UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

MICHAEL D. CROSS,
Appellant,

v.

SMITHSONIAN INSTITUTION,
Agency.

DOCKET NUMBER
DC-1221-06-0039-W-2

DATE: September 7, 2006

Bryan J. Schwartz, Esquire, Washington, D.C., for the appellant.

Dolph D. Sand, Esquire, Washington, D.C., for the agency.

BEFORE
Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

On October 19, 2005, Michael D. Cross filed an Individual Right of Action (IRA) appeal, in which he alleged that the Smithsonian Institution terminated him during his probationary period in reprisal for his having engaged in whistleblowing activities.

The pleadings and documentary evidence submitted by the appellant raised non-frivolous allegations that he engaged in protected whistleblowing activity and that a whistleblowing disclosure contributed to the Smithsonian's decision to terminate his employment. In addition, the appellant exhausted his administrative remedy before the Office of Special Counsel (OSC). Consequently, the Board has jurisdiction to adjudicate his timely request for corrective action. *See* 5 U.S.C.A. § 1214(a)(3); 5 C.F.R. § 1209.5(a); *Yunus v. Department of Veterans*

Affairs, 242 F.3d 1367, 1371-72 (Fed. Cir. 2001). I held a hearing in this case at the appellant's request.

For the reasons set forth below, the appellant's request for corrective action is GRANTED.

ANALYSIS AND FINDINGS

Factual Background

The following facts are undisputed. The appellant's career-conditional appointment with the Smithsonian Institution was subject to completion of a one-year probationary period that began on April 23, 2001. Prior to the completion of the appellant's probationary period, however, the Smithsonian's National Air and Space Museum (NASM) terminated him from his position as a GS-9 Museum Specialist at the NASM's Paul E. Garber Preservation, Restoration and Storage Facility in Suitland, Maryland. The Smithsonian, in terminating the appellant effective April 12, 2002, provided him with the procedural rights he was entitled to, as set forth in 5 C.F.R. § 315.804.

The Garber facility's mission is to protect, restore, and provide future generations the opportunity to enjoy all artifacts held by the NASM. To accomplish this mission, there was a major project underway at the Garber facility to have the Collections Division prepare and move the museum's massive collection not yet on display at the NASM to its companion facility, the Stephen F. Udvar-Hazy Center near Dulles International Airport in Chantilly, Virginia. This major undertaking was happening during the entire time of the appellant's probationary period. The Udvar-Hazy Center opened on December 15, 2003.

On September 17, 2001, the appellant's supervisors, Reese and Garber Chief, Colonel Thomas M. Alison, signed a summary performance appraisal in which the appellant received an "Outstanding" performance evaluation. Appeal File (AF), Tab 4, Attachment 1, Tab 2; Appellant's Exhibit V-1. In a January 3, 2002 document titled "Probationary or Trial Period Report" (form AD-507P),

Reese provided the appellant with an overall "Satisfactory" rating. *See* AF, Tab 4, Attachment 1, Tab 3; Appellant's Exhibit W-1. In a document Reese signed on February 19, 2002, titled "Within-Grade Increase Record," Reese checked the box stating the appellant had achieved an acceptable level of competence. However, the box on that form granting the appellant a within-grade increase was not checked. Appellant's Exhibit Y-1.

The parties stipulated that the appellant made all of his alleged protected disclosures between February and April 2002.[1] They also agreed that sometime in February 2002, the appellant, along with other employees, raised allegations to Chandra Heilman, the Smithsonian's Ombudsman, about guns, drugs in the workplace, and other abuses of authority at the NASM's Garber facility. The appellant asserted he made protected disclosures when he either met, or communicated, with: (1) Bayne R. Rector, the Garber facility's Safety Officer in March 2002; (2) Angela Roybal, with the Smithsonian's EEO Office, from February through April 2002; (3) Thomas M. Alison, during February through April 2002; and (4) Executive Officer John F. Benton II (who is the NASM's Ombudsman), on March 11, 2002. Dolph D. Sand, the Smithsonian's attorney advisor and Chief of Labor and Employee Relations and Sheila Burke (the Smithsonian's then-Undersecretary, and now Deputy Secretary, for American Museums and National Programs) were also aware of the appellant's alleged disclosures during this time.

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[1] The parties agreed that any disclosures the appellant may have made after April 12, 2002, the date he was terminated, cannot be protected because those disclosures could not have been a contributing factor to his termination, the personnel action at issue. Thus, for instance, his reporting of information to or through the OIG, the Employee Assistance Program, the Office of General Counsel, the Federal Bureau of Investigation, and Members of Congress in July and August 2002 are not "protected." *See* AF, Tab 4, Subtab 1 at p. 2 of 12 (OSC Form 11, Answers to Question 11); *id.*, Attachment to OSC Form 11, at p. 4 of 7.

In addition, on March 5, 2002, the appellant sent an e-mail message to Lawrence M. Small, the Secretary of the Smithsonian, which he copied to other managers, in which he made allegations against his supervisor, Reese.[2] In that e-mail, which referenced an e-mail he addressed earlier to Heilman, the appellant wrote:

> Mr. Small,
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> It is with great trepidation you are contacted. I have jumped the chain of command but feel justifiably doing so. Our institution is at stake. We have a situation within our walls that possess crippling potential. Please contact your Ombudsperson Shandra Heilman for details. Over 60% of your restoration people (all w/ perfect performance reviews) have brought to her attention a situation that has the potential of spiraling out of control, fast! You're our final, in house, hope. I have enclosed a copy, of our last e-mail to her, for edification.
>
> Chandra,
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> I am sorry to have been picked to send you this news but it is a majority consciences Mr. Small be notified immediately concerning our predicament. The ladies in the shop are AFRAID NOW, while several of us men feel we have to watch over our shoulder constantly. We have placed before you over 18, professional, employees with excellent performance records documented as being in jeopardy with no action taken in almost a month. With each day our fears and risks increase while Bill Reese and his people clean up and cover their tracks. We have pleaded with you to get someone on this asap without any response. Today, Ms. McCombs had to be taken to the doctors for sever chest pains (that turned out to be a case of "anxiety attack.) Ms. Hutton was jumped by Tom Alison today, who demanded to know who the other parties were. This along with the escalating shop anger, foul looks and insinuations abounding around the shop, we feel it is better to be fired or quit than to risk injury or property damage. Two people (Bob McClean and Ed Mautner) have each asked me if I was aware Bill Reese carries a gun

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[2] The parties stipulated that, in the appellant's e-mail message to the Secretary, he listed the names of 14 other individuals as co-authors of that missive, none of whom gave him consent to use their names prior to his sending this e-mail.

> and felt compelled to inform me that they thought he may be capable of using it. I don't know what possessed them to tell me this but I certainly do not take it as a sign of confidence on their part for Bills judgment. We are afraid for Heather to the point we are rotating shifts to stay with her late after hours for her protection … If this type of situation is so common in the Smithsonian that no one is concerned enough to investigate quickly then maybe we should have gone to outside sources in the first place. I am sure you have tried your best but right now we, your prize employees at Garber feel peoples safety overrides protocol.

Appellant's Exhibits A-1, C-1; *see also* AF, Tab 4, Tab 1, Attachment (spelling, grammar, emphasis, and punctuation as in the original).

