Office of Special Counsel ("OSC")

Washington, D.C.

Complaint of Normand Laberge, Environmental Protection Specialist U.S. Department of the Navy	)	**Complaints and Disclosure Analysis Division** File No. ________________ May 14, 2003

NARRATIVE STATEMENT

By and through undersigned counsel pursuant to 5. C.F.R. 1800.1(c), Normand Laberge hereby files this Complaint alleging: (1) retaliation for his protected disclosures, 5 U.S.C. 2302(b)(8); and (2) violation of Douglas principles, *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (Apr. 10, 1981). Given the extremis nature of the retaliation against him, Mr. Laberge concurrently requests a stay by the U.S. Special Counsel of any adverse action regarding his employment. [CITE]. A *Notice of Proposed Removal* has been issued as of May 17, 2003; and the response date extended to May 12, 2003, making the proposed date of removal now May 16, 2003. The U.S. Special Counsel is asked to review the request for a stay expeditiously, so as to prevent a termination and rehire, if a stay is granted.

Following his first *Disclosure* to the U.S. Office of Special Counsel in 1999, Normand Laberge has repeated communicated NTCS LANT CUTLER's failure to abide by the following environmental rules, laws and/or regulations: OSHA CPL 2-2.63; 29 C.F.R. 1926.1101(k)(3)(ii)(B) & (m), the National Environmental Protection Act of 1960, provisions codified at 42 U.S.C. Sections 4321-4370(a); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), provisions codified at 42 U.S.C. Section 9601; the Clean Water Act of 1970 ("CWA"),

provisions codified at 33 U.S.C, et seq; and the Resource Conservation and Recovery Act, provisions codified at 42 U.S.C. Sections 6901-6992(k). The evidence provided in this Complaint demonstrates both violations of the Douglas Factors and specific and continuing retaliation by Mr. Poisson against Normand Laberge for the latter's disclosing of violations of rule, law and/or regulation.

Statement of Facts

Mr. Laberge's first line Supervisor – Mr. Paul Poisson -- has proposed the removal of Normand Laberge from the federal service. The basis for the Notice of Proposed Removal is an alleged failure by Mr. Laberge to react lawfully to the discovery of asbestos at NTCS LANT Cutler in August, 2002. The *Notice of Proposed Removal* was not issued until April 17, 2003, some eight (8) months following the incident. [CITE] In the interim, an investigation by a disinterested, third-party official concluded that no specific individual was responsible for the violations of U.S. EPA and OSHA rules regarding the safe removal of asbestos. [CITE].

On 2 August 2002, civilian personnel from the Cutler detachment exposed the water line from the former commissary to the water tower to locate a ruptured / leaking section. On 6 August 2002, three individuals from the facilities maintenance and three firemen cut open the outer, metal sheath to gain access to the parallel set of water. Mr. Laberge arrived at the site just before the workers turned on the water to determine the location of the leaking pipe. Mr. Laberge was completely unaware of this event which was nearly identical to a similar incident at nearly the same site in February 2001. On 31 January 2001, Mr. Laberge concluded that the insulating material should be presumed to contain asbestos until a sample could be taken for analysis.

On 13 August 2002, Mr. Laberge took two samples after telling Mr. Poisson about the potential presence of asbestos. The results indicated a composition of 80% asbestos (amosite) as reported on 26 August 2002. During the interim on 19 August 2002, civilian personnel removed asbestos from nearly eight feet of pipe and cut out the

faulty section. Mr. Laberge reported the results of his 26 August 2002 inspection and subsequently prepared plans for the abatement and clean-up of the site which included the disposal of nearly 400 pounds of asbestos debris.

On 31 October 2002, Navy representatives requested an investigation from an asbestos expert to assess any potential misconduct on Mr. Laberge's part in this incident. On 15 November 2002, a Navy representative (R. Knowles) requested an independent investigation by a qualified Industrial Hygienist (IH) to consider what action to take and on whom. On 28 February 2003, Mr. Chabot (Portsmouth Naval Shipyard IH) concluded that the "sequence of events does not support the claim that any single individual was responsible for the potential asbestos exposure" without naming any one individual. Mr. Poisson served as the detachment's safety program manager during this period.

