations about facts in this case, I have decided to sustain all the charges ..."), were deleted from the final decision document before it was presented to Chambers. A180-82. This deletion and concealment from Appellant of those findings violated 5 U.S.C. § 7513(b), 5 C.F.R. § 752.404(b), 5 C.F.R. § 1201.25, and the Constitution's Fifth Amendment Due Process Guarantee. The deletion of Hoffman's findings is explicitly admitted. A180-82. The AJ also found these deletions had occurred. A20. The Board ignores the issue of the deletion and concealment of Hoffman's findings.

Federal law requires the Agency provide Appellant its "reasons" for taking the challenged action. 5 U.S.C. § 7513; 5 C.F.R. § 752.404; 5 C.F.R. § 1201.25; U.S. Constitution, Amendment 5.

5 U.S.C. § 7513(b)(4) requires that agency 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 notice of proposed action. Hoffman eventually admitted, after considerable effort in his deposition to evade the

question and two direct misrepresentations that he never wrote his findings down, that DOI deleted from the final decision document the extensive findings made by Hoffman (where he weighed the evidence presented in his *ex parte* interviews). A131-39, 143-44, 148, 178-79.

An agency's "reasons" referenced in the above cited laws must mean more than the mere conclusion that adverse action is warranted. The reference to an agency's reasons must refer to the why, not the what, the the agency's findings of fact, the agency's conclusions of law, and the agency's logic that together provide the agency rationale as to why the removal action is justified . If any of these three critical components are not provided, then Appellant cannot reasonably be expected to understand why the Agency made its decision or offer a meaningful defense. If any of these three critical components of the agency's reasons are not disclosed, then the agency has not complied with the laws cited.

The DOI improperly deleted and concealed these findings on which Hoffman relied. It is apparent, even without having these findings in hand, that the Agency violated 5 U.S.C. § 7513(b)(4)'s requirement that the reasons be stated in order to cover up that the deleted reasons went beyond those stated in the proposed removal and relied on the *ex parte* interviews, just as Hoffman testifed in his deposition discussed above, in violation of *Stone, supra* and 5 C.F.R. § 752.404.

The Court should draw an adverse inference that had DOI's findings of fact been disclosed, those findings would not have supported the charges against Appellant and would have evidenced prohibited personnel practices. See, *International Union v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *Taylor v. U.S. Postal Service*, 75 M.S.P.R. 322 (June 19, 1997) (*citing inter alia Wigmore*); 3A J. *Wigmore, Evidence* § 1042 (Chadbourn rev. 1970); *Evans v. Robbins*, 897 F.2d 966 (8th Cir. 1990).

> 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 [relevant documents]. 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. ..
>
> 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 ... ." 2 *Wigmore on Evidence* § 291, at 228 (*Chadbourn rev*. 1979).

Knightsbridge Marketing v. Promociones y Proyectos, 728 F.2d 572, 575 (1st Cir. 1984).

> 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. 1988).

For all these reasons, this Court should reverse the decision of the Board and find that Appellant's removal was in violation of her due process, statutory and regulatory rights, and she should be reinstated with back pay, benefits and all other appropriate relief.

G. The Board Erred as a Matter of Law in Concluding That the Agency Removal of Chief Chambers Was Not Retaliation for Protected Whistleblowing Activity

The Board agreed with the AJ that the Appellant did not engage in protected activity. A27-33. The Board did not reach the questions of whether Appellant's disclosures were contributing factors in the decision to removal her and whether DOI could show by clear and convincing evidence that it would have removed Appellant even in the absence of her whistleblower disclosures. For the reasons stated in the Dissenting Opinion by Board Member Sapin, A38-57, which Appellant would urge this Court to adopt, and which is incorporated here by reference, the Board was incorrect as a matter of law in holding that Appellant Chambers did not engage in protected whistleblowing activity. As the Dissent

points out, the Board misapplied law relating to the category of protected disclosures dealing with gross mismanagement to the category dealing with substantial and specific dangers to the public. This error of law is well analyzed by the Dissent.

Appellant also agrees with the Dissent that Chambers' disclosures were contributing factors in the DOI's decision to remove Chambers. The AJ found that Appellant's disclosures were contributing factors in the DOI's removal decision, A7. This conclusion is difficult to escape given the Whistleblower Protection Act's plain timing/knowledge test for contributing factor, 5 U.S.C. § 1221(e)(1)(A)&(B), and the direct evidence that DOI's proposal to remove and final decision documents explicitly reference Appellant's disclosures as bases for DOI's removal decision. A679-84; A2552-54, 2557.

Likewise, Appellant incorporates and urges this Court to adopt the Dissenting Opinion in regard to the Dissent's conclusion that DOI failed to meet its burden to show by clear and convincing evidence that DOI would have removed Appellant even in the absence of Appellant Chambers' protected whistleblowing. Key to the Dissent's analysis and conclusion in this regard is the fact that the evidence supporting the DOI's charges was weak, and would not justify sustaining any of the charges, as explained *supra*, as well as the fact that DOI's proposed

removal and final removal notices both directly referenced the protected disclosures as reasons for the removal decision. For all these reasons, as articulated in the Dissent, this Court should reverse the Board's decision and find that Appellant's removal was illegal retaliation for her protected whistleblowing.

H. The Board Erred as a Matter of Law in Concluding That the Agency Removal of Chief Chambers Was Not Retaliation for Protected Communications with Congress

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 5 U.S.C. § 7211. A19. The Board failed to address the issue. 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.

5 U.S.C. § 7211. The AJ concluded simply that "Section 7211 protects an employee's right to petition Congress. The Appellant failed to present evidence or argument showing how this right was violated." A19. The statute is clear that a public employee is protected for more than petitioning. Appellant was protected when she "furnish[ed] information" to a committee of Congress, whether in her private or official capacity. 5 U.S.C. § 7211. The record is clear that the Appellant

furnished information to Weatherly, Staff Director of the Interior Appropriations Subcommittee. Appellant's November 3, 2003 telephone call to Weatherly and Appellant's December 2, 2003 email to Weatherly were protected by 5 U.S.C. § 7211. The DOI's statements in the proposed removal and final decision documents show DOI removed Appellant because she furnished information to a committee of Congress. A679-84; A2552-54, 2557.

Appellant clearly preserved this issue. In closing argument at the hearing, for example, Appellant's counsel offered the following:

> 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 ... did answer Ms. Weatherly's questions, and now she's being punished for doing so, and that is against Federal law. …
>
> 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 ... it would have to give way to the superior authority of the Federal statutes which guarantee the right of communication.

A656-59.

DOI's admissions in its proposal to remove and final removal notice that Appellant's communications with Congress were a reason for her removal constitutes direct evidence of illegal retaliation. There is also strong circumstantial evidence of the causal nexus. This includes the dramatically close proximity in time between Chambers' communications with Congress and the Agency actions against her.

The AJ properly concluded that under the statutory timing-knowledge test for whistleblower claims, that Ms. Chambers' November 3, 2003 communication with Weatherly would have been a contributing factor in the Agency's removal action. A7. The AJ erroneously (as the Board acknowledged) failed to decide whether Chambers' December 2, 2003 email to Congress would also have been a contributing factor, but clearly it would have been under this test.

Although this test is not *per se* applicable to a claim under section 2302(b)12) or for retaliation for communications with Congress in violation of 5 U.S.C. § 7211, the principle of proximity in time as strong circumstantial evidence of retaliatory motive is well settled. *See, e.g.*, *Womack v. Musen*, 618 F.2d 1292, 1286 & N. 6 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981).

The "smoking gun" statements in the proposed removal charges that refer directly to Ms. Chambers' communication with Congress, direct evidence of retaliation, combined with very close proximity in time, inadequate investigation and irregular procedure, establish DOI's illegal motive to retaliate for Appellant's communications with Congress. The fact that DOI referenced Appellant's communications with Congress in charge one, for example, and then the AJ found that the DOI did not meet its burden of proving that Appellant's communications with Congress violated any valid rule or were otherwise improper, establishes as a matter of law that one of the reasons DOI removed Appellant was her communications with Congress, which were in no way improper.

This AJ finding properly resulted in charge one not being sustained. But the dropping out of charge one is not the end of the matter. The DOI removal decision was still fatally infected by the retaliation for Appellant's communication with Congress. Congress in 5 U.S.C. § 7211 did not provide for an agency defense that it would have removed the employee even if the communications to Congress had not occurred. That is, 5 U.S.C. § 7211 is an absolute protection and bar to retaliation for communication with Congress. The only course of action consistent with this statute on this record is reinstatement of Appellant.

Even if 5 U.S.C. § 7211 is read to include such a defense, the DOI could not meet its burden because of the direct evidence of its intent to remove Appellant because she communicated with Congress. If the employee presents direct evidence of discrimination, there is no need to resort to a "burden-shifting" analysis. *TWA v. Thurston*, 469 U.S. 111, 121 (1985). Direct evidence of discrimination is evidence which will prove the particular fact in question without reliance on inference or presumption. This evidence must speak directly to the issue of discriminatory intent and it must relate to the employment decision in question. *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999). 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). *And see, Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997); *Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999).

I. The Administrative Judge Made Significant Procedural and Evidentiary Errors That Were Not Corrected by the Board

1. 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 sped through Appellant's proposed exhibits refusing to allow Appellant to make proffers describing the

evidence being rejected. A578-632. This was contrary to the Board's regulations. 5 C.F.R. § 1201.61.

> 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 violated Appellant's rights under Board rules and was a denial of due process, preventing meaningful judicial review of these evidentiary errors.

2. The AJ Erred In Ordering That Appellant Would Not Be Allowed To Offer The Testimony Of Former Chief Langston

The AJ ordered, pre-trial, that appellant would not be allowed to offer the testimony of former Chief Langston to show disparate treatment. A197. Post-trial, the AJ ruled against Appellant on the basis that Appellant had not identified any similarly situated employee who was treated differently. A21. This was clearly arbitrary and a denial of due process.

3. The AJ Erred In Denying Appellant's Motion To Compel

The AJ erred in denying Appellant's motion to compel discovery regarding item B, Deputy Director Murphy's private file on Appellant. A189-90. The AJ concluded 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 Chambers related to his decisions to take disciplinary actions and had drafted her performance appraisal. No greater showing is required for documents of such central relevance to the proposed decisionmaker's decisions. Such documents clearly would either be admissible as admissions of a party opponent or could lead to discovery of admissible evidence.

The AJ also erred in denying Appellant's motion to compel discovery regarding items E and F, A189-90, which sought records of U.S. Park Police communications with Congress. The Appellant noted in her motion that document request number 15 sought such communications with Congress, including former Chief Langston's communications with Congress, which obviously relate to disparate treatment. Further, Chambers' communications with Congress are one of the Agency reasons for taking action against her. No further showing of relevance or materiality should be required.

4. The AJ Erred In Ruling That Appellant's Extensive Affidavit Attachments Were Not In The Record.

The AJ erred in ruling that although the Appellant's affidavit filed pretrial was in the record, that the numerous exhibits to the affidavit were not in the record. There was no valid basis for the AJ to so hold. These exhibits with the affidavit were submitted in support of Appellant's Motion for Stay in the IRA appeal.

Appellant later filed the identical affidavit without the exhibits physically attached, but incorporated explicitly by reference to the prior stay filing, as part of the Appellant's response to the AJ's order to show cause on jurisdiction.

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. The AJ asserted a distinction between what was filed in the IRA appeal versus the chapter 75 appeal of the removal decision, but that distinction should not matter because the two appeals were consolidated by the AJ and tried together. The Appellant reasonably relied both on the Board's regulations and the AJ's pretrial order, A190, in concluding that the numerous exhibits to Appellant's affidavit were in the record and did not need to be offered at the hearing. The AJ's pre-trial order stated "All submissions to date, ... are already part of the record and do not have to be reintroduced." A190. The AJ refused to admit virtually all of those exhibits at hearing.

5. The AJ Erred In Refusing To Disclose the Agency Findings Of Fact

The AJ erred in denying Appellant's Motion to Compel production of draft DOI decision documents containing the concealed Hoffman findings of fact, A189-90, and erred in failing to disclose those findings after reviewing them in-camera. There is no basis in the law of privilege or otherwise to protect findings of fact

drafted by an agency decisionmaker when those findings continue to be relied upon by the decisionmaker and referenced in the final decision document. At a minimum, the documents containing these still-relied-upon findings could be provided to Appellant via a redacted version.

Appellant is entitled to be provided the reasons relied on by the decisionmaker. 5 U.S.C. § 7513(b); 5 C.F.R. § 1201.25; 5 C.F.R. § 752.404(b). These findings of fact almost certainly reflect reliance by the decisionmaker on evidence and reasons not made available to Appellant Chambers, such as Hoffman's *post hoc ex parte* interviews, when Chambers requested all material relied on by the Agency for her proposed removal prior to submitting her reply. As discussed *supra*, Appellant is also entitled by law to be provided all the reasons for the final decision, which, from the face of the July 9 Hoffman decision document, includes these deleted findings of fact. Also as noted above, the refusal to grant Appellant access to these DOI findings is a denial of due process.

The AJ did apparently review the draft decision document(s) containing the deleted findings in-camera but refused to disclose the document or the findings on the basis that the findings disclosed, in the AJ's view, no material evidence and were attorney client privileged. A195. However, it is clear from Mr. Hoffman's deposition that he, a non-attorney, is the author of the findings (see discussion

supra). It is also clear that these findings represent Hoffman's attempts to reconcile evidence submitted by Chambers in her reply and by others in the *post hoc ex parte* interviews. Thus, attorney-client privilege does not apply to these Hoffman findings. 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 and documents containing them pursuant to the Board's regulation 5 C.F.R. § 1201.62. A371-72. That regulation provides:

> 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 Hoffman made and adopted these findings 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 to be used by Appellant in cross examination of Hoffman. The AJ's denial of Appellant's request for these prior statements lacked any basis in law or fact and should be reversed. This failure of both the DOI and the Board to make those findings available to Appellant was substantially prejudicial to Ms. Chambers who

to this day has yet to know exactly what the DOI final decisionmaker's reasons were for sustaining the charges against her.

J. The AJ and Board erred in concluding that the penalty of removal was proper because removal is not supported by the record

The AJ and Board ignored critical record evidence indicating that DOI's deciding official, Paul Hoffman, clearly testified that if four of the six enumerated charges were not sustained then removal would not be warranted. The following exchange occurred during the hearing.

> JUDGE BOGLE: If I can correctly state the case law that applies, the Board generally defers to the penalty chosen by the Agency. However, that is not necessarily true when less than all of the charges are sustained.
>
> In that case, the Board would look to see what the maximum reasonable penalty for the sustained charges would be, unless the deciding official has expressed a different opinion.
>
> Looking at these charges here, all of which you sustain, would you have imposed a lesser penalty if some of them had not been sustained, and if so, can you tell us which ones?
>
> THE WITNESS: Yes. If fewer than all of the charges had been sustained, I would have still imposed the penalty of removal. For me, the charge of improper disclosure of budget information, the violation of the OMB Circular, the disclosure of the staffing and patrol numbers at the icons and the Federal parkways, and the willful failure to carry out instructions by her immediate

> supervisor, those all together aggregated to the point that I felt it was justified in removal.
>
> JUDGE BOGLE: Are you saying that each of these charges standing alone would warrant the penalty of removal?
>
> THE WITNESS: No, I don't think I'm saying that. I think what I'm saying is those three in particular together warrant removal.
>
> JUDGE BOGLE: Tell me again which three you are talking about.
>
> THE WITNESS: The disclosure of budget numbers.
>
> JUDGE BOGLE: All right, charge one.
>
> THE WITNESS: The disclosure of security and staffing levels at the icons, and the failure to carry out instructions.
>
> JUDGE BOGLE: Those were the three most important charges in your mind, and if those three were not sustained, what penalty would you have chosen?
>
> THE WITNESS: I would probably have proposed a suspension and perhaps a reinstatement into a position of less responsibility.

A370-371 (emphasis added). At issue in the proposal to remove Chief Chambers was that she "telephoned a senior staff member of the Interior Appropriations Subcommittee . . ." Murphy charged that Chief Chambers' call "constituted a direct communication with a congressional staff member about the development and execution of a Department of Interior budget matter."

At hearing, when first asked, Hoffman listed "improper disclosure of budget information" as one of the four charges that needed to be sustained in order to justify removal. When the AJ asked him to repeat the list of critical charges, Hoffman listed "the disclosure of budget numbers." This statement affirmed the first item he listed when first asked to identify the combined charges that justified removal: "improper disclosure of budget information." Although phrased slightly differently, both responses refer to improper disclosure of budget information/numbers, which was stated basis for charge 1.

Consequently, when charge 1 was not sustained by the AJ and that determination was not challenged by DOI, one of the critical charges needed to support removal was eliminated. Once one of the several critical charges needed for removal was eliminated, there was no longer a basis in the record to support removal. The AJ and Board should have reduced the penalty to something short of removal. Viewing the record as a whole, substantial evidence does not support Chief Chambers' removal and the Court should reverse the decision on the penalty.

In addition to Hoffman's testimony concerning reduction of the penalty, DOI-NPS Director Mainella also thought that removal was not warranted. During her deposition, Director Mainella, Chambers' 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. A885. This testimony by Murphy's boss, constitutes an Agency admission that the penalty of removal was unduly harsh. Director Mainella's approach is the proper one under all the circumstances, and the Board and AJ erred in holding otherwise.

Additionally, the Board and 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 of Chambers not being placed on notice regarding the purported rules allegedly violated is shown in the discussion of charge 2. Press Officer John Wright testified 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. A1913.

Similarly, 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 Chambers' interview with the Washington Post and raised no objection to the content or manner of Chambers' disclosures to the Post at the time. Significantly, Fear was not called by DOI to testify. If Chambers was violating some well-established and well-known rule about not

disclosing to the press the President's budget decisions, Fear was certainly unaware of it.

While the Agency produced a memo from Chambers to Mainella that referenced an $8 million dollars related to the Park Police budget proposals, this memo did not state that the $8 million dollar figure that 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 Chambers (or any other employee) may recall or perceive regarding the budget but has to do only with disclosures of what actually represents the President's budget decisions. DOI failed to produce at trial an Agency, OMB or Presidential document that established that the amounts Chambers discussed with the press in fact represented information that fell within the OMB circular in question.

Further, 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 Chambers to have engaged in any conduct to have violated it. The record in this case makes clear that Chief Chambers was not the only employee of the DOI,-NPS and Park Police who was unaware of the existence of the alleged rules purportedly violated

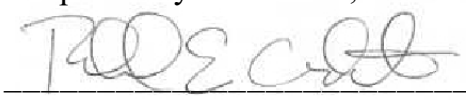
by the Chief. The Deputy Secretary, the press officers, and Chambers immediate successor, among others, testified that they were unaware of rules and policies that Murphy and Hoffman allege Chambers violated.

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 DOI planned to provide Chambers training on the Agency's 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.

V. CONCLUSION AND RELIEF REQUESTED

For the reasons stated, this Court should grant the Petition for Review and reverse the Board's decision with instructions to order: (a) Chambers reinstatement to the position of Chief of the Park Police; (2) back pay with interest; and (c) all attorneys' fees and costs.

Respectfully submitted,



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ADDENDUM

1 of 2 DOCUMENTS

TERESA C. CHAMBERS, Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.

DOCKET NUMBERS DC-0752-04-0642-I-1, DC-1221-04-0616-W-1

MERIT SYSTEMS PROTECTION BOARD

2004 MSPB LEXIS 2430

October 6, 2004

[*1]

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Robert D. L'Heureux, Esquire, McNamara & L'Heureux, and Renn Fowler, Esquire, Alexandria, Virginia, for the agency.

OPINIONBY: BOGLE

OPINION:

BEFORE

Elizabeth B. Bogle

Administrative Judge

INITIAL DECISION

On June 28, 2004, Teresa C. Chambers (appellant) filed an individual right of action (IRA) appeal alleging that the National Park Service (NPS), Department of the Interior, proposed her removal and placed her on administrative leave in reprisal for her whistleblowing activity. Under *5 U.S.C. § 1214*(a)(3), an employee may file an IRA appeal to the Board from an agency personnel action alleged to have been proposed, taken, or not taken because of her whistleblowing activity. 5 C.F.R. § 1209.2(a). The appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over her IRA appeal. 5 C.F.R. § 1201.56(a)(2). On July 12, 2004, the appellant filed a second appeal from the agency's decision to remove her. The Board has jurisdiction over the removal [*2] appeal because the appellant was an individual in the competitive service with a right to appeal a removal action taken under *5 U.S.C. chapter 75. 5 U.S.C. § § 7511*(a)(1)(A), 7512(1), 7513(d). For the following reasons, the IRA appeal is DISMISSED and the removal action is AFFIRMED. n1

n1 The appellant's September 3, 2004, motion to compel or for sanctions is DENIED as untimely. Pursuant to the hearing notice, discovery closed on August 30, 2004, the date of the prehearing teleconference.

Background

The appellant was hired on February 10, 2002, as Chief, U.S. Park Police (USPP), SP-0083-11, step 14, NPS. She had extensive law enforcement training and experience, but she had no prior Federal service. Her immediate supervisor was Donald W. Murphy, Deputy Director, NPS. Fran Mainella, Director, NPS, was her second level supervisor.

On December 5, 2003, Mr. Murphy notified the appellant that he was placing her on administrative leave "pending completion of a review of [her] conduct that may result in a proposal for disciplinary action." Appeal File (AF) 1221 tab 9, subtab 4b. By memorandum dated December 17, [*3] 2003, Mr. Murphy proposed her removal. AF 752 tab 3, subtab 4c. The reasons for the proposal were: (1) Improper budget communications; (2) Making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area; (3) Im-

proper disclosure of budget deliberations; (4) Improper lobbying; (5) Failure to carry out a supervisor's instructions; and (6) Failure to follow the chain of command. Mr. Murphy stated that in determining the penalty he considered that on March 31, 2003, the appellant received a written reprimand for using a Government-owned vehicle (GOV) for other than official business and for authorizing a similar misuse by a subordinate employee. AF 1221 tab 9, subtab 4n. The appellant made a written reply to the proposal. AF 752 tab 3, subtabs 4l, 4m.

The appellant filed a complaint with the Office of Special Counsel (OSC) on January 29, 2004. In the complaint, she alleged that the agency placed her on administrative leave and proposed her removal in reprisal for disclosures she made on November 3, 2003, to Deborah Weatherly, an Interior Appropriations Subcommittee staff member, on November 20, 2003, to a Washington [*4] Post reporter, and on December 2, 2003, to Fran Mainella, Director, National Park Service. AF 1221 tab 1. After the appellant filed her IRA appeal to the Board, OSC terminated its investigation. AF 1221 tab 8, subtab c. On July 9, 2004, Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, issued a decision sustaining all of the charges and imposing the removal penalty. AF 752 tab 3, subtab 4b.

THE IRA APPEAL

Legal standard

In order to prove that the Board has jurisdiction over an appeal as an IRA appeal, the appellant must show that she has exhausted her administrative remedies before OSC and make nonfrivolous allegations that: (1) She engaged in whistleblowing activity by making a protected disclosure under *5 U.S.C. § 2302*(b)(8), i.e., she disclosed information that she reasonably believed evidenced a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; and (2) The disclosure was a contributing factor in the agency's decision to take or fail to take a personnel actions as defined [*5] by *5 U.S.C. § 2302*(a). *See Rusin v. Department of the Treasury, 92 M.S.P.R. 298, 304 (2002), citing, Yunus v. Department of Veterans Affairs, 242 F.3d 1367 (Fed.Cir.2001).*

Exhaustion of administrative remedy

The scope of an IRA appeal is limited to those disclosures and those personnel actions raised before OSC. *Sazinski v. Department of Housing and Urban Development, 73 M.S.P.R. 682, 685 (1997).* The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that she makes in the complaint requesting corrective action, not her post hoc characterization of those statements. *Ellison v. Merit Systems Protection Board, 7 F.3d 1031, 1036 (Fed. Cir. 1993).*

In her OSC complaint, the appellant stated that the agency placed her on administrative leave and proposed her removal in reprisal for a November 3, 2003, disclosure of information to Deborah Weatherly, a November 20, 2003, disclosure to The Washington Post, and a December 2, 2003, disclosure to Ms. Mainella. AF 1221 tab 1. I find that the [*6] appellant has exhausted her administrative remedy as to those disclosures and those personnel actions.