The April 11, 2002 Probationary or Trial Period Report signed by Alison concluded that the appellant's conduct was unsatisfactory and that he should be separated from his position during his probationary period. AF, Tab 8, Subtab 4aa; Appellant's Exhibits G-2, X-1. Specifically, Alison wrote in the report that, as the Reviewing Official and based on events and information that had come to his attention, he had decided to override comments on the form AD-507P, completed by Reese on January 3, 2002. Alison indicated that, in his opinion, the appellant should be marked "Unsatisfactory" in block 14B and, under block 15B, "separated from present position." Alison further edited areas on block 12 where he did not agree with Reese's evaluation of the appellant's characteristics in areas of both performance and conduct. Alison wrote that:

> My evaluation is based on Mr. Cross's poor attendance record during his probationary period. He has used 162.5 hours of leave during the period. This situation, when projected into the future does not mark Mr. Cross as an employee that can be depended on and given the importance of the current effort by the Collections Division to prepare and move the collections to the Udvar-Hazy Center, this is an extremely important employee characteristic.
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> Additionally, during the last thirty to sixty days Mr. Cross has become a disruptive force within his workplace. He has displayed unsatisfactory leadership potential by this disruptive behavior and has, in fact, been a counter-productive force concerning the important mission we have at hand.

AF, Tab 8, Subtab 4aa; Appellant's Exhibit G-2.

Based on Alison's recommendation, NASM Director John "Jack" R. Dailey decided not to continue the appellant's employment. The appellant received a notice of his Discharge during Probationary Period on April 12, 2002.[3] It cited his poor attendance and misconduct as the reasons for his termination. The notice also informed him of his right to appeal to the Board if he believed he was being discharged for partisan political reasons or based upon discrimination because of his marital status.[4] AF, Tab 8, Subtab 4z.

Two months following the issuance of the appellant's e-mail, beginning on May 5, 2003, John K. Lapiana, at the direction of then-Undersecretary Burke, met with Garber employees. During these meetings, Lapiana listened to the Garber employees' concerns or complaints regarding alleged mismanagement at the facility. One of the concerns raised by workers during these meetings was that Garber supervisors displayed favoritism or gave preferential treatment to certain employees.

In addition, after the publication of the appellant's e-mail, the Smithsonian's Office of Inspector General (OIG) conducted an investigation into the allegations of abuse and wrongdoing at the Garber plant.[5] An OIG investigative report, dated April 30, 2003, concluded and recommended that:

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[3] The first time the appellant was notified that he was being terminated was when he received this discharge letter on April 12, 2002.

[4] The notice letter also informed him of his right to file a discrimination complaint if he believed that prohibited discrimination was wholly or partially the basis for the discharge. The appellant has a lawsuit pending in Federal District Court alleging that the agency discriminated against him when he was terminated.

[5] The appellant testified that he did not contact the OIG until approximately four months after he was terminated. When asked if he was aware that the appellant might have been a source of the investigation, Investigator Robert J. Johnson answered that he did not know anything about the appellant until near the end of his investigation. Johnson explained that "no one ever mentioned" the appellant and that he only heard of him late in the investigation.

> Based on the information set forth in this memorandum, there is substantial evidence to support the conclusion that […] engaged in violations of sections 1, 7, and 12 of OM 688. […] They were responsible for knowing the provisions of OM 688. I believe that they improperly profited from the use of Institution resources including having subordinate employees perform personal work (embezzlement or conversion of public money or property); that they lost their independence and impartiality of action in dealing with employees; and that they created a perception among employees that certain people were given preferential treatment. Numerous employees expressed the belief that certain employees were hired, promoted, and given preferential treatment because of their personal relationships with management. Finally, the investigation disclosed that […] knowingly misused Institution funds by […] keeping the proceeds off official Smithsonian records and then using money as they pleased. The Office of the United States Attorney declined prosecution in this case in favor of administrative action.

Appellant's Exhibit S-5, at p. 8.[6]

The appellant bears the burden of proof on the issue of jurisdiction.

Under the provisions of the Whistleblower Protection Act of 1989 (WPA), an employee who believes that the agency took a personnel action because he had made a protected whistleblowing disclosure may file an IRA appeal with the Board. *See* 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.2; *see also Ayers v. National Aeronautics & Space Administration*, 79 M.S.P.R. 19, 23 (1998). To establish the Board's jurisdiction over an IRA appeal, the appellant must show that he exhausted his administrative remedies before the OSC and make nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a)(2). *See Yunus*, 242 F.3d at 1371.

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[6] The empty brackets in this quote omit the names of Smithsonian managers or employees.

The appellant established that he sought corrective action from the Office of Special Counsel before he appealed to the Board.

Before filing an IRA appeal with the Board, the individual must first seek corrective action from the OSC. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2(b)(a). The Board may only review those disclosures that an appellant raised before the OSC. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1037 (Fed. Cir. 1993).

The appellant argued, and the Smithsonian did not dispute, that on July 18, 2003, he submitted a complaint (OSC Form 11) with the OSC, in which he alleged that his termination during his probationary period was done in reprisal for his protected disclosures. AF, Tab 4, Subtab 1. The OSC notified the appellant on October 6, 2005, that it was closing its inquiry into his complaint. After reviewing the evidence gathered in its investigation, the OSC made a preliminary determination to take no further action in the appellant's case. AF, Tab 4, Attachment 3; AF, Tab 8, Subtab 4a.

On October 19, 2005, the appellant filed a timely IRA appeal with the Board, after his case was pending before the OSC for more than 120 days. AF, Tab 1; 5 C.F.R. § 1209.5(a)(2). In his IRA appeal, the appellant claimed that his termination was retaliation for protected whistleblowing activity in violation of 5 U.S.C. § 2302(b)(8).

The appellant was affected by a personnel action.

Under the WPA, a "personnel action" encompasses a "disciplinary or corrective action," "decisions concerning pay, benefits, or awards," and "any other significant change in duties, responsibilities, or working conditions." A termination is a disciplinary action. I therefore find that the appellant has shown that he was subjected to a "personnel action" within the meaning of U.S.C.

§ 2302(a)(2)(A)(iv). *See Lewis v. Department of the Army*, 58 M.S.P.R. 325, 331 n.4 (1993) (probationary termination is a "personnel action" in an IRA appeal).[7]

The appellant must establish that he engaged in protected whistleblowing activities.

In an IRA appeal, an appellant must establish that he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8). *See Dick v. Department of Veterans Affairs*, 83 M.S.P.R. 464, 467 (1999). In this regard, he must show, by preponderant evidence,[8] that he disclosed information that he reasonably believed evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. *Id.* The burden of showing that a protected disclosure was made is upon the appellant. *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996). An appellant must also show that such a protected disclosure was a contributing factor in the personnel action, as defined at 5 U.S.C. § 2302(a)(2)(A). If the appellant makes such a showing, the Board will not order corrective action if "the agency demonstrates, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure." *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 17 (1994).

The proper test for whether the belief was reasonable is whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could conclude that the actions of the government evidence" misbehavior described by section 2302(b)(8). *See Lachance v. White & Merit Systems Protection Board*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999),

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[7] It is uncontested that the appellant's termination, effective April 12, 2002, is the only personnel action in dispute in these proceedings.

