

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

Cate Jenkins, Ph.D.,
Appellant,

v.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY,**
Agency.

MSPB DOCKET NUMBER
DC-0752-11-0348-I-1

DATE: April 25, 2011

**APPELLANT’S REVISED PREHEARING STATEMENT
OF FACTS AND ISSUES**

Pursuant to the February 16, 2011 Order and Notice of Hearing and Prehearing Conference and the March 7, 2011 Order Regarding Discovery and Suspension of Case Processing, and the April 11, 2011 Hearing Order, Appellant, Cate Jenkins, PhD, submits her Revised Prehearing Statement of Facts and Issues. The March 7, 2011 Order cancelled the prehearing conference and the hearing, but ordered the parties to file prehearing submissions by March 9, 2011, “(based on the information available to them at this time – they will be able to amend them).” March 7 Order at 2. Appellant accordingly filed her pre-hearing submissions on March 9, 2011.

After a 30 day suspension period to pursue discovery, the Board reset the hearing for May 9, 2011. The April 11, 2011 Hearing Order provided for pre-hearing submissions by April 25, 2011. On April 13, 2011, the Board clarified that the April 11, 2011 Order was intended to permit the parties to amend their previous submissions, and that

documents and exhibits that were previously filed should not be resubmitted. Also on April 13, 2011, the Board denied the Agency's motion for a seven day delay for pre-hearing submissions based on the fact that the Agency could not make available the two employees noticed for depositions which it did not contest until just before or after the pre-hearing submission date of April 25, 2011. The Board noted that: "If the parties obtain information in discovery that changes their prehearing submissions, those submissions may be amended."

Appellant submits this Revised Prehearing Statement of Facts and Issues which has revised the Statement filed on March 9, 2011 based on information obtained since that time in discovery. Appellant notes that important discovery matters remain outstanding – Appellant is noticing the depositions of three additional witnesses today, based on information obtained in the April 22, 2010 deposition of the proposing official, Robert Dellinger. Also, Appellant is filing this date another Motion to Compel regarding the failure to respond to much of her written supplemental discovery. Thus, Appellant will likely need to supplement this Statement when discovery is complete.

Statement of Facts

1. Appellant was hired by the Environmental Protection Agency (EPA) through a competitive service appointment as a chemist on December 2, 1979.
2. She served continuously as an Environmental Scientist at the EPA's Office of Solid Waste and Emergency Response (OSWER) from the time she was hired in 1979 until her removal effective December 30, 2010 – *i.e.*, approximately 31 years.

3. During her tenure at EPA, Appellant received numerous positive performance evaluations and awards.
4. At the time of her removal, Appellant was a GS-13 Environmental Scientist with the Waste Characterization Branch (WCB) in the Materials Recovery and Waste Management Division (MRWMD) in the Office of Resource Conservation and Recovery (ORCR) in OSWER.
5. At the time of her removal, Appellant's first level supervisor was James Michael, Chief of the WCB. Her second level supervisor was Robert Dellinger, Director of MRWMD.
6. In 1988, Mr. Dellinger was Appellant's first line supervisor and her branch chief. In 1988, Appellant made disclosures to Congress based on her personal knowledge of EPA contractor abuses. Mr. Dellinger received a formal copy of Appellant's communications with Congress.
7. In 1990, Appellant made disclosures of the misrepresentation by EPA of the cancer studies on Alar, the apple pesticide, and the apparently intentional manipulation by Monsanto Corporation of its studies on the effects of dioxins on its own workers so as to achieve a study result showing no adverse effects. Appellant prevailed in a whistleblower case at the Department of Labor with regard to these disclosures.
8. Between 2001 and 2004, Appellant made numerous disclosures and complaints regarding the improper testing and cover-up of the toxic properties of the dust emanating from the World Trade Center (WTC) disaster and the impact of that toxic dust on First Responders and other citizens. These

disclosures and complaints were disseminated by Appellant to her chain of command and others at EPA, as well as to outside parties including state officials, elected representatives, law firms representing First Responders, citizens, and the press.

