UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

TERESA C. CHAMBERS,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

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

DATE: October 6, 2004

Richard E. Condit, Esquire, Public Employees for Environmental Responsibility, Washington, D.C., and Mick Harrison, Esquire, Environmental Center, Bloomington, Indiana, for the appellant.

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

BEFORE
Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

On June 28, 2004, Teresa C. Chambers (appellant) filed an individual right of action (IRA) appeal alleging that the National Park Service (NPS), Department of the Interior, proposed her removal and placed her on administrative leave in reprisal for her whistleblowing activity. Under 5 U.S.C. § 1214(a)(3), an employee may file an IRA appeal to the Board from an agency personnel action alleged to have been proposed, taken, or not taken because of her whistleblowing activity. 5 C.F.R. § 1209.2(a). The appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over her IRA appeal. 5

C.F.R. § 1201.56(a)(2). On July 12, 2004, the appellant filed a second appeal from the agency's decision to remove her. The Board has jurisdiction over the removal appeal because the appellant was an individual in the competitive service with a right to appeal a removal action taken under 5 U.S.C. chapter 75. 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d). For the following reasons, the IRA appeal is DISMISSED and the removal action is AFFIRMED.[1]

Background

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

On December 5, 2003, Mr. Murphy notified the appellant that he was placing her on administrative leave "pending completion of a review of [her] conduct that may result in a proposal for disciplinary action." Appeal File (AF) 1221 tab 9, subtab 4b. By memorandum dated December 17, 2003, Mr. Murphy proposed her removal. AF 752 tab 3, subtab 4c. The reasons for the proposal were: (1) Improper budget communications; (2) Making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area; (3) Improper disclosure of budget deliberations; (4) Improper lobbying; (5) Failure to carry out a supervisor's instructions; and (6) Failure to follow the chain of command. Mr. Murphy stated that in determining the penalty he considered that on March 31, 2003, the appellant received a written reprimand for using a Government-owned vehicle (GOV) for other than official business and for authorizing a similar misuse by a subordinate employee.

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

AF 1221 tab 9, subtab 4n. The appellant made a written reply to the proposal. AF 752 tab 3, subtabs 4l, 4m.

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

THE IRA APPEAL

Legal standard

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

Exhaustion of administrative remedy

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

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

Covered personnel actions

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

The appellant appears to allege that she was placed under a "gag order" and that the "gag order" was also a covered personnel action. A "gag order" would be a covered personnel action if it represented a "significant change in duties, responsibilities, and working conditions." In this case, the "gag order" appellant refers to was an instruction from her supervisor, Mr. Murphy, concerning future

contact with the media. In a December 2, 2003, e-mail to the appellant, Mr. Murphy stated: "You are not to grant anymore interviews without clearing them with me or the director. You may not reference the President's 05 budget under any circumstances." AF 1221 tab 9, subtab f. In two voice mail messages on the same date, Mr. Murphy said:

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

Appellant's exhibit (App. Ex.) BBBB.

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

The appellant has not shown that she engaged in whistleblowing activity

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

The proper test for determining whether the appellant had a reasonable belief is: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence, for example, gross mismanagement? *LaChance v. White,* 174 F.3d 1378, 1381 (Fed.Cir.1999), *cert. denied,* 120 S.Ct. 1157 (2000). A purely subjective perspective of an employee is not sufficient even if shared by other employees. The Whistleblower Protection Act is not a weapon in arguments over policy or a shield for insubordinate conduct. *Id.* The Board's review starts out with a "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations," and this presumption stands unless there is "irrefragable proof to the contrary."[2] *Pulcini v. Social Security Administration,* 83 M.S.P.R.

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[2] I note that in *White v. Department of the Air Force*, 95 M.S.P.R. 1, 10 (2003), the Board concluded that the Whistleblower Protection Act does not place a burden on an appellant to submit "irrefragable proof" to rebut a presumption that federal officials act

685, 691 (1999), *aff'd*, 250 F.3d 758 (Fed.Cir.2000) (Table), *citing, LaChance v. White,* 174 F.3d at 1381.

November 3, 2003, disclosure to Deborah Weatherly – In her complaint, the appellant referred OSC to pages 2-9 of her response to the proposed removal for a description of this disclosure. Based on my review of those pages, the appellant appears to be alleging that she engaged in protected activity when she spoke to Ms. Weatherly on November 3, 2003, about the National Academy of Public Administration (NAPA) review. She stated that she and Ms. Weatherly spoke briefly about the progress the USPP had made with the original study, and the appellant expressed some disappointment at never having had the opportunity to talk with Ms. Weatherly or others about it. Ms. Weatherly suggested and the appellant agreed that the NAPA follow-up study would be good for the USPP because it would give it an opportunity to demonstrate the corrective action it had taken. AF 1221 tab 1, attachment 1 at 4.