[8] 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).

cert. denied, 120 S. Ct. 1157 (2000); *Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, 693 (1999). In that regard, the appellant must present proof, in the form of reliable evidence, showing that the matter reported was one that a reasonable person in his position would believe evidenced one of the aforementioned categories in section 2302(b)(8). In other words, the disclosure cannot be based on a "purely subjective" belief. *See Lachance*, 174 F.3d at 1380-81; *McGrath v. Department of the Army*, 83 M.S.P.R. 48, 55 (1999). Rather, the disclosure must be based on a reasonable interpretation of the events available to the appellant when he made his disclosure. *See Askew v. Department of the Army*, 88 M.S.P.R. 674, 678-79 (2001). The Board is required to consider all evidence presented on this issue, including that which detracts from a reasonable belief. *See Haley v. Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

In determining whether the appellant had a reasonable belief, the Board considers whether he was familiar with the alleged improper agency activities and was therefore in a position to form such a belief as well as whether his belief was shared by other similarly-situated employees. *See Chianelli v. Environmental Protection Agency*, 86 M.S.P.R. 651, 657 (2000), *aff'd*, 8 F. App'x 971 (Fed. Cir.), *cert. denied*, 122 S. Ct. 570 (2001). An employee's motive for making the disclosure, *e.g.*, to shield himself from future discipline, does not by itself remove the disclosure from the protection of the WPA. Whether the agency investigated the appellant's claim may be considered in determining its legitimacy. *See Kinan v. Department of Defense*, 87 M.S.P.R. 561, 566-67 (2001). Even if the appellant did not actually make a protected disclosure but is perceived as a whistleblower, he is entitled to the protections of the WPA. *See Schaeffer v. Department of the Navy*, 86 M.S.P.R 606, 617 (2000).

The U.S. Court of Appeals for the Federal Circuit has held that "[t]he purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to

help uncover and disclose that information." *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000). The court further explained that an employee must disclose government wrongdoing to persons who may be in a position to remedy the problem without fearing retaliatory action by their supervisors or those who might be harmed by the disclosures. *Id.*; *see also Willis v. Department of Agriculture*, 141 F.3d 1139, 1143-44 (Fed. Cir. 1998).

The appellant established that some, but not all, of his disclosures were protected.

With his appeal, the appellant furnished a copy of the letter he submitted to the OSC. In that letter, he summarized 11 disclosures he made and the bases for them. In my analysis, I combined two similar disclosures, "h" and "i" for purposes of efficiency. I will now analyze the disclosures and determine if they are protected.

a. *The appellant failed to show that he had a reasonable belief that Reese falsified John Curry's employment application.*

In his OSC complaint, the appellant charged that his supervisor, Reese, conspired with a restoration shop employee, John Curry, to falsify Curry's application to obtain a job for which he was unqualified. The appellant claimed that Reese helped Curry because Curry supplied Reese with illegal drugs, which they shared during and after work hours on numerous occasions. The appellant related that he told Alison and others about this matter, but they did nothing. The appellant asserted that this amounted to a violation of law and an abuse of authority. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). In his Board pleadings, the appellant changed this claim somewhat by stating Reese conspired with Curry to "falsify/exaggerate" Curry's application "possibly because" Curry supplied illegal drugs to Reese. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 6.

The parties stipulated, and the agency presented proof at the hearing, that Curry was hired at the GS-7, Step 10 level. Prior to that, he was a Small

Engineering Mechanic within the Smithsonian's Operations Directorate, Office of Physical Plant, Grounds Management Branch. *See* Appellant's Exhibit N-1.

The appellant and witnesses who testified on his behalf, including Heather L. Hutton, Robert M. McLean, Jr., David M. Wilson, and Bayne R. Rector (all employees or former employees at Garber) testified that, based on rumors and their own observations, Curry was unqualified for the position for which he was hired. They also testified that they watched Reese try to teach Curry how to weld after he was hired.[9] The appellant said that he once bluntly asked Curry, "How the hell did you get this job?," and in reply, Curry said that he sold marijuana to Reese and that Reese was his "pot buddy."

McLean believed Curry was unfairly hired and lacked experience to be hired as a welder. McLean testified that he overheard a telephone call involving Reese and someone else on the other line, just prior to Curry being hired at Garber, in which Reese seemed angry and defensive about Curry's qualifications. McLean conceded, however, that he knew nothing about Curry's work history and whether he had any prior experience in aviation. McLean believed the rumor that Curry was hired as a GS-9. When agency counsel pointed out to McLean, however, that this rumor was false, McLean seemed genuinely surprised. He then recanted his testimony about Curry's unfair hiring. He added that, to the best of his knowledge, Curry may have been qualified for the GS-7 position.

Hutton testified that she dated Curry from August 1, 2001 until the beginning of October 2001, and that, while they were dating, Curry told her Reese helped him get the job at Garber. Curry also told her that he was at

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[9] The appellant and others testified that the incumbent of the Museum Specialist position should know how to weld. Based on the position description for the GS-9 Museum Specialist position, it appears that would be true. *See* Appellant's Exhibit L-1. Two vacancy announcements for the GS-7 Museum Technician and GS-9 Museum Specialist positions, though, reflect that this experience might be needed. *See* Appellant's Exhibit N-1.

Reese's house when Reese "pulled out" a Standard Form (SF)-171, which Reese had already completed for him. She speculated that Reese helped Curry because Curry said he was supplying drugs to Reese. She admitted, however, that she never saw Curry give drugs to Reese. Hutton believed that Curry was hired at the GS-9 level. To confront evidence to the contrary, Hutton later provided a supplemental affidavit, in which she stated that sometime around August 2001, Curry showed her an appointment letter from the Smithsonian, indicating he had been selected for a Museum Specialist position at the GS-9 pay grade. *See* Appellant's Submission of Supplemental Affidavits (Affidavit of Heather L. Hutton) (June 22, 2006).

Wilson testified that he talked to Curry about his application to become a Museum Specialist. Wilson recalled that, prior to getting the job, Curry acknowledged that he knew nothing about airplanes and said he did not know how he would "get by" if he did obtain the job. Curry also told Wilson and others that he went to Reese's house and Reese helped him complete his SF-171. Wilson testified that he thought that Curry was hired as a GS-9. After being showed evidence to the contrary, Wilson tried to refute this evidence by furnishing a supplemental affidavit, stating that soon after Curry started his job at Garber, he told Wilson that he was being paid at the GS-9 level. Wilson also averred that in late 2001, Curry showed him his pay stub, which reflected he was being paid at the GS-9 level. *See* Appellant's Submission of Supplemental Affidavits (Affidavit of David M. Wilson) (June 22, 2006).

Rector testified that in the summer of 2001, Curry told Rector that Reese was assisting him in applying for a job at Garber. Curry informed Rector that he went to Reese's house on a weekend and Reese helped him put together his application. Curry said he owed Reese "big time." Rector indicated that he did not know what knowledge was required for the job Curry occupied.

Reese testified that he was involved in Curry's selection. Reese believed Curry might have had some aviation experience when he served in the U.S.

Marine Corps. Reese thought that Curry had some welding experience from when he worked in the Horticultural Division and that he possessed the rudimentary knowledge needed for the position.

Alison said he, not Reese, was directly involved in Curry's selection. Alison did not know the specific qualifications for the Museum Specialist position.

Dr. Theodore A. Maxwell, Associate Director, testified that he heard allegations that Reese helped Curry get the job, but not that Curry was unqualified for that position. Maxwell indicated that it was later determined that Curry was classified incorrectly.

An appellant does not satisfy the reasonable belief requirement under 5 U.S.C. § 2302(b)(8) if he is merely reporting unsubstantiated rumors. *See Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994) (unsupported speculation concerning possible "illegal business practices" did not satisfy the reasonable belief requirement).

