

TO: Ms. Shaunette Crawford,
FROM: Kevin H. Bell, Esq., on behalf of Dr. George Luber
RE: Proposal to Suspend Dr. George Luber

Ms. Crawford,

As you are aware, Public Employees for Environmental Responsibility (PEER) represents Dr. George Luber, a Supervisory Health Scientist in the Asthma and Community Health Branch, Division of Environmental Health Science and Practice, National Center for Environmental Health (“NCEH”). On July 3, 2019, he was personally served with a Proposal to Suspend (the “Proposal”) signed by Dr. Patrick Breyse, Director of the NCEH (the “proposing official”) to suspend him for 120 calendar days.

Introduction and Summary

Dr. George Luber, Ph.D, is one of the nation’s preeminent climate scientists, and for years was the head of the Climate and Health Program at the U.S. Centers for Disease Control and Prevention (“CDC”), the United States’ sole program dedicated to climate and human health, including adaptation research, public science diplomacy, cooperation with the academic community, and partnership with city, state, and tribal governments to mitigate the most severe impacts of climate change to public health. He has written over 50 journal articles and the definitive textbook on the subject. Dr. Luber has a 16-year record at CDC with, until 2018, no proposed or actual disciplinary action, official reprimands, or unsatisfactory performance reviews. His lowest employee evaluation before President Trump changed the federal government’s attitude towards climate science was a 4.2/5.

Dr. Luber attempted to continue his work as before. In 2017 he was invited by the National Geographic Channel to be a regular guest on their popular new program *Mars*, which presents a fictionalized account of astronauts landing on Mars, featuring interviews with public figures, scientists, and engineers, including Elon Musk, Andy Weir, Robert Zubrin, and Neil deGrasse Tyson, about difficulties humans might face on a journey to, and the colonization of, Mars. Dr. Luber was told by the CDC office of communications that there was no way they would ever approve any appearances on the program. NCEH administrators declared in no uncertain terms by email that “Luber will never be on *Mars*[.]”

From February 2017 through March 2018, Director Breysse enlisted consultants from PricewaterhouseCoopers to effectuate his preexisting plan to merge the ~18 person Climate Change and Health program into the ~90 person Asthma Branch of NCEH. The newly formed branch was planned to be called the Asthma and Climate Health Branch, but was ultimately dubbed the “Asthma and Community Health” Branch.¹ Director Breysse selected a chief for the newly formed Asthma and Community Health Branch, but the chosen individual lacked the academic qualifications required to serve in that position.

In March 2018, lacking another qualified candidate, NCEH promoted Dr. Lubber to the branch chief position. In that role Dr. Lubber repeatedly met with the consultants drawing up the merging of the climate program with the Asthma branch. He told them that the \$10 million budget for the climate change program had been explicitly set aside by Congress, and that the merging would inevitably cause impermissible “blending” of those funds: any person paid from the climate budget who supported asthma activities would by definition divert funds earmarked for climate work to another program with a separate funding line. Dr. Lubber argued that it was inevitable that he, as supervisor, and others who would become team leads, would divide their time by managing both Asthma and Climate Change staff and activities. This would go against the express will of Congress.² Dr. Lubber also raised this concern with NCEH administrators, who did not respond to his concerns.

As a result of his intransigence and his subsequent reporting of this wrongdoing by center management over the last 15 months, the management of NCEH opted to pursue a retaliatory investigation against Dr. Lubber and file multiple sets of charged misconduct which do little to establish that the claimed justifications for disciplining Dr. Lubber are more than a pretext for whistleblower retaliation. NCEH’s conduct since March of 2018 when he was exiled from the NCEH campus under armed escort for the heinous crime of failing to renew ethics clearance paperwork five years prior has been nothing but retaliatory, and the efforts to silence Dr. Lubber have accelerated since May or 2019 when he began reporting this wrongdoing to Congress, which

¹ See Branch description at <https://www.cdc.gov/asthma/community-health/about.htm>.

² See, e.g., Conference Rep’t for H.R. 6157, DEPARTMENT OF DEFENSE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2019, AND FOR OTHER PURPOSES, H.R. Rep. 115-952, at 526-27, 115th Cong., 2d Sess. (Sept. 13, 2018), <https://www.congress.gov/115/crpt/hrpt952/CRPT-115hrpt952.pdf> (setting aside \$10,000,000 for NCEH climate change program, and \$29,000,000 for asthma, of \$209,350,000 for all NCEH programs).

has since begun an official inquiry into the Climate & Health Program as a result.³ and this Proposal cannot be upheld due to its impermissible retaliatory basis.

Dr. Luber has been charged with five offenses:

1. Absence Without Leave: 15 specifications
2. Submitting Time/ Attendance Records with Inaccurate Information: 15 specifications
3. Failure to Obtain Prior Approval to Engage in Outside Employment Activities: 3 specifications
4. Misuse of Position – Creating the appearance of a Conflict of Interest: 3 specifications
5. Misuse of Official Time: 2 specifications

These offenses will be discussed in turn along with discussion of their *Douglas* factors and specific evidence, followed by a discussion of proposing official's discussion of the *Douglas* factors, and concluding with examination of how the evidence indicates that the Proposal is a pretextual excuse for retaliation against Dr. Luber.

Discussion of Proposed Charges

I. Absence Without Leave

The U.S. Office of Personnel Management ("OPM") has advised that AWOL "should be charged when the following conditions are met:

- 1) The employee was instructed to report for duty and fails to do so, OR
- 2) The requested leave was appropriately denied and the employee did not show up for work, OR
- 3) The employee does not provide medical documentation, the documentation is insufficient or not submitted within the time frame provided."

OPM, ADDRESSING AWOL at 12.⁴

The Proposal uses the same evidence file to support Charge 1 and Charge 2, and the two share an evidence file. However, the evidence demonstrates that Dr. Luber was approved for outside activity for the time in question and thus he was not AWOL.

³ HOUSE COMM. ON ENERGY & COMMERCE, PALLONE REQUESTS CDC BRIEFING ON SHUTTERED CLIMATE CHANGE AND PUBLIC HEALTH PROGRAM (July 30, 2019) (press release), <https://energycommerce.house.gov/newsroom/press-releases/pallone-requests-cdc-briefing-on-shuttered-climate-change-and-public-health>

⁴ available at <https://www.opm.gov/policy-data-oversight/employee-relations/training/presentationaddressingawol.pdf>

The evidence file includes ethics forms indicating approved outside activity, demonstrating that the absences were in fact approved and proper.⁵ The evidence file for the first specification, for an alleged absence on September 10, 2015, contains a request for approval to teach the Emory class and contains a document that states that “An HHS-550 Request for Outside Activity was approved according to the Ethics Program Activity Tracking System (EPATS) for the 2015 report year, however a paper copy of the approval cannot be located.”⁶ Each following specification contains a similar entry with either an approved HHS-520 form or indication that one existed. Approval of Dr. Lubert’s outside activity was also approval to use annual leave to teach the Emory classes in question, and therefore he was not absent without leave.

This charge is also inconsistent with the second charge, because a charge for failure to document leave taken implies that Dr. Lubert could have and should have taken leave for his Emory classes because they were properly approved absences, and he was not AWOL. There were many days that Dr. Lubert taught at Emory that he undisputedly did report leave for the time, and these are not included in the AWOL charges. Dr. Lubert did not fail to report for duty, did not have leave denied. He was properly excused for purposes of teaching his classes provided he accounted for the use of his annual leave.

The only possible exception to the clear evidence that Dr. Lubert was not AWOL would be for specifications 11-15, which relate to classes taught in the Spring semester of 2018, because there was a minor inadvertent error in Dr. Lubert’s Request for Approval of Outside Activity, form HHS-520, filed June 1, 2017, which was attached to his response to proposed removal in November 2018 as its Appendix I, and is attached hereto as Exhibit A (highlighting added for illustrative purposes). The approval to teach his Spring 2018 class contains one inaccurate sentence under page 2’s “Nature of Outside Activity,” which was filled automatically from information entered in his prior year’s approval, and states: “The course will be offered in the Fall Semester 2016.” Exhibit A at 2 (emphasis added).⁷ That this was an innocent error is substantiated by other information entered by Dr. Lubert in the same form, including the date

⁵ Evidence to Support Charge 1: Absence without Leave – Charge 2 Submitting Time/Attendance Records with Inaccurate Information (Hereinafter *Evidence for Charges 1-2*) at 1-5

⁶ Id. at 11, Doc. 1E

⁷ This sentence is also the basis of charge 3, specification 2, where this analysis will be repeated. It is particularly damning for that charge that the TOC entries for specifications 11-15 of Charges 1 and 2 cite to the same “Appendix I” from Dr. Lubert’s November 2018 response to the proposed removal as “Ethics forms indicating approval for outside activity.” *Evidence for Charges 1-2* at 3-4, Docs. 11E, 12E, 13E, 14E, 15E.

range for the covered activity showing the proper dates for his course, August 1, 2017 through July 31, 2018, *see id.* at 3. The Fall 2016 course erroneously carried over from his previous HHS-520 was listed under the “Record of Prior Compensation from Same Source” as a course he had previously taught. *Id.* at 5. Furthermore, the document was dated June 1, 2017, which would postdate the 2016 course which the proposing official believes Dr. Luber was requesting clearance for. *Id.* at 6. Paul Garbe, Dr. Luber’s supervising official, recommended approval because the “outside activity complements official duties.” *Id.* at 7. Ethics Program Manager Allerick Knight approved Dr. Luber’s Fall 2017-Spring 2018 teaching activities on June 14, 2017, *id.* at 9, and John Tibbs approved them on June 15, 2017. *Id.* at 10. No mention was made at that time of the clerical error on page 2 by any of the three reviewing officials. It is unsurprising that this approval was granted as of course, as Dr. Luber had submitted similar documentation to teach this same course, HLTH 350-R, since 2012, and had always been diligent about keeping his time records.