9. Appellant also made complaints and disclosures regard the WTC issues described above to the EPA Inspector General's Office and members of Congress.
10. Appellant's disclosures concerning the WTC were posted on web sites and repeatedly quoted in the press and television broadcasts and by members of Congress.
11. In August 2006, Appellant began disclosures concerning the falsification of pH standards (a measure of corrosivity) by her own division at EPA in its Corrosivity Characteristics regulation, and the improper use of laboratory methods in the testing of WTC dust for its pH. These laboratory methods were developed, maintained, and legally mandated by Appellant's division at EPA.
12. Appellant's disclosures and complaints alleged that the falsification of the Corrosivity Characteristics regulation and improper use of laboratory methods contributed to allowing excessive and harmful exposures of First Responders and others at the WTC.
13. Appellant claimed in her disclosures that EPA had known, but covered up the fact that WTC dust was highly caustic (corrosive), that EPA's falsified Corrosivity Characteristics regulation made it appear that the dust at the WTC

was safe, but in fact it was corrosive enough to cause First Responders and others in Lower Manhattan to later suffer respiratory disease and aggravated exposures to other toxic substances in WTC emissions.

14. Appellant's complaints to the FBI stated that Mr. Dellinger's EPA branch, division and office had falsified the non-hazardous pH levels established by the United Nations World Health Organization by a factor of 10.
15. These falsifications began in 1980 and were repeated in 1993 and 1996 and are still part of the current EPA regulations republished every year. These falsified standards were in place and utilized at the time of the WTC disaster and continue to be incorporated by reference into the benchmark safety levels under the Comprehensive Environmental Response and Liability Act (CERCLA) for First Responders at all hazardous substance release sites.
16. Appellant's disclosures concerning the corrosivity of WTC dust and EPA's cover up of the same were reported by the New York Times and other media. Appellant appeared on the CBS Early Show in September 2006 with regard to her disclosures.
17. On August 22, 2006 and October 25, 2006, Appellant made complaints to the EPA Inspector General and Congress concerning the cover-up by EPA of the corrosive alkalinity of WTC dust, falsification concerning the health effects of the corrosive dust, and fraudulent testing of pH levels of the WTC dust particles. The 8/22/06 disclosure went to both Congress and the Inspector General as two separate documents with just the addressees changed. The

10/25/06 disclosure went just to the Inspector General, with Congress getting a copy.

18. In May 2007, Appellant made complaints and requested investigations regarding the falsification of the corrosivity standard to the FBI and to members of Congress.
19. Mr. Dellinger received Appellant's disclosure to Congress and made extensive comments on a copy of the disclosure which attempted to rebut its contents. He also consulted with another Agency employee, Gregory Helms, concerning Appellant's disclosures.
20. Gregory Helms also drafted a paper in response to Appellant's disclosures concerning the corrosivity standard.
21. In October 2008, Appellant supplemented her FBI complaint concerning fraud in pH tests of the WTC dust and falsified Corrosivity Characteristic regulation, including documentation that the EPA laboratories had diluted WTC dust almost 600 times with water before testing it for corrosivity. Her communication with the FBI was copied to her chain of command at EPA, including the Administrator, the Assistant Administrator for OSWER, Mr. Dellinger (the Director of MRWMD), and James Michael (the Chief of the WCB and Appellant's immediate supervisor).
22. On March 8, 2009, Appellant sent an email to all EPA Headquarters staff, the EPA Administrator, her superiors and the EPA Health and Safety Unit entitled "Op-Ed: Should EPA Institute a Workplace Fragrance Ban as Part of its Endocrine Disruptor Initiative?" (hereinafter "workplace fragrance email").