In the instant case, the appellant provided no testimony or evidence to establish that he was aware, apart from general hearsay information, that Curry was unqualified for the position at the GS-7 level. The parties stipulated that Curry was hired at the GS-7, not the GS-9 level. The main genesis of the rumor that Curry was unqualified was based on the unfounded speculation that he held a higher grade with greater responsibilities. While if it is true that Reese may have acted inappropriately when he assisted Curry in filling out his application for the job, this, by itself, does not show the type of egregious misconduct that the WPA was designed to correct. In addition, this claim of assistance certainly does not establish, as the appellant claimed before the OSC, that Reese and Curry "falsified" his application.[10] The appellant's and others' suspicions that Reese

[10] Even though the appellant tried to broaden this allegation before the Board by claiming Reese and Curry either falsified or exaggerated his qualifications, the scope of

may have assisted Curry because Curry supplied him with drugs also was based on nothing more than conjecture.

Under these circumstances, I find the appellant's alleged report of such information does not rise above the level of conveying mere rumor and unsupported speculation. I, accordingly, find the appellant failed to show that he reasonably believed this claimed disclosure of information evidenced a violation of any law, rule or regulation or an abuse of authority under section 2302(b)(8).

b. *The appellant failed to show that he had a reasonable belief that Garber employees utilized dangerous equipment while on drugs.*

In his OSC complaint, the appellant contended that, in late March 2002, Curry nearly severed several of his fingers in a workplace accident, which occurred because he was under the influence of drugs at the time and he lacked the qualifications/certifications for his position. The appellant stated that Reese was aware of this situation and he, the appellant, disclosed this information to Alison, but nothing was done to prevent the accident from occurring. He claimed that this constituted a violation of law and a substantial and specific danger to public health. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). In his Board submissions, the appellant indicated that Curry's accident happened because neither Reese nor Alison took any action against Curry for his drug use at the worksite. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 6.

Based on my review of the testimony and documentary evidence, not one witness, including the appellant, attributed Curry's accident to his having used drugs on the day it happened. In fact, the appellant stated that he only viewed the accident scene after it took place and Curry already had been taken to the hospital. The appellant stated that other employees told him what happened and

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an IRA appeal is limited to those disclosures raised before the OSC. *Sazinski v. Department of Housing and Urban Development*, 73 M.S.P.R. 682, 685 (1997).

that some of them thought the accident resulted from Curry's being unqualified. The appellant did not say, however, that any employee mentioned that Curry had been using drugs. McLean testified that he took Curry to the hospital after it happened. McLean, who was in a good position to know, did not attribute the accident to Curry's alleged use of drugs. McLean thought the accident may have occurred because Curry should have known how to properly operate the saw table. Nevertheless, McLean, when asked, could not say if Curry's perceived lack of qualifications materially affected the safety of anyone at Garber.

Rector stated that he signed Curry's accident report a few days after it happened. *See* Appellant's Exhibit O-4. Rector said he initially wrote that the accident occurred because the "employee [was] using a machine he's not qualified to use." Later, Rector modified the report so it would not look so bad, by adding the word "possibly" before "not qualified." Rector later drafted two memorandum, on March 20, 2002, and on March 28, 2002, in which he discussed the incident and stated that "a known drug user (John Curry) recently had a serious accident while on the job." Appellant's Exhibits N-4, P-4. Rector, in these e-mails, did not categorically state that the accident happened because Curry was on drugs. In fact, Rector acknowledged that he was not at the shop on the day of Curry's accident.

Reese testified that he drafted a document regarding Curry's accident in the workplace on the same day it occurred. *See* Appellant's Exhibit O-4. The report stated that Curry cut his fingers on a piece of the shop equipment and he was taken to the hospital. Reese, on the form, also opined that the incident happened because Curry was "not paying close enough attention." Reese confirmed this assessment in his testimony. He said he only knew that Curry injured his hand on the table saw and not much more than that.

I find that the appellant does not satisfy the reasonable belief requirement for this claim, inasmuch as he provided no support for his bare assertion that Curry's accident happened because he was using drugs. Thus, at best, he is again

merely reporting unsubstantiated rumors, which is insufficient to establish a reasonable belief. *See Sobczak*, 64 M.S.P.R. at 122. I have made findings, above, regarding the general hearsay information that the appellant relied on to allege that Curry was unqualified for the position at the GS-7 level, which I will not reiterate here. I, therefore, find the appellant failed to prove that he reasonably believed this disclosure evidenced a violation of any law, rule or regulation or involved a substantial and specific danger to public health.

c. *The appellant established that he reasonably believed that employees utilized drugs in the workplace.*

In his OSC form, the appellant wrote that he informed Alison and other officials, and Reese was aware, that many Garber employees used drugs in the workplace, but they took no corrective action. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). He indicated that this amounted to a violation of law and a substantial and specific danger to public health. On appeal, the appellant indicated that Reese and others used drugs at work while being near or operating dangerous machinery. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 6.

The appellant testified that Reese told him that he used drugs and Reese sometimes appeared "stoned," because he had red eyes, he smelled of pot, and his conversations were disjointed. Sometimes, when the appellant and Reese went biking together, Reese would "get stoned" before and after their rides. Once, Curry accompanied the appellant and Reese on a bike ride. Curry gave Reese "a bag of weed," and they both smoked it in front of the appellant. The appellant stated that Curry admitted to him and other employees that he "got stoned," both during and after work. The appellant believed that Reese knew that Curry used drugs at work because he once told the appellant that Curry always came to work late and was stoned. The appellant related that other shop employees also knew that Reese and Curry were "stoners," and a few told him that they had witnessed employees using drugs at work.

During his questioning, the appellant was asked to explain the apparent discrepancy from his hearing testimony and what he said when he was interviewed in 2002 by management officials inquiring about drug use at Garber. In an April 1, 2002 memorandum following the appellant's interview, Reese and another supervisor, Bernard Poppert, reported to Maxwell that the appellant "indicated that he suspected Mr. John Curry of using drugs but had no first-hand knowledge of him actually using them." Appellant's Exhibit J-2. The appellant described his interview with Alison, Reese, and Poppert as a "guided interview" because they did not want to hear everything he wanted to tell them. He stated, for example, that when Alison asked him during the interview if he had seen drug use, Alison tried to limit the questions so that the appellant could only answer if he ever had observed drug use occurring in the workplace during work hours.

Hutton testified that she witnessed Curry smoking marijuana twice during work hours. She indicated that, sometime in the fall 2001, she told the appellant about having seen Curry using drug use, but she did not notify Reese. Hutton also stated that when she and Curry were dating, he told her that he was supplying marijuana to Reese.

Wilson suspected Reese used drugs because on two occasions when Reese talked to him – once in the shop and another time in Reese's office – Wilson noted the distinctive smell of marijuana on Reese's breath and clothes. The first time it happened, sometime between 1996 and 1999, Wilson was probably three feet away from Reese while he was being shown something on Reese's computer. The second time, Wilson was standing about a foot away from Reese. According to Wilson, three other people told him they had seen Reese smoking marijuana: the appellant; Rector; and Wilbert Lee.

Rector testified that Curry told him he liked to smoke marijuana. Rector recalled one instance when he drove Curry from a medical appointment back to work, and during the return drive, Curry asked Rector if he "wanted to smoke a bowl." Further, Rector stated that a Garber employee, Anne McCombs, came to

him in his capacity as Safety Coordinator and asked him to do something about the drug problem at Garber. Rector alerted Heilman to the apparent drug problem, *see* Appellant's Exhibits N-4 and P-4, but nothing seemed to change. Rector believed that the OIG conducted an investigation into the alleged drug use at Garber.