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

In her OSC complaint, the appellant alleged that she disclosed information to Ms. Weatherly that evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, and a substantial and specific danger to public health or safety. Based on the appellant's description of her discussion with Ms. Weatherly, she disclosed information concerning the implementation of NAPA goals. Based on this description of the disclosure, I am unable to find that

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in good faith and in accordance with law, and I have not held the appellant to that proof.

it evidenced one of the situations at section 2302(b)(8). I am aware that the proposal and decision to remove the appellant state that the appellant "telephoned a senior staff member of the Interior Appropriations Subcommittee and told her that [she] believed that the [NAPA] review was not necessary and the U.S. Park Police should not have to pay for the review." Because the appellant does not allege that she made this statement (and the agency will be required to prove it in the removal appeal), it is unnecessary to determine whether, if made, the statement would constitute protected whistleblowing activity. The appellant, I conclude, has not shown that she engaged in whistleblowing activity by making a protected disclosure to Ms. Weatherly on November 3, 2003.[3]

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

> The U.S. Park Police department has been forced to divert patrol officers to stand guard around major monuments, causing Chief Teresa C. Chambers to express worry about declining safety in parks and on parkways.
>
> Chambers said traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four. In neighborhood areas, she said residents are complaining that homeless people and drug dealers are again taking over smaller parks.

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

"It's fair to say where it's green, it belongs to us in Washington, D.C.," Chambers said of her department. "Well, there's not enough of us to go around to protect those green spaces anymore."

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

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

. . .

Park Police said that this spring, after a survey by the U.S. Secret Service and endorsed by the Department of Homeland Security, the Department of the Interior adopted rules requiring four officers to be posted at all times outside the Washington Monument and the Lincoln and Jefferson memorials. Previously, the Washington Monument had one or two officers stationed, and the two memorials had one each

. . .

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

In many cases, police said, more officers on the Mall mean fewer officers elsewhere. Even the area that includes Anacostia Park and Suitland Parkway, one of the most violent that the Park Police force patrols, now has two cruisers at most times, instead of the previous four.

Police point to several statistics to show the impact of the cutbacks. On the Baltimore-Washington Parkway, where patrols have been halved, 706 traffic accidents occurred from January to October, which was more than the annual total in the previous four years.

Since April, the number of arrests made by Park Police in the Washington area has declined about 11 percent compared with the same period last year, police said.

Chambers and the head of the Park Police union, Jeff Capps, said that morale is low and that many officers may leave the force if conditions do not improve.

. . .

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

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

She said a more pressing need is an infusion of federal money to hire recruits and pay for officers' overtime. She said she has to cover a $12 million shortfall for this year and has asked for $8 million more for next year. She also would like $7 million to replace the force's aging helicopter.

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

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

. . .

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

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

In recent weeks, the Park Police administration and the force's union have said they fear that the stationary posts on the Mall have hurt anti-terrorism efforts, because fewer officers are able to patrol in the

> area. Chambers said that she does not disagree with having four officers outside the monuments but that she would also want to have officers in plainclothes or able to patrol rather than simply standing guard in uniform.
>
> "My greatest fear is that harm or death will come to a visitor or employee at one of our parks, or that we're going to miss a key thing at one of our icons."

AF 1221 tab 9, subtab 4e.

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

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

Gross mismanagement, a gross waste of funds, and a substantial and specific danger to public health or safety, each include qualifying language that specifies a degree to which the wrongdoing must rise before its disclosure is

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

I have reviewed the statements purportedly made by the appellant and reported in The Washington Post. She (1) expressed worry about declining safety in parks and on parkways; (2) stated that traffic accidents have increased on the Baltimore-Washington Parkway and residents are complaining that homeless people and drug dealers are taking over smaller parks; (3) stated that there were not enough officers on patrol; (4) stated that her department needed a major expansion; (5) along with Officer Capps stated that morale was low and officers might leave the force; (6) expressed a "pressing need" for an infusion of Federal money to hire recruits, pay for overtime, and replace a helicopter; (7) stated her preference for the assignment of officers in plainclothes or on patrol rather than simply standing guard; and (8) expressed her "greatest fear" that harm or death will come to a visitor or employee or that a "key thing" would be missed at one of the monuments. In summary, the appellant appeared to be claiming that without more and differently assigned officers, the safety of visitors to areas

under the jurisdiction of the USPP could be jeopardized. She did not identify any management action or inaction that created the alleged safety risk, and, if she had, she did not explain how it was anything other than debatable, simple negligence or wrongdoing with no element of blatancy. The appellant did not appear to identify any wasted funds. If any of her statements was an expression of her disagreement with the way funds were being spent (for example, on officer assignments), the information concerned no more than a debatable expenditure. Finally, while the appellant's statements draw the obvious connection between the need for more officers and funding and safety in the public places under the USPP's jurisdiction, her statements do not reveal a substantial and specific danger to any particular person, place, or thing. For these reasons, I find that the information disclosed to The Washington Post does not rise to the level of wrongdoing required to show that they evidenced gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety.