23. On August 3, 2007, Appellant was issued a Memorandum of Counsel from Mr. Dellinger concerning an incident in which an IT technician in Appellant's cubicle was wearing a heavy dose of perfume. Due to Appellant's sensitivity to scents, she asked him to leave three times, but he did not. At that point, Appellant was beginning to have an asthma attack, and took a plant spray water bottle and told the technician that it was poison and that she would spray him if he did not leave. The bottle contained only water. Federal Protective Service officers were called but declined to prosecute Appellant. EPA then took steps to require that in the future IT technicians immediately vacate an EPA employee's work station upon request. The Memorandum of Counsel was an informal corrective action, not filed in Appellant's Official Personnel File, and the matter was not treated by EPA as an incident of workplace violence.
24. On June 3, 2009, Appellant was issued a proposed five day suspension from her supervisor, James Michael. Charge 1 alleged failure to follow supervisory directives, and Charge 2, "Misuse of Position," claimed that Appellant had violated the Standards of Ethical Conduct by disseminating the workplace fragrance email. Charge 3 alleged discourteous conduct.
25. On July 20, 2009, Mr. Dellinger issued to Appellant a Notice of Decision on the proposed five day suspension (hereinafter "Suspension Decision"). The Notice reduced the suspension to two days and included a "warning stemming from your nonconformance with the Standards of Ethical Conduct" in connection with the workplace fragrance email. It stated that Appellant's

conduct “did not conform to the Standards of Ethical Conduct,” but nevertheless the charge related to the workplace fragrance email would not be upheld, and that instead Mr. Dellinger was “issuing you a warning.”

26. The Suspension Decision found that Appellant had violated the Standards of Ethical Conduct in connection with the dissemination of workplace fragrance email because the subject of it was “personal” to Appellant, she was not authorized to send the email as part of her official duties, and her personal involvement was obfuscated and could have misled recipients as to whether it was an official EPA communication.
27. The Suspension Decision also stated that Appellant had been on notice from Justina Fugh that unauthorized use of EPA email would violate the Standards of Ethical Conduct.
28. The only communications that Appellant had ever received from Justina Fugh had concerned Appellant’s earlier disclosures and complaints concerning the WTC.
29. On July 9, 2007, Ms. Fugh and her superior had issued a new EPA ethics advisory stating that disclosures protected under the Whistleblower Protection Act could not be on EPA letterhead because they constituted the personal opinion of the employee and were not made on behalf of the Agency. All of Appellant’s WTC disclosures described above had been on EPA letterhead.
30. Appellant challenged the Suspension Decision through EPA’s grievance process, and it was upheld with regard to the charges of failure to follow

supervisory directives and discourteous conduct. Warnings cannot be challenged in the EPA grievance process.

31.

The conduct underlying Charges 1 and 3 did not involve violent behavior or threats of violence, and as noted above, were charged as failure to comply with supervisory directives and discourteous conduct. Charge 1 involved an incident in which Appellant told a co-worker that her perfume was problematic for Appellant. Charge 3 had two specifications in the suspension proposal. The first concerned email exchanges with another co-worker purportedly containing “threatening” language, in the form of a statement at the end of the email stating “make my day.” The other specification with regard to Charge 3 involved Appellant allegedly entering the cubicle of another co-worker and complaining that he was talking too loud in a conversation with another co-worker. The specification claimed that Appellant refused to leave and was blocking the doorway, but then the co-worker walked out past her. Charge 3 was upheld in the Step 3 grievance process solely based on the email exchange in which Appellant stated “make my day.”

32.

On August 19, 2009, Appellant challenged the warning about the workplace fragrance email contained in the Suspension Decision in a whistleblower complaint before the Office of Special Counsel (OSC).

33. On January 27, 2010, OSC declined Appellant's complaint and issued her a notice of right to pursue an individual right of action (IRA) before the Merit Systems Protection Board (MSPB).
34. In March and April, 2010, Appellant sent emails to several members of her division, her immediate superiors, outside parties and EPA Headquarters and Regional Unions concerning a pending lawsuit involving First Responders at the WTC, in which Appellant's complaints and disclosures were being used as documentary evidence. The emails referred to and provided links to Appellant's earlier FBI, congressional and Inspector General complaints over the falsification of the Corrosivity Regulation and the use of improper laboratory test methods for WTC dust by EPA and outside parties. The email also provided links to published medical studies attributing the high corrosivity of WTC dust to medical symptoms in First Responders.
35. On April 1, 2010, Appellant filed her IRA before the MSPB regarding the warning over the workplace fragrance email.
36. On April 23, 2010, Appellant Responded to the MSPB show cause order in her appeal of the warning concerning the workplace fragrance email. In it, she accused Mr. Dellinger of violating the Ethics Standards for his false accusations against her.
37. On April 30, 2010, Mr. Dellinger signed a Memorandum to Appellant entitled "Clarification on July 20, 2009 Suspension Decision" (hereinafter "Clarification Memo"). In it, he stated that the substance of the workplace fragrance email was a public health matter which was appropriate for an