Alison said he asked Reese to look into allegations of drug use in the workplace. Subsequently, Maxwell asked Alison to conduct an investigation and Poppert assisted Reese in this endeavor. Alison acknowledged that, while the investigation was never completed, they were unable to substantiate allegations of drug use. Alison recalled asking employees, or having others ask employees, if they had seen any activity of drug use. During one interview, the appellant stated to Alison that he suspected drug use in the workplace but had no first-hand knowledge of it. Alison cannot recall now if there was an allegation that Curry gave drugs to Reese. Alison remembered, however, that someone accused Reese as having been one of the persons involved in using drugs. Alison also did not recall if an investigation was conducted into allegations of Curry's drug use.

Maxwell testified that he asked Alison to look into the drug use allegations because Reese was one of the accused. Maxwell recalled that he discussed the need to go to security to ascertain what the policy was regarding drug use, and that, eventually, the Office of Protected Services was enlisted to do drug testing.

I find, based on this allegation and the testimonial and documentary evidence in support of it, that the appellant disclosed information which he reasonably believed constituted a violation of laws, rules or regulations and/or constituted a substantial and specific danger to public health or safety. Reports of unsafe conditions, such as here, are protected under the WPA. *See, e.g., Easterbrook v. Department of Justice,* 85 M.S.P.R. 60, 66 (2000) (the appellant made a protected disclosure when he notified OSHA about dead pigeons and pigeon excrement which posed a safety hazard in his workplace); *Holloway v. Department of the Interior,* 82 M.S.P.R. 435, 440-41 (1999) (the appellant's

report that agency employees used marijuana in and out of the workplace could, if proven, constitute violations of law and thus he raised a nonfrivolous allegation that he engaged in protected whistleblowing activity); *Owen v. Department of the Air Force*, 63 M.S.P.R. 621, 626 (1994) (the appellant's report to OSHA regarding exposure to chemical fumes evidenced a reasonable belief of a violation of law, rule, or regulation and a substantial and specific danger to public health or safety).

In making this finding, I note that, although it was not conclusive that an employee actually violated a law by using illegal drugs at work, the appellant need not prove an actual violation to establish that he had a reasonable belief. *See, e.g.*, *Conrad v. Department of Justice*, 99 M.S.P.R. 636, 643 (2005) (the appellant made a protected disclosure in an anonymous letter alleging that DEA employees were "aiding or abetting in a potential criminal act" by retrieving classified material so that a former Administrator could write his memoirs, even though record did not prove that Administrator actually misused the classified documents); *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, 658 (2004). In addition, with respect to protected disclosures, a danger may be substantial and specific even though the perceived danger, as in the instant case, was to a limited number of government personnel and not to the general public at large. *See Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996).

d. *The appellant failed to show that he had a reasonable belief about misappropriation of government property (waste metals).*

According to the appellant's OSC complaint, management officials directed Garber employees to regularly misappropriate money collected from government recycled waste metals. The appellant stated that when he told Reese about this practice, he was told to "mind [his] own business." The appellant believed this misappropriation violated a law, rule, or regulation and constituted gross mismanagement or a gross waste of funds. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). At the Board, the appellant argued that

Reese and others collected funds for personal gain from selling misappropriated government property, including waste metal. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 7.

Reese testified that he did not ask employees to trade scrap metal for monetary remuneration.

The appellant did not provide any testimony on this issue. However, one witness did. Wilson testified that the shop used a lot of aluminum over the course of a year and that, when it was full, employees took it to a scrap dealer and received funds. Wilson stated that Reese sent him and a colleague, William Stevenson, to sell scrap metal on at least two occasions. He recalled that the funds they received went into "some sort of slush fund" to purchase tools that the shop did not have in the budget, or to use for food and beer for parties. Wilson stated that, after the OIG investigated this, the employees could no longer receive the money directly from the scrap dealer, but would get credit to use to trade for other material.

I find that the appellant did not demonstrate that he had a reasonable belief for this allegation. As I noted above, the appellant did not even testify on this point. In addition, the appellant, through Wilson's testimony, did not establish that anyone, let alone Reese, personally benefited from the practice of using the funds from the sold scrap metal. Wilson testified that the shop used the money to buy supplies and tools for use by the Institution, a government entity. While Wilson said that some of the funds may have been misused to finance office parties and that this practice was ended after the OIG investigated, this does not establish that the appellant could have had a reasonable belief that this practice violated a law or constituted gross mismanagement or a gross waste of funds.

It may be true that the OIG report found that employees acted inappropriately with the funds garnered from the selling of scrap metal because they did not officially report it and used the money "as they pleased." Appellant's Exhibit S-5, at p. 8. That being said, the OIG did not state, or even

insinuate, that anyone violated a law, rule, or regulation. Neither the OIG nor Wilson indicated, as claimed by the appellant, that anyone personally benefited from the use of this money. Additionally, a "gross waste of funds" is defined as "a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996). That was certainly not the case here. The appellant also failed to show, by this claim, that there was a substantial risk or significant adverse impact on the Smithsonian's ability to accomplish its mission. *See Chakravorty v. Department of the Air Force*, 90 M.S.P.R. 304, 309-10 (2001); *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993) (gross mismanagement creates a substantial risk or significant adverse impact on an agency's ability to accomplish its mission).

e. *The appellant failed to show that he had a reasonable belief regarding a pre-selection based on illegitimate criteria.*

In his OSC complaint, the appellant asserted that Alison and Reese discouraged him from applying for a vacancy (Vacancy Announcement OOMH-1168) and instead pre-selected Lars Macklemore[11] for the position because he was a friend or acquaintance of Reese's. The appellant stated that this violated a rule and constituted an abuse of authority. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). In response to a Board order, the appellant asserted that Reese pre-selected a friend for a position based on illegitimate criteria; *viz.*, his personal relationship with that individual. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 7.

No one, not even the appellant, testified at the hearing about this allegation. Hence, I find that this claim is unsupported and based solely on speculation or the appellant's subjective belief. In any event, I find, assuming the truth of this assertion, that the appellant failed to establish that he had a

[11] The correct spelling of this individual's last name is "McLamore."

reasonable belief that his managers' actions violated any law or rule, or amounted to an abuse of authority. *See Kraushaar v. Department of Agriculture*, 87 M.S.P.R. 378, 381 (2000); *Carr v. Department of Defense*, 61 M.S.P.R. 172, 181 (1994); ("vague allegations of wrongdoing" do not amount to whistleblowing).

f. *The appellant failed to show that he reasonably believed that a manager, Reese, utilized government time and a government computer for personal business.*

The appellant, in his OSC complaint, accused Reese of violating Federal Rules and Smithsonian Directive (SD) 931[12] when, from the summer through December 2001, he consistently used government computers and government time for extensive day trading of stocks. The appellant stated that the applicable SD explicitly states that it is illegal for employees to be engaged in ventures involving personal profit, such as on-line brokering. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). The appellant reiterated this in his Board pleadings. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 7.