II. Time and Attendance Records

As Dr. Luber stated in his response to the earlier proposed removal regarding the same charge, he was diligent about reporting his time teaching the Emory course as leave, and there is reason to suspect that Dr. Luber properly requested that his leave be entered by the Climate and Health Program’s time clerk, Ms. Deneise Turner, who then negligently or intentionally failed to record it. In any event, it would be unreasonable to conclude that Dr. Luber, who retained more than 100 hours of available annual leave at all relevant times from 2014-2018, and an additional 792 hours of annual leave between September 15, 2015 (the date of specification 1) and February 20, 2018 (specification 15), intentionally sought to defraud the agency of 28 of those hours, or 3.5 percent, of the leave he accumulated in that period.⁸ At all relevant times he had far more accumulated leave than the amount he is accused of taking improperly.

Charge 2, as discussed *supra*, shares an evidence file and a logical connection with Charge 1, and Section I of this response is restated and reincorporated as though fully set forth herein. In specific response to Charge 2, the discussion by Dr. Luber in his November 20, 2018 response to his proposed removal in October 2018 remains relevant and persuasive:

⁸ Dr. Luber accumulated 8 hours of annual leave every two week pay period. There were 198 weeks in the relevant period, in which Dr. Luber would have accumulated 792 hours of annual leave. The sum of every specification of AWOL is 28 total hours, which is 3.5% of 792.

Our electronic timekeeping system is called TAS. Each week, we – as employees – would simply enter the time that we were out. Specifically, I would record the hours when I would not be at work. These hours related to the time I was teaching my course at Emory. The next step in the process is to submit the sheet to the time clerk, who was able to modify our timesheets as needed. Around October 2016, my Agency starts listing a lot of errors. This was the same time my timekeeper, Florence Deneise Turner (“Deneise”), was having difficulties with both her conduct and her performance at work. My Branch Deputy, Kenneth Archer and I were actually engaged in disciplinary action against Deneise at this time, this is well documented. Deneise was very disgruntled and angry with the actions taken against her.

Evidence for Charges 1-2 at 670-71, Doc. 19; see also id., at 671-74 (rebutting specific charges). The documentation provided as supplement to the statement of Ruth Williams, which presumably seeks to demonstrate that no modifications were made or requested for Dr. Lubber’s timesheets, provides evidence that Ms. Turner lacked the capacity to make changes after-the-fact without detection, but does not demonstrate that she could not have made those changes at the time the timesheets were submitted or failed to enter leave which Dr. Lubber requested that she enter on his behalf. There is no interpretation made of the Transmission File Data, which consists of paired strings of numbers devoid of context. *Id.* at 725-28, Doc. 20. The audit tables are similarly uninformative, and a close reading of them demonstrates that some changes were made on certain dates, but there is no interpretation of what they were or how they apply to those specific dates.

In the wake of Dr. Lubber’s removal from the Asthma and Community Health Branch, one time clerk was exclusively assigned to manage his timesheets, Tina Linkliter. *Evidence for Charges 1-2 at 770, Doc. 21 ¶ 6-8.* Dr. Lubber was not told that she was managing his time, and she was prohibited from speaking to him “because of what’s going on.” *Id.* at ¶ 8. Ms. Linkliter stated that the Time and Attendance System is “a little confusing because it’s not a closed system.” *Id.* at ¶ 9(e). She also confirms that changes could have been made to his time and attendance records without appearing as an amendment, because before those records are submitted, “it’s just part of the regular record” and would not “show up as comments.” *Id.* at ¶ 9(f).

During the period covered by all 15 specifications, Dr. Lubber’s time clerk was Deneise Turner, who also managed the time sheets for the rest of the Climate & Health Program. Ms. Turner has a history of inconsistent performance of her duties as time clerk, and Dr. Lubber’s disciplinary actions against her as her supervisor caused her to develop a personal enmity towards him. The evidence supports two possibilities which would absolve Dr. Lubber of any

responsibility under Charge 2, that a) Deneise Turner's personal distaste for Dr. Luber could have led her to omit personal leave entries that Dr. Luber requested that she add to his timesheet, or b) she negligently failed to make such entries due to her documented inconsistency in performing her job duties. In fact, Ms. Turner's duties as time clerk were stripped from her during the pendency of the NCEH investigation of Dr. Luber's timesheets. *Id.* at 774, Doc. 22 ¶ 2(a) ("As of a couple of months ago, my job duties changed as well. I used to do travel, time and attendance, and things like that. Now I don't do time and attendance. The contractors do it. I only do my own timesheet."). Ms. Turner's inconsistent performance of her duties as timekeeper are documented in the declaration of Ken Archer, attached hereto as Exhibit B. Ms. Turner's responses to specific questions about the functioning of the Time and Attendance System also show that she has previously been unwilling to make changes requested by Dr. Luber to his timesheets, *Evidence for Charges 1-2* at 775, Doc. 22 ¶¶ 11-12 ("I have the ability to do it, but I won't."), that she was unaware if it was even possible to look at an employee's past timesheets, ¶ 13, and that she was highly prejudicial towards Dr. Luber. *See* ¶¶ 14-23. Ms. Turner's mastery of the Time and Attendance System is thus highly suspect, and she makes it clear that she refused to comply with Dr. Luber's requests as a matter of principle.

Ms. Turner's credibility is undermined by her statement that she has no memory of Dr. Luber *ever* submitting a timesheet with a partial day of leave. ¶ 16(a). This is clearly a false statement made out of personal animus, as every day of class taught by Dr. Luber from 2012-2018 not included in this Proposal had partial days of leave taken. If it were otherwise, the specifications under charges 1 and 2 would number in the hundreds. Ms. Turner also has no memory of Dr. Luber ever requesting that she make any changes to his timesheets, ¶ 14(a-b), however she does recall telling his secretary that she would not submit a timesheet for him because she "felt good saying 'no'" to Dr. Luber's requests. ¶ 15(b). This is consistent with the attitude that she adopted as soon as she joined the Climate & Health Program, that "she would not speak to visitors unless they could 'convince me I am not wasting my time.'" Exhibit B ¶ 15(c). Ms. Turner also falsely and without credibility claims that Dr. Luber and Mr. Archer, her immediate supervisor, skipped as much as five hours of work every day. *Evidence for Charges 1-2* at 775, Doc. 22 ¶ 16(b).

She also claims that Dr. Luber and Mr. Archer skipped every single weekly management meeting they ever scheduled, ¶ 17(a), but simultaneously claims that they *did* attend those

meetings for the sole purpose of attacking her personally. ¶¶ 17(b-c), 18(1). Ms. Turner makes Dr. Luber and Mr. Archer out to be cartoonish villains who would “toss[] away” her requests for professional development without cause and mock her for stuttering because she “remind[ed them] of Donald Trump,” then laughing at her. ¶ 18(b-c). Most ridiculously, Ms. Turner claims that Dr. Luber withheld travel documents from her because “He would say ‘I’m waiting on my wife to call me back because she wants to go to Italy with me. I want to be able to sit next to her, so I need you to call the airlines and tell them to seat us together.’” Dr. Luber has *never been to Italy* for CDC travel, and the only time he travelled on CDC business with his wife her travel was arranged separately with Delta Airlines frequent flyer points which Ms. Turner would not have been involved with.

Ms. Turner also alleges that other former supervisors denied her promotions, ¶ 19(b), and that she is happy now because she is “not being attacked every day all day for every little thing.” ¶ 19(c). She claims that she was “[a]ttacked every day” by Dr. Luber when he “would walk around the office giving everyone 59 minutes and make it obvious he was excluding me.” ¶ 20(a). Ruth Williams interprets “59 minutes” to mean an “excuse . . . from duty without loss of pay or charge to leave in appropriate circumstances” for up to 59 minutes. *Id.* at 721, Doc. 20 ¶ 5. Ms. Turner’s claim that Dr. Luber gave every employee of the Climate & Health Program 59 minutes of leave every day while excluding her is a fantasy. It is virtually certain that if it were true, at least one of the fact witnesses presented by the proposing official would have made reference to such an extraordinary management strategy.

The remaining statements made by Ms. Turner included by the proposing official are highly prejudicial and completely irrelevant to the charged conduct. They should be disregarded for any purpose except to evaluate the credibility of Ms. Turner’s other accusations. She states that Dr. Luber “has a problem with women” without elaborating. and that she and Jane Horton would commiserate about Dr. Luber’s harsh treatment of women. ¶ 21(a). Ms. Turner goes so far as to accuse Dr. Luber of being a sympathizer of the South African Apartheid system, which is a wildly inappropriate accusation which, given the other clear impossibilities of claims in her testimony and its total irrelevance to the charges, should be excluded from consideration as any sort of evidence against Dr. Luber.

These claims by Ms. Turner evidence a propensity for falsehood and malice towards Dr. Luber which further substantially undermine her credibility as a witness. They also strongly

suggest that Ms. Turner would be unlikely to properly keep records of Dr. Luber's requests to make alterations to his timesheets if he realized later in a pay period that he failed to account for annual leave on days which he taught class, and that she may have purposefully refused to make such alterations. Ms. Turner's supporting character witness alluded to in her affirmation, Jane Horton, was not interviewed by the proposing official's investigation, nor were any of her emails produced. This may have been because Ms. Horton had been previously counseled for excessive absenteeism and unsatisfactory use of the policy on requesting leave herself, Exhibit C at 6-7 (10 instances of excessive leave taken in March 2014), and officially reprimanded for AWOL and failure to request leave, *id.*, at 8-9. Dr. Luber informed the deciding official in an email dated November 20, 2018 about his experiences attempting to further discipline Ms. Horton. That email is restated and incorporated herein in full:

In reference to the question asking whether I have knowledge as to whether other employees have received a different disciplinary action/penalty for the same or similar charges, I would like to add the following: Since February 2017, my deputy Ken Archer and myself have attempted to address an attendance issue with one of our employees - Ms. Jane Horton. Ms. Horton has failed to report to work, failed to request leave, and failed to note leave on her timesheet on numerous occasions. On several occasions we have had to place her on Away Without Leave Status. On all of these occasions we have had to manually enter her time for her to address the leave that she did not note on her timesheet. We have addressed this issue with HR in numerous dialogues and have ample documentation to support this process that we have undertaken. HR has repeatedly informed us that we are to take no disciplinary action. Ms. Horton has received no disciplinary actions, which are similar in nature to the ones I have been charged with.