Agency employee to raise with her chain of command and other EPA officials. He also said the workplace fragrance email was not a personal or private activity, as opposed to an official one, and that Appellant had a right under the Occupational Safety and Health Act to alert employees to workplace health and safety matters. Mr. Dellinger also stated that “upon further reflection,” there was not any substantial likelihood that the audience for the workplace fragrance email would have any confusion as to the Agency’s endorsement of Appellant’s comments. These concerns which Mr. Dellinger now stated did not apply to the workplace fragrance email were the bases for Mr. Dellinger’s conclusion in the Suspension Decision that Appellant had violated the Standards of Ethical Conduct.

38. In the Clarification Memo, Mr. Dellinger further claimed that his suspension decision did not contain a disciplinary “warning,” but was merely an attempt to counsel Appellant to consult with Agency ethics officials before again employing the “Lotus Notes All Users feature” to make a mass mailing concerning a health and safety matter.

39. Mr. Dellinger stated to Appellant in the Clarification Memo that “What I do think is fair is, now that I have made you aware of your obligation to ensure that any future mass mailings do not run afoul of the governing Standards of Conduct, holding you responsible for prospectively ensuring that you consult with OSWER’s Deputy Ethics Officer or the Agency’s Ethics Officer in the Office of General Counsel to ensure that your use of the All User distribution feature is appropriate.”

40. Appellant did not use the Lotus Notes All User distribution feature in disseminating her workplace fragrance email. She instead addressed her email to individual EPA program offices stationed at EPA Headquarters in the DC metropolitan area, as well as to the EPA Administrator.
41. Finally in the Clarification Memo, Mr. Dellinger stated that it was his intent that this clarification of his disposition of Charge 2 in the Suspension Decision would persuade Appellant that she had not suffered an adverse action incident to the workplace fragrance email and that she would withdraw her IRA appeal.
42. At about 9:15 am on Monday, May 3, 2010, Appellant found an unsealed inter-office memo in her inbox in the EPA central mail station, which contained Mr. Dellinger's Clarification Memo.
43. After receiving the Clarification Memo on May 3, 2010, but before speaking to Mr. Dellinger that day, Appellant distributed by email one of her filings in her MSPB IRA appeal concerning the workplace fragrance email to a large group of EPA staff and outside parties who were interested in the workplace fragrance issue, as well as to a large list of EPA union officials. The filing that she distributed accused Mr. Dellinger of violating the ethics standards and of reprisal against Appellant for raising the fragrance issue.
44. While Appellant was pleased concerning the admissions in the Clarification Memo that her communications in the workplace fragrance email had been appropriate and that the workplace fragrance issue she raised was a valid health and safety issue, Appellant also considered the Clarification Memo to

be an inappropriate *ex parte* communication in her MSPB proceeding, an attempt to coerce her to drop her MSPB case, and an attempt to circumvent the MSPB order requiring the Agency to file a formal response with the MSPB rather than an informal communication with Appellant. She also considered the Clarification Memo to be an improper attempt to restrict her future communications, by directing her to get approval before distributing another group email.