Covered personnel actions

Covered personnel actions are listed at 5 C.F.R. § 1209.4(a). An adverse action taken under *5 U.S.C. chapter 75* is listed. 5 C.F.R. § 1209.4(a)(3). Therefore, the proposal to remove the appellant is a covered personnel action. The placement of an employee on administrative leave, while not specifically listed as a covered personnel action, is a "significant change in duties, responsibilities, and working conditions." 5 C.F.R. § 1209.4(11). As such, it also is a covered personnel action. *See, e.g., Carey v. Department of Veterans Affairs, 93 M.S.P.R. 676, 682-83 (2003).*

The appellant appears to allege that she was placed under a "gag order" and that the "gag order" was also a covered personnel action. A "gag order" would be a covered personnel action if it represented a "significant change in duties, responsibilities, and working conditions." In this case, the "gag order" appellant refers to was an instruction from her supervisor, Mr. Murphy, concerning future contact with the media. In [*7] a December 2, 2003, e-mail to the appellant, Mr. Murphy stated: "You are not to grant anymore interviews without clearing them with me or the director. You may not reference the President's 05 budget under any circumstances." AF 1221 tab 9, subtab f. In two voice mail messages on the same date, Mr. Murphy said:

> Teresa, this is Don Murphy. I just got off the phone with the Director, and we are both agreeing that you need not do any more of these live shots or stand-up interviews until you get these interviews cleared with us and the Department. The messages that you are sending out are not consistent with the Department's message and what we want to be saying on our budgeting for the U.S. Park Police. Give me a call on my cell phone, please. Thanks.
>
> Teresa. Don Murphy here again. Just trying to get ahold of you and get the message to you about not doing any more of these interviews on our budgeting and the lack of funding for the U.S. Park Police that you have been portraying out in the media. You need to get these things cleared internally with the Department and with the agency. So anyway, give me a call as soon as possible. Thanks.

Appellant's exhibit (App. Ex.) BBBB. [*8]

The incumbent of the Chief position does have responsibility for making "statements clarifying or interpreting Service or Force policies and objectives through correspondence, speeches, articles, and the news media." App. Ex. MM. I do not find an instruction to obtain agency clearance for media interviews and to refrain from publicly discussing the fiscal year 2005 budget was a "significant change in [the] duties, responsibilities, and working conditions" of the Chief position. Moreover, there is some evidence that Mr. Murphy's instruction merely reiterated requirements that applied to all agency employees. App. Ex. RR at 97-99; Tr. I at 164. In that case, the instruction did not impose any change in duties, responsibilities or working conditions. For these reasons, I do not find that the "gag order" was a covered personnel action.

The appellant has not shown that she engaged in whistleblowing activity

To establish that she engaged in whistleblowing activity, the appellant first must show that she disclosed information that she reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or substantial [*9] and specific danger to public health or safety. *5 U.S.C. § 2302*(b)(8); 5 C.F.R. § 1209.4. She need not prove that the situation actually existed, only that a reasonable person in her position would believe that it did. *See Schaeffer v. Department of the Navy, 86 M.S.P.R. 606, 612 (2000), citing Geyer v. Department of Justice, 63 M.S.P.R. 13, 16-17 (1994). Id.* Next, she must show that she disclosed the situation to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in a disclosure to the press. *Id., citing, Horton v. Department of the Navy, 66 F.3d 279 282 (Fed.Cir.1995), cert.denied, 516 U.S. 1176,* (1996).

The proper test for determining whether the appellant had a reasonable belief is: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence, for example, gross mismanagement? *LaChance v. White, 174 F.3d 1378, 1381 (Fed.Cir.1999),* [*10] *cert. denied, 120 S.Ct. 1157 (2000).* A purely subjective perspective of an employee is not sufficient even if shared by other employees. The Whistleblower Protection Act is not a weapon in arguments over policy or a shield for insubordinate conduct. *Id.* The Board's review starts out with a "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations," and this presumption stands unless there is "irrefragable proof to the contrary." n2 *Pulcini v. Social Security Administration, 83 M.S.P.R. 685, 691 (1999), aff'd, 250 F.3d 758 (Fed.Cir.2000)* (Table), *citing, LaChance v. White, 174 F.3d at 1381.*

> n2 I note that in *White v. Department of the Air Force, 95 M.S.P.R. 1, 10 (2003),* the Board concluded that the Whistleblower Protection Act does not place a burden on an appellant to submit "irrefragable proof" to rebut a presumption that federal officials act in good faith and in accordance with law, and I have not held the appellant to that proof.

[*11]

November 3, 2003, disclosure to Deborah Weatherly -- In her complaint, the appellant referred OSC to pages 2-9 of her response to the proposed removal for a description of this disclosure. Based on my review of those pages, the appellant appears to be alleging that she engaged in protected activity when she spoke to Ms. Weatherly on November 3, 2003, about the National Academy of Public Administration (NAPA) review. She stated that she and Ms. Weatherly spoke briefly about the progress the USPP had made with the original study, and the appellant expressed some disap-

pointment at never having had the opportunity to talk with Ms. Weatherly or others about it. Ms. Weatherly suggested and the appellant agreed that the NAPA follow-up study would be good for the USPP because it would give it an opportunity to demonstrate the corrective action it had taken. AF 1221 tab 1, attachment 1 at 4.

The appellant testified that Ms. Weatherly asked her, "What is going on over there?" She had received reports from Mr. Murphy and Ms. Mainella that the NAPA recommendations were not being implemented. Tr. II at 115-16. The appellant told Ms. Weatherly that 14 out of 20 recommendations had been implemented, [*12] and if she was receiving different information from Mr. Murphy and Ms. Mainella it was because "they don't know." Tr. II at 116-17.

In her OSC complaint, the appellant alleged that she disclosed information to Ms. Weatherly that evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, and a substantial and specific danger to public health or safety. Based on the appellant's description of her discussion with Ms. Weatherly, she disclosed information concerning the implementation of NAPA goals. Based on this description of the disclosure, I am unable to find that it evidenced one of the situations at section 2302(b)(8). I am aware that the proposal and decision to remove the appellant state that the appellant "telephoned a senior staff member of the Interior Appropriations Subcommittee and told her that [she] believed that the [NAPA] review was not necessary and the U.S. Park Police should not have to pay for the review." Because the appellant does not allege that she made this statement (and the agency will be required to prove it in the removal appeal), it is unnecessary to determine whether, if made, the statement would constitute protected whistleblowing [*13] activity. The appellant, I conclude, has not shown that she engaged in whistleblowing activity by making a protected disclosure to Ms. Weatherly on November 3, 2003. n3

n3 A December 2, 2003, e-mail from the appellant to Ms. Weatherly contained information about the effect of a "staffing and resource crisis" on the ability of the USPP to prevent "loss of life or the destruction" of one of the monuments. AF 1221 tab 9, subtab 4i. It is unnecessary to determination whether the disclosure of this information was protected whistleblowing activity because the appellant has not shown that she exhausted her administrative remedy by bringing it to the attention of OSC

November 20, 2003, disclosure to The Washington Post -- In her complaint, the appellant referred OSC to pages 9-28 of her response to the proposed removal for a description of this disclosure. Based on my review of those pages, the appellant appears to be alleging that she engaged in protected activity when she made the statements to a Washington Post reporter that were relied on by the agency to propose her removal. An article that appeared in the December 2, 2003, edition of the Washington Post included the following [*14] statements:

> 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."
>
> Today, the force will begin training unarmed guards who will stand watch outside the monuments. It will be the first time in recent memory that guards have performed such duties. The Department of Homeland Security ordered additional protection around the monuments.
>
> 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 [*15] 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

. . .

Chambers said that, because the new requirements have severely stretched her force, many officers have remained on 12-hour shifts, with only limited bathroom breaks for those guarding the monuments. One recent day, Park Police used high-ranking officers, such as majors and captains, to fill in on guard duties.

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 [*16] 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.

. . .

The Park Police's new force of 20 unarmed security guards will begin serving around the monuments in the next few weeks, Chambers said. She said she eventually hopes to have a combination of two guards and two officers at the monuments.

Though such guards have worked inside the Washington Monument and the White House Visitor Center, Chambers said they had not previously been used outside monuments in place of a police officer.

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.

But leaders in Congress are not inclined to go along. Instead, they have backed a 2001 report by the National Academy of Public Administration, which found that [*17] Park Police spent about 15 percent of their time on activities that "often are extraneous to the park service mission."

The study urged Park Police officers to give away some of these duties, such as drug investigations and parkway patrols, to D.C. police or other local and state authorities.

. . .

Chambers said she was not inclined to give away any duties, believing that other police departments would not put the same focus on problems in the parks.

In the latest budget cycle, congressional leaders said they were "increasingly concerned" about the Park Police refusal to change. They ordered a new study, by the same group, to examine why the previous suggestions were not heeded.

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 [*18] at one of our parks, or that we're going to miss a key thing at one of our icons."

AF 1221 tab 9, subtab 4e.

The appellant alleged in her OSC complaint that she disclosed information to The Washington Post that evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, and a substantial and specific danger to public health or safety. As an initial matter, it is unclear what information the appellant claims in her IRA appeal to have provided the reporter because elsewhere she alleges that some of the statements attributed to her were not accurate.

Based on my review of the article, I am unable to determine that the appellant disclosed any information that evidenced a violation of law, rule or regulation. Any disclosure of a violation of law, rule or regulation is protected if it meets the reasonable belief test. *See Ganski v. Department of the Interior, 86 M.S.P.R. 32, 36 (2000).* And the employee is not required to cite any specific law, rule or regulation that she believes was violated. *See Kalil v. Department of Agriculture, 96 M.S.P.R. 77, 84-85 (2004); Ivy v. Department of the Treasury, 94 M.S.P.R. 224, 229 (2003).* [*19] Other than the inference that may be drawn from the appellant's statements that individuals may commit violations if the Park Police are insufficiently staffed to deter them, I cannot find that a disinterested observer reasonably could conclude that the statements appellant made evidenced a violation of law, rule or regulation.

Gross mismanagement, a gross waste of funds, and a substantial and specific danger to public health or safety, each include qualifying language that specifies a degree to which the wrongdoing must rise before its disclosure is protected. *Wheeler v. Department of Veterans Affairs, 88 M.S.P.R. 236, 241* at n. * (2001). Gross mismanagement means management action or inaction that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission but it does not include management decisions which are merely debatable, nor action or inaction which constitutes simple negligence or wrongdoing; there must be an element of blatancy. *See, e.g., Schaeffer v. Department of the Navy, 86 M.S.P.R. at 615, citing, Embree v. Department of the Treasury, 70 M.S.P.R. 79, 85 (1996).* [*20] A gross waste of funds is a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See, e.g., Gaugh v. Social Security Administration, 87 M.S.P.R. 245, 248 (2000).* A revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing is not a disclosure of a substantial and specific danger to public health or safety. *Sazinski v. Department of Housing and Urban Development, 73 M.S.P.R. at 686.*

I have reviewed the statements purportedly made by the appellant and reported in The Washington Post. She (1) expressed worry about declining safety in parks and on parkways; (2) stated that traffic accidents have increased on the Baltimore-Washington Parkway and residents are complaining that homeless people and drug dealers are taking over smaller parks; (3) stated that there were not enough officers on patrol; (4) stated that her department needed a major expansion; (5) along with Officer Capps stated that morale was low and officers might leave the force; (6) expressed a "pressing need" for an infusion [*21] of Federal money to hire recruits, pay for overtime, and replace a helicopter; (7) stated her preference for the assignment of officers in plainclothes or on patrol rather than simply standing guard; and (8) expressed her "greatest fear" that harm or death will come to a visitor or employee or that a "key thing" would be missed at one of the monuments. In summary, the appellant appeared to be claiming that without more and differently assigned officers, the safety of visitors to areas under the jurisdiction of the USPP could be jeopardized. She did not identify any management action or inaction that created the alleged safety risk, and, if she had, she did not explain how it was anything other than debatable, simple negligence or wrongdoing with no element of blatancy. The appellant did not appear to identify any wasted funds. If any of her statements was an expression of her disagreement with the way funds were being spent (for example, on officer assignments), the information concerned no more than a debatable expenditure. Finally, while the appellant's statements draw the obvious connection between the need for more officers and funding and safety in the public places under the [*22] USPP's jurisdiction, her statements do not reveal a substantial and specific danger to any particular person, place, or thing. For these reasons, I find that the information disclosed to The Washington Post does not rise to the level of wrongdoing required to show that they evidenced gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety.

December 2, 2003, disclosure to Director Fran Mainella -- In her complaint, the appellant referred OSC to an attached complaint she filed with Ms. Mainella about Mr. Murphy. AF 1221 tab 1 attachment B. Based on my review of that complaint, the appellant appears to be alleging that she engaged in protected activity when she complained to Ms. Mainella about "unprofessional comments" Mr. Murphy allegedly made about her during a November 26, 2003, nationwide teleconference.

Benjamin J. Holmes, Assistant Chief, USPP, was present for the November 26, 2003, meeting. At his deposition, he testified that Terry Carlstom, Regional Director, National Capital Region, NPS, raised a concern about the USPP budget because he had received a memorandum from the appellant suggesting that services to the region [*23] might have to be curtailed. App. Ex. OO at 14-15. Mr. Murphy "kind of exploded" and stated that the budget problems were attributable to the appellant's failure to cooperate in budget discussions. *Id.* at 15-16. Mr. Holmes informed the appellant of the incident and she complained about it to Ms. Mainella.

In the complaint, the appellant accused Mr. Murphy of "impugning" her character and "slandering" her. Although far from clear, this appears to refer to the written reprimand the appellant received from Mr. Murphy for misuse of a Government-owned vehicle (GOV). She complained that Mr. Murphy assured her the matter would remain confidential. Despite this, she was questioned about the reprimand during a deposition she gave in an unrelated disciplinary action and a copy was produced in discovery. The appellant never informed Ms. Mainella in the complaint of the remarks she considered slanderous and the record does not otherwise document them.

In her OSC complaint, the appellant alleged that the information she disclosed to Ms. Mainella evidenced an abuse of authority. An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a Federal official or employee [*24] that adversely affects the rights of any person or that results in personal gain or advantage to himself or other preferred persons. *See, e.g., Ramos v. Department of the Treasury, 72 M.S.P.R. 235, 241 (1996).* The definition of abuse of authority does not contain a de minimus standard or threshold. *Id.* Because the statements appellant regarded as "slanderous" are not described, I am unable to find that a disinterested observer reasonably could conclude that the appellant disclosed information about them that evidenced an abuse of authority. And even though the appellant alleges that Mr. Murphy mislead her to believe her reprimand would be confidential, a disinterested observer could not reasonably conclude that an agency official engages in an arbitrary or capricious exercise of power by producing a copy of a document that was required to be produced in response to a discovery request. The appellant, I conclude, has not shown that she disclosed information that evidenced an abuse of authority.

In summary, the appellant has not shown that she engaged in protected whistleblowing activity when she disclosed information on November 3, 2003, to Deborah [*25] Weatherly, on November 20, 2003, to The Washington Post, and on December 2, 2003, to Ms. Mainella. None of these disclosures appears to allege any real agency wrongdoing. And her disclosure of information to The Washington Post appears to be nothing more than an attempt to pressure the agency, and perhaps OMB and the Subcommittee, to increase the USPP budget by publicly airing her concerns about the ability of the USPP to protect the public places under its jurisdiction without a budget increase. As such, it is exactly the sort of policy dispute that was excluded from coverage under the Whistleblower Protection Act by the court in *LaChance.*

The appellant could show that two of her allegedly protected disclosures were a contributing factor in the agency actions

If the appellant had established that she made a protected disclosure, she would next be required to show that her disclosure was a contributing factor in a personnel action. An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action [*26] 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*(e)(1); *Scott v. Department of Justice, 69 M.S.P.R. 211, 238 (1995), aff'd, 99 F.3d 1160 (Fed. Cir. 1996)* (Table).

Mr. Murphy was the agency official who placed the appellant on administrative leave and proposed her removal. When he took those actions on December 5, 2003, and December 17, 2003, he knew of the allegedly protected disclosures the appellant made on November 3, 2003, to Ms. Weatherly and on November 20, 2003, to The Washington Post. Both he and Ms. Mainella testified that he did not know of the allegedly protected disclosure the appellant made in her December 2, 2003, complaint to Ms. Mainella. Tr. I at 92-94, 285. The appellant, I conclude, could show that two of her allegedly protected disclosures were a contributing factor in the agency's actions.

The agency could show by clear and convincing evidence that it would have taken the same actions in the absence of the alleged whistleblowing activity

When an [*27] IRA appellant has established that a protected whistleblowing disclosure was a contributing factor in the agency's personnel action, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure. *5 U.S.C. § 1221*(e)(1)-(2); *Fulton v. Department of the Army, 95 M.S.P.R. 79, 84-85 (2003).* Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). 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 a 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, and any evidence that the agency has taken similar actions against employees who are not whistleblowers but who are otherwise similarly [*28] situated. *Id. at 85-86, citing, 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).*

In this case, had the appellant met her burden of proving that she engaged in protected activity, the agency would have relied on the strength of the evidence supporting the appellant's placement on administrative leave and proposed removal, and the absence of any motive to retaliate on the part of the agency official who took these actions. The agency did not offer evidence that it has taken similar actions against similarly-situated employees who are not whistleblowers. Based on my analysis of the agency's evidence of the charges in the removal appeal, I find that clear and convincing evidence supports Mr. Murphy's decisions to place the appellant on administrative leave and propose her removal. Moreover, Mr. Murphy had no motive to retaliate for the appellant's disclosures to Ms. Weatherly and The Washington Post because they did not allege wrongdoing [*29] by him and he suffered no adverse consequences because of the disclosures. The agency, I conclude, could show by clear and convincing evidence that it would have taken the same actions in the absence of the alleged whistleblowing activity.

THE REMOVAL APPEAL

Legal standard

The agency must prove the charges contained in the proposal notice by a preponderance of the evidence. *5 U.S.C. § 7701*(c); 5 C.F.R. § 1201.56(a)(1). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The agency also must demonstrate that disciplinary action will promote the efficiency of the service, *see Kruger v. Department of Justice, 32 M.S.P.R. 71, 73-74(1987),* and that the penalty imposed was reasonable, *see Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981).*

The agency's proof of the charges

Improper budget communications -- The agency charged that on November 3, 2003, Mr. Murphy directed [*30] the appellant to provide him a USPP cost account number to fund a National Academy of Public Administration (NAPA) review that had been requested by the Interior Appropriations Subcommittee. The appellant provided him the cost account number. However, she subsequently telephoned a senior staff member of the Subcommittee and told her that she believed the review was not necessary and the USPP should not have to pay for it. Her statements to the Subcommittee staff member were a direct communication with a congressional staff member about the development and execution of a budget matter in violation of Part 112, Chapter 7 of the Department Manual. Her statements caused the staff member to question the veracity of the stated intent of the Director, NPS, to carry out the direction of Congress and implied to committee members that the NPS did not intend to comply with the direction of Congress.

Part 112, Chapter 7, of the Department Manual states:

> 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 [*31] 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 Committees, and other Federal agencies.

It is undisputed that Mr. Murphy directed the appellant to provide him a cost account number for the NAPA contract. The appellant telephoned Deborah Weatherly, staff member, Interior Appropriations Subcommittee, to ask whether the USPP was required to pay for the review, but Ms. Weatherly was not available. Before Ms. Weatherly returned her call, the appellant learned from Shelly Thomas, USPP Budget Officer, that USPP would have to pay. She provided Mr. Murphy the cost account number. The disputed portion of the charge concerns the discussion that took place when Ms. Weatherly returned the appellant's call.

Ms. Weatherly testified that before the appellant was hired, the USPP had been mismanaged and was in danger of exceeding its budget. Tr. I at 228-29. NAPA conducted a study and made recommendations for improvement. Among other things, NAPA felt [*32] the USPP was performing duties that were not part of its core mission and the mission could be redefined in a way that would save money. Tr. I at 231. A second NAPA study had been ordered because of the conflicting information the Subcommittee was receiving about the implementation of the recommendations made in the first study. Ms. Weatherly testified that she did not think it was improper for the appellant to have called her although she later learned there was an agency "process" that applied to such contact. Tr. I at 233. The discussion with the appellant concerned her, however, because the information appellant provided about the implementation of the NAPA recommendations was inconsistent with the information she had been given by Mr. Murphy and Ms. Mainella. Tr. I at 244-45. She did not recall the appellant saying that the second NAPA review was unnecessary, but the appellant did question whether USPP should have to pay for it. Tr. I at 247-49. Ms. Weatherly agreed that she "questioned the veracity of the [NPS] Director's stated intent to carry out the direction from Congress" but this was not based on the appellant's statements. Tr. I at 255.

Ms. Mainella testified that Ms. [*33] Weatherly called her on November 3, 2003, after speaking to the appellant. Tr. I at 265. She was concerned that Mainella and Murphy were allowing the appellant to debate an issue that had already been decided by Congress, i.e., that there would be a second NAPA review and USPP would pay for it. Tr. I at 265-66. Ms. Mainella asked Mr. Murphy if he were aware of Ms. Weatherly's concerns. Tr. I at 268. Mr. Murphy testified that after speaking with Ms. Mainella, he called Ms. Weatherly. Tr. I at 24. Ms. Weatherly told him that the appellant was complaining about having to pay for the second NAPA review. When Ms. Weatherly pointed out that the requirement was contained in the budget, the appellant said she needed "clarification." Tr. I at 25-26. Mr. Murphy was concerned about the appellant's call to Weatherly because the appellant knew from their discussions that the USPP was required to pay and her call to Weatherly could harm the agency's relationship with the Subcommittee and reflect negatively on the budget process. Tr. I at 26-27.

The appellant testified that when Ms. Weatherly returned her call she told her she had already learned USPP would have to pay for the NAPA review. Tr. II [*34] at 114. Ms. Weatherly continued the conversation. She told the appellant she had received disappointing information about the implementation of the NAPA recommendations. Tr. II at 115-16. The appellant testified that she was never informed that the NAPA recommendations were a priority. Nonetheless, 16 of 20 NAPA recommendations had been implemented. She so informed Ms. Weatherly and said that if Mr. Murphy and Ms. Mainella had given her different information it was because they did not know, she had not told them. Tr. II at 116-17.

Both the appellant and Ms. Weatherly documented their conversation. In an e-mail addressed but not sent to Mr. Murphy, the appellant stated that she had assured Ms. Weatherly that the USPP had made "great progress on the NAPA recommendations, other than the one or two the Department had taken a position on that they wouldn't support (such as moving out of the field offices)." She "shared with her the very positive meeting [she] had with members of the NAPA team and that they were pleasantly surprised at the progress we had made." AF 752 tab 3, subtab 4m at 7. In a December 4, 2003, e-mail to Mr. Murphy, Ms. Weatherly stated:

> . . . I was contacted directly [*35] by Ms. Chambers on November 3, 2003. The conversation was troubling to me for several reasons. First, she indicated to me that the Park Police were underfunded and understaffed. She also provided me with budget numbers that were inaccurate. I mentioned that the Committee had expected greater attention to implementing the National Academy of Public Administration's recommendations, particularly regarding restructuring the 'beat structure.' NAPA had clearly indicated to the committee that the Park Police are involved in many activities outside their core responsibility. In addition, I expressed concern to her that the other major item of concern was continued overtime pay. This

> is puzzling to the Committee because we provided $ 12.6 million in fiscal year 2003 to double the number of annual recruit classes from two to four as well as provided additional funding over the past several years in emergency supplementals. She assured me that the NAPA recommendations were being implemented. Just the other day, she sent me an e-mail in which she again requests more money and staff and contends that most of the NAPA recommendations have been implemented. . .
>
> ...
>
> The Committee has been extremely [*36] generous in increasing the National Park Police budget over the last several years, including making the pension plan funding a mandatory appropriation. The Committee also is disappointed by the lack of Park Police management to implement fully the recommendations of the NAPA study. It appears that Chief Chambers believes that most of these recommendations have been implemented. That belief, I believe is incorrect and I am concerned that Chief Chambers does not understand that much remains to be done before the committee can accurately evaluate future funding needs. That information can only be obtained after the NAPA recommendations are fully implemented.