Factual Pattern of Retaliation

The continuing pattern can be summarized as follows: The U.S. Merit Systems Protection Board issued a decision on June 14, 2002, lending credence to the position that Laberge had placed his job security at risk with communications designed to protect the public health by underscoring the ongoing violations of rule, law and/or regulation at NTCS LANT CUTLER. These comments revealed that the U.S. Navy did, indeed, violate elements of the National Environmental Protection Act of 1969 (NEPA). The Board concluded that Normand Laberge did not make a protected disclosure as that term of art is defined by U.S. Court of Appeals for the Federal Circuit case law. [CITE to HUFFMAN]. Mr. Laberge has appealed the Board's decision, alleged a misreading of Huffman, and has based his argument on Judge Elizabeth Slavet's empathetic concurrence to the decision in his case. Laberge v. U.S. Navy [CITE] was briefed over the Winter, 2002-2003, and is scheduled for oral argument on June 5, 2003. The events of Mr. Laberge's past case are not central to this Complaint, but rather form the necessary context to the present action.

On April 17, 2003, and with knowledge of this litigation and other protected disclosures, Mr. Poisson issued a *Proposed Notice of Removal* from federal service that was to take effect on May 17, 2003. The *Proposed Notice of Removal* action is the culmination of continuing retaliation against Mr. Laberge for his role in ensuring environmental compliance at NCTAMSLANT DET Cutler. This latest incident of retaliation began with the initiation of an investigation leading to a possible disciplinary action in September, 2002. This occurred after Mr. Laberge noted – to Mr. Poisson – that the Command was failure to adhere to workplace safety rules during its maintenance of the antenna systems.

In July 2002, one of the two transmitting arrays had been taken out of commission due to an insulator failure. Normand Laberge noted that Mr. Poisson had been irresponsive to warning signals regarding the condition of the arrays. The locak labor representatives of American Federation of Government Employees (AFGE) were also warned of the workplace safety problem. It was my position that our Office did not properly react to previous failures as noted by expert testimony, and that Mr. Poisson did not properly respond to a report of a lightning strike on the transmitting array several days before the failure. Later in the summer, the Office's asbestos mishandling incident also provided Mr. Poisson an opportunity to retaliate against me for my attempts at accountability.

The second event that resulted in the proposed letter of removal refers to my review of plans to transfer a portion of the Navy's Cutler facility as excess property. In March 2003, Laberge indicated to Mr. Poisson and to AFGE representatives that the Navy had not fully met all environmental requirements before being able to complete the transfer of property. Laberge had been purposively excluded from all discussions required the rules, laws and regulations required to me met before transfer of the property. This practice of exclusion began soon after Mr. Poisson's arrival at NTCS LANT CUTLER.

Mr. Poisson advised his immediate superior, Captain [NAME] Height, USN, that the property was ready for transfer; however, Mr. Laberge provided that led to a reconsideration of transfer plans. This is prima facie proof that there were substantial disagreements between Mssrs. Poisson and Laberge regarding the enforcement of rule, law and/or regulation; that Mr. Poisson had scienter of those disagreements; and that he acted to manage his department around the communications made by Mr. Laberge is reasonable belief that a law was being broken. Indeed, by her subsequent actions, Captain Height has even confirmed Laberge's reasonable belief. The Navy has now agreed to pay a consultant to prepare a closure plan for a hazardous waste facility and the Navy is also considering the possibility that the site had not been properly analyzed for potential contamination by paint waste.

Normand Laberge has also raised a number of other environmental compliance issues that are being addressed by Navy personnel at NCTS LANT CUTLER. He has taken the position that the Navy has to update an asbestos inventory and to respond to potentially hazardous conditions before, rather than after, the transfer of property. Mr. Poisson has the responsibility to complete this task. Since additional expenditure of funds is required as part of the pre-transfer process, he must acquire the funding. Mr. Laberge also warned Mr. Poisson about the need to address these issues during 2002 as part of his responsibility to assess the overall environmental compliance record at the detachment and during an exchange with NCTAMSLANT's Commanding Officer, Captain Height.

On a related issue, Mr. Laberge also communicated the possible existence of two (2) additional sites where the U.S. Navy contaminated the environment. These communications also occurred at the same time frame that Mr. Poisson decided to utilize the questionable results of the asbestos investigation to propose Laberge's removal from federal service.

In summary, Mr. Poisson has demonstrated a pattern of retaliation against Normand Laberge since 2000. Poisson's actions are excessive, and in violation of the

Douglas principle requiring proportionality. Nor is this the first time Mr. Poisson's actions have violated the *Douglas* principles. Mr. Poisson once proposed a ten (10) day suspension for after Mr. Laberge was ten (10) minutes late for a meeting. Mr. Poisson also removed Laberge's e-mail privileges because he sent a message to an EPA official requesting assistance on an issue related to PCB contamination of the inter-tidal zone. In this recent asbestos incident, Mr. Poisson has distorted the details of the event to protect his position and has placed workers at risk to exposure to air-borne asbestos. The connection between the insulator failure and the reporting of an incomplete property transfer plan support the notion that the asbestos incident was fabricated as an act of retaliation against my whistleblowing activities.