That HR refused to allow Dr. Luber, even with ample evidence, to take any further action against a subordinate who had intentionally committed far worse timekeeping offenses calls into question the legitimacy of the premise of this Proposal.

III. Failure to Obtain Prior Approval for Outside Activities

The third charge relates to Dr. Luber's alleged failure to obtain prior ethics approval for two books, GLOBAL CLIMATE CHANGE AND HUMAN HEALTH: FROM SCIENCE TO PRACTICE (2015), and FOUNDATIONS OF GLOBAL HEALTH (2018), and to teach a seminar at Emory University between January 15, 2018 and April 30, 2018, in violation of 5 C.F.R. § 5501.106(d). The charge is untrue and unsupported by the evidence.

1. GLOBAL CLIMATE CHANGE AND HUMAN HEALTH: FROM SCIENCE TO PRACTICE
(2015) Ethics Clearance

The specification charges Dr. Lubber with failure to obtain written approval prior to engaging in his work as co-author of this book. As a part of CDC's evidence file it included what appears to be the ethics approval Dr. Lubber had obtained for the 2015 volume, however the image quality of the pdf provided by CDC is so poor as to be totally illegible in many critical places, including several highlighted by the agency in yellow. Nevertheless, the evidence shows that Dr. Lubber did receive ethics approval for the book, and it is not clear what the rest of the evidence file pertains to or supposedly proves.

The paucity of evidence is striking given that the proposing official submitted 552 pages of evidence for Charge 3, 504 pages of which are reproductions of ethics training slideshows from 2012 onwards. However, there is nothing in that "evidence" that supports the validity of the claim that Dr. Lubber failed to get prior written approval for working on the book.

If the specification implies that Dr. Lubber should have gotten a renewed ethics approval for each year between 2013 and 2015 that he worked on the book, and that agency ethics training informed him of this requirement, the evidence fails to support any such implicit claim. The slide decks for 2012 and 2013 contain no discussion of the clearance process for outside activities or the 1-year limit on such ethical clearance, which is first raised in 2014.⁹ The outside activity ethics clearance process is also not discussed in 2015, 2016, 2017, or 2018 ethics trainings, and in any event his work on the book ended in 2015, so the evidentiary value of these trainings is unclear. Regardless, at worst, Dr. Lubber is alleged to have failed to renew his annual ethics documentation, a subject which was only discussed one time in the relevant period, and then only in passing and without notice of the one year expiration date. It is facially implausible to base more than a stern talking to on such a harmless error, especially considering the agency's admission that it simply lost at least one of Dr. Lubber's many ethics approval forms, for the Emory course he taught in September 2015 underlying the first specification of charges 1 and 2.¹⁰

⁹ Evidence to Support Charge 3 at 217. The 2014 discussion of outside activities also does not clarify that an HHS-520 is limited to one year in duration specifically, but does state that "renewals are due 45 days before current HHS-520 expires." *Id.* at 238.

¹⁰ Evidence to Support Charge 1 and 2 at 11, Doc. 1E.

It is also appropriate to raise here that the 2015 book in question was co-edited by Dr. Jay Lemery.¹¹ The entire investigation into Dr. Luber was started by a March 16, 2018 email from Caroline St. Louis to John Decker, John Tibbs, and Mattie Gilliam, which alleged that “a listing of contributors would indicate that at the very least he had several conversations regarding this text with CDC employees (during his tour of duty and using CDC email, phone, etc).”¹² However, the CDC apparently concluded that there was no misconduct relating to solicitation of CDC staff to contribute to the book, as no such misconduct is charged. In addition, Dr. Lemery has provided evidence that he and Dr. Luber were aware of Luber’s ethical restrictions on soliciting CDC staff to contribute to the volume, and that to maintain compliance, Dr. Lemery conducted the coordination of the CDC staff and academics participating in writing the volume, attached as Exhibit D.¹³

2. FOUNDATIONS OF GLOBAL HEALTH (2018) Ethics Approval

Specification 2 alleges that Dr. Luber failed to obtain written approval prior to his work starting July 22, 2016 as a co-author of a chapter in the book FOUNDATIONS OF GLOBAL HEALTH, published in 2018. However, Dr. Luber followed the procedures that he understood were required for a publication for which he was not paid and which was an official work product of CDC.¹⁴ Dr. Luber was representing the CDC in his official capacity in furthering the state of public understanding of climate change’s impact on public health. The interview testimony of Dr. Luber’s former supervisor, Paul Garbe, fully concurs with Luber’s understanding and with how he acted.

In Dr. Luber’s November 2018 response to the proposing official’s October 2018 proposed removal he stated that he had discussed his work on this book with his then-supervisor, Paul Garbe. The proposing official included in the evidence in support of this specification the testimony of Paul Garbe which, despite his lack of memory of the brief conversation years prior, supports Dr. Luber’s argument. Mr. Garbe states that “[i]t is not unusual for CDC staff to

¹¹ See Evidence to Support Charge 3 at 37, Doc. 5.

¹² *Id.* at 5, Doc. 2.

¹³ “it was made clear to me early on by George, that his ability to work on the text would be limited due to his official duties at the CDC. Therefore, I became the sole contact for chapter authors in collecting, editing, and crafting the manuscript. . . . To my knowledge, George never deviated from this very deliberate and thoughtful arrangement, as it would jeopardize his contractual duties to the CDC.”

¹⁴ In contrast, Dr. Luber was paid for his work on the Global Climate Change and Human Health book which is the subject of Specification 1, and he did get official ethics approval for it.

collaborate on developing book chapters or course materials.” *Evidence to Support Charge 3* at 42, Doc. 7 ¶8(a). For the conversation with Dr. Luber that he *did* remember concerning the Yale coursework, discussed *infra*, he confirmed that the discussion was not a request for permission, but to apprise the Division Director of the ongoing work of the Climate & Health Program. *Id.* He did not insist that Dr. Luber stop until he got permission.

Even more pertinent, Mr. Garbe’s description of his understanding of the approval process for contributions to a book is totally consistent with Dr. Luber’s understandings and actions. Mr. Garbe states that if someone in his division were invited to co-author a book chapter with someone outside of CDC, he would “have a conversation with them to determine how this fit in with their assignments in the branch. If I felt that the work that was described for that book chapter fit within what I wanted that person to work on I would say you can go ahead, and you can work X percent of your time.” *Id.* at ¶ 13.a. He does not refer to any need for a written pre-approval. Then, when the book chapter is finished, it goes through the CDC clearance and review process. *Id.* at ¶13(c). Only if “someone is offered money to write a book chapter [. . .] the employee has to submit a request for approval of an outside activity using CDC form 520.” *Id.* Where an employee is “getting co-author credit but no payment then, in my experience it's up to supervisory discretion as to whether the staff member is authorized to continue working on that project.” *Id.* Garbe concludes with respect to unpaid work on a book chapter or university course, “Once the draft of the either the book chapter or Yale course was completed and put into clearance, if I was the acting division director, I would have had the opportunity to review the documents and either send them forward for continued review and approval or identify anything needing additional work.” *Id.* at ¶ 15(a).

Many projects end up taking place on official CDC time, with other CDC coauthors, that are externally published. Dr. Luber’s CV, which includes dozens of articles and research projects produced while employed at CDC is attached as Exhibit E. Work performed in advancing the state of public health research in the public record, including in books, is a core function of the CDC, and preparation of this chapter was performed as an official activity of the Climate & Health Program, not an outside or paid activity which would require prior ethics clearance.

When flatly asked if he believed Dr. Luber was “in fact representing the CDC in co-authoring the book chapter,” Garbe did not directly answer but only referenced the requirement for a disclaimer that the views in a publication are the author’s alone and not the official position

of the CDC. *Id.* at ¶ 21. There is no violation of this requirement alleged in the specification, and so this testimony is irrelevant to the charge of failure to obtain prior approval. The materials included in the evidence file do not reveal what disclaimers were made in the chapter in question, and thus the issue cannot be resolved, even assuming it had any relevance to the charges.

In later evidence, the proposing official includes an affirmation by Ethics and Compliance Director Carolyn St. Louis, who affirms that employees can “represent CDC” where “the[ir] supervisor ... approve[s] this to be an extension of official duties.” *Evidence for Charge 5* at 5, Doc. 2 ¶ 2(a). This appears to support Mr. Garbe’s and Dr. Lubber’s understandings of the process.

3. Spring 2018 Session of Emory Class

The specification claims that Dr. Lubber failed to obtain prior written approval to work as an instructor in a seminar on climate change and health at Emory University. In fact, the evidence file contains the ethics approval for Dr. Lubber’s Spring 2018 class of HLTH-350.¹⁵ Although the specification does not even make this claim, the only possible basis for this approval being invalid is one sentence under page 2’s “Nature of Outside Activity,” which was filled automatically from information entered in his prior year’s approval, and states: “The course will be offered in the Fall Semester 2016.” Exhibit A at 2 (emphasis added). That this was an innocent error is substantiated by other information entered by Dr. Lubber in the same form, including the date range for the covered activity: the form requested the proper dates for his course, August 1, 2017 through July 31, 2018, *see id.* at 3, and the Fall 2016 course was listed under the “Record of Prior Compensation from Same Source” as a course previously taught. *Id.* at 5. Furthermore, the document was dated June 1, 2017, which would postdate the 2016 course which the proposing official believes Dr. Lubber was requesting clearance for. *Id.* at 6. Paul Garbe, Dr. Lubber’s supervising official, recommended approval because the “outside activity complements official duties.” *Id.* at 7. Ethics Program Manager Allerick Knight approved Dr. Lubber’s Fall 2017-Spring 2018 teaching activities on June 14, 2017, *id.* at 9, and John Tibbs approved them on June 15, 2017. *Id.* at 10. No mention was made at that time of the clerical error on page 2 by any of the three reviewing officials. It is unsurprising that this approval was granted without hesitation, as Dr.