AF 1221 tab 9, subtab 4d.

To meet its burden of proof of the disputed portion of the charge, the agency first must show that the appellant told Ms. Weatherly the second NAPA review was not necessary and the USPP should not have to pay for it. Because Ms. Weatherly did not testify that the appellant told her the NAPA review was unnecessary, the agency has not met its burden of proof of that matter. Ms. Weatherly did testify that the appellant told her the USPP should not have to pay for the NAPA review. Her hearing testimony [*37] is consistent with her prior statement to the agency (AF 752 tab 3, subtab 4g at 7) and with Murphy's and Mainella's recollections of what Ms. Weatherly told them. Moreover, it is clear that the requirement for USPP to pay was discussed because that was the initial reason the appellant placed the call. I have considered the appellant's testimony that she told Weatherly she had already learned USPP would have to pay for the NAPA review. It is generally consistent with her reply to the proposal notice (AF 752 tab 3, subtab 4l at 3-9) and with her deposition testimony except that her deposition testimony suggests a slightly longer discussion. Agency exhibit (Ag. ex.) 7 at 12. On this issue, I find Ms. Weatherly more credible than the appellant. Her testimony is consistent with her prior statement and it is corroborated by Murphy and Mainella. Moreover, she is a disinterested witness not shown to have had any reason to fabricate testimony. In fact, with respect to the other part of the charge, i.e., the allegation that the appellant said the NAPA review was unnecessary, she testified in a manner favorable to the appellant. For these reasons, I find that the agency has shown that the appellant [*38] told Ms. Weatherly the USPP should not have to pay for the NAPA review.

Next, the agency is required to show that the appellant's statement to Ms. Weatherly was a direct communication with a congressional staff member about the development and execution of a budget matter in violation of Part 112, Chapter 7 of the Department Manual and that it caused Ms. Weatherly to question the veracity of the stated intent of the Director, NPS, to carry out the direction of Congress and implied to committee members that the NPS did not intend to comply with the direction of Congress. For the following reasons, I find that the agency has not met its burden of proof of this portion of the charge. Agency witnesses and Ms. Weatherly testified that they did not think it was improper for the appellant to have called Ms. Weatherly (although Ms. Weatherly alluded to a "process" that applied to the call). And the subject of the call, the NAPA review, has not been shown to have concerned the "development and execution" of the agency's budget. As I have found, the appellant told Ms. Weatherly the USPP should not have to pay for the NAPA review, but the agency has not charged her with refusing to pay. Finally, [*39] the agency has not shown that the appellant's statement caused Ms. Weatherly to "question the veracity of the [NPS] Director's stated intent to carry out the direction from Congress" because Ms. Weatherly testified that while she agreed with the statement, her conclusions were not based on what the appellant said.

In summary, the agency has proven that the appellant told Ms. Weatherly the USPP should not have to pay for the NAPA review. The agency has not proven that this statement violated Part 112, Chapter 7 of the Department Manual or caused Ms. Weatherly to question the veracity of Ms. Mainella's stated intent to carry out the direction of Congress. Accordingly, the agency has not met its burden of proof of charge 1, and it is NOT SUSTAINED.

Making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area -- The agency charged that on or about December 1, 2003, while the appellant was on duty and acting in her official capacity as Chief, USPP, a reporter from The Washington Post interviewed her. n4 Her statements to the reporter were the subject of a December 2, 2003, Washington Post newspaper article [*40] entitled, "Park Police Duties Exceed Staffing." The article stated as follows:

> Chambers said traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four.
>
> ...
>
> '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.
>
> ...
>
> The Park Police's new force of 20 unarmed security guards will begin serving around the monuments in the next few weeks, Chambers said. She said she eventually hopes to have a combination of two guards and two officers at the monuments.

The agency charged that her remarks about how many armed and unarmed USPP officers are patrolling the Washington, D.C. metropolitan area, Federal malls, parks, and parkways constituted public remarks about the scope of security present and contemplated for these areas.

> n4 The parties agree that the interview actually was conducted on November 20, 2003. Because the error is not material to the appellant's understanding of the charge and she has expressed no misunderstanding, the error did not affect her right to advance notice of the reasons for the proposed action. *See, e.g., Walcott v. U.S. Postal Service, 52 M.S.P.R. 277, 282 (1992), aff'd, 980 F.2d 744 (Fed.Cir.1992)* (Table); *Palmer v. U.S. Postal Service, 36 M.S.P.R. 263, 266 (1988).*

[*41]

Mr. Murphy testified that the appellant's description of the law enforcement presence on the Baltimore-Washington Parkway was improper because it communicated to potential lawbreakers that if they saw two officers in a particular location no officers would be patrolling in other locations. Tr. I at 30-31. He thought it was irresponsible to make that kind of information public. Tr. I at 31. Mr. Murphy testified that the next statement attributed to the appellant was inappropriate because it communicated to the public that the USPP was not protecting the parks and indicated to potential lawbreakers that these areas could be exploited. Tr. I at 31-32. Mr. Murphy testified that the information provided in the third statement attributed to the appellant was from a document that she prepared and labeled "law enforcement sensitive." Ag. ex. 4. He testified that "law enforcement sensitive" is an informal way of designating information that is sensitive and should not be released to the public. In this instance, Mr. Murphy felt explicit information about staffing profiles at the monuments should not be in the public domain because it placed the officers in jeopardy and compromised the security [*42] of the monuments. Tr. I at 32-34. And he felt this would be true even if the appellant merely confirmed for the reporter information he had received from another source. Tr. I at 35.

The appellant testified that the Washington Post reporter, David Farenthold, was "very well armed with information" when he interviewed her. Tr. II at 105. She denied that she disclosed staffing numbers that were "classified." She testified that she had not placed the "law enforcement sensitive" designation on agency exhibit 4. n5 According to the appellant, the "law enforcement sensitive" designation was a "practice" based on a "common sense approach." Tr. II at 106, 150. She denied that the information she provided in the interview was "law enforcement sensitive." Tr. II at 151.

> n5 She did, however, issue the document (marked law enforcement sensitive not for public dissemination) over her signature. AF 1221 tab 28, exhibit 4.

In her deposition, the appellant testified that before Mr. Farenthold interviewed her, Jeff Capps, Chairman, USPP Fraternal Order of Police Labor Committee, had provided him detailed information about "actual budget numbers, about staffing numbers, about crime data, and accident [*43] data." Ag. ex. 7 at 26. She testified that she "confirmed" for Mr. Farenthold that the Baltimore-Washington Parkway had two officers on patrol instead of four. He already had that information. *Id.* at 30. She testified that she did make the statement he attributed to her about protecting "green spaces." *Id.* at 33-34. And she testified that Mr. Farenthold misquoted her in the third statement attributed to her because the statement sounded like "there will be 20 guards and that's all there is," when in fact there would be more. *Id.* at 39. Finally, she testified that Mr. Farenthold already knew there would be four officers assigned to each of the monuments, and she confirmed that her "hope for the future" was to have a combination of "two [unarmed] guards and two officers." *Id.* at 39-41. She did not consider the information she provided or "confirmed" about the number of officers assigned to the monuments to be sensitive because one could confirm this information by driving by the monuments. *Id.* at 42.

John Wright, Senior Public Affairs Officer for the Department of the Interior, testified at his deposition that he contacted Mr. Farenthold at the request of an agency [*44] attorney to determine whether statements that appeared in the December 2, 2003, article were accurate. App. Ex. RR at 45. He read the statements attributed to the appellant, and Mr. Farenthold said he would "stand by his story." *Id.* at 53; AF 752 tab 3, subtab 4d. Based on Mr. Wright's deposition testimony and declaration, I find that the appellant made the statements (both in quotes and without quotes) Mr. Farenthold attributed to her. I have considered the appellant's testimony that she just "confirmed" information Farenthold already had. I find it unpersuasive because it is unsupported by any other evidence even though she could have but did not call corroborating witnesses. Both Mr. Farenthold (obviously) and Scott Fear, USPP Public Relations Officer, were present for the interview. The appellant did not propose to call Mr. Farenthold as a witness, and although I initially disapproved her request to call Mr. Fear, on the morning of the hearing I reversed that ruling and approved him. Despite this, the appellant failed to call Mr. Fear to testify.

Having found that the appellant made the statements, I agree with Mr. Murphy that they were improper. I further agree with him that [*45] they would have been improper even if the appellant only "confirmed" information Mr. Farenthold already had. For public confirmation by the chief of police is clearly far more significant than information provided by a less prominent source. While a potential lawbreaker may have been able to ascertain the same information through careful observation, for the chief of police to call attention to the information by providing it to a newspaper reporter is astonishing. It is unnecessary to determine whether the third statement included "classified" or "law enforcement sensitive" information because the agency did not charge the appellant with the release of information so designated. Nonetheless, I find that the staffing profiles included in the third statement are the type of information contained in agency exhibit 4 and that this document was labeled "law enforcement sensitive." This finding supports the conclusion that the release of such information in the statement to Mr. Farenthold was improper. Charge two is SUSTAINED by preponderant agency evidence. I have considered the appellant's evidence and argument allegedly showing that other agency officials made similar statements. However, [*46] I find that the other statements she identified were not similar because they addressed safety measures in place without revealing potential weaknesses in them.

Improper disclosure of budget deliberations -- The agency charged that the same Washington Post newspaper article contained the following statement attributed to the appellant: "She said she has to cover a $ 12 million shortfall for this year and has asked for $ 8 million more for next year." The appellant made an improper disclosure of 2005 Federal budget deliberations to the media, in violation of Office of Management and Budget (OMB) Circular No. A-11, Section 22.1, by informing the reporter that she had "asked for $ 8 million more for next year" before the President had transmitted the fiscal year 2005 budget to Congress.

OMB Circular A-11 provides:

> 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 [*47] to OMB and any agency future plans or long-range estimates to anyone outside the executive branch, except in accordance with this section.

Mr. Murphy testified that the alleged improper disclosure was that the appellant had "asked for $ 8 million for next year." It was improper because this was the amount of the increase in the USPP budget developed by the agency for fiscal year 2005, and it was then under negotiation with OMB for the President's budget. Tr. I at 37-39. Both Mr. Murphy and Ms. Mainella testified that during National Leadership Counsel (NLC) meetings and other meetings appellant

attended where the budget was discussed Ms. Mainella would begin the meetings with an admonition to those present not to disclose numbers or other details of budget negotiations prior to the issuance of the President's budget in January or February. Tr. I at 39-40, 270-75. They testified that the premature release of this information could negatively impact the budget process. Tr. I at 42, 274-75. Finally, Charles B. Schaefer, Comptroller, National Park Service, testified that NLC and other meetings that included budget discussions routinely began with a warning not to discuss the numbers [*48] outside the organization. Tr. II at 217. He testified, unequivocally, that the proposed increase in the USPP budget for fiscal year 2005 was $ 8 million and the appellant would not have been permitted to discuss that figure publicly on December 1, 2003. Tr. II at 212, 216-18.

The appellant admitted in her deposition testimony that in each meeting where the budget was discussed Ms. Mainella would remind the participants that "what we had just heard was not for public discussion and in most cases other than with our own budget officer was not even to be taken back to our employees." Ag. ex. 7 at 64. The appellant's testimony concerning her statement to Mr. Farenthold was confusing. In her deposition, she testified that Mr. Farenthold asked her what she would "need today to be able to provide the services [she] thought should be provided." Ag. ex. 7 at 66. She answered that "what we would need to be made whole was really $ 27 million, $ 12 million to cover the shortfall in '04, $ 7 million for the helicopter, which would leave $ 8 million for hiring and overtime." *Id.* at 67. She denied telling Mr. Farenthold that she had "asked for $ 8 million more for next year." *Id.* at 69. [*49] She admitted, however, that she knew at the time of the interview that the agency had asked OMB for $ 8 million more for next year. *Id.* at 70-71. She thought it was safe to say $ 27 million because that did not match any budget numbers under consideration. *Id.* at 71. It did not occur to her that $ 8 million was the same amount that was sent to OMB. The appellant did not believe Mr. Farenthold knew the specific dollar amounts in the proposed '05 budget. *Id.* at 73-74. In her hearing testimony, the appellant tried to retract her admission that $ 8 million was the amount requested from OMB. Instead, she testified that USPP did not request an $ 8 million increase for fiscal year 2005, the request was for $ 42 million. Tr. II at 103. She also testified that she became aware in late July (apparently of 2003) that Mr. Schaefer had sent forward a budget request for a $ 3 million increase in the USPP budget. Tr. II at 104.

The testimony of the agency witnesses was clear and consistent. As of December 1, 2003, the agency had sent to OMB a request for an $ 8 million increase in the USPP budget. The appellant knew it and knew she was prohibited from discussing it publicly. In her deposition [*50] testimony, the appellant appeared to agree. Her hearing testimony was inconsistent with both the testimony of agency witnesses and her own deposition testimony, and I therefore find it was incredible. The $ 42 million she referred to most likely represents a wish list requested of all organizations at the beginning of the budget process (*see, e.g.,* tr. II 209), and the $ 3 million coincides with the amount of an increase approved for USPP over the amount of the initial budget submission (tr. II at 211). n6 While these two amounts may have been in play at times during the budget process, neither is the amount sent forward to OMB. The appellant, I conclude, knew that amount was $ 8 million when she was interviewed by Mr. Farenthold.

n6 In a November 28, 2003, memorandum to Ms. Mainella concerning the fiscal year 2005 passback, the appellant stated: "Please consider requesting that the Department appeal our passback of $ 3.3 million and request an increase to at least the $ 8 million initially passed back by the Department." App. Ex. QQ, exhibit 2 and SSS. *See also* AF 1221 tab 3, subtab 4m at 74.

Having found that the appellant knew the amount of the increase was $ 8 million, [*51] I also find that the appellant's statement to Mr. Farenthold referred to this increase. In the analysis of charge two, I found that Mr. Farenthold accurately reported the appellant's statements. For the same reasons, I find that he accurately reported her statement that she "asked for" the $ 8 million. I do not find credible the appellant's deposition testimony that the $ 8 million she referred to represented hiring and overtime unrelated to the amount of the budget increase. The appellant has not explained how she knew it would cost $ 8 million for hiring and overtime if this were not the amount requested in the budget. Finally, read in context, her statement appears to refer to the budget process. After reporting that the appellant had asked for $ 8 million for next year, Mr. Farenthold wrote, "But leaders in Congress are not inclined to go along." AF 1221 tab 9, subtab 4e. For all these reasons, I find that the appellant made an improper disclosure of 2005 Federal budget deliberations to the media, in violation of OMB Circular No. A-11, Section 22.1. Charge three is SUSTAINED by preponderant agency evidence.

Improper lobbying -- The agency charged that the same Washington Post [*52] newspaper article contained the following statements attributed to the appellant:

> In the long run, Chambers said, her 620-member department needs a major expansion, perhaps to about 1,400 officers.
>
> ...
>
> She said a more pressing need is an infusion of federal money to hire recruits and pay for officers' overtime.

The agency charged that the appellant did not have approval to make the statements; thus the statements constituted improper lobbying in violation of 43 C.F.R. § 20.506(b). That regulation provides: 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 proper Departmental authority.

It is undisputed that the appellant made the statements. Mr. Murphy testified that the appellant made these statements in her official capacity as Chief during a time when the agency's budget was being developed. The numbers she used did not reflect the position of the agency on staffing. He believed the appellant made the statements with the intent to influence the appropriations process. Tr. I at 45.

For the following reasons, I do not find that the [*53] appellant engaged in lobbying in violation of 43 C.F.R. § 20.506(b). The statements were made by the appellant in her official capacity. However, the statements refer only to future staffing needs without making any connection to the appropriations process then underway. It is not even clear that the appropriations process had reached the Subcommittee when she made the statements. Finally, the statements do not identify any pending legislation or promote increasing the USPP's appropriation to meet the stated staffing needs. The agency, I conclude, has not met its burden of proof of this charge, and it is NOT SUSTAINED.

Failure to carry out a supervisor's instructions -- Unlike a charge of insubordination, a charge of failure to follow instructions does not require proof that the failure was intentional. *Eichner v. U.S. Postal Service, 83 M.S.P.R. 202, 205 (1999); Hamilton v. U.S. Postal Service, 71 M.S.P.R. 547, 555-57 (1996).* Thus the agency is not required to prove intent here.

In specification 1, the agency charged that on or about August 18, 2003, Mr. Murphy instructed the appellant to detail Pamela Blyth to the [*54] Office of Strategic Planning for 120 days. The appellant stated she was unwilling to allow Ms. Blyth to go on a detail because she was too valuable to her and that placing Ms. Blyth on detail would send a message to her "detractors" at the USPP that they had been successful in getting rid of Ms. Blyth. Mr. Murphy informed the appellant that he was giving her a specific order to detail Ms. Blyth. She continued to express her unwillingness to do it. Mr. Murphy advised her that his decision was final. As a compromise, he offered to break the detail into increments of time acceptable to the appellant. Notwithstanding this, she failed to detail Ms. Blyth as she had been instructed.

Mr. Murphy testified that in early August of 2003 he discussed with the appellant Ms. Blyth's general knowledge of the Federal Government. He explained that he thought Ms. Blyth would benefit from a detail to the NPS Office of Strategic Planning because she would gain a broad understanding of the goals and objectives of both the Department of the Interior and NPS. He thought that would be very helpful because Ms. Blyth had limited Federal experience and was acting in a fairly high level with the USPP. Tr. I [*55] at 52. The appellant responded that she did not think it was a good idea. She was "somewhat agitated" about losing a key member of her staff and she questioned whether the detail had been motivated by "snipers" in the agency. n7 Tr. I at 52-53. Mr. Murphy testified that his only motivation was to get Ms. Blyth better training in Federal rules and regulations and administrative procedures, a broader understanding of how the Federal Government worked, so she could better serve the USPP. Tr. I at 53.

> n7 This refers to allegations made by the appellant and others that unknown USPP employees had played pranks on the appellant and members of her staff. The appellant advised her supervisors of the incidents but chose to investigate them herself. *See, e.g.,* AF 752 tab 3, subtab 4m at 118; app. Ex. JJ. Because the appellant did not ask for any assistance in dealing with the incidents, she cannot credibly claim NPS management lent support to the pranksters.

Ms. Blyth was a former member of the Durham, North Carolina city council. The appellant became acquainted with her when she was the Durham police chief. Ag. ex. 7 at 107, 113. When the appellant became Chief of the USPP, she helped [*56] create a "special assistant" position and invited Ms. Blyth to apply for it. *Id.* at 113. Ms. Blyth had no prior Federal service, and in her deposition testimony, the appellant had a difficult time describing Ms. Blyth's qualifications for the special assistant position. *Id.* at 100-10. On March 31, 2003, the appellant was reprimanded for personal use of a Government-owned vehicle (GOV) and for authorizing Ms. Blyth to do the same. n8 AF 1221 tab 9, subtab 4n. Based on these facts, Mr. Murphy appeared to have solid reasons for believing that Ms. Blyth (and the appellant whom she was advising) could benefit from the detail to the NPS.

n8 It is unclear how the agency arrived at this penalty because the minimum statutory penalty for willful misuse or for authorizing misuse of a GOV is a one-month suspension. *31 U.S.C. § 1349.*

Mr. Murphy testified that after a lengthy conversation with the appellant about the Blyth detail he finally said, "Look, this is not open for discussion any longer, you have to do this." Tr. I at 54. He testified that he was "very clear" that the detail would take place and the appellant was to effect it. *Id.* The [*57] appellant said she understood and would comply "reluctantly." *Id.* The next day, he discussed the detail with Ms. Blyth. She was "somewhat enthusiastic" about it until she had a conversation with the appellant. Tr. I at 55. After that, she informed Mr. Murphy that there were concerns about her availability to perform in her current assignment. Tr. I at 54-55. Mr. Murphy responded that he was "very willing to be flexible." He assured both the appellant and Ms. Blyth that he would "break up the detail, if necessary," so that Ms. Blyth would be available to work on assignments the appellant thought were critical. Tr. I at 56. He expected the appellant to go to the director of the Office of Strategic Planning and work out the details of Ms. Blyth's assignment. Tr. I at 57.

In her deposition testimony, the appellant agreed that Ms. Blyth lacked "federal training." Ag. ex. 7 at 94. She also agreed that Mr. Murphy either said he had "decided" to detail Ms. Blyth or he "would like to" detail her, but she conceded it was "very likely" he said he had decided on the detail. *Id.* at 93. She "engaged [Mr. Murphy] in some conversation about what an absolutely difficult and inappropriate time" [*58] it was for the Blyth detail. *Id.* at 98. Mr. Murphy said he wanted Blyth detailed full-time for the first two weeks. *Id.* at 120. The appellant named some upcoming meetings, and Mr. Murphy said he would "consider" them, but he "really wanted to make this happen." *Id.* Apparently, the appellant continued to press her case until both she and Mr. Murphy were called to a meeting on an unrelated matter. *Id.* at 121. After the meeting, Mr. Murphy suggested that he and the appellant meet with Ms. Blyth together. *Id.* at 146. The appellant still was opposed to the detail and she asked Mr. Murphy to call Ms. Blyth himself. *Id.* at 146-48. He agreed to call her. The appellant testified that other than an e-mail she sent Mr. Murphy, that was her "last involvement" in the matter. *Id.* at 149.

Based on Mr. Murphy's testimony and the appellant's admission that it is "very likely" Mr. Murphy told her he had decided on the detail, I find that Mr. Murphy instructed the appellant to arrange for Ms. Blyth's detail. The appellant has not even alleged that she took any action to comply with those instructions. Instead, it appeared that any action she took was meant to prevent the [*59] detail from happening. Her hearing testimony focused almost entirely on the reasons why the Blyth detail would have been disruptive. However, the agency's proof of the charge does not require it to show that the detail was a wise or well-timed management decision. Having found that Mr. Murphy instructed the appellant to arrange for the Blyth detail and that the appellant took no steps to comply, I find that the appellant failed to follow Mr. Murphy's instructions as charged. Specification 1 is SUSTAINED by preponderant agency evidence.

In specification 2, the agency charged that on May 8, 2003, the Office of Special Counsel (OSC) requested proof that Deputy Chief Barry Beam had successfully passed a psychological evaluation associated with his appointment to his position with the USPP and that Deputy Chief Dwight Pettiford had successfully passed a medical and psychological evaluation associated with his appointment. The requests were part of an ongoing OSC investigation into alleged prohibited personnel practices in the hiring of Blyth, Beam and Pettiford. On or about June 12, 2003, Mr. Murphy instructed the appellant to direct these two employees to undergo the required evaluations. [*60] She protested that the evaluations were not necessary. Mr. Murphy explained that none of her reasons had merit and that it was necessary for the agency to comply with OSC's request. He instructed her a second time to direct Beam and Pettiford to undergo the evaluations, but the appellant failed to carry out his instruction. Instead, she challenged the propriety of his instructions and openly expressed her unwillingness to comply with them. After Mr. Murphy personally instructed Beam and Pettiford to undergo the evaluations, they complied.