45. On the morning of May 3, 2010, in an attempt to speak with Mr. Dellinger about these matters, Appellant took the Clarification Memo and found Mr. Dellinger in the open bay area in front of his office. She told him that it was an inappropriate *ex parte* communication, and that all of the communications should go through the lawyers in the MSPB whistleblower case. Appellant handed the memo back to Mr. Dellinger and he took it at that time.
46. Then, Appellant left the bay area and returned to her cubicle.
47. About ½ hour later or more, Mr. Dellinger came to Appellant's cubicle and handed her the Clarification Memo. He said he had checked with the EPA lawyer and was told that he could give the memo to Appellant. Appellant took the memo at that time and did not say much.
48. Mr. Dellinger then walked around the cubicle block to see if Ross Elliott had arrived to work in a cubicle a short distance away. He dropped off some papers in Mr. Elliott's cubicle. When he was walking back and still in the aisle in front of the windows, he told Appellant that it was Justina Fugh, the EPA Ethics Counselor, who had given him bad advice when he wrote the

Suspension Decision. Appellant said she believed Dellinger about Ms. Fugh, but he was the one who signed the document.

49. Mr. Dellinger then came back near Appellant's cubicle and leaned over the partition wall. He did not enter Appellant's cubicle and was not in the entryway. Appellant did not ask or gesture for Mr. Dellinger to come in to her cubicle.

50. Mr. Dellinger then told Appellant that the EPA attorney working on her "current case" was "the same one who is handling your other case."

Appellant motioned Mr. Dellinger to hush, because she was afraid that Steve Hoffman, who was in the adjacent cubicle, would overhear. Appellant had filed a complaint against Steve Hoffman and reported a death threat Hoffman had made against his supervisors. She also thought the "other case" might refer to her FBI complaints. She did not want Mr. Hoffman to overhear a conversation about the "other case," but instead wanted to find out what Mr. Dellinger was referring to by talking with him in his office.

51. Mr. Dellinger remained leaning over the partition to Appellant's cubicle, so Appellant stood up and mouthed words to the effect of "don't say anything more." She then pointed in the direction of his office, and left her cubicle heading that way, following Mr. Dellinger.

52. On May 18, 2010, Appellant learned in an investigative interview with Ms. Wendy Lawrence that Mr. Dellinger had claimed that during the conversation just described, Appellant had beckoned him to come inside her cubicle and had said, "I am going to kill you, you fucking asshole."

53. In fact, Appellant did not make any threats or utter any obscenities to Mr. Dellinger at that time or at any other time. She also did not beckon him to come inside her cubicle during that conversation, and the entire conversation occurred with Mr. Dellinger leaning over Appellant's cubicle's partition wall.
54. After Appellant got up and pointed in the direction of Mr. Dellinger's office, Appellant and Mr. Dellinger did go into Mr. Dellinger's office. Appellant tried to find out what other case Mr. Dellinger was talking about, but he did not respond. Appellant also asked Mr. Dellinger why he had left the Clarification Memo in an unsealed envelope over the weekend, and asserted that this was a Privacy Act violation. Mr. Dellinger said, "I guess I messed up." Appellant responded saying, "You think you can do whatever you want with impunity." Appellant then walked out of Mr. Dellinger's office.
55. Appellant had one more conversation with Mr. Dellinger on May 3, 2010, which was in the early afternoon. Appellant went back to Mr. Dellinger's office to try to get him to revise or retract the Clarification Memo. Appellant stood in Mr. Dellinger's open doorway during this conversation.
56. Appellant told Mr. Dellinger that because he had included language about her suspension in the Clarification Memo, it could open up the matter of the suspension and grievance before the MSPB. Appellant also told Mr. Dellinger that he may have been given bad advice by EPA counsel with regard to the Clarification Memo, because it constituted new retaliation and improperly claimed that Appellant needed to ask for prior approval from the

EPA Ethics Advisor before sending out a group e-mail. Then Appellant left Mr. Dellinger's doorway.