¹⁵ It is particularly damning for this charge that the Table of Contents entries for specifications 11-15 of Charges 1 and 2 cite to the same “Appendix I” from Dr. Lubber’s November 2018 response to the proposed removal as “Ethics forms indicating approval for outside activity.” *Evidence for Charges 1-2* at 3-4, Docs. 11E, 12E, 13E, 14E, 15E.

Luber had submitted similar documentation to teach this same course, HLTH 350-R, since 2012, and had always been diligent about keeping his time. Finally, the proposing official has provided *five copies* of this document in the *Evidence for Charges 1-2*: the TOC entries for specifications 11-15 of Charges 1 and 2 cite to this document as “Ethics forms indicating approval for outside activity.” *Evidence for Charges 1-2* at 3-4, Docs. 11E, 12E, 13E, 14E, 15E.

IV. Misuse of Position – Creating the Appearance of a Conflict of Interest regarding guest lectures

The supporting evidence for the fourth and fifth charge presented against Dr. Luber is lacking in substance and much of it would be inadmissible before any court or the MSPB¹⁶ due to the overwhelming quantity of irrelevant and prejudicial content, including unsubstantiated nebulous accusations of drug and alcohol abuse, “racist” and “sexist jokes,” and other personal attacks that are unrelated to the charged conduct and more easily understandable as character assassination.¹⁷ These statements are untrue, have no indicia of evidentiary reliability and no relevance to the charges. They should be entirely disregarded.

Charge 4 is an extremely attenuated claim to being with – creating the appearance of a conflict of interest. It does not claim an actual conflict of interest or specify what that conflict of interest might be. It does not provide a rule or provision of the Code of Federal Regulations or CDC policy which Dr. Luber is alleged to have violated, so it is difficult to assess what conduct specifically is alleged to be improper or how. The specifications merely state that Dr. Luber “asked and encouraged” Drs. Conlon and Saha to be guest lecturers in courses in which Dr. Luber

¹⁶ While the MSPB does permit the introduction of hearsay evidence that would be excluded under the Federal Rules of Evidence, relevance remains a prior question to admissibility.

¹⁷ See, e.g. Charge 4 Evidence File, Document 6, *Adena Wright Williams, “Sworn Statement” dated April 17, 2019*. This document, which, like the other witness statements included in the evidence file, is not actually “sworn.” It is not a notarized affidavit or a sworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 or any provision of state law, but merely a signed statement. It purports to summarize “to the best of my recollection” an interview conducted more than two months prior on Feb. 12, 2019 with Kathryn Conlon. It is used as a delivery vehicle for introduction of an unsigned and undated statement, presumably reflecting Ms. Williams’ recollection of her interview with Ms. Conlon, but credited to the interviewee, labelled “Sworn Statement of Kathryn Conlon (*Unsigned Draft*)” (emphasis added). It does not contain a transcript of the discussion, complies with none of the formality requirements for affidavits or affirmations in GA Code § 24-9-902 or any other known requirements, and suggests improper practices for preservation of evidence or testimony. Presumably, if Ms. Conlon had been willing to attest to these statements, she would have done so, and the agency would not be using an unsigned statement based on Ms. Williams’ “recollections.” Similar concerns apply to *every statement* submitted by CDC in this matter, none of which are actually sworn or in compliance with evidentiary requirements.

was a paid instructor. The implication is that this created an “appearance” that Dr. Lubber was misusing his position as their supervisors to pressure them into being guest lecturers in these classes. However, the “appearance” could just as well be that Dr. Lubber was giving these employees professional opportunities that would benefit them, which far better reflects the actual facts. These specifications are based on inaccurate claims and information, and the implication that anything improper occurred is not supported.

1. Asking Dr. Conlon to be a guest lecturer in HLTH 350 in August 2014 and December 2014

The proposing official alleges that “[b]etween in or about August 2014 and in or about December 2014, you asked and encouraged Dr. Kathryn Conlon to be a guest lecturer at Emory University's Class HLTH 350.” The reason for the broad date range is due to Dr. Conlon’s own uncertainty as to when she taught, stated in an email sent responding to the request of John Tibbs and Mattie Gilliam for any requests from Dr. Lubber to give lectures in his classes.¹⁸ Because Tibbs and Gilliam asked for “requests” from Dr. Lubber, and not any further details, they did not learn that it was not Dr. Lubber that did any asking. Dr. Lubber allowed Dr. Conlon to teach one of his classes in March 2018 after she directly asked him if she could in fall of 2017. It is doubtful whether Dr. Conlon ever actually taught a class of Dr. Lubber’s in 2014 due to her own uncertainty as to when it was taught, and because the syllabus for the 2014 class, attached as Exhibit F, does not indicate the presence of any guest lecturers.¹⁹

Furthermore, Dr. Conlon misremembered two other classes she may have taught in as Dr. Lubber’s classes, when they were in fact taught by other members of the Emory faculty. Dr. Conlon’s emailed discussion of requests to teach classes by Dr. Lubber alleges, though it is not included in the specifications, that Dr. Lubber requested that she guest lecture for the Spring 2016 session of EH 586, a class which Dr. Lubber was not teaching.²⁰ It also refers to multiple lectures in EH 582, which is another class Dr. Lubber did not teach in 2016 or 2017. Dr. Lubber never asked her to teach this class, and Dr. Conlon did not inform Dr. Lubber that she had taught in this class. If she had, Dr. Lubber would have required her to complete a form HHS-520. While not relevant to

¹⁸ *Evidence for Charge 4* at 42, Doc. 5.

¹⁹ This specification and the other two in Charge 4 do not actually claim that Dr. Conlon or Dr. Saha actually *were* guest lecturers in these courses; only that Dr. Lubber allegedly “asked and encouraged” them to be.

²⁰ *Id.*

rebutting the charge specifically, these erroneous reports call into question the veracity of Dr. Conlon's other statements about guest lecturing.

2. Asking Dr. Saha to guest lecture in HLTH 350R-1 in October 2017

Dr. Shubhayu Saha approached Dr. Luber in the fall of 2016 to ask about opportunities to gain better inroads to Emory and asked if he could lecture in one of Dr. Luber's classes. He asked again in the Spring of 2017, during which time Dr. Luber was not teaching. Dr. Luber promised to try and give him an opportunity in the Fall of 2017, which he did.

Allowing someone to teach a class is a tricky thing because one's ability to get further teaching jobs is contingent on the ratings your students give you, bad ratings mean you're not invited back, so Dr. Luber was hesitant. Additionally, Dr. Luber had to prepare by reading Dr. Saha's notes and presentation to familiarize himself with the material, since Dr. Luber might have not been up to date on the literature and did not want to appear unprepared while supervising the guest lecture or if a student had follow-up questions based on that literature in future classes. Guest lecturers inevitably amounted to more work for him than if he had taught the class himself. Dr. Luber considered himself a mentor to Dr. Saha, however, and was willing to make the extra effort in order to allow a junior scientist to grow and learn. At no point was Dr. Saha coerced into teaching this class. Nor does his testimony reflect that he felt coerced or in any way taken advantage of.

3. Asking Dr. Conlon to guest lecture for EH 586 "Advanced Seminar in Climate Change and Health, Research and Policy" in March 2018

Dr. Conlon asked Dr. Luber in the fall of 2017 whether she could participate in the teaching of this class, which he agreed to. Dr. Luber has never approached an employee cold to ask them to guest lecture a class because of the possibility that a guest lecturer could severely disrupt the flow of the class and his ability to properly educate his students. The following spring on the date when Dr. Conlon would have taught the lecture which Dr. Luber had agreed to feature her in, she cancelled due to a scheduling conflict.

V. Misuse of Official Time – Yale and book chapter

1. Yale University Course "Climate Adaptation"

This specification alleges that Dr. Kathryn Conlon’s work on the Yale Climate Adaptation course was improper because it was an outside activity, and not an official CDC activity. Dr. Lubert is alleged to have violated 5 C.F.R. § 2635.705(b), which prohibits encouraging or directing a subordinate to use official time to perform activities that are not official duties. This specification is not supported by the evidence, because Dr. Conlon’s work on the Yale course was part of her official duties, and in any event for the most part it was not directed by Dr. Lubert. Dr. Lubert’s then-supervisor Paul Garbe confirms that “[i]t is not unusual for CDC staff to collaborate on developing book chapters or course materials” as a part of their official duties.²¹ Mr. Garbe adds that he was told by Dr. Lubert that the Climate & Health Program was working on the Yale coursework and did not object.²² Garbe “thought it’s probably a good collaboration to develop. My thought at the time was I’ll wait to hear more. I didn’t say yes, you should do it or no, I don’t think you should do it. I said thank you for telling me.”²³ This point bears repeating because it is the only first-hand account of the management relationship between the Climate & Health Program and the Division of Environmental Hazards and Health Effects. It confirms that the Division did not require the Climate & Health Program to get prior approval before working on a project, and that Garbe did not find it unusual that he was being kept abreast of a project’s development that he did not personally approve before they commenced preliminary work on it. Garbe also did not think to ask Lubert to formally request approval for the work.²⁴ The approval would have come once the draft for the coursework was completed, when the substance of the course would have been reviewed.²⁵ Furthermore, outside activity documentation is not dispositive of whether the activity performed by Dr. Conlon was a proper use of official time.