Mr. Murphy testified he instructed the appellant to have Deputy Chief Pettiford take his psychological test and his physical examination and to have Mr. Beam take his psychological examination. Tr. I at 61. He gave her this instruction after agency attorneys told him that OSC had an open investigation into the hiring of the two deputy chiefs and had communicated that there was a problem with the fact that their psychological and/or physical examinations had not been taken. Tr. at 61-62. He explained this to the appellant, and she said she did not think that was necessary because they had taken the exams as young recruits and now held jobs at the [*61] deputy chief level. Tr. at 62. Mr. Murphy testified that he told her he understood but he thought it best to have them take the exams. Tr. I at 62-63. About a month later, OSC asked for an update. He asked the appellant about the status of the exams and learned from the appellant that they had not been taken and no arrangements had been made for them to be taken. Tr. I at 63. The appellant reiterated her argument that these employees should not have to take the exams because they had taken the exams as young recruits, and she mentioned that the "snipers" might have filed the OSC complaints to break up her team. Tr. I at 64. Mr. Murphy again explained that it had to be done, and the appellant replied that Mr. Murphy would have to issue the officers a written order to take the exams. Tr. I at 65. Mr. Murphy testified that he issued written orders to them. *Id.* Mr. Murphy's testimony is corroborated by a prior consistent statement he wrote on December 4, 2003. AF 1221 tab 9, subtab 4c.

In her deposition, the appellant testified that she alerted Mr. Murphy to OSC's concern about the exams, and he expressed surprise that the requirement had not been waived. AF ex. 7 at 187-89. She denied [*62] that Mr. Murphy ever instructed her to direct the officers to take the exams (ag. ex. 7 at 189, 195), but she testified that after he met with agency attorneys he told her "You won't like it but now that I've heard the rationale behind it I'm going to . . . ask you to have these two take the test. Ag. ex. 7 at 191-92. According to the appellant, after further discussion, Mr. Murphy agreed to call the officers so they could "hear [his] rationale." *Id.* at 192. Instead, his secretary gave her "two blue envelopes" to deliver to them. *Id.* at 193. In her hearing testimony, the appellant denied that she refused to require Beam and Pettiford to take the recommended exams. She testified that she insisted they do it once she knew that was the decision. Tr. II at 148.

Based on Mr. Murphy's testimony and the appellant's deposition testimony that Mr. Murphy asked her to have the officers take the exams, I find that the Mr. Murphy did instruct the appellant to require Beam and Pettiford to take the exams. It is undisputed that there was an OSC investigation into the employment of Beam and Pettiford. App. Ex II. I find it entirely plausible that even if Mr. Murphy initially agreed with the [*63] appellant that the exams could be waived, after speaking to agency attorneys, he determined the prudent course of action was to require the exams. As Chief, USPP, the appellant would be the one to take the necessary action concerning her subordinate employees. The fact that Mr. Murphy had to do it is evidence that the appellant refused. The appellant's testimony that she "insisted they do that once [she] knew that was the decision" is disingenuous because based on her deposition testimony (*See, e.g.,* ag. ex. 7 at 189, 195) this could only have been after Mr. Murphy issued written orders. The appellant, I conclude, was instructed by Mr. Murphy to require Beam and Pettiford to take the exams and she failed to follow his instruction as charged. In reaching this conclusion, I have considered the similarity between the appellant's actions in this instance and with the Blyth detail. In both instances, after Mr. Murphy gave her an instruction, she tried to talk him out of it rather than comply. As Mr. Murphy testified, her conduct fit a pattern of "not listening, not following instructions." Tr. I at 27. The specification is SUSTAINED by preponderant agency evidence.

In specification [*64] 3, the agency charged that in March of 2003 after the Constitution Gardens "tractor man" incident which paralyzed significant portions of the nation's capitol, Mr. Murphy instructed the appellant to fully cooperate and work with attorneys in the Solicitor's Office in connection with any information and/or assistance they needed regarding the incident. On several occasions during July 2003-September 2003, Randolph J. Myers, a Solicitor's Office senior attorney, sought her specific assistance to meet with him and discuss a complaint that had been made to her by the Organization of American States (OAS). OAS alleged that during the "tractor man" incident, armed USPP sharpshooters had deployed on the grounds of OAS Headquarters and, in so doing, had violated the treaty governing the building's diplomatic status. Mr. Myers needed to meet with the appellant so he could assess whether any applicable treaty had been violated and whether the USPP had complied with its own General Orders. The OAS complaint raised critical and sensitive legal issues. However, contrary to Mr. Murphy's instructions, the appellant did not respond to Mr. Myers' request for a meeting.

Mr. Murphy testified that Randy [*65] Myers complained to him that he had tried on a number of occasions to schedule a meeting with the appellant concerning a complaint from the OAS, and he asked him to intervene. Mr. Murphy informed the appellant of the call and asked her to cooperate with the Solicitor's Office. Tr. I at 67. Mr. Myers subsequently told him that he had never gotten an appointment with the appellant. Tr. I at 68.

Mr. Myers testified that a USPP official informed him that in a meeting OAS had complained to the appellant about the USPP. He immediately called the appellant's office and asked for a meeting. Tr. II at 239-40. A meeting was scheduled for July 30, but the appellant's office cancelled it and said he would be notified when it was rescheduled. The meeting was never rescheduled. Tr. II at 240. On August 13, 2003, he wrote a personal note to the appellant reminding her that the meeting he had requested had not been scheduled, and his office needed to know more about the OAS complaint. He received no response. Later, he was asked to review an after-action report of the "tractor man" incident. In his analysis of the report, he again reminded the appellant that he needed to meet with her. Once again, [*66] he received no response. Tr. II at 241. The matter was not resolved while the appellant held the Chief position. Tr. II at 242. Mr. Myers' testimony is corroborated by a copy of his August 13, 2003, memorandum to the appellant, his September 15, 2003, review of the after-action report, and a January 13, 2004, memorandum he wrote after the appellant replied to the proposal notice. AF 752 tab 3, subtab 4k. In his hearing testimony, Mr. Myers adopted the statements made in his memorandum as sworn testimony. Tr. II at 239.

In her deposition, the appellant testified that she did not receive an instruction from Mr. Murphy to cooperate with the Solicitor's Office concerning this matter. Ag. Ex. 7 at 198. She acknowledged that a meeting with Mr. Myers was scheduled and then cancelled and that she received a memorandum from Mr. Myers concerning a meeting. *Id.* 199, 201. She asked Lieutenant Phillip Beck if he knew anything about a complaint, and he said he did not. She noted the statement in the Myers memorandum that in the absence of a meeting he was closing the inquiry, then she gave the matter to Lieutenant Beck to handle. *Id.* at 201-02. The appellant testified that Mr. Myers cancelled [*67] the scheduled meeting, and Lieutenant Beck told her he had tried to arrange another one. *Id.* at 202-03. According to the appellant, the "tractor man" incident was an "overwhelming success." *Id.* at 211. The appellant's hearing testimony was similar. She said that she did not know why Mr. Myers wanted to meet with her, she thought it was to "go over a document." She relied on Lieutenant Beck to "handle[] her calendar. Tr. II at 149. In his deposition testimony, Lieutenant Beck could not recall what his role was regarding this matter. App. PP at 30-31.

Based on the testimony of Mr. Murphy and Mr. Myers, I find that Mr. Myers sought the appellant's assistance concerning the OAS complaint and Mr. Murphy instructed the appellant to cooperate. Mr. Myers' testimony was corroborated by the memoranda he wrote the appellant seeking a meeting. Moreover, the appellant's failure to cooperate with him is similar to her apparent lack of cooperation with an investigation of the same incident conducted by Earl E. Devaney, Inspector General. n9 Ag. ex. 2. In a scathing memorandum to the appellant, Mr. Devaney criticized her "failure to acknowledge even the remote possibility that the incident [*68] could have been handled better" and the "length of time it took to receive [her] initial response." In her deposition testimony, the appellant dismissed the accusations saying, inter alia, that Devaney "may not have known that another member of his staff had asked a very narrow set of questions." Ag. ex. 7 at 223. The Devaney memorandum appears to respond to this stating: "I understand that upon learning of my displeasure with your response, you have informed your superiors that you simply answered the questions asked of you. This fails to address my specific request for a summary of lessons-learned." I find the appellant's testimony incredible because it is inconsistent with the testimony of Mr. Murphy and Mr. Myers and because her failure to cooperate is similar to her apparent failure to cooperate with Mr. Devaney's investigation of the same incident. Moreover, she cannot credibly avoid responsibility for responding to Mr. Myers' specific request for a meeting by handing the request off to a subordinate. The specification is SUSTAINED by preponderant agency evidence.

n9 Proposed agency exhibit 2 was not moved into evidence as a hearing exhibit; however, it is otherwise in evidence as a deposition exhibit. Ag. ex. 7 exhibit 2.

[*69]

Failure to follow the chain of command -- The agency charged that during Mr. Murphy's absence from work in the week of August 18, 2003, the appellant appealed to Deputy Secretary Griles to cancel the Blyth detail and convinced him to cancel it. By appealing to Mr. Griles rather than appealing to her second level supervisor, Ms. Mainella, the appellant failed to follow the chain of command.

It is undisputed that Ms. Blyth's detail to the Office of Strategic Planning was scheduled by Mr. Murphy to begin on Monday, August 25, 2003. As far as Mr. Murphy knew then, the appellant supported it. On August 21, 2003, the appellant had sent him an e-mail stating she was "excited" about the opportunities it afforded Ms. Blyth. AF 1221 tab 1 at 5-1. On Saturday, August 23, 2003, Ms. Blyth discussed the detail with Mr. Murphy. When she described their conversation to the appellant, it caused the appellant to believe Ms. Blyth might "never return to the Park Service." Tr. II at 90-91. Ms. Blyth began notifying people that she would be unable to keep commitments she had made because of the

detail, and one of the people she notified was Jeff Capps, Chairman, USPP Fraternal Order of Police Labor [*70] Committee. Tr. II at 91. Mr. Capps called Deputy Secretary Griles, told him an "emergency" had arisen, and asked him to call the appellant. Tr. III at 6. Mr. Griles called the appellant on Sunday evening, August 24, 2003. Mr. Griles testified that the appellant told him Ms. Blyth was going to be detailed and that she was concerned the detail would affect her ability to complete assignments she had been given. Tr. III at 7, 16-17. Mr. Griles decided to cancel the detail. He convened a meeting on August 28, 2003, with the appellant and all of the members of her chain of command where a "compromise solution" was reached. Tr. III at 13.

The appellant did not make any attempt to contact either Mr. Murphy or Ms. Mainella about the allegedly new information that caused her to believe Blyth would not return from the detail. She appeared to offer two reasons for this, they were traveling and she knew what their decisions would be. Ag. ex. 7 at 231. These reasons are unavailing because Mr. Griles was also traveling (Tr. II at 93) and because knowledge that members of the chain of command are unlikely to provide the desired answer is not an excuse to ignore the chain of command. The appellant, [*71] I conclude, failed to follow her chain of command as charged. The charge is SUSTAINED by preponderant agency evidence.

In summary, I find charges (1) and (4) NOT SUSTAINED, and charges (2), (3), (5) and (6) SUSTAINED. And, for the reasons I have given, I find that the agency has met its burden of proof of the sustained charges by clear and convincing evidence.

Affirmative defenses

Reprisal for whistleblowing activity - The appellant alleges that the removal action was taken in reprisal for her whistleblowing activities in violation of *5 U.S.C. § 2302*(b)(8). She alleges that she disclosed and was perceived to have disclosed to the press, internally to superiors outside her chain of command, and to Congress "violations of law (including improper handling of the Park Police budget and improper release of personnel and disciplinary files and records), a substantial and specific danger to public health or safety (including disclosures that funding and staffing limits on the Park Police created a substantial likelihood of preventable loss of life and destruction of a national icon (e.g., a national monument), and abuse of authority and gross [*72] mismanagement (including mishandling of the Park Police budget including submission of budget requests for the Park Police without consulting with and obtaining input and concurrence from the Park Police leadership regarding the resources required to protect the national monuments and the public on parkways and parks)." AF 1221 tab 29 at 8-9.

To establish the affirmative defense of reprisal for whistleblowing, the appellant must show by preponderant evidence that: (1) She made a disclosure protected under *5 U.S.C. § 2302*(b)(8); and (2) The disclosure was a contributing factor in the agency's personnel action. If the appellant meets her burden, the agency then must show by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Scott v. Department of Justice, 69 M.S.P.R. at 236..*

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 [*73] whistleblowing activity when she disclosed information about "improper handling of the Park Police budget and improper release of personnel and disciplinary files and records," and the "substantial likelihood of preventable loss of life and destruction of a national icon" as the result of "funding and staffing limits on the Park Police." The only exception might be the allegation that appears to be raised for the first time as an affirmative defense that the appellant disclosed information that evidenced abuse of authority and gross mismanagement "including mishandling of the Park Police budget including submission of budget requests for the Park Police without consulting with and obtaining input and concurrence from the Park Police leadership regarding the resources required to protect the national monuments and the public on parkways and parks." As an initial matter, the appellant has not identified when or to whom this disclosure was made. Generally, disclosures made in the normal performance of her duties as Chief would not be "protected disclosures." *Huffman v. Office of Personnel Management, 263 F.3d 1341, 1353 (Fed.Cir.2001).* And, when an employee [*74] reports that there has been misconduct by a wrongdoer to the wrongdoer (such as in a disagreement with a supervisor over job-related duties), she is not making a "protected disclosure" of misconduct. *Id. at 1350.* In any event, I am unable to find that a disinterested observer reasonably could conclude that a disclosure of information about inclusion in the budget process would evidence abuse of authority or gross mismanagement. For all these reasons, I conclude that the appellant has not met her burden of proof on the affirmative defense of reprisal for whistleblowing because she has not established that she engaged in protected activity.

One who is perceived as a whistleblower is entitled to the protections of the Whistleblower Protection Act, even if she has not actually made protected disclosures. *Schaeffer v. Department of the Navy, 86 M.S.P.R. at 617.* In *Zimmerman v. Department of Housing and Urban Development, 61 M.S.P.R. 75, 82-83 (1994),* the Board held that an appellant had made a nonfrivolous allegation that he was perceived as a whistleblower based, in part, on his "suspected involvement [*75] in [] newspaper articles." In this case, the agency knew the appellant made statements to a newspaper reporter because she was quoted in the article. The appellant has not shown or even alleged that Mr. Murphy or Mr. Hoffman perceived her statements to evidence wrongdoing protected by section 2302(b)(8). And I find that they perceived that it was improper for the appellant to have made the statements for other reasons given in the proposal notice. The appellant, I conclude, has not shown that she is entitled to the protection of the Act as a perceived whistleblower.

Reprisal for filing a grievance -- The appellant alleges that the removal action was taken in reprisal for exercising an appeal, complaint, or grievance right granted by law, rule, or regulation in violation of *5 U.S.C. § 2302*(b)(9). For an appellant to prevail on a contention of illegal retaliation, she has the burden of showing that: (1) She engaged in protected activity; (2) the accused official knew of the activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the [*76] adverse action. *Warren v. Department of the Army, 804 F.2d 654, 656-58 (Fed. Cir. 1986).*

An employee engages in activity protected by *5 U.S.C. § 2302*(b)(9) when she exercises an appeal, complaint, or grievance right granted by any law, rule, or regulation. The appellant alleges that on December 2, 2003, she filed an appeal or grievance with Ms. Mainella concerning Mr. Murphy's conduct during a teleconference. The appellant was not a member of a bargaining unit (AF 752 tab 3, subtab 2), and she has offered no evidence that she otherwise had a right granted by law, rule or regulation to file a grievance or appeal. The document she filed with Ms. Mainella does not indicate that it was filed pursuant to any right granted by law, rule, or regulation, and Ms. Mainella did not treat it as filed under any. Ms. Mainella testified that she regarded it as a "letter of concern" and she immediately gave it to legal counsel. Tr. I at 285. The appellant, I conclude, has not shown that she engaged in activity protected by *5 U.S.C. § 2302*(b)(9) when on December 2, 2003, she gave Ms. Mainella a letter [*77] complaining about Mr. Murphy.

The appellant also alleges that she engaged in activity protected by *5 U.S.C. § 2302*(b)(9) when she "appealed" to Mr. Griles to cancel the Blyth detail. The appellant's contact with Mr. Griles was not activity protected by *5 U.S.C. § 2302*(b)(9) because it was not an exercise of an appeal, complaint, or grievance right granted by law, rule, or regulation.

Violation of *5 U.S.C. § 2302*(b)(12) -- The appellant alleges that the removal action was taken in violation of *5 U.S.C. § 2302*(b)(12) which prohibits an agency from taking a personnel action if the action would violate any law, rule, or regulation implementing, or directly concerning, the merit system principles contained at *5 U.S.C. § 2301.* The appellant suggested that the removal action violated the "First Amendment, the Lloyd-La Follette Act, *5 U.S.C. § 7211,* and the Anti-Gag statute." As an initial matter, she has not shown that any of these laws implements or directly concerns the [*78] merit system principles.

The appellant's First Amendment claim is addressed elsewhere. The Lloyd-La Follette Act was the predecessor of *5 U.S.C. chapter 75* and the Office of Personnel Management's implementing regulations. *See, e.g., Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).* Other than the alleged due process violations that I have addressed elsewhere, the appellant has not specifically alleged how the Act was violated. Section 7211 protects an employee's right to petition Congress. The appellant failed to present evidence or argument showing how this right was violated. Mr. Murphy testified that the only restriction on an employee's communication with Congress would be if that employee were speaking in his or her official capacity. In that case, he would require them to adhere to the agency's policies and positions. Tr. I at 133-34. Based on his testimony and because the appellant has not otherwise established a violation, I conclude that the removal action did not violate section 7211. Finally, the appellant has not identified the "Anti-Gag statute." However, [*79] I have considered elsewhere her allegation that she was placed under a "gag order" and found it without merit. She was simply required to clear future interviews with Mr. Murphy or Ms. Mainella. For all of these reasons, I find that the appellant has not shown that the removal action violated *5 U.S.C. § 2302*(b)(12).

Violation of her First Amendment rights -- The appellant alleges that her statements to The Washington Post are protected by the First Amendment. To determine whether a public employee's speech is protected by the First Amendment, the interests of the employee as a citizen commenting on matters of public concern must be weighed against those of the government, as an employer promoting the efficiency of the public service it performs through its employees. *Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed. 811 (1968).* Thus it must be determined whether the appellant's speech addressed a matter of public concern and if so whether the interest of the agency in promoting the efficiency of the public service it performs outweighed the appellant's [*80] interest as a citi-

zen. *Sigman v. Department of the Air Force, 37 M.S.P.R. 352, 355 (1988), aff'd, 868 F.2d 1278 (Fed. Cir. 1989)* (Table), *citing Brown v. Department of Transportation, 735 F.2d 543, 546 (1984).*

Whether an employee's speech addressed a matter of public concern, is determined by the "content, form, and context of a given statement, as revealed by the whole record." *Id.* Speech that involves only internal agency grievances rather than matters of concern to the community does not involve a matter of public concern. *Id., citing Mings v. Department of Justice, 813 F.2d 384, 388-89 (Fed.Cir.1987).* In this case, the appellant made statements to The Washington Post concerning the number of officers patrolling the Baltimore-Washington Parkway, the inability of the USPP to protect parks, staffing profiles at the monuments, and the USPP budget. The statements all involve matters of public concern. When she made the statements, however, the appellant appeared to be a public employee attempting to garner support for an increase in her staffing and budget [*81] levels, not a private citizen commenting on matters of public concern. And, as I have found, the information she 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. For these reasons, I conclude that while the appellant's statements involved matters of public concern the interest of the agency in promoting the efficiency of the public service it performs outweighs any interest the appellant may have had as a citizen in making the statements. In reaching this conclusion, I have considered that the appellant's First Amendment defense applies to only three of the six reasons for her removal.

Failure to timely inform her of the "true and complete set of reasons for the action taken against her" -- Under *5 U.S.C. § 7513*(b)(4), an employee is entitled to a written decision and the specific reasons therefor. It is undisputed that in his written decision the deciding official, Mr. Hoffman, did not explain his reasons for sustaining the charges. In discovery, the appellant learned that Mr. Hoffman prepared a draft decision [*82] that did explain his reasons, but on the advice of agency counsel, he issued a final written decision that did not contain those reasons. It is well settled that the requirement for "a written decision and the specific reasons therefor" is satisfied if the charges and specifications are stated with sufficient specificity in the proposal notice. *See Johnson v. Department of the Treasury, 13 M.S.P.R. 145, 418-19 (1982).* In this case, I find that the proposal notice was sufficiently specific and met the requirements of *5 U.S.C. § 7513*(b)(4).

Violation of due process -- The appellant also appears to allege that the agency violated her right to due process because the deciding official conducted an investigation that introduced new information to the decision-making process. In *Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1376 (Fed.Cir.1999),* the court held that the introduction of new and material information by means of *ex parte* communications to the deciding official undermines the public employee's constitutional guarantee of notice and opportunity to respond. [*83] The court set forth the test for determining whether new and material information that has been received by the deciding official through *ex parte* communications has resulted in a due process violation. The court identified three factors that should be considered: whether the *ex parte* communication merely introduces "cumulative" information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. The court held that ultimately the inquiry is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be subjected to a deprivation of property under such circumstances.

In this case, the record shows that after the appellant made her written reply to the proposal notice Mr. Hoffman conducted interviews with five agency employees and with Ms. Weatherly. AF 752 tab 3, subtabs 4e - 4j. Mr. Hoffman also may have considered the affidavit of John Wright and comments prepared by Randolph Myers. AF 752 tab 3, subtabs 4d, 4k. Present with [*84] Mr. Hoffman for each of the interviews was Jackie Jackson, Office of the Solicitor, NPS, and Steve Krutz, Division of Labor and Employee Relations Policy, NPS. Mr. Hoffman conducted the interviews himself and participation by Ms. Jackson and Mr. Krutz was nominal. The stated purpose of the interviews was to investigate the reasons for the proposed removal and the appellant's reply to the proposal. *See, e.g.,* AF 752 tab 3, subtab 4h at 3. The interviews are not shown to have developed new and material information. They merely confirmed information that was contained in the proposal notice and disputed by the appellant in her written reply. The information obtained by Mr. Hoffman was *ex parte* because the appellant was not present for the interviews and the transcripts were not provided to her until she received the agency file on the case. There is no indication that Mr. Hoffman was under any pressure to reach a particular conclusion, and he testified that no one influenced his decision. Tr. II at 7-8. Based on this application of the *Stone* factors, I find that the appellant's due process rights were not violated. Moreover, in *Blank v. Department of the Army, 247 F.3d 1225, 1229-30 (Fed.Cir.2001),* [*85] the court clarified that investigatory interviews and communications that do no more than confirm or clarify pending charges do not introduce new and material

information and do not undermine an employee's constitutional due process guarantee of notice and the opportunity to respond.

Failure to provide "unbiased personnel" to investigate the allegations, to advise the proposing and deciding officials, and to make the proposed and final decisions - The constitutional guarantee of procedural due process applies to a non-probationary employee's removal from Federal service. It is a violation of due process to allow an individual's basic rights to be determined either by a biased decision-maker or by a decision-maker in a situation structured in a manner such that the risk of unfairness is intolerably high. *See, e.g., Svejda v. Department of the Interior, 7 M.S.P.R. 108, 111 (1981).* The Board will review to determine whether an appellant has established either actual bias or an intolerably high risk of unfairness. *Id.* Nonetheless, there is no general proscription on the appointment of a deciding official who is familiar with the facts of the case [*86] and has expressed a predisposition contrary to the appellant's interests. *Id., citing, Keeney v. United States, 150 Ct.Cl. 53 (1960).* The appellant failed to state specific facts and circumstances concerning the alleged bias of agency officials that would show either actual bias or an intolerably high risk of bias. I therefore find no agency error in the appointment of these officials and no violation of her due process rights.

Disparate penalties - The appellant alleged that the agency imposed disparate penalties in this case because the penalty imposed in her case was more severe than the penalties imposed in the cases of other agency employees who engaged in similar conduct. To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force, 16 M.S.P.R. 404, 407 (1983).* Where an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence. *Woody v. General Services Administration, 6 M.S.P.R. 486, 488 (1981).* [*87] An agency may refute a charge of disparate penalties by establishing a legitimate reason for the difference in treatment, either by showing that the offenses in question were not really equivalent, or that mitigating or aggravating factors justified a difference in treatment. *Butler v. Department of the Navy, 23 M.S.P.R. 99, 100 (1984).* Finally, where the punishment is appropriate to the seriousness of an employee's offense, an allegation of disparate penalties is no basis for reversal or mitigation. *Quander v. Department of Justice, 22 M.S.P.R. 419, 423 (1984), aff'd, 770 F.2d 180 (Fed. Cir. 1985)* (Table). In this case, because the appellant was unable to identify any similarly situated employees, she failed to meet her burden of proof of this affirmative defense.