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

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

Holmes informed the appellant of the incident and she complained about it to Ms. Mainella.

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

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

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

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

If the appellant had established that she made a protected disclosure, she would next be required to show that her disclosure was a contributing factor in a personnel action. An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

Mr. Murphy was the agency official who placed the appellant on administrative leave and proposed her removal. When he took those actions on December 5, 2003, and December 17, 2003, he knew of the allegedly protected disclosures the appellant made on November 3, 2003, to Ms. Weatherly and on November 20, 2003, to The Washington Post. Both he and Ms. Mainella testified that he did not know of the allegedly protected disclosure the appellant made in

her December 2, 2003, complaint to Ms. Mainella. Tr. I at 92-94, 285. The appellant, I conclude, could show that two of her allegedly protected disclosures were a contributing factor in the agency's actions.

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

When an IRA appellant has established that a protected whistleblowing disclosure was a contributing factor in the agency's personnel action, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(1)-(2); *Fulton v. Department of the Army,* 95 M.S.P.R. 79, 84-85 (2003). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of a protected disclosure, the Board will consider the strength of the agency's evidence in support of its action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, and any evidence that the agency has taken similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Id.* at 85-86, *citing, Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Caddell v. Department of Justice,* 66 M.S.P.R. 347, 351 (1995), *aff'd,* 96 F.3d 1367 (Fed.Cir.1996).

In this case, had the appellant met her burden of proving that she engaged in protected activity, the agency would have relied on the strength of the evidence supporting the appellant's placement on administrative leave and proposed removal, and the absence of any motive to retaliate on the part of the agency official who took these actions. The agency did not offer evidence that it has

taken similar actions against similarly-situated employees who are not whistleblowers. Based on my analysis of the agency's evidence of the charges in the removal appeal, I find that clear and convincing evidence supports Mr. Murphy's decisions to place the appellant on administrative leave and propose her removal. Moreover, Mr. Murphy had no motive to retaliate for the appellant's disclosures to Ms. Weatherly and The Washington Post because they did not allege wrongdoing by him and he suffered no adverse consequences because of the disclosures. The agency, I conclude, could show by clear and convincing evidence that it would have taken the same actions in the absence of the alleged whistleblowing activity.

THE REMOVAL APPEAL

Legal standard

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

The agency's proof of the charges

Improper budget communications – The agency charged that on November 3, 2003, Mr. Murphy directed the appellant to provide him a USPP cost account number to fund a National Academy of Public Administration (NAPA) review that had been requested by the Interior Appropriations Subcommittee. The appellant provided him the cost account number. However, she subsequently

telephoned a senior staff member of the Subcommittee and told her that she believed the review was not necessary and the USPP should not have to pay for it. Her statements to the Subcommittee staff member were a direct communication with a congressional staff member about the development and execution of a budget matter in violation of Part 112, Chapter 7 of the Department Manual. Her statements caused the staff member to question the veracity of the stated intent of the Director, NPS, to carry out the direction of Congress and implied to committee members that the NPS did not intend to comply with the direction of Congress.

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

> POB [Office of Budget] has primary staff responsibility for directing and coordinating the development, presentation, execution, and control of the Department's Budget. This includes formulation within the Department and the Office of Management and Budget and presentation to the Congress, press, interest groups, and the public, and budget execution and control. Among other things, POB is the liaison on all matters dealing with budget formulation and presentation with the Office of Management and Budget, the House and Senate Appropriations Committees, and other Federal agencies.

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

Ms. Weatherly testified that before the appellant was hired, the USPP had been mismanaged and was in danger of exceeding its budget. Tr. I at 228-29.

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

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

her call to Weatherly could harm the agency's relationship with the Subcommittee and reflect negatively on the budget process. Tr. I at 26-27.

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

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

> . . . I was contacted directly by Ms. Chambers on November 3, 2003. The conversation was troubling to me for several reasons. First, she indicated to me that the Park Police were underfunded and understaffed. She also provided me with budget numbers that were inaccurate. I mentioned that the Committee had expected greater attention to implementing the National Academy of Public Administration's recommendations, particularly regarding restructuring the 'beat structure.' NAPA had clearly indicated to the committee that the Park Police are involved in many activities outside their core responsibility. In addition, I expressed concern to her that the other major item of concern was continued overtime pay. This is puzzling to the Committee because we provided $12.6 million in fiscal year 2003 to double the number of annual recruit classes

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

AF 1221 tab 9, subtab 4d.