The only point in Mr. Garbe’s statement where he questions the propriety of Lubert’s actions regards the inclusion of Lubert and Conlon as “faculty” on the Yale course page in January 2018.²⁶ It is true that a faculty assignment *would* require outside activity approval, but Dr. Lubert

²¹ *Evidence for Charge 5* at 14, Doc. 4-5 ¶ 8(a).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at ¶ 19.

²⁵ *Id.* at ¶ 15. “I would expect him to tell me how much time he’s expecting to spend working on this and how the program will use the publication. Once the draft of either the book chapter or Yale course was completed and put into clearance, if I was the acting division director, I would have had the opportunity to review the documents and either send them forward for continued review and approval or identify anything needing additional work.”

²⁶ *Id.* at ¶ 16.

was unaware that Yale considered himself or Dr. Conlon to be “faculty” for the course until he was made aware of that statement in Mr. Garbé’s affirmation by the undersigned counsel. Dr. Lubner never asked, nor agreed to be faculty for the course. In fact, he had very little to do with its development, and had nothing to do with it after September 9, 2017, when he suffered a heart attack and responsibility was assumed by Dr. Conlon. Emails between Dr. Conlon and Ken Archer are attached as Exhibit G.

Moreover, Dr. Lubner did not direct or encourage Dr. Conlon to perform these duties, but rather she took them on when Dr. Lubner suffered a health emergency. On September 11, 2017, Dr. Conlon informed Yale in response to an inquiry that “George will be out for the next two weeks because of a personal emergency. I will work with Lisa and our acting branch chief, Ken Archer (cc’ed), to address the logistical aspects of our collaboration.” Exhibit G at 5-6. That correspondence included acknowledgment that CDC internal approvals would be sought for certain aspects of the work as needed. *Id.* at 7. It also confirmed that the work was being conducted as an official collaboration between Yale and CDC. *Id.* at 3 (“partnership with CDC”); 4 (“everyone here is very excited by the prospect of collaborating with the CDC”). It demonstrates that in Dr. Lubner’s absence, Conlon was reaching out to “our leadership here to figure out our next steps,” further evidence that she had assumed responsibility for the project. *Id.* at 4. She also told Yale on October 4, 2017 that “[w]e are going through the procedures here to get the approval, which includes reaching out to our Ethics department.” *Id.* at 1-2. Far from the suggestions made by Ms. St. Louis that this was an unsanctioned and self-serving frolic on Dr. Lubner’s part, the evidence strongly supports the conclusion that Lubner’s only involvement was to approve Dr. Conlon’s use of staff time to develop the programmatic possibility of official collaboration, and she then appears to have followed all of the required steps to consult with the ethics office.²⁷ Unless Dr. Conlon was lying to the Yale team, it appears that the NCEH ethics program had notice of the Yale coursework development five months before Dr. Lubner was removed on March 22, 2018, and no red flags were raised. It was only after Dr. Lubner began causing problems for the merging of the Asthma and Community Health Branch as its Acting Chief that every project he

²⁷ See Exhibit G at 9-10 (email from Conlon to Ken Archer) (“Attached is a brief description of the Yale virtual course that we discussed. You mentioned you’d share this with Peter so that I could submit a request for review to the Ethics department. Please let me know when I can proceed.”)

had previously touched became ethical calamities, which further suggests the improper nature of this proposed disciplinary action.

2. 2016-17 work on book chapter in FOUNDATIONS OF GLOBAL HEALTH by Stasia Widerynski

Dr. Lubert's assignment of Dr. Widerynski to work on the 2018 book was a normal assignment of staff time to proper Climate & Health Program work. As this argument has been laid out in full in response to Charge 3, Specification 2, that section is reincorporated and restated as though fully set forth herein. The deciding official should refer to that reasoning for the claim that the activity was official CDC work. The evidence actually shows that there was no work outside of official duties directed or encouraged by Dr. Lubert.

The additional information in the evidence file for Charge 5, Specification 2, particularly an email exchange between Josephine Malilay to Mattie Gilliam dated June 24, 2019, is self-serving and lacking in persuasive value.²⁸ First, Josephine Malilay is the Chief of the Climate and Community Health Branch, a position which she attained as a direct result of Dr. Lubert's firing and, reportedly, without having competed for the position through normal hiring practices. Reportedly, Dr. Malilay has also ordered Asthma and Community Health Branch staff in a general meeting to not speak Lubert's name even in passing because he was "toxic" and told them that he was "gone for good." It is highly inappropriate to discuss personnel matters on such a broad basis and before a final personnel action has been taken or even proposed. Her statements that he was gone for good also suggest that this Proposal was a foregone conclusion.

Besides Dr. Malilay's professional incentive to support Dr. Lubert's removal, the phrasing of the questions posed by Ms. Gilliam to Dr. Malilay beget only one answer. No specific book, coursework, journal article, or other project is "required by" a Title 42 fellow's appointment, which is why those appointments contain open-ended language to allow a fellow to meet the evolving needs of a program. Stasia Widerynski's appointment description states that she shall work on "other science related projects" as well as "training with communications activities," both of which could cover the work in question.²⁹ As Mr. Garbe stated and was discussed *supra*,

²⁸ Evidence for Charge 5 at 35, Doc. 11. Gilliam appears to have asked Malilay and Pamela Collins to answer certain questions about the duties of certain Title 42 fellows, which were then answered in-line by Malilay. The color of the text in the pdf is slightly lighter in the in-line responses.

²⁹ Evidence for Charge 5 at 31-34, Doc. 10.

“[i]t is not unusual for CDC staff to collaborate on developing book chapters or course materials.”³⁰ While Ms. St. Louis declares that she “d[id]n’t see where permission was granted to co-author in his official capacity,” and makes a hearsay statement that she “asked John Decker and they didn’t find any official duty request,”³¹ her description of the necessary approval and management practices is at odds with Mr. Garbe’s description of it.³² In Mr. Garbe’s words, the approval process was “a conversation with them to determine how this fit in with their assignments in the branch. If I felt that the work that was described for that book chapter fit with what I wanted that person to work on I would say you can go ahead, and you can work on that X percent of your time.”³³ As a former Branch Chief before he became Division Director, Mr. Garbe was familiar with the process from both the divisional and branch perspectives, and makes no mention of divisional or center- level approval, official duty requests, or other similar authorizations. While it is possible that those are now considered standard practice by the ethics office, at the time Dr. Luber informed Garbe of his work it was apparently not.

Douglas Factors

In *Douglas v. Veterans Administration*, the MSPB set forth twelve factors to be considered in determining the appropriate penalty for the subject employee. See 5 M.S.P.B. 313, 331-32 (1981); see also *Zingg v. Dep't of Treasury*, 388 F.3d 839, 844 (Fed. Cir. 2004) (explaining that *Douglas* "requires" the employing agency to consider the twelve factors but "does not mandate that any particular factor be given special treatment[] or that all factors be considered in every case without regard to their relevancy"). Generally, the choice of penalty is granted deference "unless the penalty exceeds the range of permissible punishment specified by statute or regulation, or unless the penalty is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Tartaglia v. Dep't of Veterans Affairs*, 858 F.3d 1405, 1408 (Fed. Cir. 2017) (quoting *Zingg*, 388 F.3d at 843 (internal quotation marks and citation omitted)). As a structural issue, it is significant that none of the five *Douglas* factor checklists are signed by the proposing official, nor their entries initialed, despite including a certification that “I hereby certify that I have

³⁰ *Evidence to Support Charge 3* at 42, Doc. 7 ¶8(a).

³¹ *Evidence for Charge 5* at 6, ¶ 4(b-c).

³² See generally *id.*, at 15, Doc. 4-5 ¶¶ 14-20; ¶ 13(c) (“If they're getting co-author credit but no payment then, in my experience **it's up to supervisory discretion as to whether the staff member is authorized to continue working on that project.**”) (emphasis added).

³³ *Id.* at ¶ 13(a).

considered the twelve (12) Douglas factors as indicated above (with my initial next to each factor) in making my penalty determination.” It would be unjust to punish Dr. Luber for paperwork errors based on a Proposal riddled with the same variety of errors.

1. Douglas Factor 1 - Seriousness of Offense

Charge 1, as discussed *supra*, is unsupported due to the approval sought and received for the outside activity Dr. Luber was participating in while away from CDC campus. It was not a serious offense because it was not an offense at all. At most, the offense could be supported because the paperwork to get approval for the course was somehow deficient, which, if true, would be a minor, inadvertent paperwork offense. Based on the HHS-520 submitted by Dr. Luber attached as Exhibit A and discussed above, it is clear that Dr. Luber at least *sought* approval for this course and believed he had received it, as that form was approved by his chain of command for a period ending in summer 2018.

It should be noted that in combination, all 15 AWOL and timesheet charges amount to just 28 hours of leave time allegedly unaccounted for in a period in which he accumulated 792 hours of leave and consistently maintained a substantial unused leave balance. The most seriously this charge can be taken is that Dr. Luber negligently failed to account for less than 5 percent of his total accumulated annual leave in the period covered by the 15 specifications of charges 1 and 2. To suggest some deeper nefarious scheme to defraud his agency of such a minor amount of leave is in error.

For charge 3, concerning his writing activities and Spring 2018 class at Emory, again the most that can be claimed is negligence, rather than any serious offense. Dr. Luber did seek ethics approval for the book published in 2015, as the evidence file shows. He did not realize the necessity of renewing his 2012 ethics approval, assuming that is what the charge is based on., He earnestly believed that the chapter published in 2018 was official conduct in support of the Climate & Health Program’s mission and he complied with the procedures he understood to be necessary, which understanding was concurred in by his former supervisor, Mr. Garbe. He also earnestly believed that he had obtained ethics approval for his 2018 class, and the record shows he did seek such approval.