The appellant testified that, when he first came to work as a volunteer at the Smithsonian, he and Reese spent many hours each day during work hours doing day trading. Other than his own bare allegation, the appellant offered no support for his claim that he and Reese evidently spent many work hours on the computer doing non-Smithsonian related work. I find it odd that, if it is true that Reese and the appellant were doing this for as long a time as the appellant claimed, no other person stepped forward to confirm this issue. As an aside, I also find it strange that the appellant would accuse his supervisor of doing something inappropriate when he, too, was doing it, even though he was a

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[12] Although the appellant cited SD-931, he apparently meant to refer to Smithsonian Announcement No. 97-11 (Dec. 17, 1997), which is contained in the file at Appellant's Exhibit I-1.

volunteer at the time. In any event, it appears that the appellant was not so offended by the practice that he himself refused to engage in it. He also seemed relatively unfazed by the practice, given that he presumably waited more than a year after it happened to report it to anyone. I find that his comments about such a broad and imprecise matter, without any support other than his own subjective belief about such a claim, do not amount to an allegation of a violation of law or rule that would be covered by 5 U.S.C. § 2302(b)(8).

g. *The appellant did not show that he had a reasonable belief concerning his allegation about the possession of unauthorized firearms in Federal facilities.*

The appellant reported to the OSC that Reese violated section 930 of the Gun Control Act of 1968 ("Possession of firearms and dangerous weapons in Federal facilities") and SD-217 ("Policy on Violence in the Workplace") when he repeatedly carried and condoned the carrying of weapons in the workplace. According to the appellant, this activity amounted to a violation of law and rule, and a substantial and specific danger to public safety. He alleged that he alerted Secretary Small and others to this practice in his March 5, 2002 e-mail and later notified Dailey about it. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). The appellant contended that paragraph 2 of SD-217 states that "While on the premises of the Institution, no person may carry firearms, other dangerous and deadly weapons, or explosives."[13] *Id.*; *see also* AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 7.

The appellant related that, soon before he sent the March 5, 2002 e-mail to Secretary Small, someone asked him if he knew that Reese had a gun. He indicated that he included that information in his e-mail because he did not know how bad the situation could get at Garber.

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[13] A copy of SD-217 is located in the file at Appellant's Exhibit H-1.

In addition, the appellant testified that on two occasions, he observed Reese in the welding area with a "broken down pistol." The appellant stated that he was passing through the welding section and noticed Reese and Stevenson examining the barrel of a revolver. The appellant explained that the gun had been taken apart. Another time, the appellant saw Reese and Stevenson working on the barrel extension of a "broken down gun." The appellant believed that they might have been working on a "flash suppressor." Both times, the appellant asked Reese what they were doing and Reese said the guns were his. The appellant stated that other employees also brought in weapons and modified or repaired them at the shop.

McLean testified that a co-worker, Edward M. Mautner, once called him and said he was concerned about the stress level at Garber facility. Mautner said he was anxious about management officials' reactions to certain employees who were challenging management practices. Mautner recounted that he had seen Reese with a gun at the Airlie airfield and so he told McLean that he was concerned that Reese might become angry enough to use the gun. McLean indicated, however, that he did not perceive Mautner's phone call to him to be a "gun in the workplace" issue. He just listened to what Mautner had to say in general terms. McLean told the appellant about this conversation. McLean was asked to read the appellant's March 5, 2002 e-mail referring to McLean's telling the appellant about Reese having a gun. McLean said that he disagreed with the appellant's characterization therein that "Bill Reese carries a gun." Appellant's Exhibits A-1.

McLean also was asked to review a March 12, 2003 e-mail he sent to Heilman. In that e-mail, McLean wrote that Reese approached him and said, "I want you to know that I wouldn't shoot any of you, no matter how this turns out." Appellant's Exhibit G-3. McLean verified that this conversation took place, but said he did not feel particularly threatened by this comment. He did, though, think it was an interesting comment and he was "surprised" by it.

Wilson never saw anyone carry a gun at Garber. Wilson remembered a former employee (now retired), George Vencelov, who machined parts. Wilson recalled that, sometime in late 1998-99, he saw Vencelov working on a gun receiver (a Colt .45) owned by Derek Hodge, a former shop employee. When Vencelov worked on the revolver, he used the Smithsonian's milling machine. *See* AF, Tab 4, Attachment 10 (the incident is listed in an anonymous OSC Form 11). Wilson believed that Reese was aware of this project, which lasted for about a week or more.

Rector testified that Mautner once told him that Reese owned a gun. Rector, after reading the appellant's March 5, 2002 e-mail to Secretary Small, clarified that he heard Mautner say that Reese owned a gun, not that Reese carried a gun on the workroom floor. Rector emphasized that he "never heard anybody say that."

Reese testified that he did not request any of his employees to work on guns or parts of guns at Garber. He acknowledged that he owns a gun. He said he has shot his gun at the Airlie airfield, which is not government property. He indicated that Mautner was there when he shot the gun and so Mautner witnessed him with a gun. Reese does not believe he ever said to McLean that he "would not shoot anyone." Reese stated that the appellant "filled other employees with false notions," including that he carried a gun at work and threatened employees.

When Alison was asked at the hearing whether Reese carried a gun at work, he smiled, and almost laughed, at the suggestion. By this, it seemed he thought it was a preposterous claim. Dailey, after reading the appellant's March 5, 2002 e-mail to Secretary Small, made an inquiry into the claims. Dailey found there was no merit to the appellant's allegation that Reese carried a gun at work. Dailey stated that he also learned that people were more afraid of the appellant than of Reese.

Before I address whether this was a protected disclosure, I need to clarify this issue. The appellant, in his e-mail to Secretary Small, wrote that:

> Two people (Bob McClean and Ed Mautner) have each asked me if I was aware Bill Reese carries a gun and felt compelled to inform me that they thought he may be capable of using it. I don't know what possessed them to tell me this but I certainly do not take it as a sign of confidence on their part for Bill[']s judgment.

Appellant's Exhibit A-1. It is clear by this allegation that the appellant was implying that Reese or others carried weapons at work and were inclined to use them, creating a potentially dangerous situation. I put little, or no credence, to the appellant's after-the-fact re-characterization of this issue as Reese also possibly violating a law or rule when he may have brought a weapon into the shop to repair it. The appellant failed to mention any "broken down" pistol or gun in his e-mail letter and he did not raise this in his conversation with Dailey. Even if I were to consider this claim, I note that only the appellant said that he saw Reese with a broken gun on work premises. No one else supported him on this. I thus would find that he lacked a reasonable belief as to this claim. In fact, this issue would more appropriately be included under allegations "h" and "i," which are analyzed together below.

Next, I find that the appellant failed to show that he had a reasonable belief that Reese carried a gun at work or condoned that action by others. McLean, who told the appellant that Reese owned a gun, disputed the appellant's rewording of that fact, when he implied in his e-mail to Secretary Small that Reese carried a gun at work. Every other witness disputed the appellant's assertion that Reese ever carried a gun in the workplace. I find that the appellant engaged in hyperbole in the hope of getting Secretary Small's attention so that this high-level official would take an interest in remedying the appellant's complaints. This, then, fails to show he had a reasonable belief concerning this claim.

h. *The appellant proved that he had a reasonable belief that managers utilized government time, tools and misappropriated government property for personal business.*

i. *The appellant demonstrated that he reasonably believed that Reese utilized government time and tools for personal business.*

As I stated earlier, because of overlap concerning the appellant's claims for these two disclosures, I have treated them together.

As to disclosure "h," the appellant, in his OSC complaint, stated that Reese misappropriated government time and resources and abused his authority by regularly taking government tools, aircraft and shop supplies for his use during off-hours on private airplanes at Airlie, a private airstrip near Warrenton, Virginia. The appellant wrote that, although he told Alison, Dailey, and others about Reese's activity, no action was taken against Reese. In addition, he wrote that he disclosed Reese and Alison used paid government hours and government tools to work together repairing Alison's private aircraft located at Manassas, Virginia. He indicated that these activities violated laws and rules, and constituted gross mismanagement, a gross waste of funds, and an abuse of authority. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2). The appellant repeated these claims before the Board. AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 7.