To meet its burden of proof of the disputed portion of the charge, the agency first must show that the appellant told Ms. Weatherly the second NAPA review was not necessary and the USPP should not have to pay for it. Because Ms. Weatherly did not testify that the appellant told her the NAPA review was unnecessary, the agency has not met its burden of proof of that matter. Ms. Weatherly did testify that the appellant told her the USPP should not have to pay for the NAPA review. Her hearing testimony is consistent with her prior statement to the agency (AF 752 tab 3, subtab 4g at 7) and with Murphy's and Mainella's recollections of what Ms. Weatherly told them. Moreover, it is clear that the requirement for USPP to pay was discussed because that was the initial reason the appellant placed the call. I have considered the appellant's testimony that she told Weatherly she had already learned USPP would have to pay for the NAPA review. It is generally consistent with her reply to the proposal notice (AF 752 tab 3, subtab 4l at 3-9) and with her deposition testimony except that her deposition testimony suggests a slightly longer discussion. Agency exhibit (Ag.

ex.) 7 at 12. On this issue, I find Ms. Weatherly more credible than the appellant. Her testimony is consistent with her prior statement and it is corroborated by Murphy and Mainella. Moreover, she is a disinterested witness not shown to have had any reason to fabricate testimony. In fact, with respect to the other part of the charge, i.e., the allegation that the appellant said the NAPA review was unnecessary, she testified in a manner favorable to the appellant. For these reasons, I find that the agency has shown that the appellant told Ms. Weatherly the USPP should not have to pay for the NAPA review.

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

In summary, the agency has proven that the appellant told Ms. Weatherly the USPP should not have to pay for the NAPA review. The agency has not

proven that this statement violated Part 112, Chapter 7 of the Department Manual or caused Ms. Weatherly to question the veracity of Ms. Mainella's stated intent to carry out the direction of Congress. Accordingly, the agency has not met its burden of proof of charge 1, and it is NOT SUSTAINED.

Making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area – The agency charged that on or about December 1, 2003, while the appellant was on duty and acting in her official capacity as Chief, USPP, a reporter from The Washington Post interviewed her.[4] Her statements to the reporter were the subject of a December 2, 2003, Washington Post newspaper article entitled, "Park Police Duties Exceed Staffing." The article stated as follows:

> Chambers said traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four.
>
> ...
>
> 'It's fair to say where it's green, it belongs to us in Washington, D.C.,' Chambers said of her department. 'Well, there's not enough of us to go around to protect those green spaces anymore.
>
> ...
>
> The Park Police's new force of 20 unarmed security guards will begin serving around the monuments in the next few weeks, Chambers said. She said she eventually hopes to have a combination of two guards and two officers at the monuments.

The agency charged that her remarks about how many armed and unarmed USPP officers are patrolling the Washington, D.C. metropolitan area, Federal malls,

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

parks, and parkways constituted public remarks about the scope of security present and contemplated for these areas.

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

The appellant testified that the Washington Post reporter, David Farenthold, was "very well armed with information" when he interviewed her. Tr. II at 105. She denied that she disclosed staffing numbers that were "classified." She testified that she had not placed the "law enforcement sensitive" designation on agency exhibit 4.[5] According to the appellant, the "law enforcement sensitive" designation was a "practice" based on a "common sense

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

approach." Tr. II at 106, 150. She denied that the information she provided in the interview was "law enforcement sensitive." Tr. II at 151.

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

John Wright, Senior Public Affairs Officer for the Department of the Interior, testified at his deposition that he contacted Mr. Farenthold at the request of an agency attorney to determine whether statements that appeared in the December 2, 2003, article were accurate. App. Ex. RR at 45. He read the statements attributed to the appellant, and Mr. Farenthold said he would "stand by his story." *Id.* at 53; AF 752 tab 3, subtab 4d. Based on Mr. Wright's deposition testimony and declaration, I find that the appellant made the statements (both in quotes and without quotes) Mr. Farenthold attributed to her. I have considered the appellant's testimony that she just "confirmed" information Farenthold already had. I find it unpersuasive because it is unsupported by any other

evidence even though she could have but did not call corroborating witnesses. Both Mr. Farenthold (obviously) and Scott Fear, USPP Public Relations Officer, were present for the interview. The appellant did not propose to call Mr. Farenthold as a witness, and although I initially disapproved her request to call Mr. Fear, on the morning of the hearing I reversed that ruling and approved him. Despite this, the appellant failed to call Mr. Fear to testify.

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

Improper disclosure of budget deliberations – The agency charged that the same Washington Post newspaper article contained the following statement attributed to the appellant: "She said she has to cover a $12 million shortfall for

this year and has asked for $8 million more for next year." The appellant made an improper disclosure of 2005 Federal budget deliberations to the media, in violation of Office of Management and Budget (OMB) Circular No. A-11, Section 22.1, by informing the reporter that she had "asked for $8 million more for next year" before the President had transmitted the fiscal year 2005 budget to Congress.