For charge 4, Dr. Luber did not “request” that his subordinates teach his classes, he granted them permission after those subordinates requested to teach guest lectures. The Douglas factor discussion improperly adds a claim that is not in the charge or specifications, that Dr. Luber

“abused his position” ... “to provide him with a benefit,” while the charge only claims that he created the appearance of a conflict of interest. Even assuming this were a proper consideration given the charges and specifications, the supposed benefit which he would have received, at most 6 fewer hours of lecture time which he still had to supervise and account for, is *de minimis*.

For charge 5, the work which his subordinates performed was reasonably believed by Dr. Lubner to have been work in furtherance of his programmatic mission and which he had noticed his Division Director about. As such, it is, again, at most an inadvertent offense, if it is an offense at all.

2. Douglas Factor 2 - Job Level and Type of Employment

This discussion is not disputed except to note that the proposing official confirms that “[h]e was wholly responsible for contract decisions, cooperative agreement and grants, hiring, approving travel and training opportunities” and acted “without a great deal of oversight.”³⁴ This adds to the accumulation of evidence that as Chief of the Climate & Health Program, Dr. Lubner should not have been expected to obtain prior clearance for every programmatic decision, including the 2018 book chapter or Yale coursework, the same way that a line employee would have. All of the analysis of the preclearance requirements performed by the proposing official and supporting evidence does not distinguish between an employee’s decision to pursue a work project without approval and a Program Chief’s decision to allocate his resources in furtherance of a higher strategy in support of the mission of the agency.

3. Douglas Factor 3 - Prior Misconduct

The spotless prior disciplinary record should be granted particular weight in this case, especially given Dr. Lubner’s 17-year distinguished career at CDC (since July 2002) without so much as a reprimand. His career showed steady advancement from its beginning at the GS-12 level to his current GS-15 position. His performance evaluations always ranged from fully successful to exceptional, never below 4.2 on a 5-point scale, and have indicated strength in leadership abilities, proper conduct, and attention to administrative responsibilities.³⁵ Another

³⁴ Proposal to Suspend at 7.

³⁵ Evidence for Charge 1 at 682. *See also*, Removal Proposal, Douglas Factor Evaluation Checklist, Factor 4, stating that Dr. Lubner has been rated as “Achieved More than Expected Results” to “Achieved Outstanding Results” from 2009 to the present.

consideration is that if there were any prior concerns about Dr. Luber's conduct, they were not communicated to Dr. Luber.

4. Douglas Factor 4 - Employee's Past Work Record

Dr. Luber has a stainless work record before these charges, and the agency itself cites his consistently positive performance appraisals. The accusations raised in the Douglas Factor evaluation that he does not get along well many employees, including women and subordinates, and engaged in abusive conduct, are not part of the charges or specifications, are inconsistent with the positive evaluations he received, including with regard to leadership and conduct, and are unsupported and prejudicial accusations, as discussed above. The lack of an evidentiary basis for those charges should lead the deciding official to discount them in consideration of this factor, particularly in light of Dr. Luber's noted success as a manager in prior performance evaluations in resolving conflicts with problematic employees.³⁶ Because the agency has introduced evidence which attacks Dr. Luber's good character, letters of support from his former coworkers and colleagues Lisa Wright and Zachary Myles have been included as Exhibits H and I, respectively, and Dr. Luber's character is also supported in evidence provided from Ken Archer, Exhibit B, and Jay Lemery, Exhibit D.

5. Douglas Factor 5 - Erosion of Supervisory Confidence

As discussed *infra*, the loss of supervisory confidence in Dr. Luber is a self-fulfilling prophesy, as the basis for the relevant charges was a retaliatory investigation triggered by Dr. Luber's refusal to comply with what he felt to be unlawful orders to blend the appropriations streams of the Climate program and the Asthma Branch in his brief tenure as acting Branch Chief. It is evident that until that resistance was raised, Dr. Luber had the highest of supervisory confidence, as he was made Acting Chief over the objection of Senior Adviser Paul Garbe.³⁷ Moreover, the claimed erosion of supervisory confidence relies entirely on the alleged time and

³⁶ See Exhibit J.

³⁷ See Evidence for Charge 5 at 16 ¶ 20(d) ("The question of who could be ACHB branch chief came up in discussions I had with the new Division leadership. In my new role as Senior Advisor, I advised the acting Division Director to not make George ACHB chief, as I did not think he was willing to do the supervision and management work a branch chief is expected to do. I had no further conversations. Then two or three days later George was announced as the acting branch chief.")

attendance violations, which, as explained above, are at most minor and inadvertent errors in timekeeping.

6. Douglas Factor 6 - Consistency of Penalty

The proposing official only discusses this factor in relation to charge 1 and demurs for the others on the grounds that this particular combination of charges is a matter of first impression. It is significant that the same proposing official sought dismissal under substantially similar charges with less evidence in October 2018, and it is in no way clear how 120 days was arrived at as an appropriate alternative. Regarding the AWOL charges specifically, Dr. Luber has demonstrated that other employees in his Program were not disciplined for AWOL issues, even after multiple warnings and reprimand.³⁸ Even the Douglas factor analysis itself admits that prior discipline for AWOL charges has involved suspensions of only 1-5 days, and that the employee was formally counseled prior to a suspension proposal (which Dr. Luber was not). Thus, the penalty here is admittedly inconsistent with that imposed for other employees.

7. Douglas Factor 7 - Consistency of Penalty with Table of Penalties

The Douglas factor analysis admits that the penalty exceeds the range of the agency's table of penalties for the AWOL charge, which provides a penalty of a suspension of 1 to 14 days. The proposed penalty claims to be based on consideration of all five charges together, but their quantification to equal a suspension of 120 days remains unclear. Due to the lack of evidence of Dr. Luber's consciousness of guilt or awareness that he was committing any wrongs, a far lesser penalty, if any, should be imposed. The proposing official supplies no precedent for a 120 day suspension for any combination of charges.

8. Douglas Factor 8 - Notoriety

The Douglas factor analysis mentions a Washington Post article about Dr. Luber's situation, which it claims was due to "his own contacts with the press." It does not claim that this "measure of notoriety" harmed the agency or supports the penalty. To the extent that this press story has any relevance at all, Dr. Luber and counsel did not initiate contact with Karen Tumulty, author of the WASHINGTON POST article cited by the proposing official. Using any notoriety that

³⁸ See discussion of November 20 email to deciding official from Dr. Luber regarding Jane Horton in Section II.

could stem from her article to support the penalty would amount to a punishment enhancement based on Dr. Luber's delivery of his acceptance speech at the First Amendment Awards which the story quotes from. Dr. Luber previously sought and obtained guidance from the CDC about the contents of his speech, which he was told he was permitted to give.

9. Douglas Factor 9 - Notice of Warning about Conduct

Assuming the factual basis for entire proposed suspension is valid, Dr. Luber engaged in minor misconduct spanning six years which the agency failed to offer warning or guidance about in any formal or informal capacity. Dr. Luber believed at all times that he was acting in compliance with all applicable laws, rules, and regulations. The discussion of this factor in the Douglas factor evaluation refers only to the alleged time and attendance violations, i.e. charges 1 and 2, and does not claim any notice at all regarding the other charges. With regard to charges 1 and 2, it only claims that as a senior federal employee of longstanding, Dr. Luber "should have known" that he was required to comply with rules, policies, etc. The proposed suspension's evidence file for Charge 3 demonstrates that in six years of ethics trainings, approval for outside activities, the core of these charges, was only discussed once, in 2014, and then only in passing.

10. Douglas Factor 10 - Potential for Rehabilitation

The discussion of this factor admits Dr. Luber's "scientific expertise that is of great value to the CDC" and his 17 years of "otherwise good service." The only thing said to undermine his potential for rehabilitation is, again, his alleged time and attendance violations, which as noted above, were at worst inadvertent errors involving a very small proportion of his time, and which were allowed to continue over a four-year period without any expressions of concern or warnings. Any claim that Dr. Luber has a low potential "to conform his behavior to agency standards" is absurd.

Dr. Luber's potential for rehabilitation can be inferred from his ongoing desire to work for an office and a program that has demonstrated nothing but a sincere desire to remove him by any means necessary, even after the launching of a retaliatory investigation, *see* Evidence discussion *infra*. Additionally, the proposal to suspend does not propose to change Dr. Luber's job duties, title, or supervisory status, which confuses the suggestion by the proposing official that "If removed from a supervisory position and placed under the strict scrutiny of senior managers, Dr. Luber may have the potential to conform his behavior to Agency standards."

11. Douglas Factor 11 - Mitigating Circumstances

In addition to Dr. Luber's lengthy and excellent record of service recognized by the proposing official, mitigating circumstances should also include discussion of Dr. Luber's role as the "go to" official for CDC, the White House, and numerous other federal agencies on climate and health issues.³⁹ Dr. Luber's good faith belief that he had not committed any wrongdoing should also be evaluated and seriously considered as justification for reduced penalties

12. Douglas Factor 12 - Effectiveness of a Lesser/ Alternative Sanction

The proposing official does not state that any lesser sanctions were considered or how 120 days was arrived at as a proposed length of suspension. The proposing official also fails to inform the deciding official of the prior considered sanction of removal for similar conduct, which did not present evidence or a discussion of the *Douglas* factors, which suggests that the proposing official arrived at the conclusion to harshly sanction Dr. Luber in advance of performing a full investigation, a sincere examination of the evidence, or the *Douglas* factors.