57. Appellant is 5 feet 4 inches, wears glasses with large lenses, weighs less than 120 pounds, and is known in the EPA office as physically weak. She had polio, and as a result uses a special stylus mouse keyboard that does not require accurate wrist-forearm movements, purchased by EPA to accommodate her minor disability. Mr. Dellinger is over 6 feet tall.
58. After the alleged death threat on May 3, 2010, Mr. Dellinger waited a week to speak with anyone or to make a report about it. On Monday May 10, 2010, he spoke about it to Mr. Roy Prince, and then he and Mr. Prince spoke with Maria Vickers, then Acting Director of the Office of Resource Conservation and Recovery (ORCR), and Mr. Dellinger's supervisor.
59. Appellant's alleged death threat was reported to the Federal Protective Service (FPS) by someone at EPA other than Mr. Dellinger. An FPS officer, Mr. Dearborn, interviewed Mr. Dellinger on May 11, 2011.
60. FPS produced an Incident Report on May 11, 2010, and a Report of Investigation on October 4, 2010. These reports contained numerous inaccuracies concerning Dr. Jenkins' past discipline and other matters, which were apparently supplied by Mr. Dellinger.
61. The FPS reports were based entirely on Mr. Dellinger's statements. Dr. Jenkins was never interviewed.
62. The matter was referred to the U.S. Attorney's office for possible criminal prosecution, but prosecution was declined.

63. On May 11, 2010, Mr. Dellinger was interviewed by Kenneth White and Beverly Carter of the EPA personnel office concerning the alleged death threat. The report of this interview differs with regard to significant details from the report which Mr. Dellinger claims that he supplied to the FPS and which was provided to Dr. Jenkins in connection with her proposed removal. Dr. Jenkins was not provided the report of the EPA interview until discovery in this case.
64. On May 12, 2010, James Michael, Chief, WCB, and Appellant's immediate supervisor, issued a Memorandum placing Appellant on administrative leave pending investigation into allegations of misconduct. She remained on administrative leave until her removal.
65. On May 19, 2010 Appellant emailed Wendy Lawrence, who was investigating the alleged death threat, the names of eight people who may have overheard the conversations between Appellant and Mr. Dellinger on May 3, 2010.
66. On June 2, 2010, Appellant submitted a supplemental complaint to OSC and MSPB alleging additional retaliation by Mr. Dellinger in the Clarification Memo. Appellant complained that while the Clarification Memo dropped the ethics charge against her, it imposed a new censorship of her rights to raise health and safety concerns by requiring that she obtain pre-approval from the EPA Ethics Office to distribute such concerns.
67. At some time after May 3, 2010 and before July 9, 2010, Mr. Dellinger had meetings with Action OCRC Director Maria Vickers concerning the alleged death threat on May 3, 2010. Ms. Vickers first suggested that Appellant be

immediately placed on administrative leave and then suggested that a removal action be taken.

68. The removal action was first assigned to James Michael, Appellant's immediate supervisor, but later Ms. Vickers asked Mr. Dellinger to be the proposing official.
69. On July 9, 2010 Mr. Dellinger issued a Notice of Proposed Removal to Appellant, claiming that Appellant had made a "profanity-laced threat to kill me." He asserted two charges: "Threatening or attempting to inflict bodily harm," and "Abusive or offensive language, gestures or other conduct," both based on the same alleged death threat.
70. After Appellant's placement on administrative leave but before her removal, there were additional press stories citing Appellant's disclosures concerning the toxicity of WTC dust and resulting injuries to First Responders and others. On August 1, 2010, in connection with then-ongoing congressional debate about the Zadroga Act which would provide medical compensation for WTC First Responders and others, a newspaper and radio station quoted Appellant and gave links to her 2006 interview on the CBS Early Show. The August 1, 2010 news story also reported that Appellant had revealed that on Sept. 12, 2001, EPA Region 2 refused the assistance from Region 8 offering superior microscope asbestos testing, turning away the offer with a profanity.
71. On August 6, 2010, Appellant presented her oral reply to the proposed removal to the deciding official, Ms. Rudzinski. Ms. Lawrence attended this meeting. Two union officials, Rosezella Canty-Letsome and Anne-Marie

Pastorkovich, also attended this meeting. During this meeting, Appellant asked Ms. Lawrence whether she had interviewed any of the people Appellant suggested might have overheard her interactions with Mr. Dellinger on May 3, 2010. Ms. Lawrence responded that she had not.