OMB Circular A-11 provides:

> The nature and amounts of the President's decisions and the underlying materials are confidential. Do not release the President's decisions outside of your agency until the budget is transmitted to Congress. Do not release any materials underlying those decisions, at any time, except in accordance with this section . . . Do not release any agency justifications provided to OMB and any agency future plans or long-range estimates to anyone outside the executive branch, except in accordance with this section.

Mr. Murphy testified that the alleged improper disclosure was that the appellant had "asked for $8 million for next year." It was improper because this was the amount of the increase in the USPP budget developed by the agency for fiscal year 2005, and it was then under negotiation with OMB for the President's budget. Tr. I at 37-39. Both Mr. Murphy and Ms. Mainella testified that during National Leadership Counsel (NLC) meetings and other meetings appellant attended where the budget was discussed Ms. Mainella would begin the meetings with an admonition to those present not to disclose numbers or other details of budget negotiations prior to the issuance of the President's budget in January or February. Tr. I at 39-40, 270-75. They testified that the premature release of this information could negatively impact the budget process. Tr. I at 42, 274-75. Finally, Charles B. Schaefer, Comptroller, National Park Service, testified that NLC and other meetings that included budget discussions routinely began with a warning not to discuss the numbers outside the organization. Tr. II at 217. He testified, unequivocally, that the proposed increase in the USPP budget for fiscal

year 2005 was $8 million and the appellant would not have been permitted to discuss that figure publicly on December 1, 2003. Tr. II at 212, 216-18.

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

The testimony of the agency witnesses was clear and consistent. As of December 1, 2003, the agency had sent to OMB a request for an $8 million increase in the USPP budget. The appellant knew it and knew she was prohibited

from discussing it publicly. In her deposition testimony, the appellant appeared to agree. Her hearing testimony was inconsistent with both the testimony of agency witnesses and her own deposition testimony, and I therefore find it was incredible. The $42 million she referred to most likely represents a wish list requested of all organizations at the beginning of the budget process (*see, e.g.*, tr. II 209), and the $3 million coincides with the amount of an increase approved for USPP over the amount of the initial budget submission (tr. II at 211).[6] While these two amounts may have been in play at times during the budget process, neither is the amount sent forward to OMB. The appellant, I conclude, knew that amount was $8 million when she was interviewed by Mr. Farenthold.

Having found that the appellant knew the amount of the increase was $8 million, I also find that the appellant's statement to Mr. Farenthold referred to this increase. In the analysis of charge two, I found that Mr. Farenthold accurately reported the appellant's statements. For the same reasons, I find that he accurately reported her statement that she "asked for" the $8 million. I do not find credible the appellant's deposition testimony that the $8 million she referred to represented hiring and overtime unrelated to the amount of the budget increase. The appellant has not explained how she knew it would cost $8 million for hiring and overtime if this were not the amount requested in the budget. Finally, read in context, her statement appears to refer to the budget process. After reporting that the appellant had asked for $8 million for next year, Mr. Farenthold wrote, "But leaders in Congress are not inclined to go along." AF 1221 tab 9, subtab 4e. For all these reasons, I find that the appellant made an improper disclosure of 2005

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

Federal budget deliberations to the media, in violation of OMB Circular No. A-11, Section 22.1. Charge three is SUSTAINED by preponderant agency evidence.

Improper lobbying – The agency charged that the same Washington Post newspaper article contained the following statements attributed to the appellant:

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

The agency charged that the appellant did not have approval to make the statements; thus the statements constituted improper lobbying in violation of 43 C.F.R. § 20.506(b). That regulation provides: When acting in their official capacity, employees are required to refrain from promoting or opposing legislation relating to programs of the Department without the official sanction of the proper Departmental authority.

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

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

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

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

Mr. Murphy testified that in early August of 2003 he discussed with the appellant Ms. Blyth's general knowledge of the Federal Government. He explained that he thought Ms. Blyth would benefit from a detail to the NPS Office of Strategic Planning because she would gain a broad understanding of the goals and objectives of both the Department of the Interior and NPS. He thought that would be very helpful because Ms. Blyth had limited Federal experience and was acting in a fairly high level with the USPP. Tr. I at 52. The appellant responded that she did not think it was a good idea. She was "somewhat agitated" about losing a key member of her staff and she questioned whether the detail had been motivated by "snipers" in the agency.[7] Tr. I at 52-53. Mr.

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[7] This refers to allegations made by the appellant and others that unknown USPP employees had played pranks on the appellant and members of her staff. The appellant advised her supervisors of the incidents but chose to investigate them herself. *See, e.g.,*

Murphy testified that his only motivation was to get Ms. Blyth better training in Federal rules and regulations and administrative procedures, a broader understanding of how the Federal Government worked, so she could better serve the USPP. Tr. I at 53.