Evidence File

There is reason to suspect the veracity and relevance of virtually all of the evidence submitted by the proposing official in this case. Much of it is irrelevant or does not contain the specific information which it is supposedly presented for, such as the hundreds of pages of ethics training slideshows, only two of which from 2014 discuss outside activity approval. Additionally, there is no attempt made in the memorandum proposing the suspension to discuss how the evidence relates to proving any of the charges or the *Douglas* factors. While it is an improvement from the October 2018 proposed removal by the same proposing official which presented no evidence at all, the proposing official has set a low bar. The haphazard arrangement of the evidence and its great volume (over 1,800 pages) substantially complicated the work of counsel and Dr. Luber in crafting a response, and the proposing official's failure to provide an electronic version of the evidence file until more than a week after personally serving the proposed

³⁹ Exhibit J.

suspension memorandum also impeded the effective preparation of a response. The evidence file also does not include any relevant exculpatory evidence, such as Dr. Conlon's prior attempt to secure ethics and other clearance for the Yale coursework, which was fortunately secured through alternate means, but it is highly likely that even a cursory discovery process would yield far more evidence inconsistent with the proposing official's narrative.

Much of the evidence presented, particularly the statements of Dr. Conlon, which was an unsigned draft, and Deneise Turner, is needlessly prejudicial and questionably relevant. The only justification for the inclusion of the baseless and highly prejudicial claims that Dr. Luber is a misogynist racist with sympathies for South African Apartheid is, tenuously, a claim in Douglas Factor 4 that he does not get along well with others and has been abusive to subordinates. It is of highly questionable validity to introduce evidence to support a claim in the Douglas factors analysis that is not part of the charged conduct. The agency is required to prove its charges and base discipline on them, not on unsubstantiated slanders that appear only in the Douglas factors analysis.

Tellingly, in the proposing official's Douglas Factor 4 analysis, the statement of his employee which states that it was submitted under penalty of perjury is still only described in the passive voice, that "*it has been reported* that he has made derogatory comments."⁴⁰ It is not mentioned that the witness, Ms. Turner, has a strong animus towards Dr. Luber and a history of unreasonable statements and conduct. Dr. Luber has spent years attempting to resolve the workplace behavior problems presented by Ms. Turner, and was even commended for those attempts in his 2015 performance appraisal, attached as Exhibit J.⁴¹

Whistleblower Retaliation

There is a reason that a severe penalty has been imposed based on stale, weak and in the end, even if true, minor charges of misconduct. The reason is that the real motivation for this action is whistleblower retaliation. Dr. Luber engaged in activity protected under the

⁴⁰ Proposal to Suspend at 8, 13, 18, 24, 30 (Douglas Factor analysis for each charge).

⁴¹ "Not least, Dr. Luber has given a high level of attention to the successful remediation of one of his employee's performance issues[, Ms. Deneise Turner]. Through regular consultation, encouragement and attention, he has been able to improve the performance of this individual to the point that they have been removed from the PIP process and this employee continues to improve on their performance evaluations." Exhibit J at 7.

Whistleblower Protection Act that put his managers at the CDC in a bad light and provided a strong motive to retaliate.

Dr. Luber made multiple disclosures protected by 5 U.S.C. § 2302(b)(8), for which he was retaliated against by the CDC. It is a prohibited personnel practice to take or threaten to take a personnel action, including firing, detailing, transferal, or demotion, against an employee, because of “any disclosure of information by an employee . . . which the employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8).⁴² To establish “reasonable belief,” the employee must only show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified. The test, outlined in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), asks whether a disinterested observer with knowledge of the essential facts readily known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act. *See also Wojcicki v. Dep’t of the Air Force*, 72 M.S.P.R. 628, 632 (M.S.P.B. 1996) (citing *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991) *aff’d*, 976 F.2d 1400 (Fed. Cir. 1992)) and *Horton v. Dep’t of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996)).

The first such disclosure was immediately following the November 2016 election, when Dr. Luber told superiors within the agency that the cancellation of the Al Gore address at a planned CDC meeting would undermine the scientific integrity of the agency. This disclosure was that to cancel the meeting would be in violation of an agency regulation regarding the rights

⁴² “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences--

(i) any violation of any law, rule, or regulation; or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2)(D).

A disclosure shall not be excluded from subsection (b)(8) because--

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);
(B) the disclosure revealed information that had been previously disclosed;
(C) of the employee's or applicant's motive for making the disclosure;
(D) the disclosure was not made in writing. § 2302(f)(1)

of agency staff to participate in public scientific fora, the CDC Scientific Integrity Policy. Dr. Lubner informed Dr. Patrick Breyse and his Policy Lead Pam Protzel-Berman in their debate over the February 2017 conference that cancellation would undermine the integrity of the agency, its public and scientific reputation, and the agency's own scientific integrity policy. Even if he was not in fact, the agency also perceived him to be a whistleblower because of the assumptions they made that he had told the press that the event was canceled for political reasons which improperly violated the scientific integrity policy.

His second disclosure is made up of the many various instances in which Dr. Lubner communicated the grave risk to the public posed by climate change, "a substantial and specific danger to public health or safety." § 2302(b)(8)(ii). Those disclosures, which are too numerous to list, included:

- Participation as lead author in the human health section of the 2014 National Climate Assessment. See George Lubner *et al.*, "Chapter 9: Human Health," *Climate Change Impacts in the United States: The Third National Climate Assessment*, U.S. Global Change Research Program, doi:10.7930/J0PN93H5, 2014.
- Participation as federal coordinating lead author in the human health section of the 2018 National Climate Assessment. See George Lubner *et al.*, "Chapter 14: Human Health," *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*. U.S. Global Change Research Program, doi: 10.7930/NCA4.2018.CH14, 2018.
- Public statements in support of CDC's mission to assist state and local governments build resilience against the impacts of climate change. See Kristen Lombardi and Fatima Bhojani, *An Army Of Deer Ticks Carrying Lyme Disease Is Advancing And Here's Why It Will Only Get Worse*, HUFFINGTON POST (Aug. 9, 2018), https://www.huffingtonpost.com/entry/an-army-of-deer-ticks-carrying-lyme-disease-is-advancing-and-heres-why-it-will-only-get-worse_us_5b69b04fe4b0b15abaa74ea0.⁴³
- Participation in the Emmy-winning climate change series *Years of Living Dangerously*, in which he appeared as an expert Science Advisor on June 2, 2014 to discuss the human health effects of heatwaves caused by climate change and the need for adaptation, stating "This is a threat that we should take seriously, the one that I think can engage us in decisions so that we'll help make a better world."⁴⁴

⁴³ "The only federal support for state and city health officials on climate change is the CDC's Building Resilience Against Climate Effects (BRACE) grant program. George Lubner, chief of the CDC's climate and health program, considers it "cutting-edge thinking for public health." He intends to expand it to all 50 states, but funding constraints have kept him from doing so.

Republicans in Congress have tried repeatedly to excise BRACE's \$10 million budget, to no avail. Its average annual award for health departments has remained around \$200,000 for nearly a decade."

⁴⁴ <http://theyearsproject.com/>

- Appearing at or the 2017 climate change conference hosted by Al Gore in lieu of the original conference which was cancelled by CDC in February 2017. Dr. Lubner was not made available for comment by Bernadette Burden, a senior press officer with the CDC, despite media requests.⁴⁵

While these activities did not engender retaliation under the last administration, the new administration has a well-known policy of denying the public health implications of climate change (as well as climate change itself) and preventing federal employees from speaking out about or working on those issues. This is generally known and evidenced in this case by the direction to Dr. Lubner to not even use the words “climate change.” Therefore, his very public earlier work on the subject contributed to the agency’s motivation to retaliate against him as an act of self-censorship. The public statements made by Dr. Lubner concerning climate change have been cited by outside observers as improper grounds on which he might be retaliated against by CDC. Laura Turner Seydel, an environmentalist who sits on the board of the Turner Foundation, a sponsor of the cancelled 2017 Al Gore climate meeting, stated that CDC scientists may be “scared by the wrath of Trump.”⁴⁶ Reporting on Ms. Seydel’s statements continued:

researchers like George Lubner, an epidemiologist who’s participated in the global warming documentary series, *Years of Dangerously Living* [sic], might be deterred from speaking further about issues of climate and health. “George Lubner had done a very good job of describing the problem,” Seydel said. “He’s been quiet for the past couple of years as he hangs in there like a loose tooth.”

The third disclosure was the misuse of agency funds specifically appropriated by Congress for climate change work at CDC, which, by being merged into the asthma unit, blurred the lines of appropriations in violation of the express will of Congress, and is both a violation of statute and “a gross waste of funds [and/or] an abuse of authority.” *Id.* His disclosure was made both to the consultants organizing the merging of his program with the Asthma branch and to NCEH management including Director Breyse.

⁴⁵ Max Blau, *The CDC climate change conference, scrapped after the election, is being resurrected Thursday*, STAT NEWS (Feb. 14, 2017), <https://www.statnews.com/2017/02/15/cdc-climate-change-al-gore/>; see also Anne Polansky, *The Insanity of Self-Censorship: Climate Change, Politics, and Fear-Based Decision-Making*, GOV’T ACCOUNTABILITY PROJECT BLOG (Apr. 4, 2017), <https://www.whistleblower.org/blog/014604-insanity-self-censorship-climate-change-politics-and-fear-based-decision-making> (discussing how CDC’s “self-censorship” of climate scientists and “political interference in the communication of scientific findings crucial to informing policymakers and the public is literally a life-threatening act of betrayal against current and future generations”).

⁴⁶ Max Blau, *At a resurrected climate conference, concerns loom that CDC scientists may be silenced*, STAT NEWS (Feb. 16, 2017), <https://www.statnews.com/2017/02/16/climate-conference-cdc-scientists/>.