Reasonableness of the penalty

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration, 5 M.S.P.R. at 306.* When the Board [*88] sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall, 178 F.3d 1246, 1260 (Fed.Cir.1999).*

In this case, Mr. Hoffman testified that he considered charges (2), making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area, (3), improper disclosure of budget deliberations, and (5) failure to carry out a supervisor's instructions, to be the three most important charges that together would warrant removal. n10 Tr. II at 17-18. He testified that if those three charges were not sustained, he "would probably have proposed [sic] a suspension and perhaps a reinstatement into a position of less responsibility." Tr. II at 18. Because the three charges identified by Mr. Hoffman have been sustained, I find that agency has not indicated that it desires that a lesser penalty be imposed based on the sustained charges.

n10 During Mr. Hoffman's testimony, I incorrectly identified "disclosure of budget numbers" as charge (1). Although neither Mr. Hoffman nor either of the parties corrected me, Mr. Hoffman clearly was referring to charge (3), improper disclosure of budget deliberations. Tr. II at 18.

[*89]

In making the penalty determination, Mr. Hoffman considered that the appellant held a "very high profile position." She was expected to adhere to the highest standard of conduct. There must be a high degree of trust and confidence by NPS that the Chief of the USPP will carry out the policies and directives of the agency. The appellant's conduct fit a pattern of "unwillingness to follow instructions" that eroded her supervisors' confidence in her. He did not believe the relationship could be repaired. In less than two years of employment, she had been reprimanded. n11 Because she failed

to admit any wrongdoing after she was reprimanded and continued to engage in misconduct, she did not demonstrate potential for rehabilitation nor could she regain the confidence of her superiors. Based on her statements to the media that conveyed "her own personal policies and positions," she was incapable of communicating agency policy. Tr. II at 9-16.

n11 The reprimand met the factors announced in *Bolling v. Department of the Air Force, 9 M.S.P.R. 335, 339-40 (1981)* for consideration in the penalty determination. AF 1221 tab 9, subtab 4n.

In evaluating a penalty [*90] determination, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities including whether the offenses were intentional or were frequently repeated. *See, e.g., Hernandez v. Department of Agriculture, 83 M.S.P.R. 371, 374 (1999).* A higher standard of conduct and a higher degree of trust are required of an incumbent of a position with law enforcement duties. A higher standard of conduct is also required of a supervisor. *See Luongo v. Department of Justice, 95 M.S.P.R. 643, 648 (2004).* Consequently, a very high standard of conduct and trust was required of the appellant who managed a department of approximately 600 employees including law enforcement officers. Despite this, in less than two years of employment the appellant was reprimanded for misuse of a GOV and charged with offenses that call into question her willingness to follow agency policies and procedures and the instructions of her supervisor. These offenses are inconsistent with the degree of trust required for her position. Moreover, because the appellant has [*91] accepted no responsibility for her conduct and has expressed no remorse, her reinstatement would impair the agency's ability to carry out its law enforcement mission. *See, e.g., Ferrone v. Department of Labor, 797 F.2d 962, 967-68 (Fed.Cir.1986).* For these reasons, I conclude that the removal penalty was within the range of reasonable penalties, and the Board is without authority to mitigate it.

DECISION

The IRA appeal is DISMISSED and the removal action is AFFIRMED.

FOR THE BOARD:

Elizabeth B. Bogle

Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

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

NOTICE TO APPELLANT

This initial decision will become final on **November 10, 2004,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision [*92] is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board

Merit Systems Protection Board

1615 M Street, NW., Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election [*93] may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

JUDICIAL REVIEW [*94]

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals for the Federal Circuit

717 Madison Place, NW.

Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

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

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 279

Docket No. DC-1221-04-0616-W-1
DC-0752-04-0642-I-1

Teresa C. Chambers,

Appellant,

v.

Department of the Interior,

Agency.

September 21, 2006

Mick G. Harrison, Esquire, Bloomington, Indiana, for the appellant.

Richard E. Condit, Esquire, Washington, D.C., for the appellant.

Deborah S. Charette, Esquire, Washington, D.C., for the agency.

Jacqueline Jackson, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Member Sapin issues a dissenting opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision sustaining her removal and denying her request for corrective action. For the reasons stated below, we GRANT the appellant's petition and AFFIRM the initial decision AS MODIFIED herein. The appellant's removal is SUSTAINED.

BACKGROUND

¶2 The appellant served for many years on the Prince George's County, Maryland police force. From about 1998 until 2002, she was Chief of Police in Durham, North Carolina. She was appointed Chief of the U.S. Park Police on or about February 14, 2002. *See* Initial Appeal File (IAF) (1221), Tab 45 (att.). The Park Police is a unit of the National Park Service, which in turn is an agency within the Department of the Interior. Thus, although the appellant was the head of a police force with over 600 officers, she was outranked within her Department by at least four other individuals: The Deputy Director of the National Park Service; the Director of the National Park Service; a Deputy Secretary of the Interior; and the Secretary of the Interior.

¶3 The Park Police was an agency in transition when the appellant took over. In 2000, the National Park Service commissioned a "counterterrorism study," which concluded that the monuments at the core of the national capital region were

vulnerable to an attack similar to the 1993 World Trade Center bombing or the 1995 Oklahoma City bombing. A U.S. Senator commented in response to the study that part of the problem was that the mission of the Park Police was not defined clearly enough. IAF (1221), Tab 1 (att.). In the wake of the September 11, 2001 terrorist attacks, the National Academy of Public Administration (NAPA), along with the Secret Service, issued 20 specific recommendations for improving the performance of the Park Police, which included redeploying the Park Police so as to enhance security at the monuments and memorials on the national mall. The House subcommittee with oversight responsibility for the Park Police endorsed the NAPA recommendations. *See* IAF (0752), Tab 3, Subtab 4G.

¶4 Again, the appellant assumed her position in early 2002. In August of 2003, the Department of the Interior Inspector General (DoI IG) issued a report addressing "homeland security issues," with a focus on the role of the Park Police in protecting monuments and memorials on the national mall. The report noted that the Department of the Interior had been designated as the "Lead Federal Agency" with jurisdiction over "national icons and monuments" in the *National Strategy for the Physical Protection of Critical Infrastructure and Key Assets*. IAF (1221), Tab 5, Ex. X at 1. The DoI IG summarized his findings as follows:

> The National Park Service 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. . . . 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 [agency officials] that they continue to do everything they did prior to September 11, in addition to their new security responsibilities. . . . . [T]his 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. . . . [C]urrent 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.
>
> Throughout our assessment, we encountered management officials lacking situational awareness and acceptance of the fact that their parks were susceptible to terrorist attacks, and they appeared unconvinced that security enhancements were necessary.

Id. at 3. On September 10-11, 2003, the DoI IG did a follow-up study and found "a continued lack of effort in the protection practices for the [monuments and memorials on the] national mall," and he expressed "grave concerns" for "security and public safety at these facilities." *Id*., Ex. O.

¶5 On October 22, 2003, the Chairman of the U.S. Park Police Labor Committee, Fraternal Order of Police, delivered a letter to the Secretary of the Interior in which he disagreed with many of the recommendations for enhanced security on the national mall; objected to the redeployment of Park Police resources; and complained of "plummet[ing]" "morale" among Park Police officers who were being asked to perform unaccustomed roles in protecting the public from terrorist attacks. IAF (1221), Tab 1 (att.). The appellant was aware of the contents of the letter at the time it was delivered. *Id*. (10/29/03 e-mail).

¶6 From 1999 to 2003, Congress more than doubled the budget of the Park Police. The Office of Management and Budget (OMB), which speaks on behalf of the President on budgetary matters, decided not to seek further increases for FY04 and

beyond "until the Park Police improves its financial management, clearly defines its mission, focuses resources on core responsibilities, and takes steps to control costs as recommended by Congress, OMB, the [DoI] IG, and NAPA." S-1 File, Tab 1, Ex. 67.

¶7 The appellant was dissatisfied with the Park Police budget situation and the plan to redeploy officers. In November of 2003 she expressed her concerns to a House subcommittee staffer and to a reporter for the Washington Post. On December 2, 2003, the Washington Post published an article entitled "Park Police Duties Exceed Staffing." The article contained several statements about Park Police resources and deployment strategies that it attributed to the appellant. IAF (1221), Tab 9, Subtab 4E.

¶8 On the day that the Washington Post article was published, the appellant's immediate supervisor, Donald Murphy, the Deputy Director of the National Park Service, sent her an e-mail message instructing her that she was "not to grant anymore [sic] inerviews [sic] without clearing them with [him] or" the appellant's second-level supervisor, Frances Mainella, the Director of the National Park Service. *Id.*, Subtab 4F at 1; *see* Murphy Deposition at 9, IAF (1221), Tab 25, Exhibit (Ex.) J; Mainella Deposition at 34-35, IRA File, Tab 25, Ex. H. On December 5, 2003, Mr. Murphy placed the appellant on paid administrative leave "pending the completion of a review of [her] conduct," and on December 17, 2003, he proposed to remove her based on the following charges: (1) Making improper budget communications with an Interior Appropriations Subcommittee staff member; (2) making public remarks regarding security on the federal mall, in parks, and on the parkways in the Washington, D.C., metropolitan area; (3) improperly disclosing budget deliberations to a Washington Post reporter; (4) improper lobbying; (5) three specifications of failing to carry out a supervisor's instructions; and (6) failing to follow the chain of command. IAF (1221), Tab 8, Attachment G; IAF (752), Tab 3, Subtab 4C.

¶9 The appellant submitted a written response to the proposal to remove her. IAF (1221), Tab 1 (att.). She also filed a complaint with the Office of Special Counsel (OSC), in which she claimed that her placement on administrative leave and the proposal to remove her constituted reprisal for disclosures she had made to the subcommittee staff member mentioned in the first charge, to the Washington Post reporter, and to her second-level supervisor on November 3, November 20, and December 2, 2003, respectively. OSC Complaint, IAF (1221), Tab 1. On June 28, 2004, the appellant filed an individual right of action (IRA) appeal with the Board, challenging the proposal to remove her and the decision to place her on administrative leave. *Id*. at 1, 5.[1] In a subsequent submission, she indicated that the actions she was challenging in her IRA appeal included a "gag order" the agency had issued to her on December 2, 2003, i.e., Mr. Murphy's instruction that she should not grant any more interviews without his prior approval or that of Ms. Mainella. IRA File, Tab 8 at 13. In a notice issued on July 9, 2004, the Deputy Assistant Secretary for Fish and Wildlife and Parks informed the appellant of his decision to sustain all six of the charges, and to remove her effective the following day. IAF (752), Tab 3, Subtab 4B. The appellant filed a separate appeal from the removal. *Id*., Tab 1.

¶10 The administrative judge to whom these cases were assigned held a hearing and issued an initial decision. IAF (1221), Tab 46. In that decision, she sustained four of the six charges, specifically, the charges of making public remarks regarding security in public areas (charge two), improperly disclosing budget deliberations (charge

three), failing to carry out a supervisor's instructions (charge five), and failing to follow the chain of command (charge six). Initial Decision at 17-40. She also found that, although the appellant's placement on administrative leave was a personnel action that could be challenged in an IRA appeal, the "gag order" was not; that the appellant had failed to establish that she had made any disclosures protected under 5 U.S.C. § 2302(b)(8); and that, even if she had, the agency had established, by clear and convincing evidence, that it would have removed her in the absence of her allegedly protected disclosures. *Id.* at 4-17. In addition, she found the appellant's other affirmative defenses unsubstantiated; she found that the penalty of removal was reasonable in light of the sustained charges and other relevant factors; and she sustained the removal. *Id.* at 49-51.[2]

¶11 The appellant has filed a timely petition for review of the initial decision, and the National Treasury Employees Union has filed an amicus brief in support of that petition. Petition for Review (PFR), PFR File, Tabs 7, 12. The agency has filed timely responses to both the petition and the amicus brief. *Id.*, Tab 16.[3]

ANALYSIS

I. The administrative judge's findings and conclusions on the charges are affirmed.

¶12 As indicated above, the administrative judge did not sustain the first and fourth charges. The agency does not challenge these findings. The appellant does contest the administrative judge's determination that the agency proved the second, third, fifth, and sixth charges.

¶13 The Board "is not free simply to disagree with an administrative judge's assessment of credibility." *Chauvin v. Department of the Navy*, 38 F.3d 563, 566 (Fed. Cir. 1994). Rather, the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002); *accord Walker v. Department of the Army*, 2006 MSPB 207, ¶ 13. Here, the administrative judge's findings on the charges are based either on undisputed facts or, in significant part, on her assessment of the appellant's credibility and the credibility of other witnesses. *See* Initial Decision at 25-26, 29, 39. The appellant has not presented sound reasons for us to revisit those credibility determinations or the resultant findings. We therefore affirm the administrative judge's findings on the charges.

II. The administrative judge was correct to find that the appellant did not make a protected whistleblowing disclosure, although she should have addressed the appellant's fourth claimed protected disclosure.

¶14 It is a prohibited personnel practice for an agency to take or threaten to take a personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences" a "violation of any law, rule, or regulation," or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8). The appellant claims that the agency removed her and took other actions in retaliation for four disclosures: (A) Her November 3, 2003 conversation with a House staffer; (B) her November 20, 2003 interview with the Washington Post reporter; (C) her December 2, 2003 letter to the Director of the

National Park Service; and (D) her December 2, 2003 e-mail to a House staffer.

¶15 The administrative judge found that the first three disclosures were not protected under 5 U.S.C. § 2302(b)(8). She did not address the fourth disclosure, finding instead that the appellant had failed to raise it in her OSC complaint. Initial Decision at 8 n.3. While a disclosure must be raised before OSC in order for it to be considered in an IRA appeal, *see* 5 U.S.C. §§ 1214, 1221, the OSC exhaustion requirement does not apply in the case of a personnel action that may be appealed directly to the Board, such as a removal. *See* 5 C.F.R. § 1209.5(b). Therefore, the administrative judge should have considered whether the fourth disclosure was protected. We find, for the reasons given below, that the appellant did not make a protected whistleblowing disclosure.

A. The appellant's November 3, 2003 conversation with a House staffer

¶16 The appellant spoke to Deborah Weatherly, a House subcommittee staffer, by telephone on November 3, 2003. The appellant made the call to object that the Park Police was being asked by House appropriators to pay for a follow-up study on how much progress the Park Police had made in implementing the NAPA recommendations. According to the appellant's own account of the conversation, Weatherly criticized the appellant for not "straighten[ing] . . . out" the Park Police, which Weatherly said the appellant had been hired to do. The appellant asked for a "chance to be heard," but Weatherly turned her down, saying that it would be "inappropriate" because she was already in close contact with the appellant's superiors at the National Park Service about the situation with the Park Police. Further, according to the appellant, Weatherly told the appellant that if in fact the Park Police was making progress toward implementing the NAPA recommendations, the follow-up study that the appellant had called to complain about could actually improve the appellant's standing. The appellant says that the conversation ended on this "positive" note. *See* IAF (1221), Tab 1 (appellant's response to "Charge 1" at 6-7).

¶17 A communication is not protected under 5 U.S.C. § 2302(b)(8) unless the speaker reveals something to the listener. *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000). Here, the appellant does not claim that she imparted any information to Weatherly at all. *See* 5 U.S.C. § 2302(b)(8) (a disclosure is protected if the employee reveals "information" evidencing one or more types of wrongdoing). The appellant's suggestion that she disclosed to Weatherly that the follow-up study was a gross waste of funds is unconvincing. The study was projected to cost $392,000, IAF (1221), Tab 1 (the appellant's response to "Charge 1" at 2-3); implementing the NAPA recommendations was "important" to House appropriators, IAF (0752), Tab 3, Subtab 4G; and in fact House appropriators mandated the expenditure because they thought it was necessary to determine how well the Park Police was protecting the public from terrorism, *id*.; *see Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994) (an individual discloses a "gross waste of funds" by revealing a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government"). We agree with the administrative judge that this disclosure was not protected.

B. The appellant's November 20, 2003 interview with the Washington Post reporter

¶18 The appellant spoke to a Washington Post reporter on November 20, 2003. About two weeks later, the following article appeared:

Park Police Duties Exceed Staffing

Anti-Terror Demands Have Led
Chief to Curtail Patrols Away From Mall

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."

Today, the force will begin training unarmed guards who will stand watch outside the monuments. It will be the first time in recent memory that guards have performed such duties. The Department of Homeland Security ordered additional protection around the monuments.

In the long run, Chambers said, her 620-member department needs a major expansion, perhaps to about 1,400 officers.

Congressional leaders, however, have urged the Park Police force to refocus on the Mall, cutting back on such activities as drug investigations and traffic enforcement that take them away from National Park Service lands.

* * *

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.

* * *

Chambers said that, because the new requirements have severely stretched her force, many officers have remained on 12-hour shifts, with only limited bathroom breaks for those guarding the monuments. One recent day, Park Police used high-ranking officers, such as majors and captains, to fill in on guard duties.

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.

* * *

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.

"They took the job to be a police officer," Capps said. "If they wanted to be a security guard, they'd go to the Capitol Police, Supreme Court Police."

The Park Police's new force of 20 unarmed security guards will begin serving around the monuments in the next few weeks, Chambers said. She said she eventually hopes to have a combination of two guards and two officers at the monuments.

Though such guards have worked inside the Washington Monument and the White House Visitor Center, Chambers said they had not previously been used outside monuments in place of a police officer.

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.
>
> But leaders in Congress are not inclined to go along. Instead, they have backed a 2001 report by the National Academy of Public Administration, which found that Park Police spent about 15 percent of their time on activities that "often are extraneous to the park service mission."
>
> The study urged Park Police officers to give away some of these duties, such as drug investigations and parkway patrols, to D.C. police or other local and state authorities.
>
> * * *
>
> Chambers said she is not inclined to give away any duties, believing that other police departments would not put the same focus on problems in the parks.
>
> 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, December 2, 2003, page B1 (reproduced at IAF (1221), Tab 9, Subtab 4E).

¶19 The appellant admits that with just one exception (relating to the precise number of guards at monuments), she made the statements attributed to her in the Post article. IAF (1221), Tab 38 (Appellant's Deposition at 30-40). Thus, the appellant publicly disagreed with the choice, made by officials who outrank her after extensive study by experts, to cut back on Park Police patrols along the Baltimore-Washington Parkway, and to reduce Park Police enforcement of traffic and drug laws, in favor of increasing security at monuments and memorials on the mall. Further, the appellant, the highest-level management official at the Park Police, publicly supported the police union's complaints about the change in mission emphasis mandated by Congress and officials in the Department of the Interior who outranked her. The appellant also publicly advocated more than doubling the size of the Park Police force -- whose budget had *already* doubled in the 4 years preceding the appellant's interview with the reporter -- so that parkway patrols and enforcement of drug laws outside the national capital core could continue. She did this knowing that legislative appropriators and executive branch policymakers did not share her view, that they preferred to see the Park Police shed law enforcement activities traditionally performed by state and local police, and that they believed that the massive increase in the Park Police budget over the preceding 4 years had been squandered by poor management.

¶20 The statutory protection for whistleblowers "is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal, professional service from subordinates . . . ." *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). A policy disagreement can serve as the basis for a protected disclosure only if the legitimacy of a particular policy choice "is not debatable among reasonable people." *White v. Department of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004).[4]

¶21 The administrative judge was right to conclude that this case presents a classic

policy disagreement over which reasonable minds might differ, and that as a result, the appellant's interview with the reporter was not protected whistleblowing. The level and allocation of resources generally may impact traffic and crime. Nevertheless, law enforcement is not, and cannot be, omnipresent. Public resources are limited, necessitating choices by policymakers over how to allocate those resources. Every day government officials make judgments that directly or indirectly affect the level of risk to which private citizens, in various contexts, are exposed. An assertion that a particular judgment raises the risk level in one area is not automatically a protected disclosure.

¶22 Rather, under *White*, a statement that a particular policy choice raises risks to the citizenry is protected only if the desirability of the trade-off that the policy choice represents is "not debatable among reasonable people." 391 F.3d at 1382. In the present case, the appellant's statements to the Post reporter do not rise to this level. After the September 11, 2001 terrorist attacks, no one can reasonably claim that beefing up security measures at monuments and memorials along the national mall is an illegitimate use of public resources. While some may disagree with that policy choice, a reasonable person could not conclude that policymakers have no right to make the choice in the first place. Since federal resources are not unlimited, then an individual's disagreement with the trade-off made by policymakers -- to deemphasize Park Police traffic patrols and traditional law enforcement at the periphery of the national capital, in favor of protecting people at the core from terrorism -- is nothing more than that, disagreement.

¶23 Revelation of what a reasonable person would consider an illegitimate choice by policymakers may be protected whistleblowing, but here, a reasonable person could not conclude that the policy choices with which the appellant disagreed were illegitimate. The decisions that displeased the appellant were the result of the lawful, ordinary give and take among executive and legislative officials. This exchange of views is common to the public policy making process. Trying to build support for a particular position in a policy debate, as the appellant did here, is distinct from revealing waste, fraud, abuse, or similar wrongdoing by government officials; Congress only intended to cover the latter situation when it enacted 5 U.S.C. § 2302(b)(8).

¶24 This case thus stands in contrast to *Braga v. Department of the Army*, 54 M.S.P.R. 392, 398 (1992), where a clothing designer disclosed a substantial and specific danger to public health or safety when he reported that the real-world threat levels from anti-personnel mines greatly exceeded the threat levels he had been asked to design body armor systems to meet, and that soldiers relying on that armor for protection would therefore be in grave danger of being killed or maimed. In *Braga*, there was no evidence, as there is here, that the individual who made the disclosure was expressing disagreement with considered judgments reached by policymakers after extensive study and discussion. In the present case, the appellant has not shown that she disclosed a substantial and specific danger to public health or safety, within the meaning of 5 U.S.C. § 2302(b)(8), in her interview with the Post reporter.

¶25 Member Sapin argues that there is no meaningful distinction between this case and *Braga,* but in fact *Braga* is fundamentally different from this case. All indications are that Mr. Braga reasonably believed that the actual risk of injury from anti-personnel mines would be unacceptably high to the officials who were ultimately responsible for

sending troops into battle, were he to design the body armor according to the specifications he was given. Here, by contrast, the appellant expressed her disagreement with what she knew was a considered decision by executive and legislative branch officials to focus Park Police resources on the national capital core area rather than its periphery. The personal opinions that the appellant shared with the newspaper reporter and congressional staffer regarding the funding level and priorities consciously set by policymakers for her agency are quite different from Mr. Braga's revelation of substantial and specific dangers to troops he reasonably believed were unacceptably high.

¶26 For purposes of section 2302(b)(8), "gross mismanagement" means management action or inaction that creates "a substantial risk of significant adverse impact on an agency's ability to accomplish its mission." *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, ¶ 8 (2000). Here, the appellant did not reveal gross mismanagement to the Post reporter. While the appellant may have reasonably believed that the Park Police did not have the resources to accomplish its mission *as she envisioned it*, she did not have the power to decide what her agency's mission should be. Her disagreement with how her agency was being reshaped by policymakers after expert study and input was not a disclosure of gross mismanagement.

¶27 The appellant also did not reveal an "abuse of authority" to the Post reporter. An "abuse of authority" is "an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001) (citations omitted). Here, the appellant has not shown that she reasonably believed that the executive and legislative officials with whom she disagreed were engaged in self-dealing or depriving people of their rights.

¶28 The appellant also has not shown that she disclosed a "gross waste of funds," which, again, is a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Van Ee*, 64 M.S.P.R. at 698. If anything, the appellant believed that not enough funds were being allocated to the Park Police; she has not shown that she reasonably believed she was revealing *wasted* expenditures when she spoke to the Post reporter. Finally, there is no evidence that the appellant disclosed, or that she reasonably believed she disclosed, a "violation of any law, rule, or regulation," the last category described at 5 U.S.C. § 2302(b)(8), when she spoke with the reporter.