Ms. Blyth was a former member of the Durham, North Carolina city council. The appellant became acquainted with her when she was the Durham police chief. Ag. ex. 7 at 107, 113. When the appellant became Chief of the USPP, she helped create a "special assistant" position and invited Ms. Blyth to apply for it. *Id.* at 113. Ms. Blyth had no prior Federal service, and in her deposition testimony, the appellant had a difficult time describing Ms. Blyth's qualifications for the special assistant position. *Id.* at 100-10. On March 31, 2003, the appellant was reprimanded for personal use of a Government-owned vehicle (GOV) and for authorizing Ms. Blyth to do the same. [8] AF 1221 tab 9, subtab 4n. Based on these facts, Mr. Murphy appeared to have solid reasons for believing that Ms. Blyth (and the appellant whom she was advising) could benefit from the detail to the NPS.

Mr. Murphy testified that after a lengthy conversation with the appellant about the Blyth detail he finally said, "Look, this is not open for discussion any longer, you have to do this." Tr. I at 54. He testified that he was "very clear" that the detail would take place and the appellant was to effect it. *Id.* The appellant said she understood and would comply "reluctantly." *Id.* The next day, he discussed the detail with Ms. Blyth. She was "somewhat enthusiastic" about it until she had a conversation with the appellant. Tr. I at 55. After that, she

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AF 752 tab 3, subtab 4m at 118; app. Ex. JJ. Because the appellant did not ask for any assistance in dealing with the incidents, she cannot credibly claim NPS management lent support to the pranksters.

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

informed Mr. Murphy that there were concerns about her availability to perform in her current assignment. Tr. I at 54-55. Mr. Murphy responded that he was "very willing to be flexible." He assured both the appellant and Ms. Blyth that he would "break up the detail, if necessary," so that Ms. Blyth would be available to work on assignments the appellant thought were critical. Tr. I at 56. He expected the appellant to go to the director of the Office of Strategic Planning and work out the details of Ms. Blyth's assignment. Tr. I at 57.

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

Based on Mr. Murphy's testimony and the appellant's admission that it is "very likely" Mr. Murphy told her he had decided on the detail, I find that Mr. Murphy instructed the appellant to arrange for Ms. Blyth's detail. The appellant has not even alleged that she took any action to comply with those instructions. Instead, it appeared that any action she took was meant to prevent the detail from happening. Her hearing testimony focused almost entirely on the reasons why the

Blyth detail would have been disruptive. However, the agency's proof of the charge does not require it to show that the detail was a wise or well-timed management decision. Having found that Mr. Murphy instructed the appellant to arrange for the Blyth detail and that the appellant took no steps to comply, I find that the appellant failed to follow Mr. Murphy's instructions as charged. Specification 1 is SUSTAINED by preponderant agency evidence.

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

Mr. Murphy testified he instructed the appellant to have Deputy Chief Pettiford take his psychological test and his physical examination and to have Mr. Beam take his psychological examination. Tr. I at 61. He gave her this instruction after agency attorneys told him that OSC had an open investigation into the hiring of the two deputy chiefs and had communicated that there was a problem with the fact that their psychological and/or physical examinations had not been taken. Tr. at 61-62. He explained this to the appellant, and she said she

did not think that was necessary because they had taken the exams as young recruits and now held jobs at the deputy chief level. Tr. at 62. Mr. Murphy testified that he told her he understood but he thought it best to have them take the exams. Tr. I at 62-63. About a month later, OSC asked for an update. He asked the appellant about the status of the exams and learned from the appellant that they had not been taken and no arrangements had been made for them to be taken. Tr. I at 63. The appellant reiterated her argument that these employees should not have to take the exams because they had taken the exams as young recruits, and she mentioned that the "snipers" might have filed the OSC complaints to break up her team. Tr. I at 64. Mr. Murphy again explained that it had to be done, and the appellant replied that Mr. Murphy would have to issue the officers a written order to take the exams. Tr. I at 65. Mr. Murphy testified that he issued written orders to them. *Id.* Mr. Murphy's testimony is corroborated by a prior consistent statement he wrote on December 4, 2003. AF 1221 tab 9, subtab 4c.

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

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

In specification 3, the agency charged that in March of 2003 after the Constitution Gardens "tractor man" incident which paralyzed significant portions of the nation's capitol, Mr. Murphy instructed the appellant to fully cooperate and work with attorneys in the Solicitor's Office in connection with any information and/or assistance they needed regarding the incident. On several occasions during July 2003-September 2003, Randolph J. Myers, a Solicitor's Office senior attorney, sought her specific assistance to meet with him and discuss a complaint that had been made to her by the Organization of American States (OAS). OAS

alleged that during the "tractor man" incident, armed USPP sharpshooters had deployed on the grounds of OAS Headquarters and, in so doing, had violated the treaty governing the building's diplomatic status. Mr. Myers needed to meet with the appellant so he could assess whether any applicable treaty had been violated and whether the USPP had complied with its own General Orders. The OAS complaint raised critical and sensitive legal issues. However, contrary to Mr. Murphy's instructions, the appellant did not respond to Mr. Myers' request for a meeting.