All of these disclosures were repeated again in May 2019 when Dr Luber visited Washington, DC to receive a First Amendment Award, and he spoke about his experience attempting to right these wrongs, which cast the reputation of the proposing official and the CDC in a negative light. He spoke about these issues before a substantial audience, and his speech was covered in part by the Washington Post, as the proposing official notes in Douglas Factor 8. He also held meetings with members of Congress and their staff to discuss what he perceived to be this existential threat to Climate & Health research at CDC. Those disclosures were protected by both the Whistleblower Protection Act and 5 U.S.C. § 7211, concerning the right of federal employees to petition Congress.

One of the main indications that this proposed action is based on whistleblower retaliation, as well as a violation of the Whistleblower Protection Act in itself, is the retaliatory investigation that was conducted that led to this proposal. After backing down on Dr. Luber's proposed removal after the media threatened to shine light on the situation, the CDC apparently hired outside investigators⁴⁷ to gin up a case against Luber that would be more supportable. The large but unstructured evidence filed that was compiled attempts to create an appearance of extensive evidentiary support for the action, but in reality it is filled with irrelevant and highly prejudicial material but little if any support for the actual charges.

Section 104(c) of the Whistleblower Protection Enhancement Act (WPEA) states that the remedy for a whistleblower subjected to a retaliatory investigation can include "fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for" protected whistleblowing. The WPEA does not define what constitutes a retaliatory investigation, leaving in place the MSPB's decision in *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323-25 (1997), holding that "[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing." *Id.* at 324. The Office of Special Counsel has added that "[r]etaliatory

⁴⁷ The witness statements in this case were all collected by a firm called WrightWay Consulting which also conducted the interviews of those witnesses and on whose letterhead those statements are made. To reflect the fact that at least one of those statements, Dr. Conlon's, was an unsigned draft, it was even introduced by a WrightWay employee, Adena Wright Williams. *Evidence for Charge 4* at 44, Doc. 6.

investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or overly scrutinized reviews of time and attendance records.”⁴⁸

There are many indications that the investigation was initiated in an attempt to bolster the case against Luber after the failure of the first proposed removal, in retaliation for his protected activity. For example, in both proposed actions, CDC based charges for falsifying timesheets solely on matching up the dates of his course syllabus to the days he took annual leave. It did not bother to verify whether the classes on the syllabus were actually taught, and several charges which appeared in the 2018 proposed removal were easily disproven in Luber’s response to the first proposal and cleaned out of the 2019 proposed suspension.

The evidence files also demonstrate that all of Dr. Luber’s former subordinates who provided testimony or evidence against him did so in response to direct requests by the proposing official and his colleagues to find any evidence that could plausibly support any disciplinary charge against him: the very model of a retaliatory investigation. In Kathryn Conlon’s March 22, 2018 email to Mattie Gilliam and John Tibbs delivering such evidence, she opens “Per our discussion yesterday morning, I looked into my emails and files about requests from George to give lectures in his Emory class(es).”⁴⁹ She concluded “I think this is what you needed,” referencing her superiors’ request for incriminating information about Dr. Luber. *Id.* The retaliatory nature of this investigation can also be inferred from the pay raises, promotions, or fellowship extensions which were granted to former subordinates who agreed to testify against him.⁵⁰

Perhaps most tellingly, in one of the unsigned affidavits prepared in evidence against Dr. Luber, Kathryn Conlon supposedly stated that “**There's a culture of NCEH protecting itself.** When it comes down to it, people knew about George's inappropriate behavior and it was ignored. **I don't have a lot of faith in this system.**”⁵¹ While this statement was made in regards to Dr. Luber’s alleged inappropriate behavior, it is telling that not only was this behavior not charged, but Dr. Luber has become a victim of the “culture of NCEH protecting itself.” As the

⁴⁸ CAROLYN N. LERNER & JASON M. ZUCKERMAN, THE U.S. OFFICE OF SPECIAL COUNSEL’S ROLE IN PROTECTING WHISTLEBLOWERS AND SERVING AS A SAFE CHANNEL FOR GOVERNMENT EMPLOYEES TO DISCLOSE WRONGDOING at 6 (2014), [https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20\(5-19-14\).pdf](https://osc.gov/Resources/OSC's%20Role%20in%20Protecting%20Whistleblowers%20(5-19-14).pdf).

⁴⁹ Charge 4 at 42, Doc. 5.

⁵⁰ Shubahyu Saha, *Evidence for Charge 4* at 106, 99; Kathryn Conlon, *Evidence for Charge 5* at 19, Doc 6.

⁵¹ Evidence for Charge 4 at 51 (emphasis added).

U.S. EEOC has recognized in the employment discrimination context, where “evidence of wrongdoing was not simply unearthed during an investigation [. . .], but was deliberately sought to retaliate against [an employee] and to discourage similar charges” a reviewing court or official should limit the applicability of that evidence.⁵² Use of an illegal retaliatory investigation to gather evidence colors how an adjudicator should consider that evidence, and “[a]n employer who chooses to wage a retaliatory investigation must lose the advantage of equities that would, absent the retaliation, favor that employer.”

If Dr. Luber’s alleged misconduct was so widely known, it should be explained by the proposing official why no action was taken to provide guidance or training on any misconduct during the six years that this proposal spans before escalating immediately to proposing his removal in October 2018 and now proceeding with a request for a very substantial suspension more than seven months later. The evidence presented by the proposing official should also be viewed as highly suspect due to the nature of the underlying investigation and the motive for retaliation against Dr. Luber by the proposing official due to Dr. Luber’s reporting of the proposing official’s wrongdoing to Congress in the intervening period.

These charges primarily stem from alleged failure to properly complete ethics forms for outside activities; however, the NCEH has shown a reluctance to abide by the same rules. In the period between the withdrawal of the initial charges against Dr. Luber in December 2018, which supported a proposed removal, and their reintroduction on July 3, 2019, NCEH mishandled Dr. Luber’s properly completed ethics paperwork which necessitated intervention by professional ethics staff. In February 2019, Dr. Luber learned that he had been selected as a recipient of the Hugh M. Hefner Foundation’s First Amendment Award, to be granted in Washington, DC on May 15, 2019. Counsel submitted a request for ethics approval on February 19, 2019, requesting expedited consideration as the Foundation’s press release announcing the event and the award winners was to be issued soon.

Dr. Erik Svendsen, the Division Director of Dr. Luber’s division, replied that Luber should submit a form 520 outside activity approval form, and “that we will respond to this request as our agency would any other outside activity request.” Exhibit K 1. Dr. Luber did so, and on March 6, 2019, he received a system generated email copied to Josephine Malilay, the Chief of the Asthma and Community Health Branch, titled “Award Request Denied” with one line of text:

⁵² EEOC Notice 915.002 (Dec. 14, 1995), <https://www.eeoc.gov/policy/docs/mckennon.html>.

“CDC's climate change and health program is not closed.” Exhibit K 2. Later that day Dr. Luber emailed Dr. Svendsen asking about the reasoning for the denial, which was replied to on March 12, stating that “it is my understanding that the award description noted the ‘closure of the CDC’s climate and health program’. The CDC’s climate and health program is not closed. I hope this helps.” Exhibit K 3.

An employee may generally accept an award for public service or achievement, provided the award and any item incident to the award is from a person or organization that does not have interests that may be substantially affected by the employee's official duties. It is not believed that the Hugh M. Hefner Foundation has now or ever had any business before CDC. A dispute with the factual basis for an award is not a recognized reason to deny ethics approval to receive it.

On March 13, a phone call was arranged between Dr. Luber’s counsel, Dr. Luber, and two members of the CDC ethics staff: Tina Mangal and Allerick Knight. On that call, counsel explained his understanding of the ethics rules around receipt of awards, which understanding was confirmed by the ethics staff. Mangal and Knight were not aware of the reason for the denial but promised to follow up. After Dr. Luber sent two follow up emails on March 19 and March 25, Ms. Mangal replied that she had received a copy of the Form 520 and was conducting a conflict of interest analysis. Exhibit K 4. On April 1, counsel replied to an inquiry by Ms. Mangal concerning the Hefner Foundation by referring it to the Foundation for response. Exhibit K 5. At the time, counsel was in communication with Bill Torpy, a writer for the ATLANTA JOURNAL-CONSTITUTION who had inquired about Dr. Luber’s personnel situation. Counsel informed Mr. Torpy about Luber’s problems with gaining approval to accept the award. On April 3 and 4, 2019, Mr. Torpy inquired and spoke with CDC personnel about the First Amendment Award. Exhibit K 6. The next day, April 5, Dr. Luber received approval for the award. Exhibit K 7.

This pattern of behavior mirrored the proposing official’s conduct around the October 2018 proposed removal. On December 17, 2018, reporters from the New York Times contacted the CDC for comment on Dr. Luber’s then-pending proposed removal on substantially similar charges to those now pending. The next day at 5:30 pm on December 18, Dr. Luber received an email from the proposing official, Dr. Patrick Breysse, that “[a]fter reading your response and thoughtful consideration, I will rescind the ‘proposal for removal’ memo.” Exhibit K 8 (partially redacted to preserve attorney-client privileged communication). It is clear from this conduct that the proposing official did not believe in the substance of the charges but was unconcerned until

there was a threat of public attention, and that NCEH was similarly willing to bend the ethics approval rules to prevent Dr. Luber from receiving the First Amendment award until the press began to inquire. Dr. Luber's removal is now supposedly based on his alleged failure to comply with ethics requirements, however his agency has proven unwilling to make ethics decisions with the consistency that it demands from its most scrutinized employee.

Finally, as this proposed suspension amounts to prohibited whistleblower retaliation, counsel for Dr. Luber will soon be filing a complaint with the Office of Special Counsel including a request for a stay of this proposed disciplinary action. As such, it is requested that the deciding official refrain from ruling on the proposed disciplinary action until after the OSC has indicated whether it will accept jurisdiction and place a stay on the action.

Respectfully Submitted,

Aug. 8, 2019

A handwritten signature in black ink, appearing to read "Kevin H. Bell", with a long horizontal flourish extending to the right.

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