The aforementioned incidents touched off this latest incident of retaliation, and followed from these other acts of retaliation forming a pattern of reprisal:

? *Accountability System* – A "letter-to-the-editor" appeared in 11 June 2002 edition of the Bangor Daily News that criticized the management at the Cutler detachment and that emphasized the importance of establishing a system of checks and balances to ensure an acceptable level of accountability.

? *MSPB Decision* – On 14 June 2002, MSPB issued a decision on a complaint that LABERGE filed in June 1999 against the U.S. Navy. The decision indicated that LABERGE was treated as a whistleblower by the U.S. Navy, that LABERGE risked employment security by making the disclosures, that the U.S. Navy had violated environmental standards (Laberge.e., National Environmental Policy Act [NEPA]), and that LABERGE had attempted to protect the health and safety of the nearby population. However, MSPB also concluded that LABERGE would not receive Whistleblower protection because my disclosures were made while satisfying my job responsibilities. This decision is being appealed and a hearing date of 5 June 2003 has been set for the proceeding.

? *VLF Insulator Incident* – On 2 July 2002, an insulator failed at the Cutler that resulted in the temporary (if not permanent) disconnection of one of two transmitting arrays. This event led to an exchange of e-mails and correspondence with Mr. Poisson in which LABERGE questioned his efficiency as the technical director for not apply appropriate maintenance oversight that could have prevented this incident while also questioning

precautions that should have been taken to protect personnel from electromagnetic radiation.

? *Ten Day Suspension* – On 3 July 2002, Mr. Poisson issued a ten day suspension for "disrespectful behavior". Disciplinary action was later reduced to a four day suspension in January 2003 after the local Union (AFGE) requested arbitration on this issue. Arguments against the suspension included a claim the Mr. Poisson had demonstrated a continuing patter of retaliation against for my efforts to ensure environmental compliance.

? *Communications* – In a memorandum, Mr. Poisson sent a directive that attempted to limit my input into discussions on the clean-up of contaminated sites on base. Mr. Poisson once again reiterated his policy on using the "chain of command" to deal with controversial issues.

? *Whistleblowing* – Based on the conclusions from the MSPB decision, LABERGE requested a congressional inquiry into the management of the Cutler facility. This request was sent to Senator Susan Collins office and was supported by the local Union (AFGE).

? *Correspondence to Maine DEP* – On my own time, LABERGE sent two letters to the Commissioner of Maine DEP questioning the effectiveness of DEP personnel on the Cutler remediation projects. LABERGE described my background on whistleblowing issues and requested greater accountability from the regulators. LABERGE also claimed that DEP personnel had adversely affected my ability to ensure environmental compliance at the detachment by becoming in internal affairs. Maine DEP responded to my two letters. At the end, LABERGE indicated that LABERGE would continue my efforts to comprehensively address the contamination of the intertidal zone abutting the detachment.

? *Amnesty Letter* – An exchange of e-mail was initiated after LABERGE requested amnesty from the regulators and the U.S. Navy in order to be able to produce more disclosures on the release of information from federal workers. My rationale for making this request was due to retaliatory practices that had been exhibited by Mr. Poisson et al.

? *Classification Appeal Decision* – By his input into the appeal process, Mr. Poisson was able to reduce my effectiveness in trying to ensure environmental compliance while reducing my responsibilities and by having me absorb some of his work elements.

? *Charge of Waste, Fraud, and Abuse* – An investigation was conducted by officials from NCTAMSLANT that supported Mr. Poisson's actions on the purchase of chairs. The fact that LABERGE questioned Mr. Poisson's

authority had the net effect of increasing Mr. Poisson's propensity to commit acts of reprisal.

? *Retraction of Engineering Seal* – During the classification appeal process, Mr. Poisson indicated that LABERGE did not function as a professional engineer even though LABERGE completed a thermal study with my engineer's seal. When LABERGE requested the removal of my seal from the study, Mr. Poisson refused the request and tried to describe my new job responsibilities by characterizing me as an advisor instead of a manager.

? *Asbestos Remediation at Salvage Yard* – This incident serves as another example of Mr. Poisson's lack of support on environmental issues. In this case, my allegations were proven correct and LABERGE was still restricted by Mr. Poisson on being to perform my functions. This particular incident happened during the same period that Mr. Poisson was conducting an investigation on my lack of oversight on asbestos compliance for the water line repair project.

? *Timely Correspondence* – LABERGE responded to a memorandum from Mr. Poisson that blamed me for not submitting an annual report on the detachment's air emission license on time. The late report resulted in a letter of warning from DEP to Mr. Poisson. In this case, LABERGE was being blamed for mistakes made by others including Mr. Poisson. LABERGE raised a concern that Mr. Poisson's actions constituted an attempt at retaliation for reporting violations of the air emission license.