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

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

proposal notice. AF 752 tab 3, subtab 4k. In his hearing testimony, Mr. Myers adopted the statements made in his memorandum as sworn testimony. Tr. II at 239.

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

Based on the testimony of Mr. Murphy and Mr. Myers, I find that Mr. Myers sought the appellant's assistance concerning the OAS complaint and Mr. Murphy instructed the appellant to cooperate. Mr. Myers' testimony was corroborated by the memoranda he wrote the appellant seeking a meeting. Moreover, the appellant's failure to cooperate with him is similar to her apparent lack of cooperation with an investigation of the same incident conducted by Earl E. Devaney, Inspector General. [9] Ag. ex. 2. In a scathing memorandum to the

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

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

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

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

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

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

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

Affirmative defenses

Reprisal for whistleblowing activity - The appellant alleges that the removal action was taken in reprisal for her whistleblowing activities in violation of 5 U.S.C. § 2302(b)(8). She alleges that she disclosed and was perceived to

have disclosed to the press, internally to superiors outside her chain of command, and to Congress "violations of law (including improper handling of the Park Police budget and improper release of personnel and disciplinary files and records), a substantial and specific danger to public health or safety (including disclosures that funding and staffing limits on the Park Police created a substantial likelihood of preventable loss of life and destruction of a national icon (e.g., a national monument), and abuse of authority and gross mismanagement (including mishandling of the Park Police budget including submission of budget requests for the Park Police without consulting with and obtaining input and concurrence from the Park Police leadership regarding the resources required to protect the national monuments and the public on parkways and parks)." AF 1221 tab 29 at 8-9.

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

The appellant's affirmative defense of reprisal for whistleblowing activity does not appear to raise any allegedly protected disclosures that have not been considered in my analysis of the IRA appeal. For the reasons given in that analysis, I find that the appellant did not engage in whistleblowing activity when she disclosed information about "improper handling of the Park Police budget and improper release of personnel and disciplinary files and records," and the "substantial likelihood of preventable loss of life and destruction of a national icon" as the result of "funding and staffing limits on the Park Police." The only exception might be the allegation that appears to be raised for the first time as an affirmative defense that the appellant disclosed information that evidenced abuse

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

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

appellant, I conclude, has not shown that she is entitled to the protection of the Act as a perceived whistleblower.

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

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

The appellant also alleges that she engaged in activity protected by 5 U.S.C. § 2302(b)(9) when she "appealed" to Mr. Griles to cancel the Blyth detail. The appellant's contact with Mr. Griles was not activity protected by 5 U.S.C.

§ 2302(b)(9) because it was not an exercise of an appeal, complaint, or grievance right granted by law, rule, or regulation.

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

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

Violation of her First Amendment rights – The appellant alleges that her statements to The Washington Post are protected by the First Amendment. To determine whether a public employee's speech is protected by the First Amendment, the interests of the employee as a citizen commenting on matters of public concern must be weighed against those of the government, as an employer promoting the efficiency of the public service it performs through its employees. *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed. 811 (1968). Thus it must be determined whether the appellant's speech addressed a matter of public concern and if so whether the interest of the agency in promoting the efficiency of the public service it performs outweighed the appellant's interest as a citizen. *Sigman v. Department of the Air Force,* 37 M.S.P.R. 352, 355 (1988), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989) (Table), *citing Brown v. Department of Transportation,* 735 F.2d 543, 546 (1984).

Whether an employee's speech addressed a matter of public concern, is determined by the "content, form, and context of a given statement, as revealed by the whole record." *Id.* Speech that involves only internal agency grievances rather than matters of concern to the community does not involve a matter of public concern. *Id., citing Mings v. Department of Justice,* 813 F.2d 384, 388-89 (Fed.Cir.1987). In this case, the appellant made statements to The Washington Post concerning the number of officers patrolling the Baltimore-Washington Parkway, the inability of the USPP to protect parks, staffing profiles at the monuments, and the USPP budget. The statements all involve matters of public concern. When she made the statements, however, the appellant appeared to be a public employee attempting to garner support for an increase in her staffing and budget levels, not a private citizen commenting on matters of public concern. And, as I have found, the information she provided should not have been made public because it exposed potential weaknesses in USPP security measures and violated the prohibition against premature release of budget information. For these reasons, I conclude that while the appellant's statements involved matters

of public concern the interest of the agency in promoting the efficiency of the public service it performs outweighs any interest the appellant may have had as a citizen in making the statements. In reaching this conclusion, I have considered that the appellant's First Amendment defense applies to only three of the six reasons for her removal.