C. The appellant's December 2, 2003 letter to the Director of the National Park Service

¶29 The appellant wrote a letter to Fran Mainella, the Director of the National Park Service, complaining that Don Murphy, the Deputy Director of National Park Service, had "slandered" her in unspecified ways. She also complained that Murphy had provided the agency personnel office with a copy of a letter of reprimand he had issued to the appellant in March 2003 for improper use of a government vehicle. According to the appellant's letter to Mainella, Murphy had promised to keep the reprimand "confidential." *See* S-1 File, Tab 1, Ex. 74. In her OSC complaint, the appellant claimed that she disclosed Murphy's "abuse of authority" to Mainella. IAF (1221), Tab 1 (att.).

¶30 As to the supposed "slanderous" comments, the appellant's letter to Mainella

never actually specified how Murphy slandered her. Based on other documents in the record, it appears that the appellant was displeased that in a conference call with several Department of the Interior officials on or about November 27, 2003, Murphy blamed the Park Police's budget problems on the appellant's lack of cooperation. *See* S-1 File, Tab 1, Ex. 65. Such a remark is hardly an "abuse of authority," and indeed, all indications are that Murphy believed what he said in good faith.

¶31 As to Murphy's provision of a copy of the reprimand to the personnel office, the appellant does not clearly explain why she thinks Murphy abused his authority in doing what he did. *See Wheeler*, 88 M.S.P.R. 236, ¶ 13 (an abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons"). It is undisputed that the appellant repeatedly violated agency rules by using her government vehicle for personal trips to North Carolina on weekends, and that she condoned similar violations by her subordinate employee. IAF (1221), Tab 9, Subtab 4N. The appellant's reliance on Murphy's assurance that the reprimand would remain "confidential" apparently reflects a misunderstanding on her part. The episode was "confidential" in that it was a personnel matter that Murphy was not free to discuss openly with others who did not have a need to know, but it does not appear that Murphy went to the trouble of drafting a detailed written reprimand only to hide the reprimand from the personnel office. Murphy made the reprimand part of the appellant's record, and there is no indication that as the appellant's superior he lacked the authority to do so. We find, in the alternative, that even if Murphy did promise the appellant that he would keep the reprimand a secret from the personnel office, the appellant's allegation that he broke his promise was not a disclosure of any of the kinds of wrongdoing described at 5 U.S.C. § 2302(b)(8).

D. The appellant's December 2, 2003 e-mail to a House staffer

¶32 The appellant sent an e-mail to House staffer Weatherly on the day that the Post article was published. The e-mail simply reiterated the appellant's statements to the Post reporter about the Park Police budget and deployment decisions with which she disagreed. *See* IAF (1221), Tab 9, Subtab 4I (the appellant warns of a "staffing and resource crisis" at the Park Police). This disclosure was not protected, for the reasons stated in Part II.B. above. Here too, what the appellant said to Weatherly was an expression of policy disagreement. It was not a disclosure of a substantial and specific danger to public health or safety, nor was it a disclosure of any of the other conditions described at 5 U.S.C. § 2302(b)(8).[5]

III. The administrative judge was correct to conclude that the appellant failed to make out her First Amendment defense.

¶33 A public employee, like all citizens, enjoys a constitutionally protected interest in freedom of speech. *Connick v. Myers*, 461 U.S. 138, 149 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Employees' free speech rights must be balanced, however, against the need of government agencies to exercise "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Mings v. Department of Justice*, 813 F.2d 384, 387 (Fed. Cir. 1987). Thus, in determining the free speech rights of government employees, a balance must be struck between the interest of the employees, as "*citizens*," in commenting on matters of public concern, and the interest of the government, as an

employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568 (emphasis supplied).

¶34 The charges that remain contested on review and to which the appellant's First Amendment claim applies are charge (2), making public remarks regarding security on the federal mall, in parks, and on the parkways in the Washington, D.C., metropolitan area, and charge (3), improperly disclosing budget deliberations to a Washington Post reporter. With regard to charge (2), the appellant admitted that she discussed security on the mall, in parks, and on parkways with the Washington Post reporter. Specifically, she admitted that she told the reporter that the Park Police had reduced parkway patrols from four officers to two; that in light of staffing levels, the Park Police could not adequately protect "green spaces" under Park Police jurisdiction; and that she hoped eventually to have a combination of two guards and two police officers at the monuments on the mall. With regard to charge (3), the agency proved that the appellant told the reporter that she was seeking an additional $8 million in funding for the Park Police, at a time when OMB rules imposed a "blackout" on public discussion of impending budget deliberations.

A. The appellant's First Amendment claim fails under recent precedent.

¶35 After the appellant filed her petition for review, the Supreme Court ruled as follows in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006):

> [W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. . . . Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

The administrative judge found that the appellant was not speaking as a citizen when she made the statements for which she claims First Amendment protection. Initial Decision at 45. We agree. Those statements were made pursuant to the appellant's official duties as she perceived them, and in fact the appellant expressly objected to the so-called "gag order" imposed after the Post article was published on the ground that it was her job to talk to the press about agency affairs. Accordingly, the appellant's First Amendment claim fails under *Garcetti*.

B. The appellant did not prove her First Amendment claim under the prevailing law when the initial decision was issued.

¶36 The *Garcetti* decision was issued after the appellant filed her petition for review, and as a result the parties submissions on review do not address it. Accordingly, we also find, in the alternative and for the reasons given below, that the appellant's First Amendment claim fails under pre-*Garcetti* law as well.

¶37 A law enforcement officer's First Amendment rights are much narrower than those of other kinds of public employees. *O'Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998); *McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985); *Jurgensen v. Fairfax County, Virginia*, 745 F.2d 868, 880 (4th Cir. 1984); *Kannisto v. City & County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976). The First Amendment rights of a Chief of Police are even more limited than the narrow rights of rank and file officers. *Bonds v. Milwaukee County*, 207 F.3d 969, 980-82 (7th Cir. 2000); *Green v. City of Montgomery*, 792 F. Supp. 1238, 1261-62 (M.D. Al. 1992). The

reason for allowing greater restraints on the speech of law enforcement officers than on other kinds of public employees is that law enforcement work requires: A high degree of discipline and harmony among officers; confidentiality; protection of close working relationships that require loyalty and confidence; minimal disruption to the public safety mission; and fostering uniformity and esprit de corps. *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000); *Bennett v. City of Holyoke*, 230 F. Supp. 2d 207, 225 (D. Mass. 2002), *aff'd*, 362 F.3d 1 (1st Cir. 2004); *Pierson v. Gondles*, 693 F. Supp. 408, 413 (E.D. Va. 1988).

¶38 In *Armstrong v. City of Arnett*, 708 F. Supp. 320 (E.D. Ok. 1989), a city's Board of Trustees fired the Chief of Police based in part on his public disagreement with them over how the police department should operate. The court found that the operation of the police department was a matter of public concern, but concluded that the Chief's free speech interests were outweighed by the Trustees' interest in having a loyal department head. According to the court, the Trustees were justified in firing the Police Chief because they "had no confidence" that he would carry out the law enforcement policies established by the Trustees.

¶39 A similar result was reached in *Dicks v. City of Flint*, 684 F. Supp. 934 (E.D. Mich. 1988), where a deputy city administrator who was in line to become Chief of Police claimed that his First Amendment rights were violated when the mayor chose not to appoint him as Chief, because he had publicly disagreed with the mayor's staffing plan for the police department. The court found that the deputy city administrator's statements involved a matter of public concern, but concluded that his free speech interests were outweighed by the mayor's interest in having a Chief of Police who would carry out the mayor's policies. The court noted that the deputy city administrator's statements undermined the mayor's authority, and that as Chief of Police, he would have been in a position to hinder the mayor's lawfully-adopted policies.

¶40 In the present case, the appellant's statements about Park Police patrols and its budget addressed matters of public concern. *See, e.g., Campbell v. Towse*, 99 F.3d 820, 827-28 (7th Cir. 1996). Nevertheless, consistent with the decisions cited above, the agency had an overriding interest in not having the Chief of the Park Police publicly question decisions made by officials who outranked her concerning the functions and budget of the Park Police. *See Bonds*, 207 F.3d at 979-82 (county did not violate the plaintiff's First Amendment rights when it rescinded a job offer it had made to him because he had publicly criticized the county board's allocation of block grant funds; the county was within its rights to conclude that the criticism undermined the plaintiff's credibility with county supervisors, created the appearance of disloyalty, and could foment "workplace dissension"); *Moore v. City of Wynnewood*, 57 F.3d 924 (10th Cir. 1995) (city did not violate First Amendment rights of deputy chief of police when it demoted him for publicly criticizing another officer and suggesting that the police department's "image problem" led to a "riotlike" situation).

¶41 The public's interest in learning about "corruption" or "wrongdoing" by government officials will usually foreclose discipline against a public employee who reveals such activities, even when the speaker is a law enforcement officer with limited First Amendment rights. *See McGreal v. Ostrov*, 368 F.3d 657 (7th Cir. 2004). Here, though, it is beyond far-fetched to say that the appellant revealed corruption or wrongdoing by legislative and executive branch officials who, after

extensive study by experts, acted within their authority to formulate a particular budget and staffing scheme for the Park Police. The First Amendment did not shield the appellant from discipline because "[h]igh-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superiors' policies, and perceived by the public as sharing their superiors' aims." *Hall v. Ford*, 856 F.2d 255, 263 (D.C. Cir. 1988).

¶42 In sum, we agree with the administrative judge's conclusion that the appellant did not make out her First Amendment defense.

IV. The administrative judge was correct to conclude that the penalty of removal is reasonable.

¶43 The administrative judge gave a complete analysis of the penalty, which we need not repeat here and with which we agree. In brief, removal is a reasonable penalty, considering, among other factors, the position of great trust that the appellant held as the head of a law enforcement agency, *see Fischer v. Department of the Treasury*, 69 M.S.P.R. 614, 619 (1996); *Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990); her repeated breach of that trust in the various instances of misconduct; her lack of remorse and poor potential for rehabilitation; her prior discipline for her own misuse of a government vehicle and condonation of such misuse by a subordinate; and the deciding official's justifiable loss of confidence that the appellant, if retained, would faithfully carry out her duties in accordance with the priorities set by Congress and higher-level executive branch officials.

ORDER

¶44 The initial decision is AFFIRMED as modified herein. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website,

http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Washington, D.C

/s/
Bentley M. Roberts, Jr.
Clerk of the Board

DISSENTING OPINION OF BARBARA J. SAPIN

in

Teresa C. Chambers v. Department of the Interior

MSPB Docket Nos. DC-1221-04-0616-W-1 and DC-0752-04-0642-I-1

¶1 In an interview published in the Washington Post on December 2, 2003, the appellant, then Chief of the U.S. Park Police (USPP), expressed concerns about insufficient staff and declining safety in the parks and parkways. She stated that her "greatest fear [was] that harm or death [would] come to a visitor or employee at one of our parks." Dec. 2 Post Article, Appeal File, Docket No. DC-1221-04-0616-W-1 (IRA File), Tab 9, Subtab 4e. On the day this interview was published, the agency ordered the appellant not to grant any more interviews without prior clearance from her superiors. On December 5, the agency placed the appellant on administrative leave pending a review of her conduct and on December 17, proposed her removal. On July 9, 2004, the agency issued a decision removing the appellant.

¶2 It is undisputed that the appellant's statements in the Washington Post interview were a contributing factor in the agency's actions against her. The central dispute is over whether the appellant's statements are a disclosure of information that she "reasonably believes evidences … a substantial and specific danger to public … safety" under the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302 (b)(8). The majority finds that the statements are not protected disclosures because they simply reflect a policy disagreement, and that the budget-related decisions that led to the allegedly unsafe conditions disclosed by the appellant represented legitimate choices made by authorized policymakers. I disagree with imposing this policy analysis on disclosures concerning public safety. Because policy is routinely involved in public safety matters, this analysis could take virtually any disclosure concerning public safety outside the protection of the WPA. Yet, surely Congress intended to protect covered employees from reprisal for expressing reasonably based concerns about substantial and specific danger to public safety regardless of how that perceived danger came about. For the reasons stated below, I find that the appellant's statements are protected disclosures; that her removal, her placement on administrative leave, and the agency's order restricting her communications with the news media constitute reprisal for those disclosures; and that the agency has not proven the charges and specifications sustained by the administrative judge.

Protected Disclosures of Safety-Related Information

¶3 Under 5 U.S.C. § 2302(b)(8), an agency may not take a personnel action in reprisal for the employee's disclosure of information that she "reasonably believes evidences … a substantial and specific danger to public … safety." For the reasons stated below, I would find that the appellant made protected disclosures in the statements she made to the Post reporter on the occasion mentioned above and in the e-mail message she sent to a congressional subcommittee staff member on December 2, 2003.

Disclosures to the Washington Post

¶4 As the majority opinion indicates, the appellant stated to the Post reporter that USPP had "been forced to divert patrol officers to stand guard around major

monuments"; that this diversion contributed to "declining safety in parks and on parkways"; that traffic accidents had increased on a parkway for which USPP was responsible; that resource problems had led to complaints "that homeless people and drug dealers [were] again taking over smaller parks"; that there were not enough USPP personnel "to go around to protect [areas for which USPP was responsible] anymore"; that USPP personnel needed to be more than doubled "[i]n the long run"; that many officers had "remained on 12-hour shifts"; that additional funding was needed to correct these problems; and that her "greatest fear [was] that harm or death [would] come to a visitor or employee at one of our parks …." Dec. 2 Post Article, IRA File, Tab 9, Subtab 4e.[6] She also provided statistical information supporting her statements regarding the increased rate of traffic accidents, as well as information on the declining number of arrests USPP had been making. *Id.*

¶5 At least some of the information the appellant conveyed to the Post reporter was a matter of public record. Nothing in the file on this case, however, suggests that the public was generally aware of the effects of resource constraints on the public safety matters addressed in the remarks quoted above. The Post's publication of the article, and the other media attention that followed this publication, provide further evidence that the appellant's statements to the reporter disclosed information not previously known to the general public. *See* IRA File, Tab 28, Agency Exhibit 5 (transcript of radio report, Dec. 4, 2003). I would find, therefore, that those statements constituted a "disclosure," as that term is used in connection with 5 U.S.C. § 2302(b)(8). *See Horton v. Department of the Navy*, 60 M.S.P.R. 397, 402 (1994), *aff'd*, 66 F.3d 279 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996). Moreover, whether it was "an attempt to pressure the agency" or others for an increase in the budget, as the administrative judge found, Initial Decision at 15, IRA File, Tab 46, is immaterial, since it is the nature of the disclosure, and not the employee's motivation in making it, that determines whether the disclosure is protected. *See Horton*, 66 F.3d at 282-83.

¶6 I also note that the potential dangers identified in the appellant's statements – including fatalities and other harm that traffic accidents and increased drug-related crimes could cause to visitors and others in federal parks – are substantial. Moreover, the statements in the Post article that are quoted or described above show that the appellant identified with a considerable degree of specificity the circumstances that she believed increased those dangers. *See* S. Rep. No. 95-969, at 21 (1978) (statement, in report on legislation proposing section 2302(b)(8), that "general criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected," but that "an allegation by an Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections"). The disclosures therefore meet the requirement of 5 U.S.C. § 2302(b)(8) that the danger to public safety that is believed to be evidenced by a disclosure be "substantial and specific."

¶7 Finally, the record shows that the appellant's belief that she was disclosing evidence of a danger to public safety was reasonable. Two reports the agency's Office of the Inspector General issued shortly before the appellant was interviewed by the Post reporter address security issues in the "icon parks" for which the National Park Service (NPS) was responsible. *See* IRA File, Tab 25, Exhibit (Ex.) O, Ex. X. While the reports reflect concerns about the manner in which USPP was managing the

resources it had been given, they also reflect safety concerns similar to those expressed by the appellant. *See* IRA File, Tab 25, Ex. O at 2 (the assessment that was the subject of the report "certainly raises grave concerns for the security and public safety at [certain NPS] facilities"); *id.* at 16-17 (expressing "concern about the long-term effectiveness of the protection staff and the officers who operate under … intense conditions," such as those requiring them to work 12-hour shifts for extended periods). The testimony of various officials familiar with park security issues also indicates that the appellant's concerns about the adequacy of USPP resources were reasonable. For example, Craig Manson, the Assistant Secretary for Fish, Wildlife, and Parks, testified that the risk of a terrorist attack on the national monuments was "a real risk," and not an imagined one, Manson Deposition at 264, IRA File, Tab 42; and Donald Murphy, the appellant's immediate supervisor and the Deputy Director of NPS, acknowledged that a change in "police staffing to patrol the highways" could have an impact on traffic safety and even traffic deaths, Hearing Transcript for Sept. 8, 2004 (HT-1) at 122.

¶8 For the reasons stated above, I would find that the appellant reasonably believed that the statements she was making to the Post reporter evidenced a substantial and specific danger to public safety, and that those statements accordingly are protected under 5 U.S.C. § 2302(b)(8). *See Braga v. Department of the Army*, 54 M.S.P.R. 392, 398 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table); *Gady v. Department of the Navy*, 38 M.S.P.R. 118, 121 (1988) (a librarian's complaint that an agency policy allowing smoking in the library threatened the health of the staff and constituted a fire hazard was a protected disclosure under section 2302(b)(8)).

Disclosures to Congressional Staff Member

¶9 The appellant also alleges that she made protected disclosures in her e-mail message of December 2, 2003, to a congressional subcommittee staff member. As the majority has indicated, the administrative judge declined to determine whether that message was protected, stating that doing so was unnecessary because the appellant had not shown that she had exhausted her administrative remedy by bringing the matter to the attention of the Office of Special Counsel (OSC). Initial Decision at 8 n.3. I agree with the majority that the appellant was not required to exhaust her OSC remedy in order to have the Board consider this disclosure in connection with her removal. I do not concur, however, in the majority's finding that the disclosure was not protected.

¶10 Some of the content of the December 2 message overlaps with the disclosures the appellant made to the Post reporter. December 2 E-Mail Message, IRA File, Tab 9, Subtab 4i at 1. If the recipient of the message had already read the Post article by the time she read the message, the appellant could not be said to have disclosed this overlapping information to her. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001) (the term "disclosure" means, in the context of 5 U.S.C. § 2302(b)(8), "to reveal something that was hidden and not known"). However, the e-mail message includes other information that was not included in the Post article. For example, it includes more specific information about the effects of 2005 funding levels on the ability to fund hiring, about the effect this could have on staffing levels, about the level of patrol staffing on a parkway other than the one mentioned in the Post article, and about the effects this staffing level had had on enforcement of laws against drunk driving. December 2 E-Mail Message at 1-2. This

information, like the information the appellant provided to the Post reporter, was not generally known; it concerned matters that could have substantial and specific effects on public safety; and documentary and testimonial evidence indicates that the appellant's belief that those matters posed a public safety threat was reasonable. I therefore would find that the appellant made protected disclosures in her December 2 e-mail message.

Reliance on *White and Braga*

¶11 In finding that the appellant in this case made no protected disclosures, the majority relies on *White v. Department of the Air Force*, 361 F.3d 1379 (Fed. Cir. 2004). *See* Majority Opinion ¶¶ 20-23 & n.4. Specifically, it describes the *White* court as holding that a "policy disagreement can serve as the basis for a protected disclosure only if the legitimacy of a particular policy choice 'is not debatable among reasonable people.'" *Id.* ¶ 20. The majority finds that the budget-related decisions that led to the allegedly unsafe conditions described by the appellant in her interview with the Washington Post reporter represented legitimate choices made by authorized policymakers, and states that they "were the result of the lawful, ordinary give and take among executive and legislative officials." *Id.* ¶¶ 21-23.

¶12 As the majority acknowledges, the *White* court stated the holding described above while addressing a claim that the employee had disclosed information he reasonably believed evidenced gross mismanagement; it was not addressing a claim that he had disclosed information evidencing a danger to public safety. *Id.* ¶ 20 n.4; *White*, 361 F.3d at 1381-84. Although the majority asserts that "the *White* analysis is equally applicable" to this appellant's statements regarding public safety, ¶ 20 n.4; it provides no support for this assertion, and none is apparent to me. Moreover, I note that the holding on which the majority relies is expressly limited to disclosures of information allegedly believed to evidence gross mismanagement. *See White*, 391 F.3d at 1382 ("for a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people") (emphasis added). The court also specifically stated that the requirement that differences of opinion concerning policy matters be "non-debatable … does not, of course, apply to" a certain other category of disclosures protected under 5 U.S.C. § 2302(b)(8), i.e., disclosures of information allegedly evidencing violations of law, rule, or regulation. *Id.* at 1382 n.2.

¶13 The *White* court did not refer specifically to the kind of disclosures addressed here, i.e., to public-safety-related disclosures. Its reasoning, however, suggests that those disclosures also are outside the reach of the holding on which the majority relies. That reasoning is based largely on the history of the "gross mismanagement" provision. That is, the court noted that 5 U.S.C. § 2302(b)(8) had in the past protected disclosures of information the employee reasonably believed evidenced "mismanagement," and that in 1989 Congress had amended the provision by limiting its coverage to "gross mismanagement." *Id.* at 1381-82. The holding on which the majority relies therefore appears to reflect the court's understanding of the effect on the "gross mismanagement" provision of the addition of the term "gross" as requiring a more restrictive interpretation of mismanagement. Under these circumstances, I see no basis for applying the *White* holding to disclosures related to public safety dangers.

¶14 The majority also attempts to distinguish the present case from *Braga*, 54

M.S.P.R. at 398, in which the Board found that 5 U.S.C. § 2302(b)(8) protected an employee's expression of his concern that the equipment he had been asked to design would not protect soldiers from death or maiming. According to the majority, *Braga* differs from the present case in that the record in *Braga* did not include "evidence … that the individual who made the disclosure was expressing disagreement with considered judgments reached by policymakers after extensive study and discussion." Majority Opinion ¶ 24.

¶15 I see nothing in *Braga* that suggests that the agency did not give sufficient consideration to the equipment standards the employee in that case considered inadequate. That decision simply includes no information at all about the extent of the "study and discussion" that led the agency to set the standards the employee considered inadequate. *Braga* also includes no information about the soundness of the policies on which the equipment standards presumably were based.

¶16 There is a very good reason for the absence of this information from the Board's decision in *Braga*. By enacting the public-safety-related provision of 5 U.S.C. § 2302(b)(8), Congress was not seeking to empower employees to overturn inadequately considered or unwise decisions and policies made by the executive or legislative branches of the federal government. It also was not authorizing the Board to evaluate the wisdom of management decisions and policies or the sufficiency of the deliberations that led to them. *See Garrison v. Department of Defense*, 101 M.S.P.R. 229, ¶ 8 (2006) (an employee need not prove that the information he disclosed established wrongdoing of a kind listed in 5 U.S.C. § 2302(b)(8)). Instead, its purpose was to enable employees to disclose information they believed provided evidence of public safety dangers without suffering reprisal for their statements.

¶17 The majority's holding in this case is not consistent with this purpose. It indicates that employees such as the appellant in the present case must show not only a reasonable belief that the information they disclosed evidenced substantial and specific dangers to public safety, but also that their agencies or other responsible authorities failed to give adequate consideration to matters related to the alleged danger. This additional requirement – which has no basis in statute, legislative history, or case law – can only discourage employees from making the disclosures Congress sought to encourage them to make. *See* S. Rep. 100-413, at 13 (1988) ("The [Senate] Committee [on Governmental Affairs] intends that disclosures be encouraged."); *id.* ("The [Office of Special Counsel (OSC)], the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing."). Moreover the effects of the majority's holding could be significant. Policy decisions underlie virtually all matters at issue in disclosures related to public safety dangers, and even the most extensive and thorough consideration cannot preclude any possibility of substantial and specific dangers to public safety.

Personnel Actions

¶18 In an IRA appeal, an employee may challenge an action that meets the definition of a "personnel action" in 5 U.S.C. § 2302(a)(2)(A). *See Arauz v. Department of Justice*, 89 M.S.P.R. 529, ¶ 4 (2001). That definition includes "any … significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xi).