? *Self Environmental Compliance Evaluation (ECE)* – In this document, LABERGE complained that Mr. Poisson had not taken action on correcting deficiencies identified in the ECE of February 2002. LABERGE also emphasized the need to update a number of environmental plans by expending detachment funds to retain consultants. LABERGE had previously indicated that the closure of a hazardous waste storage facility was required before being able to transfer excess property. Mr. Poisson has still not responded to the February 2002 and March 2003 reports on the status of environmental compliance at the detachment.

? *Mainside* – Starting in 2000, Mr. Poisson provided oversight responsibilities for the disposal of excess property known as "mainside". On 24 March 2003, LABERGE expressed in writing that a number of actions had to be taken in order to be able to transfer the property in question. Mr. Poisson had previously stated that the property was ready for transfer; however, Mr. Poisson now had to request the completion of a number of studies that were identified in my e-mail of 24 March 2003. LABERGE had also recommended the performance of an asbestos inventory in order to update a 1993 report. From June 2000 when Mr.

Poisson assumed his position as technical director, LABERGE had been left out of the review of environmental issues associated with the transfer of Mainside as excess property.

? *Possible Off-Base Contamination Sites* – After being officially given the responsibility to investigate possible contamination sites in June 2002, LABERGE started reporting several sites that needed evaluation as potential candidates for clean-up. Mr. Poisson had previously tried to limit my involvement in these areas (e.g., *communications*); however, LABERGE still felt a need to report on potential candidates that had been revealed to me from various individuals. In one e-mail, Mr. Poisson attempted to dissuade me from requesting accountability on these issues by bringing up legal questions.

Mr. Poisson's eight (8) month delay in issuing the *Notice of Proposed Removal* is an abuse of authority, an act to shift focus away from workplace safety failures of the Technical Director's Office, in general, and to scapegoat the one employee bold enough to risk his employment by highlighting these issues, again and again, over the past three (3) years. Cost-economizing measures have been taken as the aging Cutler facility is slowly deactivated and returned to non-military use. These cost cutting measures have led to 'shortcuts' in violation of various workplace safety and environmental laws. It is Paul Poisson, the malefactor retaliating against Normand Laberge, who is required to ensure compliance with the environmental and workplace safety rules which are triggered by the information disclosed by Mr. Laberge. Mr. Poisson has presented a distorted view of the events to protect his personal interests; he has demonstrated an abject disregard of asbestos handling law.

Since the asbestos incident eight (8) months ago, Normand Laberge's protected disclosures confirm that the pending *Notice of Proposed Removal* uses the asbestos incident as a pretext for retaliation against a federal employee protected by the Whistleblower Protection Act of 1989, as amended. [CITE]. Indeed, *Mr. Poisson* was the responsible authority that allowed the project to continue without the appropriate protection to workers and in violation of appropriate standards. [CITE].

Prima Facie Case of Retaliation:
5 U.S.C. § 2301 (b)(9)

It is a violation of federal law to engage in a prohibited personnel practice in violation of the merit system principle codified under Title 5, Section 2301. Mr. Laberge pleads the pending execution of a prohibited personnel practice under 5 U.S.C. § 2302(b)(12), and meets that assertion by substantiating a violation of the merit system principle at 5 U.S.C. § 2301(b)(9). A prohibited personnel practice is not established under § 2302(b) (12) merely by showing that an action violates the merit system principles. It must be shown by a two-step analysis that the agency:

(i) violates a law, rule, or regulation,

? and—

(ii) that the violated law, rule or regulation is one which 'implements' or which 'directly concerns' the merit system principles.

Wells v. Harris, 1 M.S.P.R. 208, 215 (1979).

Under Title 5, Section 2301, federal personnel management actions – including the issuing of a Notice of Proposed Removal to Mr. Laberge – are be implemented consistent with several underlying principles, including:

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences:

(A) a violation of any law, rule, or regulation, or
(B) 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. § 2301(B)(2)(6)&(9).

It is a violation of federal law to take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences:
>
> > (i) a 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. Furthermore,

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority
>
> * * * *
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--
>
> > (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: (i) a 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,
>
> * * * *
>
> (12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

5 U.S.C. § 2302(b)(8)&(12).

To successfully plead this case before the U.S. Merit System Protection Board, Mr. Laberge must ? through the U.S. Office of Special Counsel or through his Individual Right of Action ("IRA") show by a preponderance of the evidence, that:

(1) he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety;

(2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2)(A) after the July 9, 1989 effective date of the Whistleblower Protection Act of 1989 (WPA); and

(3) he raised the precise whistleblower reprisal issue before the OSC, and proceedings before the OSC have been exhausted.