72. Also at this August 6, 2010 meeting, Ms. Rudzinski told Appellant that she would interview the persons whose names Appellant had supplied to Ms. Lawrence. However, she did not do so.

73. After Appellant's oral reply, Ms. Rudzinski received further evidence in the nature of affidavits from Mr. Dellinger and Paul Winick, an EPA attorney. Appellant filed responses to these affidavits.

74. On December 30, 2010, Ms. Rudzinski issued her final removal decision, making Appellant's removal effective that same date.

75. On January 31, 2011, Appellant filed the appeal in this case.

Statement of Issues

Defenses

1. The agency proposed removal and final removal actions are prohibited personnel practices under 5 USC 2302(b)(8) and are a violation of the Whistleblower Protection Act because these actions were retaliation for Appellant's activities protected under 5 USC 2302(b)(8) and the Whistleblower Protection Act.

2. The agency proposed removal and final removal actions are prohibited personnel practices under 5 USC 2302(b)(9) because these actions were retaliation for Appellant's filing appeals and complaints to the MSPB, Congress, the EPA Office of Inspector General, and the FBI .

3. The agency proposed removal and final removal actions are prohibited personnel practices under 5 USC 2302(b)(12) because these actions were retaliation for Appellant's communications with and petitions to Congress.

4. The Agency charges and removal of Appellant Jenkins are not supported by the Agency record or the Agency's disclosed evidence, or by a preponderance of the evidence.

5. The agency removal action does not promote the efficiency of the federal service.

6. The penalty of removal is not reasonable and is not supported by the law, the facts, or the Douglas factors.

Issues

1. Whether Appellant threatened proposing official Dellinger as Mr. Dellinger alleged.

2. Whether, assuming that Appellant did threaten proposing official Dellinger as alleged, it was a true threat subject to discipline in accordance with *Metz v. Dep't of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986) and related cases.

3. Whether Mr. Dellinger is credible.

4. Whether Dr. Jenkins is credible.

5. Whether the penalty of removal is appropriate for the charge in light of the Douglas factors and the circumstances of this case including the absence of any prior offenses of the same type as alleged in the charge underlying the removal action.

6. Whether the agency proposed removal and final removal actions are prohibited personnel practices under 5 USC 2302(b)(8) and are a violation of the Whistleblower

Protection Act because these actions were retaliation for Appellant's activities protected under 5 USC 2302(b)(8) and the Whistleblower Protection Act including those activities and disclosures listed in Appellant's table in her attachment to her MSPB appeal which is incorporated here by reference.

7. Whether the agency proposed removal and final removal actions are prohibited personnel practices under 5 USC 2302(b)(9) because these actions were retaliation for Appellant's filing appeals and complaints to the MSPB, Congress, the EPA Office of Inspector General, and the FBI .

8. Whether the agency proposed removal and final removal actions are prohibited personnel practices under 5 USC 2302(b)(12) because these actions were retaliation for Appellant's communications with and petitions to Congress.

9. Whether Appellant engaged in activities protected under 5 USC 2302(b)(8) and the Whistleblower Protection Act including those activities listed in her current appeal of the agency removal action including the attachments thereto.

10. Whether Appellant engaged in activities protected under 5 USC 2302(b)(9) including filing appeals and complaints to the MSPB, Congress, the EPA Office of Inspector General, and the FBI .

11. Whether Appellant engaged in activities protected under 5 USC 2302(b)(12) including communications with and petitions to Congress.

12. Whether the proposing official Dellinger had knowledge that Appellant engaged in activities protected under 5 USC 2302(b)(8) and the Whistleblower Protection Act including those activities listed in her current appeal of the agency removal action including the attachments thereto.

13. Whether the proposing official Dellinger had knowledge that Appellant engaged in activities protected under 5 USC 2302(b)(9) including filing appeals and complaints to the MSPB, Congress, the EPA Office of Inspector General, and the FBI .

14. Whether the proposing official Dellinger had knowledge that Appellant engaged in activities protected under 5 USC 2302(b)(12) including communications with and petitions to Congress.