As to disclosure "i," the appellant argued that Reese violated Smithsonian rules, stole government property, and abused his authority by repairing and ordering Garber employees to repair his personal property, including weapons, a "flash suppressor" or "silencer," a bicycle, and candle holders. The appellant contended that Reese and the employees under his direction used government time and equipment during normal business hours to work on these projects. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2); AF, Tab 4 ("Appellant's Response to Order to Show Cause"), at 7.

The appellant testified that, when he and Reese were on good terms, he would accompany Reese to the Airlie airfield.[14] He stated that he started to

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[14] For the first time at the hearing, the appellant raised claims of possible egregious violations of law by certain employees who use airplanes at Airlie airfield. Because allegations raised for the first time in a Board appeal are not "protected," I have not

realize that Smithsonian supplies, tools, and other equipment was kept at Airlie. He also remembered seeing unmarked paint cans and "bunny suits" that John D. Shatz, a co-worker, advised him were taken from Garber.

The appellant testified that most Garber employees did not like having to do "home projects" at work. He himself had to work such projects, which bothered him. Once, Reese asked him to fix a brass candle holder that was broken and needed to be welded. The appellant was aware of other employees having to work on home projects. For instance, he knew that one employee, Scott Woods, worked on a Merlin engine project. Other employees, including Reese and Wilson, spent considerable time restoring a classic car, a Bug-Eye Sprite, which was owned by a neighbor of Reese's. Reese also asked a fellow employee, Gary Gordon, to totally revamp the gear system and other parts on Reese's bicycle.

Rector testified that he has extensive knowledge of non-Smithsonian work being performed at Garber. Rector had to get involved in a lot of "homeys" because of his chemical background. He explained that "homeys" was a slang the employees used to describe work they had to do for non-governmental related work "numerous times" during normal business hours. This work included jobs involving parts for motorcycles, cars, and airplanes. Rector declared that the "homeys" had been performed at Garber as far back as 1977, when he began working there. Yet, the practice increased under Alison's reign. Rector was afraid to report the practice earlier because he feared retaliation and being ostracized in the workplace. Rector notified Heilman about non-Smithsonian projects being done on the premises very early in 2002.

Wilson testified that he, too, was required to work on "homey" projects. He stated that Reese assigned these projects to his subordinate employees. For

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considered them. *See, e.g., Ruffin v. Department of the Army*, 48 M.S.P.R. 74, 78 (1991).

example, he had the appellant work on polishing and then a clear coating candlesticks. In the fall of 2001, Reese, who was "big into bicycles," assigned Gordon to build/fix bike parts. Wilson saw Gordon working on this and Gordon talked to him about it. Wilson recalled that Wilbert Lee worked on sheet metal damage to the wing of a Roussard aircraft that was partly owned by Reese. Wilson also mentioned that Vencelov, a former employee, worked on a Colt .45 owned by Derek Hodge, in which he used government equipment. Wilson recalled that he and other shop employees, during work hours and using Garber materials and tools, repaired a private Bug Eyed Sprite automobile. Wilson observed co-workers working on non-Smithsonian projects for other supervisors, including work done on Alison's personal aircraft. Wilson recalled that only one project was ever performed for Dailey, on his tow bar. This work included the use of government equipment, including yellow paint and a spray gun. He said certain employees had to do these projects more than others, including himself (a painter), Rector, Stevenson (a welder) and Lee (who had sheet metal expertise).

When Wilson worked for Reese at the Airlie airfield, Wilson observed tools in a tool box stamped "NASM" or "PGF" ("Property of Garber Facility"). Wilson said Reese should return these tools, but he did not. Robert Padgett often borrowed tools and supplies and never returned them to Garber. Wilson was with Padgett and saw a tool on racks at Padgett's hangar. Wilson told Reese and was told to tell Padgett to return it to the Garber facility. There were a lot of smaller things (sandpaper, nuts and bolts, etc.) that Wilson observed Padgett was taking for personal use and he told Reese about those things, too.

Reese admitted that he asked employees to work on projects that were unrelated to Smithsonian business. He conceded that he asked employees to work on bicycle parts. Reese also asked Stevenson to perform some maintenance on a motorcycle part, but Stevenson did not do it. He disputed, though, that he asked the appellant to work on any candlesticks. He also denied that he requested any employees to work on private airplanes, guns or parts of guns.

Alison said that some Garber employees, Reese, Wilson, and Padgett, on their personal time, worked on his aircraft. Alison paid Wilson for working on his airplane. He tried to pay Reese but Reese refused to accept it. Alison acknowledged that he used Garber equipment, such as scaffolding and sheet metal, to repair his aircraft engine. He and Reese worked together on this. Alison admitted that he arranged for Dailey's tow bar to be fixed. Alison stated that he was aware of findings in the OIG report, which determined that Garber employees repaired Alison's aircraft for him.

Dailey acknowledged that he asked Alison to have his airplane tow bar fixed. Dailey thought that Alison was going to do it himself, with his own tools. Dailey told Alison that he did not "want anything inappropriate done," or words to that effect. Dailey did not instruct Alison to have his tow bar fixed at the Garber facility. Dailey indicated that, to fix the tow bar, only minor skills were required. He said he could have fixed the tow bar himself. He said that it required a vice and perhaps a torch, depending upon how much it was bent. Alison simply returned the repaired tow bar to Dailey and they did not have a discussion on where or how it was fixed. Two months afterwards, Dailey learned that his tow bar had been fixed by Garber employees. Dailey also gave Scott Woods, a subordinate employee, a seat latch to repair at Dailey's hangar in Warrenton. This happened around the same time that Alison repaired his tow bar.

Dailey stated that he knows it is inappropriate to use Smithsonian equipment and employees to fix personal equipment. After the OIG report was issued, Dolph Sand (the Smithsonian's representative) admonished Dailey for his actions regarding the repair of personal equipment for his airplanes. Dailey reimbursed the government five times the cost of the repair. He did this several years ago, around the same time the report was issued. Dailey was aware of the OIG report findings concerning the tow bar and seat latch. Dailey said he admitted these things to the OIG when they questioned him about it. Dailey acknowledged that, during his deposition, he stated that after the OIG report was

issued, he counseled Reese and Alison for their inappropriate conduct and told them they needed to ensure these types of things did not continue in the future.[15]

The parties stipulated that the OIG's report determined, *inter alia*, that a tow bar for Dailey's private airplane had been repaired by Garber employees at the Garber facility, using government time, equipment, and resources.

As to the claim of violation of law or rule, the appellant did not cite to any specific law, rule or regulation for this allegation, other than the Smithsonian's Standards of Conduct.[16] In this instance, however, the claims of using government tools, equipment, and workers while they were on government time are clearly contrary to the Smithsonian's mission, and involve conduct that plainly falls below the standards of the conduct expected from a Federal employee. With respect to WPA disclosures, some allegations of wrongdoing, such as theft or blatant misuse of government property, so obviously implicate a violation of law, rule, or regulation, that an appellant need not identify any law, rule, or regulation that was violated. *DiGiorgio v. Department of the Navy*, 84 M.S.P.R. 6, 13 (1999). I find that this disclosure would fall into this category. Furthermore, the appellant's disclosures represent an action on his part to bring an issue to the attention of authorities that would lead his managers to rationally believe that they might be subjected to discipline.

Accordingly, I find that the appellant has established that he had a reasonable belief that the matters he was disclosing were either a violation of a law, rule or regulation, gross mismanagement, a gross waste of funds, and/or an abuse of authority. *See Salinas v. Department of the Army*, 94 M.S.P.R. 54, 58 (2003) (a disclosure may be considered protected as a regulatory violation in the

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[15] Dailey also inserted two intermediate supervisors between Reese and the workforce.