See White v. Department of the Air Force, *63 M.S.P.R. 90, 94 (1994);* Geyer v. Department of Justice, *63 M.S.P.R. 13, 16-17 (1994).* By this Complaint, Mr. Laberge initiates administrative action to exhaust his remedies and asks for a stay of any adverse action until such time as the U.S. Merit Systems Protection Board has decided this matter.

As for the reasonableness of Mr. Laberge's belief in the violation of rule, law and/or regulation, his state of mind more than exceeds the threshold standard. When one must meet the threshold of "reasonable", the reviewing decision-maker -- in this case U.S. Office of Special Counsel -- are directed to a well-defined, by not always respected, tradition at Anglo-American law, both statutory and case. "Reasonable" is not—as the uninitiated often assume—a mere bootstrapping to the subjective whim of a one decision-maker determining whether a particular standard has been met. It is an objective standard designed to impart neutrality in the law:

. . . Ordinary or usual. Fit and appropriate to the end in view.

BLACK'S LAW DICTIONARY (3d. ed. 1951) at 1431 [Emphasis supplied].

As the definition cited *supra* notes, "reasonable" is the lowest threshold of legal standards. It is a standard framed by an understanding of the average and middling qualities of the common individual. It is precisely because the legal decision-maker finds "reasonable" in the average or mean standard of understanding that it is objective and not subjective. Within the ambit of "reasonable", lawyers describe the fundamental norms of society in terms broad enough to encompass the breadth of experience across the spectrum of all possible Complainants, or, for example -- the Complainant -- in this case.

Contrawise, a subjective, as opposed to objective, standard of law is a set of standards applied by decision-makers when determining the law, and not when assessing whether the Complainant carried of the burden of proof. Subjective standards are for matters of law; objective standards are for matters of fact. Nor is "the reasonable standard" that the U.S. Special Counsel must assess a complex burden of proof—as, indeed, the Complainant or OSC will be required to eventually meet before MSPB. No, it is a rather simple burdens of justification required to be met prior to the commencement of a case investigation. In determining reasonableness, OSC must review this Complaint's evidence objectively to determine whether the threshold has been met, and it must later review the case subjectively to determine the application of appropriate propositions of law. These are very different functions and can not lawfully be confused. It is a two staged process: objective for propositions of fact and subjective for propositions of law.

It is axiomatic that both subparts of the Whistleblower Protection Act of 1989 require that the Complainant must "reasonably believe" that the disclosed information evidences certain types of wrongdoing. This standard is an objective standard focused on the circumstances in which the particular employee is situated. This protects the

employee even if no wrongdoing occurs, so long as the circumstances indicate that such a belief is reasonable. *See* Robert G. Vaughan, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 625 *citing* Vaughn, *Public Employees and the Right to Disobey*, 29 HASTINGS L.J. 261 (1977). Within the specific context of federal Whistleblower law, the "reasonable belief" standard is further glossed by a lawful understanding that disclosures by employees who are specialists (such as Mr. Laberge) further lessen the need for factual detail.

As a matter of threshold determination, the distinction between 'objective standards' and 'subjective standards' comes down to very fundamental questions regarding the distinction between 'truth' and 'justification' and between 'existence' and one's knowledge of 'existence'. Or as one author has put it, "before one throws around terms like 'proof', 'truth' and 'justification', one should specify, as best one can, what it means for a proposition to be true and for a truth claim to be proved or justified -- in the law or otherwise." Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. U.L. REV. 859, 866 (1992). Conducting such an analysis of the attached evidence reveals that Mr. Mr. Laberge has met the threshold for "reasonable belief".

In reviewing the exhibits and factual narrative supporting this Complaint, OSC must apply the reasonable standard as the first of many bench marks that present themselves throughout litigation. Without such benchmarking, arguments float in mid-air and lack grounding in the statutory regime from which these arguments arise. To paraphrase Professor Lawson, the admissibility of evidence must be <u>identified</u> and <u>evaluated</u>. For any given proposition in any given context, one therefore needs a standard of proof that expresses the total weight of magnitude of the evidence required for a justified assertion of that proposition.

On a cardinal scale of measurement, one can express the standard numerically in terms of probability:

(1) a "beyond reasonable doubt" standard (highest probability);
(2) a "clear and convincing" standard (50 % + n %);
(3) a "preponderance-of-the-evidence" standard (> 50%);

(4) a "reasonable" person or belief standard (lowest probability);
(5) a "substantial likelihood" (50%)
(6) the "scintilla" threshold (point at which any proof fails).

Cf. Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. U.L. REV. 859, 870 (1992).