15. Whether the deciding official Rudzinski had knowledge that Appellant engaged in activities protected under 5 USC 2302(b)(8) and the Whistleblower Protection Act including those activities listed in her current appeal of the agency removal action including the attachments thereto.

16. Whether the deciding official Rudzinski had knowledge that Appellant engaged in activities protected under 5 USC 2302(b)(9) including filing appeals and complaints to the MSPB, Congress, the EPA Office of Inspector General, and the FBI .

17. Whether the deciding official Rudzinski had knowledge that Appellant engaged in activities protected under 5 USC 2302(b)(12) including communications with and petitions to Congress.

18. Whether the proposing official Dellinger had a motive to retaliate against Appellant.

19. Whether other EPA officials or persons with retaliatory motive and or knowledge of Appellant's protected activities under 5 USC 2302(b)(8) influenced the proposing official Dellinger.

20. Whether other EPA officials or persons with retaliatory motive and or knowledge of Appellant's protected activities under 5 USC 2302(b)(9) influenced the proposing official Dellinger.

21. Whether other EPA officials or persons with retaliatory motive and or knowledge of Appellant's protected activities under 5 USC 2302(b)(12) influenced the proposing official Dellinger.

22. Whether the deciding official Rudzinski had a motive to retaliate against Appellant.

23. Whether other EPA officials or persons with retaliatory motive and or knowledge of Appellant's protected activities under 5 USC 2302(b)(8) influenced the deciding official Rudzinski.

24. Whether other EPA officials or persons with retaliatory motive and or knowledge of Appellant's protected activities under 5 USC 2302(b)(9) influenced the deciding official Rudzinski.

25. Whether other EPA officials or persons with retaliatory motive and or knowledge of Appellant's protected activities under 5 USC 2302(b)(12) influenced the deciding official Rudzinski.

26. Whether the investigation conducted by the agency of the charges against Appellant was inadequate.

27. Whether the investigation conducted by the agency of the charges against Appellant was irregular.

28. Whether Dellinger or other EPA employees provided false information to the Federal Protective Service in connection with its investigation of Dr. Jenkins and the May 3, 2010 incident charged in her removal.

29. Whether the agency used irregular procedure in proposing the removal of Appellant.

30. Whether the agency used irregular procedure in making the final decision to remove Appellant.

31. Whether the proposing official had expressed hostility towards Appellant's protected activities under 5 USC 2302(b)(8), 5 USC 2302(b)(9), and/or 5 USC 2302(b)(12).

32. Whether the deciding official had expressed hostility towards Appellant's protected activities under 5 USC 2302(b)(8), 5 USC 2302(b)(9), and/or 5 USC 2302(b)(12).

33. Whether the agency met its burden to prove by clear and convincing evidence that it would have removed Appellant even if she had not made protected disclosures under 5 USC 2302(b)(8).

34. Whether there were any prior instances of the agency charging Appellant with a violation of the type charged in support of the removal action (i.e. any prior examples of charges of workplace violence) and whether any such prior charges were sustained.

35. The nature and severity of any past disciplinary actions by agency officials regarding Dr. Jenkins, and whether these prior actions supported the removal decision.

36. Whether there was fraudulent use of laboratory methods, contrary to the test methods legally developed and mandated, by EPA funded researchers for World Trade Center (WTC) dust.

37. Whether circumstances reflect actual or constructive knowledge on the part of the proposing or deciding official or persons influencing them of fraudulent use of laboratory methods, contrary to the test methods legally developed and mandated, by EPA funded researchers for World Trade Center (WTC) dust.

38. Whether there was falsification of safe levels in the Corrosivity Characteristic regulation promulgated and maintained by Mr. Dellinger's division.

39. Whether circumstances reflect actual or constructive knowledge on the part of the proposing or deciding official or persons influencing them of falsification of safe levels in the Corrosivity Characteristic regulation promulgated and maintained by Mr. Dellinger's division.

40. Whether the discipline imposed on Appellant was consistent with that imposed on similarly-situated non-whistleblowers.

Dated this 25th day of April, 2011

Respectfully submitted,

_____/s/_____
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