¶19 The administrative judge found that the appellant's placement on administrative

leave was a "personnel action" that could be the subject of an individual right of action (IRA) appeal. The agency has not challenged that finding, and I see no error in it. The administrative judge also found, however, that the "gag order," in which Mr. Murphy instructed the appellant not to grant any more interviews without his prior approval or that of his own immediate supervisor, Fran Mainella, was not a personnel action. I would find, for reasons stated below, that this action constituted a personnel action.

¶20 The record includes persuasive evidence that the appellant had not been expected to obtain prior approval of her supervisors before participating in interviews. Not only did the appellant testify at the hearing that she "spoke to the press on a regular basis," Hearing Transcript for Sept. 9, 2004 (HT-2) at 154, but her testimony is supported by her position description, which describes her as being responsible for making "statements clarifying or interpreting Service or Force policies and objectives through speeches … and the news media," IRA File, Tab 25, Ex. MM at 3. The agency also has asserted the appellant "was required … to have frequent contact with Congressional staff, the media, and other law enforcement entities," and it has referred repeatedly to the appellant as "an Agency spokesperson," Appeal File, Docket No. DC-0752-04-0642-I-1 (752 File), Tab 3, Subtab 1 at 15, 18, 19. In addition, the record shows that the appellant carried out this responsibility in a largely independent manner. John Wright, the agency's senior public affairs officer, indicated that he was "not aware that there was anything that would have precluded" the appellant from engaging in interviews with the media. Wright Deposition at 99-100, IRA File, Tab 43; *see also* 752 File, Tab 3, Subtab 1 at 18 (agency's statement, in addressing the appellant's communications responsibilities, that the appellant "was required to work, to a large extent, independently").

¶21 In addition, I note that the December 2 "gag order" seems to have had an almost immediate effect on the appellant's duties and responsibilities. The morning after it was issued, the appellant asked for permission to participate in a live television interview on the Ellipse regarding the Pageant of Peace. IRA File, Tab 43 at 13 (e-mail message from the appellant to Murphy). Although the appellant has indicated without contradiction that such interviews were conducted by the same television station every year, Mr. Murphy denied the request by return e-mail message, stating only, "The prohibition on interviews includes all interviews, this one requested by channel 9 may not be granted." *Id.*

¶22 In light of the evidence described above, I would find that the appellant was responsible for communicating with the news media on a regular basis, that she routinely did so without prior approval, that the imposition of a requirement that she obtain advance approval for such communications was a significant change in her duties and responsibilities, and that the imposition of the December 2 order therefore is a personnel action subject to review in an IRA appeal.

Contributing Factor

¶23 Even though she had not found any of the appellant's disclosures protected, the administrative judge found that the appellant could show that the statements that were reported in the December 2 newspaper article were a contributing factor in the appellant's placement on administrative leave and in her removal. Initial Decision at 15-16. She based this finding on the timing of the actions in relation to the disclosure, and on evidence that Mr. Murphy was aware of the appellant's statements to the

reporter at the time he placed the appellant on administrative leave and proposed her removal. *Id.* at 15. The agency has not challenged this finding in a cross petition for review, and I see no error in it.

¶24 I have noted above that I would find the appellant's disclosures in her December 2 e-mail protected. Because the appellant did not exhaust her OSC remedy with respect to those disclosures, I would not reach the issue of whether they were a contributing factor in the appellant's "gag order" or her placement on administrative leave. I would, however, find that the disclosures the appellant made to the Post reporter were a factor in the "gag order." There is no doubt that Mr. Murphy was aware, at the time he issued that order, of the disclosures that were described in the December 2 Post article. In his order, he told the appellant that she was not to "reference the President's 05 budget under any circumstances." IRA File, Tab 9, Subtab 4f. In a follow-up e-mail on the same day Mr. Murphy advised the appellant that the "reference to the 05 budget was made in the second column of the" December 2 Post article. Clearly, Mr. Murphy's reference in the "gag order" to "the President's 05 budget" was prompted by the Post article.

¶25 The appellant's December 2 e-mail message which was issued shortly before Mr. Murphy proposed the appellant's removal was a contributing factor in that removal. The record shows that Mr. Murphy was aware of the message at the time he proposed the removal. The record includes a copy of an e-mail message the subcommittee staff member mentioned above sent to Mr. Murphy on December 4, 2003, referring to an e-mail message the appellant had sent her "[j]ust the other day …." IRA File, Tab 9, Attachment 2. The staff member acknowledged in her hearing testimony that the message to which she was referring was "[p]erhaps" the December 2 message from the appellant; and the description of the message she provided to Mr. Murphy leaves little room for doubt that she was referring to that message. *See id.* (describing the message from the appellant as one in which the appellant "requests more money and staff and contends that most of the NAPA recommendations have been implemented");[7] HT-1 at 243.

¶26 The record does not appear to show whether Mr. Murphy had received or read a copy of the appellant's December 2 e-mail message by the time he took the actions mentioned above. The staff member's December 4 message to Mr. Murphy refers to the content of the appellant's message, however; it is quite critical of the appellant; and it includes a statement that the "Committee has been extremely generous in increasing the National Park Police budget over the last several years …." *Id.* I would find that these statements were sufficient to put Mr. Murphy on notice that the appellant had communicated her dissatisfaction with funding to the staff member, and that Mr. Murphy's receipt of the December 4 e-mail message 13 days before he proposed the appellant's removal therefore is sufficient to establish that the appellant's disclosures to the subcommittee staff member were a contributing factor in her removal. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995) (an employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that 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), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

Clear and Convincing Evidence

¶27 When an employee has established that her protected disclosures were a contributing factor in personnel actions taken against her, the Board will order corrective action with respect to those personnel actions unless the agency proves, by clear and convincing evidence, that it would have taken the same actions in the absence of the disclosures. *See* 5 U.S.C. § 1214(b)(4)(B). As the majority notes, Majority Opinion ¶ 10, the administrative judge found that the agency had presented sufficient proof that it would have done so. She based this finding primarily on the agency's evidence supporting the charges against the appellant, most of which she sustained. *See* Initial Decision at 16-17.

¶28 I would find that the agency has failed to present clear and convincing evidence that it would have removed the appellant in the absence of her disclosures. One of the bases for this finding is the absence of persuasive evidence that the appellant engaged in the misconduct with which she was charged. As I have explained below, the agency has simply failed to support any of its charges and specifications by preponderant evidence.

¶29 In affirming the administrative judge's findings regarding the merits of the charges and specifications, the majority states that those findings "are based either on undisputed facts or, in significant part, on her assessment of the … credibility" of the appellant and other witnesses. Majority Opinion ¶ 13. The majority also cites *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002), and other cases in support of the proposition that "the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing," and that it "may overturn such determinations only when it has 'sufficiently sound' reasons for doing so." Majority Opinion ¶ 13.

¶30 This case differs from *Haebe*. The findings at issue here are not based on the administrative judge's observation of any witness's demeanor. Although the administrative judge expressly made credibility findings four times in the initial decision, two of those findings applied partly or entirely to the credibility of testimony provided in a deposition – a proceeding the administrative judge could not have observed. *See* Initial Decision at 29, 39. Moreover, to the extent the administrative judge relied on hearing testimony, her findings were expressly based on the alleged consistency or inconsistency of that testimony with other statements. *See, e.g., id.* at 22, 29.[8] Because neither these nor any other findings in the initial decision were based – either expressly or implicitly – on the administrative judge's observation of any witness testifying before her, neither *Haebe* nor any other authority on which the majority relies supports the deference the majority gives to those findings.

Charge 2

¶31 The first charge the administrative judge sustained is charge two, i.e., making public remarks regarding security in public areas. Initial Decision at 23-26. This charge is based on the interview with the Post reporter that is addressed above. *See* Proposal Notice at 2, 752 File, Tab 3, Subtab 4c. Specifically, the agency alleged that the appellant had said, as reported in the Post, that "traffic accidents ha[d] increased on the Baltimore-Washington Parkway, which now often ha[d] two officers on patrol instead of the recommended four"; that there were "not enough of us to go around to protect [the Park Service's] green spaces anymore"; that USPP's "new force of 20

unarmed security guards [would] begin serving around the monuments in the next few weeks"; and that she "eventually hope[d] to have a combination of two guards and two officers at the monuments." *Id.*

¶32 In her initial decision, the administrative judge noted the appellant's allegation that the reporter had mischaracterized her statement regarding the number of unarmed security guards who would be serving at monuments, and her assertion that she had not indicated that there would be only 20 such guards. Initial Decision at 25. The administrative judge also noted, however, that the record included a declaration in which Mr. Wright, who had contacted the reporter who wrote the newspaper article mentioned above, stated that the reporter had said that the Post stood behind its story. She stated further that the appellant had failed to support her own allegations by calling corroborating witnesses such as the reporter and Scott Fear, USPP's press officer who was the other agency official present during the reporter's interview of the appellant. *Id.* at 25-26. Based on these considerations, the administrative judge concluded that the appellant had made all the statements the agency attributed to her in connection with this charge. *Id.*

¶33 The appellant's failure to call the reporter or Mr. Fear does not serve as a proper basis for the adverse inference that seems to have been drawn against her. The agency has the burden of proving the charge against the appellant. *See* 5 U.S.C. § 7701(c)(1). The agency also had an opportunity to call Mr. Fear and the reporter, and it failed to call either of them. Under circumstances such as these, the appellant's failure to call these witnesses is irrelevant. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 82 (1981); *see also Bradley v. Department of Veterans Affairs*, 78 M.S.P.R. 296, 299 (1998) (where the absence of a witness affects the probative weight of the agency's evidence, the appellant's failure to call the witness is irrelevant).

¶34 I also note that the appellant, during her deposition, testified under oath that the statement in the newspaper article that she had said that 20 unarmed security guards would be serving at national monuments was inaccurate. Appellant's Deposition at 38-39, IRA File, Tab 38. She testified further that the information she was reported to have provided was in fact inaccurate, that "many, many more" would be needed because of the need for 24-hour protection of the monuments, and that the figure of 20 represented the number of guards who were in training that week alone. *Id.* at 39.

¶35 The agency has not challenged the accuracy of the appellant's assertion that the statement attributed to her was factually incorrect; it has not denied that the appellant knew that such a statement would be incorrect; and the appellant's statement regarding the need for a far greater number of guards seems reasonable. These circumstances raise significant doubts about the accuracy of the statement attributed to the appellant.

¶36 I note further that the Wright declaration on which the administrative judge relied provides little support for the agency's claim that the reporter quoted the appellant accurately with respect to the particular statement at issue here. That declaration indicates only that the reporter "stated that he had accurately quoted [the appellant] and that The Washington Post stands behind what was written in the December 2, 2003, story." Wright Declaration, IRA File, Tab 43, Ex. 1 at 1-2. However, Mr. Wright indicated in his deposition that he had not "go[ne] into the details of" the alleged statement at issue here. He testified that, when he tried to question the reporter further concerning the appellant's statements, the reporter declined to provide

further information and referred Mr. Wright to his editor. Wright Declaration at 53-54. Mr. Wright testified further that the editor declined to provide any answers to his questions. *Id.* at 54-55. It is apparent, therefore, that the reporter declined to answer any specific questions about the accuracy of the particular statement at issue here.

¶37 Under the circumstances described above, I would find that the agency has not shown by preponderant evidence that the appellant disclosed the number of unarmed security guards who would "begin serving around the monuments in the next few weeks."

¶38 The appellant has acknowledged making the other statements attributed to her. Appellant's Deposition of Aug. 18, 2004, at 38-39, IRA File, Tab 38. The agency has argued that the information the appellant provided could not be gathered easily, and that doing so would require "a reconnaissance … done by someone on foot day and night to observe at what times and places the officers, armed and unarmed, were present or would be present …." Hearing Transcript for Sept. 14, 2004 (HT-3) at 80. The appellant is not alleged to have provided any information about variations in staffing levels at different times, however, and she was not charged with disclosing information about the extent to which the agency employed plainclothes personnel. Instead, she was charged, in connection with the last of the four statements quoted above, with providing only general information about the presence of certain categories of personnel whose uniforms would make them visible to members of the public who visited the monuments. Moreover, she referred only to the numbers of those uniformed personnel she "eventually hope[d] to have."[9]

¶39 While the appellant provided somewhat more specific information regarding the number of police officers patrolling the Baltimore-Washington Parkway, I am not persuaded, that the information she provided had the effect that the agency alleges, i.e., the effect of "clearly indicat[ing] to those who are disposed to break the traffic laws [that they] need only count [the] two officers [patrolling] and then feel free on that parkway to do … whatever they chose to do, knowing that the likelihood that any other officer would be patrolling is remote," HT-3 at 81. Rather than identifying the number of officers who were on patrol duty at any given time of the day, the appellant said only that there "often" were two officers patrolling the road. This information would appear to be no more helpful to potential lawbreakers than information other agency officials have provided to the news media. *See, e.g.*, 752 File, Tab 3 (agency response to appellant's appeal), Subtab 4m at 97 (newspaper report in which the appellant's predecessor is described as saying that USPP radio frequencies were not secure, and that officials suspected that protesters had jammed their frequencies); *id.* at 184 (news report in which agency law enforcement officials are said to have indicated that only two law enforcement rangers were on duty at a time in the agency's Indiana Dunes park); *id.* at 187 (news report, based on information provided by acting chief ranger of Shenandoah National Park, that "rangers are often on their own inside the park borders," and that the "park's antique radio system is riddled with dead zones, so if a ranger needs help, he may not have the opportunity to ask for it"); *id.* at 189 (report, based on information provided by Park Service ranger, that the ranger "sometimes patrols half a million acres by himself," and the area where he worked was "a great place for people to cross with drug loads and illegal aliens because we have so few people and so many miles to patrol"). Nothing in the record

indicates that the agency viewed any of these statements by other officials to be improper.

¶40 The remaining two statements by the appellant are no more damaging to the agency's security efforts than the ones addressed above. I can see no basis for concluding that the appellant's statement regarding traffic accidents on the Baltimore Washington Parkway compromised security or public safety. Moreover, the appellant's statement that there were "not enough of us to go around to protect [the Park Service's] green spaces anymore" is simply an expression of opinion not unlike some of the opinions quoted in the preceding paragraph of this opinion. As noted in that paragraph, the agency does not appear to have considered those opinions improper.

¶41 For the reasons stated above, I do not believe the agency substantiated its allegations in charge two.

Charge 3

¶42 In the second sustained charge, i.e., charge three, the agency alleged that the appellant violated section 22.1 of Office of Management and Budget (OMB) Circular A-11 (2003), which it quoted as follows:

> 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.

Id. at 3. The agency asserted further that the President had not transmitted the 2005 budget to Congress; that the appellant had informed the Washington Post reporter, during the same interview mentioned above, that she had "asked for $8 million more for next year"; and that making this statement before the President transmitted the 2005 budget to Congress constituted an improper disclosure of 2005 federal budget information in violation of section 22.1 of OMB Circular A-11. *Id.*

¶43 The agency has presented testimony, by NPS's Comptroller, that it requested an $8 million increase in USPP funding for fiscal 2005, HT-2 at 212; the appellant acknowledged in her deposition that an increase of this amount had been requested, Appellant's Deposition at 70-71; and the December 2 Washington Post article mentioned above indicated that the appellant told the reporter she had "asked for "$8 million more for next year," Dec. 2 Post Article. The appellant has alleged, however, that her statement regarding that figure was reported inaccurately, that she was in fact responding to a question about how much money was needed, rather than how much she had requested, and that the $8 million to which she referred did not even cover the same expenses covered by the $8 million increase to which the agency refers. Appellant's Deposition at 73, 88; Appellant's Response to Proposal Notice at 19, 752 File, Tab 3, Subtab 4*l*.

¶44 The administrative judge found that the appellant presented inconsistent, and therefore incredible, testimony regarding this charge. Initial Decision at 28-29. In support of this finding, she stated that the appellant had testified at her deposition that she knew during the interview that the agency had requested an $8 million increase, and that she "tried to retract [this] admission" at the hearing by testifying that USPP had requested a $42 million increase. *Id.* at 28. The administrative judge also stated

that the latter testimony was inconsistent with that presented by agency witnesses. *Id.* at 28-29.

¶45 The administrative judge's credibility finding is not based on her observation of witnesses' demeanor. It is based instead on her misreading of the appellant's testimony. The appellant's testimony regarding an $8 million increase concerned the request for USPP resources that the Department of the Interior ultimately included in its budget proposal, while her testimony regarding a $42 million increase concerned a request USPP had asked the Department to include in the proposal it submitted to OMB. *See* HT-2 at 103, 212, 216; Appellant's Deposition at 70-71. Furthermore, this finding concerns a matter immaterial to the merits of this charge; the appellant does not deny that she knew of the requested $8 million increase at the time she was interviewed.

¶46 I note further that the Post Article's quote of "$8 million more for next year" was followed immediately by a statement that the appellant "also would like $7 million to replace the force's aging helicopter." *Id.* Therefore, the article indicates that the appellant referred to an increase of at least $15 million – nearly twice the size of the overall net increase in USPP funding that the agency had requested. In addition, another article by the same reporter was published in the Post 4 days after the article at issue here, and that article described the appellant's statement regarding the $8 million figure in a manner consistent with the appellant's allegation; that is, it indicated that the appellant had said "that $8 million was <u>needed</u> for next year." IRA File, Tab 1, "Charge Three" Subtab at 9-10 (emphasis added).

¶47 Finally, I note that the amounts of money described in the article do not even match the amounts the appellant, as Chief of USPP, had asked her agency to request during the budget process. While the record reflects some uncertainty and disagreement concerning the exact amount of the increase requested by the appellant's organization, nothing in the record indicates that the increase matched any totals mentioned in the December 2 Post article. *See* HT-2 at 212 (Comptroller's testimony that the USPP proposal "showed an increase need of some $12 million, if I recall"); *id.* at 103 (the appellant's testimony that the USPP had requested an increase of $42 million).

¶48 The record shows that the appellant referred to a total increase amount that was nearly twice the amount requested by the agency, that the amount to which she referred also was significantly different from the amount she had requested in her capacity as Chief of USPP and that she was referring during the interview to her own wishes rather than to any budget request covered by the OMB circular. The agency does not deny – and in fact, Mr. Murphy has conceded, Murphy Deposition at 251 – that employees are entitled to publicly express their beliefs as to the resources the agency needs to meet its goals. In fact, Mr. Murphy appears to have made similar statements to the press. *See* IRA File, Tab 1, "Charge 3" Subtab at 35 (Murphy described in Arizona Star article as saying "he's pushing Congress to spend $4 million to $7 million to install 32 miles of the barrier at Organ Pipe").[10]

¶49 For the reasons stated above, I would find that the agency has failed to prove, by preponderant evidence, that the appellant violated section 22.1 of OMB Circular A-11. I therefore would not sustain charge three.

<u>Charge 5</u>

¶50 Charge five, failure to carry out a supervisor's instructions, was supported by

three specifications, each of which the administrative judge sustained. In the first of these specifications, the agency alleged that Mr. Murphy instructed the appellant to detail a member of her staff, Pamela Blyth, to the Office of Strategic Planning (OSP); that the appellant stated that she was unwilling to take that action; that, after the appellant continued to object, Mr. Murphy informed her that he was giving her a specific order to effect the detail; that the appellant continued to express her unwillingness; that Mr. Murphy offered to permit the detail to be served in increments acceptable to the appellant; and that the appellant nevertheless failed to detail Ms. Blyth as instructed. Proposal Notice at 4.

¶51 The appellant has acknowledged that she expressed objections to the detail, and that she attempted to persuade Mr. Murphy not to effect it. *E.g.*, Appellant's Deposition at 98, 117-21. Neither these objections and efforts nor testimony reflecting her continued belief that the detail was unwise, however, necessarily supports this specification. *See Berube v. General Services Administration*, 30 M.S.P.R. 581, 592 (1986) (as long as senior executives perform their assigned responsibilities and do not engage in actionable misconduct, their disagreements with policy decisions may not form the basis for adverse actions against them), *vacated on other grounds*, 820 F.2d 396 (Fed. Cir. 1987).[11] Instead, the question raised by this specification is whether Mr. Murphy instructed the appellant to take some action or actions to effect the detail, and whether, if so, the appellant failed to take the action or actions.

¶52 The appellant does not claim that she issued any document by which she instructed Ms. Blyth to report for her detail, or that she took any other action to effect the detail. She has denied, however, that Mr. Murphy instructed her to effect the detail; and she has testified that he instead authorized her to "alert Ms. Blyth to the fact that he … would be contacting her," that she contacted Ms. Blyth "that night," and that Ms. Blyth subsequently told her that she had met with Mr. Murphy at his request, as well as with the head of OSP, to whom she was to report during her detail, HT-2 at 88-89, 98; Appellant's Deposition at 145-47.

¶53 The bases for the agency's apparent position that Mr. Murphy had instructed the appellant to take additional actions related to the detail are unclear. The proposal notice indicates only that Mr. Murphy had instructed the appellant to detail Ms. Blyth, and that the appellant had failed to do so. Proposal Notice at 4. Moreover, when the agency representative questioned Mr. Murphy about "the nature of any instruction" he gave to the appellant, the witness simply said that Ms. Blyth was to be detailed to OSP. HT-1 at 57. In addition, when the representative asked what the appellant "was supposed to actually do" as a result of the instruction, Mr. Murphy referred to a general practice he said was followed in detailing employees, and he seemed to indicate that he expected that the same practice would be followed in connection with Ms. Blyth's detail. *See* HT-1 at 57. The practice he described, however, was one in which "[y]ou go directly … to the head of office, division, or whatever agency," and "you work out the details, reporting times, dates, length of time, those sorts of things …." *Id.* While this practice may be the normal procedure when the directors of the originating and receiving offices are responsible for determining the terms of a detail, Mr. Murphy apparently did not consider the appellant free to set or modify those terms. *See, e.g.*, 752 File, Tab 3, Subtab 4j at 14 (Murphy's statement, during the investigation the agency deciding official conducted before issuing his decision, that

if the appellant "had a problem with the scheduling [of the detail] … she was to come to me and I was willing to be flexible and to work that out"); Proposal Notice at 4 (Murphy's statement that he had instructed the appellant to detail Blyth to OSP for 120 days). Mr. Murphy's responses to the agency representative's questions, therefore, shed little light on the nature of the actions the appellant allegedly was instructed or expected to take.

¶54 Even when the administrative judge intervened and asked Mr. Murphy what he had told the appellant "to do, if anything, to accomplish this detail," the witness responded by referring to the procedures he had described previously. HT-1 at 58-59. That is, he indicated that he expected the appellant "to communicate … to Ms. Blyth that I had instructed her … to go on a detail with the Office of Strategic Planning," and that the appellant "would have then subsequently contacted the [head of OSP] and begun to negotiate reporting dates, times, and to, you know, write up whatever agreement … they thought necessary between them … to effect the detail." HT-1 at 58-59. Mr. Murphy then described this process as "standard procedure," and said that he "simply expected her to follow … the established procedures." *Id.* at 59. Finally, when asked what he "actually [said] to [the appellant] that communicated to her that she was supposed to accomplish this detail as she had in the past," Mr. Murphy testified, "Well, I said specifically to her that this detail … is going … to take place and I expect you to communicate to Ms. Blyth that … this detail is going to be effected with the Office … of Strategic Planning." *Id.* at 60.

¶55 In light of the testimony described above, it appears that the instructions Mr. Murphy provided to the appellant regarding this matter consisted only of instructions that the appellant inform Ms. Blyth that she would be detailed. The appellant has indicated consistently that she did inform Ms. Blyth that Mr. Murphy planned to detail her and would provide her with further information regarding the assignment. *E.g.*, Appellant's Deposition at 148-49; HT-2 at 88. Nothing in Mr. Murphy's testimony or elsewhere in the record rebuts that testimony.