The U.S. Special Counsel must therefore weigh both the direct and circumstantial evidence presented by the Complainant. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 338 (4th ed. 1992). In assessing the weight of such evidence, OSC—logically and ironically? is held to the same de minimus standard any litigant before a lower court:

> A "scintilla" of evidence will not sufficient. The evidence must be that a reasonable person could draw from it the inference of the existence of the particular fact to be proven, or, as put conversely by one federal court, "if there is substantial evidence opposed to the [motion for directed verdict], that is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgement might reach different conclusions, the [motion] should be denied."

JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 338 (4th ed. 1992) citing Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

The critical question, therefore, is whether Mr. Laberge meets the "reasonable" belief and "reasonable" person standard through the argument and evidence provided, herein. And as the lowest possible standard required by the Whistleblower Protection Act of 1989, the reasonable standard is met by Mr. Laberge's twenty-two (22) exhibits. Mr. Laberge's belief is reasonable, notably that there was a vioation of rule of law.

Within the attached body of evidence are ____ (__) strong disclosures protected by section 2302(b)(8). These are communications of matters the Complainant Mr. Laberge reasonably believes evidence a violation of any law, rule, or regulation; an abuse of authority; or a substantial and specific danger to public health or safety. Christensen, 82 M.S.P.R. 430, P10. The test for whether an appellant reasonably believes that he has made a protected disclosure, is whether a "disinterested observer with knowledge of the

essential facts known to and readily ascertainable by the [appellant] reasonably could conclude that the actions of the government evidence," inter alia, a violation of law, rule, or regulation. Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), cert. denied, 528 U.S. 1153 (2000).

Normand Laberge meets the 'substanial likelihood' standard required for the issuing of a stay from the U.S. Special Counsel

It is also necessary to review OSC's obligation to weigh the "substantial likelihood" standard as the door to further action on Mr. Laberge's part, notably the granting of the pending adverse action. To parse "substantial likelihood", one must consult resources such as Black's Law Dictionary. "Substantial" is defined as:

> Belonging to substance; actually existing; real, not seeming or imaginary; not illusive; solid; true; veritable. Seglem v. Skelly Oil Co., 145 Kan. 216; 65 P.2d 553, 554 . . . Synonymous with material. Lewandowski v. Finkel, 129 Conn. 526, 29 A.2d 762, 764.

Black's Law Dictionary (4th Ed. 1951) at 1597. So "substantial" is synonymous with "material". A "substantial likelihood' standard is therefore met by evidence which is material, real, and veritable and which satisfies the element of:

> Probability. Clark v. Welch, C.C. A.Mass, 140 F.2d 271, 273. [A] word which imports something less than reasonably certain. Ottegen v. Garvey, 41 Ohio App. 499, 181 N.E. 485, 487.

Black's Law Dictionary (4th Ed. 1951) at 1076. See also Marlow Indus. v. Igloo Prods. Corp., 2002 U.S. Dist. LEXIS 5290 at 11-12 (N.D. Tex. 2002). (The Federal Circuit has given "material" an even broader definition. "Information is 'material' when there is a substantial likelihood that a reasonable examiner would have considered the information important in deciding whether to allow the application to issue as a patent." Elk Corp. of Dallas v. GAF Building Materials Corp., 168 F.3d 28, 31 (Fed. Cir. 1999).")

The definitional restriction to those levels of evidence below "reasonably certain" is important to understand. "Substantial likelihood" can therefore be defined as material, real, and veritable evidence indicating the probable existence of the infraction, and which is less than evidence of a "reasonably certain" infraction. See Black's Law Dictionary (4th Ed. 1951) 1431, 285 (definitions of "reasonable" and "certain").

The evidence supporting this Complaint is therefore reviewed as to whether a "substantial likelihood" exists that an infraction, such as "violation of rule, law and regulation", has taken place. For "violation of rule, law and regulation" the evidence must indicate [INSERT].

Normand Laberge made protected disclosures

Normand Laberge made communications which all constitute protected disclosures protected under 5 U.S.C. § 2302(b)(8). These protected disclosures include:

[LIST]

The disclosures, supra, were protected because they fall within the rule in Huffman, which distinguishes the three (3) fact patterns in which a public employee may reasonably believe conduct to be improper:

(1) when, as a part of routine duties, the employee has been assign the task of investigating and reporting wrongdoing by Government employees and, in fact, reports such wrongdoing through normal channels; Huffman, 263 F.3d at 1352;

(2) when, as a part of routine duties, an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels; Huffman, at 1354;

? or —

(3) when an employee is obligated to report wrongdoing, but such a report is not part of the employee's normal duties. Id.