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

Violation of due process – The appellant also appears to allege that the agency violated her right to due process because the deciding official conducted an investigation that introduced new information to the decision-making process. In *Stone v. Federal Deposit Insurance Corporation,* 179 F.3d 1368, 1376 (Fed.Cir.1999), the court held that the introduction of new and material information by means of *ex parte* communications to the deciding official undermines the public employee's constitutional guarantee of notice and opportunity to respond. The court set forth the test for determining whether new and material information that has been received by the deciding official through *ex parte* communications has resulted in a due process violation. The court identified three factors that should be considered: whether the *ex parte* communication merely introduces "cumulative" information or new information;

whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. The court held that ultimately the inquiry is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be subjected to a deprivation of property under such circumstances.

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

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

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

Disparate penalties - The appellant alleged that the agency imposed disparate penalties in this case because the penalty imposed in her case was more severe than the penalties imposed in the cases of other agency employees who engaged in similar conduct. To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). Where an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence. *Woody v. General Services Administration*, 6 M.S.P.R. 486, 488 (1981). An agency may

refute a charge of disparate penalties by establishing a legitimate reason for the difference in treatment, either by showing that the offenses in question were not really equivalent, or that mitigating or aggravating factors justified a difference in treatment. *Butler v. Department of the Navy,* 23 M.S.P.R. 99, 100 (1984). Finally, where the punishment is appropriate to the seriousness of an employee's offense, an allegation of disparate penalties is no basis for reversal or mitigation. *Quander v. Department of Justice*, 22 M.S.P.R. 419, 423 (1984), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table). In this case, because the appellant was unable to identify any similarly situated employees, she failed to meet her burden of proof of this affirmative defense.

Reasonableness of the penalty

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

In this case, Mr. Hoffman testified that he considered charges (2), making public remarks regarding security on the Federal mall, and in parks and on the parkways in the Washington, D.C. metropolitan area, (3), improper disclosure of budget deliberations, and (5) failure to carry out a supervisor's instructions, to be the three most important charges that together would warrant removal.[10] Tr. II at

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

17-18. He testified that if those three charges were not sustained, he "would probably have proposed [sic] a suspension and perhaps a reinstatement into a position of less responsibility." Tr. II at 18. Because the three charges identified by Mr. Hoffman have been sustained, I find that agency has not indicated that it desires that a lesser penalty be imposed based on the sustained charges.

In making the penalty determination, Mr. Hoffman considered that the appellant held a "very high profile position." She was expected to adhere to the highest standard of conduct. There must be a high degree of trust and confidence by NPS that the Chief of the USPP will carry out the policies and directives of the agency. The appellant's conduct fit a pattern of "unwillingness to follow instructions" that eroded her supervisors' confidence in her. He did not believe the relationship could be repaired. In less than two years of employment, she had been reprimanded.[11] Because she failed to admit any wrongdoing after she was reprimanded and continued to engage in misconduct, she did not demonstrate potential for rehabilitation nor could she regain the confidence of her superiors. Based on her statements to the media that conveyed "her own personal policies and positions," she was incapable of communicating agency policy. Tr. II at 9-16.

In evaluating a penalty determination, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities including whether the offenses were intentional or were frequently repeated. *See, e.g., Hernandez v. Department of Agriculture,* 83 M.S.P.R. 371, 374 (1999). A higher standard of conduct and a higher degree of trust are required of an incumbent of a position with law enforcement duties. A higher standard of conduct is also required of a

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

supervisor. *See Luongo v. Department of Justice,* 95 M.S.P.R. 643, 648 (2004). Consequently, a very high standard of conduct and trust was required of the appellant who managed a department of approximately 600 employees including law enforcement officers. Despite this, in less than two years of employment the appellant was reprimanded for misuse of a GOV and charged with offenses that call into question her willingness to follow agency policies and procedures and the instructions of her supervisor. These offenses are inconsistent with the degree of trust required for her position. Moreover, because the appellant has accepted no responsibility for her conduct and has expressed no remorse, her reinstatement would impair the agency's ability to carry out its law enforcement mission. *See, e.g., Ferrone v. Department of Labor,* 797 F.2d 962, 967-68 (Fed.Cir.1986). For these reasons, I conclude that the removal penalty was within the range of reasonable penalties, and the Board is without authority to mitigate it.

DECISION

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

FOR THE BOARD: Elizabeth B. Bogle

Elizabeth B. Bogle
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

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

NOTICE TO APPELLANT

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

BOARD REVIEW

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

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

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

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk

of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

JUDICIAL REVIEW

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

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

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

NOTICE TO AGENCY/INTERVENOR

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