¶56 It appears that Mr. Murphy's claim or belief that the appellant failed to follow his instructions to detail Ms. Blyth is based on events that occurred after arrangements had been made for the detail. The appellant evidently believed or assumed, at the time the e-mail messages cited above were sent, that Ms. Blyth would be permitted to continue some of her USPP work during the detail. *See* 752 File, Tab 3, Subtab 4m at 120-21. Ms. Blyth informed her, however, either late on the Friday before the detail was to begin or on the following day, that no such accommodation would be made. *See* Appellant's Deposition at 227-29. The appellant then informed J. Steven Griles, the Deputy Secretary of the Interior, of her concerns regarding this matter; the detail was postponed pending consideration of these concerns; a meeting was held to discuss the situation; and the detail eventually was cancelled. HT-3 at 6-10 (Griles testimony); Manson Deposition at 108-09, IRA File, Tab 42.

¶57 When questioned about the basis for his belief that the appellant had failed to comply with his instructions regarding the detail, Mr. Murphy repeatedly referred to the appellant's conversation with Mr. Griles, and to the subsequent cancellation of the detail. For example, when the deciding official asked him whether the appellant's "going to Griles [had] any bearing on [his] determination that [the appellant] was willfully disobeying [his] order to detail" Ms. Blyth, Mr. Murphy replied that it did, Murphy Investigation Testimony at 98-99, 752 File, Tab 3, Subtab 4j; and when the

agency representative asked him at the hearing when he discovered that the appellant had not complied with his instructions, he testified that it was when he was informed by telephone of the decision to "put this detail on hold," HT-1 at 54-55.

¶58 The propriety of the appellant's bringing her concerns to the attention of Mr. Griles is a matter separate from this charge. I note, however, that the appellant's communication with Mr. Griles occurred only after Mr. Murphy had arranged the detail and informed Ms. Blyth about it. Moreover, the decisions to postpone and eventually to cancel the detail were made by Mr. Murphy's superiors, and not by the appellant. The communications mentioned above therefore cannot support a finding that the appellant failed to follow any instructions by Mr. Murphy to effect the detail in question. For the reasons stated above, I would not sustain specification one of charge five.

¶59 The second specification of charge five concerns a request by OSC, which had been investigating the propriety of the hiring of Ms. Blyth, Deputy Chief Barry Beam, and Deputy Chief Dwight Pettiford. *See* Proposal Notice at 4. The agency noted that OSC had asked for proof that Messrs. Beam and Pettiford had undergone medical and psychological evaluations, and it alleged that Mr. Murphy had instructed the appellant, on or about June 12, 2003, to direct those two employees to undergo the required evaluations. *Id.* It also alleged that the appellant had responded by "protest[ing] that, for various reasons, [the] evaluations were not necessary"; that Mr. Murphy explained to the appellant that none of her reasons had merit; that he "[t]hereafter" instructed the appellant for a second time to direct the employees to undergo the evaluations; and that the appellant failed to do so, instead challenging the propriety of the instructions and "openly express[ing her] unwillingness to comply with them." *Id.*

¶60 Mr. Murphy and the appellant discussed OSC's request on two telephone conversations. Mr. Murphy testified at the hearing that, during his first conversation with the appellant, he had advised her that "the best course of action to take … was to … have [the deputy chiefs] take … their examinations … as requested." HT-1 at 62-63. With respect to the second conversation, he stated that the subject of his advising the deputy chiefs himself of the need for the evaluations was raised, by the appellant and that she had told him that he was "going to have to write … a memo" conveying this information. *Id.* at 65.

¶61 Mr. Murphy did not testify specifically that he instructed the appellant on either occasion to order the deputy chiefs to undergo the evaluations. He also seemed somewhat uncertain about whether the appellant had complied with any instructions he might have given on the subject. When asked whether the appellant had complied, he initially responded, "Not immediately," *id.* at 63; and he responded in the negative only after further prompting by the agency representative, *see id.* at 63 (Murphy responded "No," after the agency representative asked, "What makes you say not – did she ever comply with your instruction?"). Moreover, while he wrote a note dated September 3, 2003, in which he expressed his dissatisfaction with the appellant's actions related to the evaluations, he made no mention in that note of any failure on her part to carry out instructions given before his written memorandum was delivered to the deputy chiefs. *See* IRA File, Tab 28, Agency Hearing Ex. 3.

¶62 In addition, Mr. Murphy has acknowledged repeatedly that he agreed during the second conversation that he, and not the appellant, would be the one to advise the deputy chiefs of the evaluation requirement. 752 File, Tab 3, Subtab 4j at 12; HT-1 at

65. Mr. Murphy testified that he communicated his decision on the evaluation requirement directly to the deputy chiefs in an effort "to be cooperative with the" appellant, and as part of an effort "to understand her point of view, giving her the benefit of the doubt." 752 File, Tab 3, Subtab 4j at 12. Mr. Murphy also testified he did not recall the appellant's saying that she would not advise the deputy chiefs herself. *See* HT-1 at 65. Mr. Murphy's testimony as a whole, therefore, provides very little support for this specification.

¶63 In sustaining the specification, the administrative judge relied in part on a statement Mr. Murphy had written regarding events related to the evaluation requirement. Initial Decision at 35; IRA File, Tab 9, Subtab 4c. She indicated in her decision that the statement corroborated Mr. Murphy's testimony. Initial Decision at 35. I see little in the statement that corroborates Mr. Murphy's testimony, and even less that supports the specification at issue here. While it indicates that the appellant "protested that [the evaluation requirement] was not necessary" and was otherwise undesirable, IRA File, Tab 9, Subtab 4c, the appellant does not deny that she tried to persuade Mr. Murphy to waive the requirement, and the agency has not alleged that her efforts to do so constituted misconduct. *Cf. Berube*, 30 M.S.P.R. at 592.

¶64 More important, the statement does not indicate that Mr. Murphy instructed the appellant to tell the deputy chiefs to undergo their evaluations, or that the appellant acted inappropriately when she failed to advise the deputy chiefs of that requirement. Instead, it indicates that Mr. Murphy faulted the appellant for failing to ensure – after he issued his memoranda to the deputy chiefs – that the deputy chiefs underwent the evaluations as he had ordered. *See* IRA File, Tab 9, Subtab 4c. (after referring to a period during which he allegedly "reissued [his] order to [the deputy chiefs] in writing and met with them to further explain why it was important that they comply," Murphy stated that the appellant "cooperated reluctantly and was not supportive of [his] position.")

¶65 The statement cited above suggests that Mr. Murphy has confused the appellant's actions prior to the issuance of his memoranda to the deputy chiefs with her actions following the issuance of those memoranda. Yet, the appellant has not been charged with any action or inaction regarding the evaluation requirement that followed Mr. Murphy's issuance of his memoranda to the deputy chiefs, and Mr. Murphy himself conceded during his hearing testimony that he did not blame the appellant for any delay that occurred after he issued those memoranda.[12] HT-1 at 192; *see* Proposal Notice at 4.

¶66 For the reasons stated above, I would find that the evidence presented by the agency concerning this specification is unpersuasive. I would not sustain the specification.

¶67 The last specification of charge five concerns the "tractor man" incident at Constitution Gardens, which seriously disrupted traffic in in early 2003. *See* Proposal Notice at 4. According to the agency, the Organization of American States (OAS) had complained that armed USPP sharpshooters had been deployed on the grounds of its headquarters during the incident, and that this action had violated a treaty. Proposal Notice at 4-5. The agency also alleged that Randolph Myers, an attorney in the agency's solicitor's office, needed to meet with the appellant in order to assess whether USPP had violated any treaties and whether it had complied with its own General Orders requiring contacting the Department of State. *Id.* It alleged further

that Mr. Myers had asked the appellant to discuss the complaint with him, that the appellant had failed to respond to this request, and that this failure constituted a violation of instructions by Mr. Murphy "to fully cooperate with and work with attorneys in the Solicitor's Office in connection with any information and/or assistance they needed regarding the ['tractor man'] incident." *Id.*

¶68 The appellant has unequivocally denied that Mr. Murphy ever instructed her to cooperate with the solicitor's office regarding the "tractor man" incident, Appellant's Deposition at 197-99; *see also id.* at 218; HT-2 at 150; and the only evidence that those instructions were given consists of statements made by Mr. Murphy. Moreover, Mr. Murphy's statements are vague. He testified that he did not "remember explicitly [sic] what [he] said". *See* HT-1 at 67. Perhaps most important, when he was asked during the agency investigation to describe the instructions he gave the appellant regarding the OAS matter, Mr. Murphy testified that he did not "recall speaking with [the appellant] directly about this instance." 752 File, Tab 3, Subtab 4j at 15-16. When questioned further about the matter, he testified that his "memory [was] just really sketchy on that," that he was "being ambivalent" because he knew he was testifying under oath, that his "memory [was] just failing him," and that he would "have to go back and check." *Id.* Furthermore, although he was asked following these responses to submit a signed statement and supporting documentation, *id.*, he conceded at the hearing that he had submitted nothing, HT-1 at 195.

¶69 I would find that the agency has failed to establish, by preponderant evidence, that Mr. Murphy gave the appellant the instructions it has charged her with violating.[13] I would, therefore not sustain this specification. In addition, because (as explained above) the agency also has failed to substantiate the other specifications of charge five, I would not sustain this charge.

Charge 6

¶70 The last charge sustained by the administrative judge, a charge of failure to follow the chain of command, is related to a matter at issue in the first specification of charge five, i.e., to Ms. Blyth's scheduled detail to OSP. In this charge, the agency alleges that, during the week of August 18, 2003, when Mr. Murphy was absent from the office, the appellant appealed to Deputy Secretary Griles and convinced him to "cancel [Mr. Murphy's] instructions that Ms. Blyth be detailed …." Proposal Notice at 5.

¶71 As indicated above, the appellant evidently assumed that Ms. Blyth would be allowed to continue working on USPP work during her detail; it was only after the weekend preceding the scheduled effective date of the detail had begun that she learned that this arrangement had not been made; she informed Mr. Griles of her concerns regarding Ms. Blyth's unavailability for any USPP work during the detail; and the detail subsequently was postponed and eventually cancelled altogether.

¶72 The appellant acknowledges that she did not contact her first- or second-level supervisors, Mr. Murphy and Ms. Mainella, before contacting Mr. Griles, who was her fourth-level supervisor. *See* Appellant's Deposition at 231. Moreover, although she called her third-level supervisor, Judge Manson, and left a message for him, she has acknowledged, in effect, that she talked to Mr. Griles before Judge Manson returned her call. *See* 752 File, Tab 3, Subtab 4i at 33 (Mainella's testimony that she reported to Manson); Appellant's Deposition at 244-45.

¶73 The appellant's contacting Mr. Griles without first talking to Mr. Murphy, Ms.

Mainella, and Judge Manson could be regarded as taking her concerns regarding the Blyth detail outside the chain of command. *See Webster's Third New International Dictionary* 370 (1993) (defining "chain of command" as "a series of executive positions or of officers and subordinates in order of authority) (emphasis added). Moreover, going outside the chain of command may constitute a basis for disciplinary action. *See Tyler v. City of Mountain Home, Arkansas*, 72 F.3d 568, 569-71 (8th Cir. 1995); *Bartlett v. Fisher*, 972 F.2d 911, 912, 917-18 (8th Cir. 1992); *Brown v. United States Coast Guard*, 10 M.S.P.R. 573, 578 (1982).

¶74 The appellant's actions in this case, however, differ significantly from those in the cases cited above. Unlike the employees in *Brown* and *Tyler*, the appellant did not take or order an action that she did not have the authority to take or order; instead, she brought her concerns to the attention of an official who unquestionably had the authority to overrule Mr. Murphy's decision. *Compare Tyler*, 72 F.3d at 569 (police sergeant's letter to a sheriff's department official, criticizing sheriff's deputies' actions and instructing the recipient to take corrective action, violated requirement that letters on official stationery be cleared by police chief in advance), *and Brown*, 10 M.S.P.R. at 578 (employee was charged with asking his personnel branch to terminate a detail, instead of directing his concerns about the detailee's performance to his supervisor), *with* Appellant's Deposition at 246 (appellant's testimony that, in raising her concerns with Griles, she was hoping he would cancel the detail, but she knew she "couldn't control that"). Unlike the employee in *Bartlett*, the appellant did not raise her concerns outside the agency or damage the agency's reputation. *Cf. Bartlett*, 972 F.2d at 912-13, 917 (state trooper's letter to the governor criticizing an alleged ticket quota system, and his dissemination of the letter to other political leaders, damaged the agency's reputation, created significant political problems, and brought discredit to the highway patrol, and his suspension for reasons allegedly related to the letter therefore did not violate the First Amendment). Instead, she raised her concerns privately within her agency, and her actions led, in Mr. Griles's words, to "a resolution … that satisfied the needs of the agency, as well as the [training] needs of Ms. Blyth …." HT-3 at 12.

¶75 I also note that the agency has identified no agency instruction or similar authority prohibiting the appellant from taking the action she took here, and that the record includes persuasive evidence that such actions were considered acceptable. Judge Manson testified that it "wouldn't have been appropriate for [Mr. Murphy] to respond in any hostile manner" to the appellant's "having gone to [him] or Mr. Griles to cancel [Ms. Blyth's] detail," Manson Deposition at 112-13, and he testified that he could think of no specific conditions that would justify disciplining the appellant for contacting him or Mr. Griles in connection with the detail, *id.* at 114-15. He also testified that it was "[q]uite common" for subordinates to come to him outside the presence of their immediate supervisors, that such actions did not cause him concern, that he knew of no document or training indicating that employees were not to raise concerns with second-level supervisors in the absence of first-level supervisors, that he did not consider the appellant's calling him directly "about various matters" unusual, and that, when he heard the appellant's voice-mail message, he did not "think that it was unusual that she was calling [him] about any particular subject." *Id.* at 119-20; 752 File, Tab 3, Subtab 4f (Manson's sworn testimony during agency investigation).

¶76 Mr. Griles provided similar testimony. He testified that he had spoken with the appellant in the past in the absence of her more immediate supervisors, that he had done so with other employees, and that he was not offended by employees' approaching him in the absence of their immediate supervisors. HT-3 at 7-8. Mr. Griles further testified that he had never expressed any objection to the appellant's talking to him on the occasion at issue here. *Id.* at 7.

¶77 Under the circumstances described above, I would find that the agency has failed to prove, by preponderant evidence, that the appellant acted improperly in bringing her concerns regarding the scheduled detail of Ms. Blyth to the attention of Mr. Griles. Therefore, I would not sustain this specification.

¶78 I have indicated above that the agency has failed to substantiate any of the charges and specifications the administrative judge sustained. Two additional charges were found unsubstantiated below, as the majority has noted, and the agency has not challenged the administrative judge's findings with respect to them. Under these circumstances, the agency cannot meet its "clear and convincing evidence" burden by relying on the evidence it has presented regarding the appellant's alleged misconduct.

¶79 I note further that three of the six charges brought against the appellant, i.e., charges two, three, and four, are based on statements to the Post reporter that I believe are protected under 5 U.S.C. § 2302(b)(8), i.e., on statements regarding the alleged inadequacy of the resources provided to USPP, and regarding the effect of this alleged inadequacy on the public safety. *See* Proposal Notice at 3. Moreover, these three charges are the only ones that concern misconduct that appears to have occurred within 4 weeks before the first of the personnel actions at issue here, i.e., the "gag order" of December 2, 2003. The conduct at issue in charge six and in the first specification of charge five occurred prior to August 25, 2003, when Ms. Blyth's detail was scheduled to begin, *see* IRA File, Tab 1, "Charge 6" Subtab at 11; the conduct at issue in the second specification of charge five occurred no later than June 16, 2003, when Mr. Murphy issued his memoranda to the deputy chiefs, instructing them to undergo evaluations, *see id.*, "Charge 5 – 2" Subtab at 9; and the conduct at issue in the third specification of charge five is said to have occurred sometime during the period from July through September 2003, *see* Proposal Notice at 4. Although Mr. Murphy sent the appellant an e-mail message on August 25, 2003, regarding the appellant's raising the Blyth detail with Mr. Griles, nothing in the record indicates that he took any other action with respect to any matters at issue here until after the December 2 Post article was published.

¶80 Under the circumstances described above, and in the absence of any persuasive evidence that the agency would have taken the same personnel actions against the appellant in the absence of her protected disclosures,[14] I would conclude that the agency has failed to meet its burden of proof in this matter, and that the appellant has substantiated her claim of reprisal under 5 U.S.C. § 2302(b)(8).

First Amendment

¶81 After the initial decision in this case was issued, the U.S. Supreme Court issued a decision holding that the U.S. Constitution "does not insulate … from employer discipline" statements employees make "pursuant to their official duties." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). I agree with the majority that the appellant made her disclosures to the Post reporter and to the subcommittee staff member while carrying out her official responsibilities, and that, under *Ceballos*, her

communications with those individuals therefore are not protected.

¶82 I do not concur in the majority's alternative finding regarding this matter. *See* Majority Opinion ¶ ¶ 35-40. Because *Ceballos* is dispositive of the appellant's First Amendment claims, however, I regard the alternative finding as dictum and do not address it.

Conclusion

¶83 For the reasons stated above, I would sustain none of the agency's charges and specifications, and I would find that the appellant's removal, her placement on leave, and the order restricting her contact with news media constituted reprisal in violation of 5 U.S.C. § 2302(b)(8).

/s/
Barbara J. Sapin
Member

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[1] Although OSC's investigation of the appellant's complaint had not been completed at the time the IRA appeal was filed, OSC subsequently notified the appellant, by letter dated July 9, 2004, that it had closed the investigation because of the filing of the appeal. IRA File, Tab 8, Subtab C.

[2] In an earlier order, the administrative judge denied the appellant's requests that she stay the removal and the appellant's placement on administrative leave. Stay Request File, DC-0752-04-0642-S-1, Tab 2 (decision on consolidated stay requests).

[3] In her petition, the appellant has challenged the administrative judge's findings on her affirmative defenses. *See generally* PFR at 164-86, 201-02, 205-12. Below, we address the appellant's First Amendment claim and her claim of retaliation for making protected disclosures. As to the appellant's remaining defenses, we see no error in the administrative judge's findings that would affect the outcome of this case. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

[4] While in *White* the appellant claimed that he revealed "gross mismanagement," the *White* analysis is equally applicable here, where the appellant claims to have disclosed a substantial and specific danger to public safety.

[5] In light of our conclusion that the appellant did not make a protected disclosure under 5 U.S.C. § 2302(b)(8), we do not reach the following questions: Whether the "gag order" was a personnel action under 5 U.S.C. § 2302(a)(2)(A); whether an IRA appeal based on a proposed personnel action may proceed where, as here, the proposal is no longer outstanding but instead has ripened into a decision; and whether the agency proved by clear and convincing evidence that it would have taken the same actions against the appellant in the absence of her disclosures.

[6] The majority opinion suggests that the appellant objected to agency decisions intended to increase security at monuments and memorials on the National Mall by reducing the resources devoted to traffic and drug enforcement on parkways and in other areas "outside the national capital core." *See* Majority Opinion ¶ 19. In fact, the appellant expressed concern about security on the Mall and in other "national icon" parks, as well as in other areas. See Dec. 2 Post Article (describing the appellant as saying that she "would also want to have officers in plainclothes or able to patrol" outside the monuments, "rather than simply standing guard in uniform," and that her "greatest fear is that … we're going to miss a key thing at one of our icons").

[7] The "NAPA recommendations" were another topic mentioned in the appellant's December 2 message. *See* IRA File, Tab 9, Subtab 4i at 1.

[8] In addition, I note that one of the latter two findings was made in the administrative judge's analysis of a charge she did not sustain, Initial Decision at 22, and that, as I have explained below

in connection with charge three, the remaining credibility finding – a finding that the appellant had presented inconsistent testimony on the subject of budget increases – is based on the administrative judge's misreading of the allegedly inconsistent deposition testimony with which she compared the hearing testimony.

[9] The administrative judge, who found that the appellant had disclosed the number of unarmed security guards who would soon begin serving around the monuments, also agreed with the agency that this action was improper because the information was the type of information contained in a document submitted by the agency labeled "law enforcement sensitive." Initial Decision at 26. As noted above, I would not find that the appellant made this disclosure. Moreover, to the extent the agency's argument applies to the disclosures the appellant has admitted making, I would find that argument unpersuasive. The document in question, which was included in the record under seal, includes information related to security and staffing at the monuments to which the agency refers as "icons." HT-3 at 80; *see* Sealed Document, IRA File, Tab 28. Because of the sensitive nature of the document, and because the document is under seal, I will not describe its contents specifically. However, it does include far more detailed information which is substantially different from that included in the appellant's statements concerning "icon" staffing. Sealed Document at 10-11, 13, 15-20.

[10] This article, like the December 2 Post article, was published at a time when the release of agency budget requests and underlying information would, according to the agency, have been prohibited. *See* IRA File, Tab 1, Appendix B at 1 (indicating that article was published on September 8, 2002); 752 File, Tab 3, Subtab 4i at 24-25 (Mainella's testimony that agency budget requests and related information could be released only after the proposed budget was submitted to Congress, and that this transmission occurred in early February).

[11] In sustaining this charge, the administrative judge relied on the appellant's "admission" that Mr. Murphy very likely told her he had decided to detail Ms. Blyth. Initial Decision at 33. Nothing in that statement, however, is inconsistent with the appellant's claims. As indicated further below, the appellant does not deny that she was aware of Mr. Murphy's plan to detail Ms. Blyth. The administrative judge's finding therefore is irrelevant to, and provides no support for, the merits of this charge.

[12] The delay following the issuance of the memoranda appears to have been the result of a delay in scheduling appointments required to complete the evaluations. *See* Appellant's Deposition at 194-95.

[13] In sustaining this charge, the administrative judge relied on a similarity she believed existed between the appellant's alleged failure to cooperate on the OAS matter and her alleged failure to cooperate with an investigation the agency's Inspector General conducted concerning the same "tractor man" incident. Initial Decision at 39. She cited a memorandum in which the agency's Inspector General was highly critical of the appellant's response to his own inquiry regarding the incident. *Id.* at 38. *see* Appellant's Deposition, Ex. 2. The appellant testified, however, that the Inspector General's statements were based on his mistaken belief that a document she had sent him—a document that consisted only of responses to "a very narrow set of questions"—represented her office's final response to the inquiry. Appellant's Deposition at 220-24. The appellant also testified that she subsequently talked with the Inspector General, and that the Inspector General complimented her on her work. *Id.* at 221-22. This testimony is unrebutted. Moreover, the appellant has presented unrebutted testimony that Mr. Murphy asked her in November to contact another official of the solicitor's office, that she contacted him within 30 seconds of that request, and that she and that official met later that month. *Id.* at 224-25. In light of this unrebutted evidence, I see no basis for finding that the appellant's actions under similar circumstances support a finding that she failed to comply with instructions to cooperate.

[14] I have indicated above that the December 2 e-mail message cannot be considered in connection with the appellant's claim that the "gag order" and her placement on administrative leave constituted reprisal. The timing of those personnel actions in relation to the December 2 Post article, however, the strong evidence that the Post article was a contributing factor in the actions, and the absence of evidence that the agency would have taken the actions in the absence of the article preclude a finding that the agency has met the "clear and convincing evidence" burden described above.

CERTIFICATE OF SERVICE

United States Court of Appeals
for the Federal Circuit
2007-3050

----------)
TERESA C. CHAMBERS,
Petitioner,

vs.

DEPARTMENT OF THE INTERIOR,
Respondent.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Public Employees for Environmental Responsibility, Attorneys for Petitioners.

That on the **7th day of March 2007**, I served 2 copies the within **Brief for Petitioner** in the above captioned matter upon:

Todd M. Hughes
U.S. Department of Justice
1100 L Street, NW, Rm. 12044
Washington, D.C. 20530
Tel. 202.616.0331

via Federal Express.

Unless otherwise noted 12 copies have been hand delivered to the court on the same date as above.

March 7, 2007

_____
John C. Kruesi, Jr.

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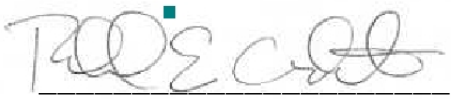

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