By Executive Order, federal employees are obliged to, " . . . disclose waste, fraud, abuse and corruption . . . ." Executive Order 12674 (Apr. 12, 1989), as modified by Executive Order 12731. Mr. Laberge is obligated to report wrongdoing as a form of corruption. The reports he made via his disclosures were also not part of his Position Description. Ergo, Mr. Laberge's case falls under element number three (3) of the rule in Huffman. See also Watson v. Department of Justice, 64 F.3d 1524, 1530 (Fed. Cir. 1995). Mr. Laberge's role in environmental assessment -- as that function supports environmental review and compliance -- would also qualify him as making a protected disclosure under element number (2) of the Huffman rule, as well.

Reading Huffman through antecedent case law it is also evident that Mr. Laberge may disclose evidence of violation of rule, law and/or regulation to any government employee including a supervisor or other who is in a position to aid in correcting the wrongdoing. The only person he could not communicate with and have that communication classified as a 'disclosure' is Mr. Poisson, himself. So all communications to others within the U.S. Department of the Navy would qualify as disclosures. See Huffman v. Office of Personnel Management, 263 F.3d 1341, 1351 (Fed. Cir. 2001), Meuwissen v. Department of Interior, 234 F.3d 9 (2000), and the gloss imparted to Huffman case law by the remaining rules in Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998); Marano v. Department of Justice, 2 F.3d 1137, 1142 (Fed. Cir. 1993); and Watson v. Department of Justice, 64 F.3d 1524, 1526 (Fed. Cir. 1995).

And learning about the misconduct on the job is not an obstacle to protection under the Whistleblower Protection Act, it is the disclosure of the misconduct which matters. Schmittling v. Department of Army, 92 M.S.P.R. 572, 576-7 (2002). Beginning with LaChance v. White, 174 F. 3rd, 1378, 1381 (Fed. Cir. 1990), the Board has reaffirmed its long standing doctrine that there is no barrier to Whistleblower Protection

Act coverage just because an employee learns of misconduct on the job or within his job duties. Askew v. Department of the Army, 88 M.S.P.R. 674, 678-9 (2001).

According to the definition of Huffman, supra, Mr. Laberge's case is predicated on bona fide protected disclosures. Jurisdiction also exists because he was generally perceived as making disclosures, as evidenced by Mr. Poisson's repeated concerns with Mr. Laberge's communications "outside the chain of command". See Juffer v. USIA, 80 M.S.P.R. 8186 (1998); Mausser v. Dept. of Army, 63 M.S.P.R. 41, 44 (1994), and Sirgo v. Dept. of Justice, 66 M.S.P.R. 274, 278-280 (1990).

Paul Poisson had general and specific knowledge of Normand Laberge's disclosures

Paul Poisson has threatened to take an adverse action against Normand Laberge

Paul Poisson's reaction to the protected disclosures was a contributing factor to the adverse action

The communicated disclosures made by Mr. Laberge were a contributing factor in the agency's decision to take or fail to take one or more personnel actions as defined by Title 5, notably the *Notice of Proposed Removal*. See 5 U.S.C. § 2302(a).

To prove that the Laberge's protected disclosure were a contributing factor in the decision to issue the *Notice of Proposed Reprimand*, the Complainant may establish his

case through circumstantial, rather than direct, evidence, "such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." Johnson v. Department of Defense, 87 M.S.P.R. 454, P8 (2000). Laberge's case meets both sub elements of the requirement to plead 'contributing factor':

(1) that the individual taking the action knew of the disclosure;

? and—

(2) that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

Proof that the asbestos mishandling incident is merely the pretext for retaliation lies in the documentary justification for the proposed removal action. The short letter from an Navy Industrial Hygienist indicates that a number of individuals could have prevented the mistakes made in the asbestos incident without naming any particular person. [CITE] Details of this incident support the allegation that Mr. Poisson was the responsible party and that Normand Laberge responded appropriately.

A Prima Facie Case of Retaliation: *Douglas*, 3 M.S.P.B. 313 (Apr. 10, 1981)

It is the U.S. Department of the Navy's burden to prove the propriety of the Proposed Notice of Removal, under a "preponderance of the evidence" standard. Maliconico v. U.S. Postal Service, 14 M.S.P.R. 542 (1983). The deference shown to the Agency in its determination is subject to the scrutiny required to meet the factors found in the Douglas case. *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (April 10, 1981.

The specificity of the *Notice of Proposed Removal* in the case of Normand Laberge must be sufficient to meet a balancing of the following factors:

(1) the nature and seriousness of the offence, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical and inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fudiciary role, contacts with the public and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees alleged to have committed like or similar offenses;

(7) consistency of the penalty with the applicable agency table of penalties;

(8) the notoriety of the offense, or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the alleged offense;

(10) the potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the event, such as unusual job tension, personality problems, mental impairment, harassment, bad faith, malice or provocation on the part of others involved in the matter;

(12) and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Peter Broida, Guide to the Merit Systems Protection Board (Dewey 2000) at 1550.

Douglas Factors Which Argue Against the Agency's Action in Issuing a Notice of Proposed Removal to Normand Laberge

The absence of *Notices of Proposed Removal* against the other NTCS LANT Cutler employees who word for Technical Director at the time of the asbestos mishandling incident argues forcibly for not only a stay issued by the U.S. Special Counsel, but also for the illegitimacy of the *Notice of Proposed Removal* issued to Mr. Laberge. Given that the Navy's industrial hygienist based in Groton, Connecticut certified that many employees – perhaps even including Mr. Poisson – could have been found to have made mistakes during the asbestos mishandling incident, the singling out of Normand Laberge is a violation of the *Douglas* factors. Compare Douglas Factor #6 with [CITE]. For the same reasons, the proposed removal is excessively in light of the U.S. Department of the Navy's table of penalties – which was not cited in the *Notice of Proposed Removal*. See Douglas Factor # 7.

Mr. Laberge has committed no offense, but instead is now being held accountable for the actions of his first line supervisor. The failure of Mr. Poisson to react to the mishandling of asbestos at the U.S. Navy's Cutler, Maine, facility was not within Mr. Laberge's duties, position or responsibility, nor was their any matter to commit maliciously or for gain, or to do so frequently. Mr. Laberge completed his required tasking. Compare Douglas Factor #1 with [CITE]. Likewise, neither Mr. Laberge's job level or type of employment required him to do the functions his first line supervisor failed to do. See Douglas Factor #2. Similarly, the record is replete with instances where it was clear that Mr. Laberge was following the letter of Maine's law regarding asbestos mishandling. Accordingly, the violation of rule he has been cited with was not clear from a reading of the asbestos handling rules governing Mr. Laberge's actions. See Douglas Factor # 9. Given the incredibly detailed nature of the rules alleged to be offended, and the fact that all those involved in the incident last August were trained to prevent similar mishaps, it would appear that Douglas Factor #10 also argues for the impropriety of Mr. Poisson's actions in issuing a *Notice of Proposed Removal*.

With respect to the employee's past work, Mr. Laberge's record on environmental matters at the U.S. Navy's Cutler, Maine facility argues that had he been responsible for

the safe handling of asbestos, the exposure would not have taken place. Normand Laberge has been the 'voice' of environmental compliance and the face of the Navy's public integrity in these matters. Compare Douglas Factor ## 4, 8 with [CITE]. Indeed, the more appropriate way to address this issue would have been to issue a Performance Improvement Plan ("PIP"). See Douglas Factor # 11.

Douglas Factors Which, Due to the Awkward Role of Mr. Poisson as the Violator in this Incident, Ought to be Retired from Consideration

An employee's past disciplinary record often plays an important role in determining whether a particular adverse action should be issued against the employee. Mr. Poisson cited to past disciplinary offenses: misuse of computer/e-mail and disrespectful conduct, as – in part – the bases for his decision to remove Mr. Laberge. Use of Douglas Factor #3 (employee's past disciplinary record) is inappropriate where the past conduct for which Mr. Laberge was disciplined is materially related to the misconduct in which his supervisor is now engaged. Mr. Laberge's e-mail access was the means through which he could communicate with U.S. EPA Region 1 about the hazardous materials he was to advise upon. And as for his disrespectful conduct charge, what more could one expect in tense relations with a first line supervisor managing his environmental compliance in a manner contrary to Mr. Laberge's advice? Compare Douglas Factor #3 with Douglas Factor # 11 (mitigating circumstances).

Likewise, it is inappropriate to consider the full ambit of Douglas Factor #5, particularly as it weighs first line supervisor's confidence in the employee. Mr. Poisson may a complete lack of confidence in Mr. Laberge, and such a state of management may be entirely correct – if that lack of confidence is in Mr. Laberge's ability to cover-up the environmental malfeasance at the U.S. Navy's Cutler facility. Compare Douglas Factor #5 with [CITE].

At most, two (2) of the twelve (12) *Douglas* factors argue for a Notice of Proposed Removal. More likely, these two (2) should not be consider. This leaves the

overwhelming weight of a *Douglas* analysis in favor of some penalty less than a Notice of Proposed Removal.

Based on the argument and evidence presented above, Complainant Normand Laberge requests the U.S. Office of Special Counsel issue an immediate stay of any removal and undertake the prosecution of this case against the U.S. Navy for violations of Title 5 of the U.S. Code.

Very respectfully,

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