[16] The Smithsonian's Standards of Conduct are located in the file at Appellant's Exhibit M-1.

absence of identification of a specific regulation when it and the circumstances surrounding the disclosure clearly implicate an identifiable violation).

j. *The appellant failed to show that he had a reasonable belief that managers favored personal friends for opportunities and denied others similar opportunities and job necessities.*

At the OSC, the appellant contended that Reese and Alison abused their authority when they favored employees who were their personal friends by giving them travel opportunities, use of particular tools, assignments on desirable projects, and opportunities to earn compensatory time at work. The appellant claimed he disclosed these practices to Dailey and others. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2).

The appellant testified that, when he first began working at Garber, Reese considered him a friend. During that time, Reese treated him favorably, by placing him in charge of a project with other employees, namely McLean and Matthew Nazarro, who had more experience than he did. He also received a lot of compensatory time. He indicated that this preferential treatment began to change when his relationship with Reese soured sometime in late November or early December 2001. For example, he could no longer arrive at work late or take long lunches. He also was given "lower end" jobs, could not choose which assignments he worked on, and lost the opportunity for compensatory time projects, such as after-hour cleaning jobs. Reese stopped talking to the appellant for four months. He would route his instructions for the appellant through other employees, such as Jeffrey Mercer or Steven G. Kautner.

The appellant testified that Alison, too, showed favoritism by spending more time with his friends and looking over certain projects. The appellant once broached the topic of favoritism with Alison and Alison replied that it was Reese's shop and so he let Reese run it. Alison tried to allay the appellant's concerns, by adding that, "besides, you're one of the favorites." The appellant said that he also spoke to Heilman, Roybal, Rector, Reese, and Dailey about the

practice of favoritism, and he informed Secretary Small about it in his March 5, 2002 e-mail.

Kautner stated that Reese gave employees "the silent treatment," for months or even years, if they displeased him. Kautner stated that after he refused to provide management with a letter implicating the appellant in a fight they had at the shop, it seemed he was given less desirable projects, such as airplane restoration and recovery of aircraft on loan from other museums. Instead, he was assigned difficult projects unrelated to aviation.

Wilson said he used to be one of Reese's favorites prior to meeting with the Ombudsman about problems at Garber. When he was a favorite, he was afforded choice assignments, got to get supplies, and traveled to road shows. He felt "bad vibes" from Reese's close knit group of employees who were his friends (called the "A-Team"). Wilson testified that both Alison and Reese exercised preferential treatment.

McLean stated that Reese had a poor management style and that he exercised favoritism. At one time, McLean was on better terms with Reese. Afterwards, Reese either did not communicate with him, provided him with minimal communication, or their interactions were adversarial. Reese would have someone else talk to him instead of speaking to him directly. McLean explained that Reese's silent treatment could be injurious to an employee's progress on a project. McLean also noticed that his opportunities for travel diminished and he was given less choice assignments. McLean indicated that Reese had his "cronies," whom he favored and they looked out for each other. McLean blamed Alison for the problems, too, because he allowed Reese to continue this behavior for so long.

Dailey testified that he did not recall Heilman telling him that Reese and Alison gave preferential treatment to certain Garber employees. In his deposition, however, he said that Heilman mentioned that there was a perception

that both Reese and Alison had favorites and that they gave them preferential treatment. Dailey asked Maxwell to look into these allegations.

I find that the appellant has failed to prove that he had a reasonable belief as to this claim. In this instance, the appellant's "disclosures" do not represent any action on his part to bring an issue to the attention of authorities that would lead his supervisor or manager to believe that they might be subjected to discipline. *Willis*, 141 F.3d at 1143 (an appellant's disagreement with his supervisors over his job-related activities is merely "a normal part of most occupations"). In addition, I find that this allegation is grounded on mere speculation and subjective beliefs.

k. *The appellant failed to show that he had a reasonable belief that managers imposed different terms/conditions of employment for improper reasons.*

According to the appellant, Reese failed to follow Smithsonian rules regarding time and attendance when he allowed two employees, who were his personal friends, to use more leave than did the appellant. The appellant specified that Jeffrey Mercer and Robert Mawhinney were not disciplined for being lax in their time and attendance, whereas he was. He maintained that this constituted a violation of rule and an abuse of authority. *See* AF, Tab 4, Subtab 1, Attachment, at pp. 1-3 of 7 (Response to Question 2).

Alison stated that Reese was the appellant's supervisor for much of this probationary period. Mercer was serving a probationary period during the same time-frame as the appellant. Mercer, though, was in a different section of the Collections Division, and was not under Reese's supervision. Alison did not consider Mercer's use of leave without pay problematic because he relied on his supervisor's advice and discretion regarding the approval/disapproval for their subordinate employees' leave.

The WPA was enacted to protect employees who report genuine infractions of law, not to encourage employees to report arguably minor and inadvertent

miscues occurring in the conscientious carrying out of one's assigned duties. Thus, an employee who discloses information that is trivial in nature could not have a reasonable belief that the information evidenced a violation of law, rule, or regulation. *See Frederick v. Department of Justice*, 73 F.3d 349, 353 (Fed. Cir. 1996). Here, I find that the appellant did not have a reasonable basis to believe that he was reporting violations of rules or an abuse of authority.

In conclusion, I find that appellant engaged in whistleblower activity by making some disclosures protected under 5 U.S.C. § 2302(b)(8). Moreover, the record is clear that, regardless of the actual nature of the appellant's disclosures, he was widely perceived as a whistleblower by management and other employees. *See, e.g., Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, 617 (2000) ("one who is perceived as a whistleblower is entitled to the protections of the WPA, even if he has not actually made protected disclosures").

The appellant established that his protected whistleblowing disclosure was a contributing factor in his termination.

I have determined that the appellant made several protected disclosures. Next, to satisfy his burden of proof, the appellant also must prove by preponderant evidence that his protected disclosure was a contributing factor in the "personnel action" at issue. 5 U.S.C. § 1221(e)(1); 5 C.F.R. § 1209.7(a). An employee may demonstrate contributing factor through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosures and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosures were a contributing factor.[17] *See* 5 U.S.C. § 1221(e)(1); *Kewley v. Department of Health & Human Services*, 153 F.3d 1357, 1361-63 (Fed. Cir. 1998); *Conrad*, 99 M.S.P.R. at 643-44. The WPA's legislative history allows for the possibility that agency officials may be held culpable where they had only constructive knowledge of a protected

[17] Commonly referred to as the "knowledge/timing test."

disclosure. *McClellan v. Department of Defense,* 53 M.S.P.R. 139, 146-47 (1992).

Here, the three officials most directly involved in the decision to terminate the appellant were Alison, the reviewing official, Associate Director Maxwell, and Dailey, the deciding official. The appellant argued that these officials were aware of his whistleblowing and acted within such time that a reasonable person could find that the disclosures contributed to his termination. For reasons I now explain, I find that the appellant established contributing factor through the "knowledge/timing test."

It is undisputed, and Dailey, Maxwell, and Alison testified, that they were aware of the appellant's March 5, 2002. Alison testified that he reviewed the appellant's e-mail to Secretary Small prior to the appellant's termination. Alison, in his April 11, 2002 Probationary or Trial Period Report, provided this as one of the reasons why the appellant should be terminated:

> Additionally, during the last thirty to sixty days Mr. Cross has become a disruptive force within his workplace. He has displayed unsatisfactory leadership potential by this disruptive behavior and has, in fact, been a counter-productive force concerning the important mission we have at hand.

AF, Tab 8, Subtab 4aa; Appellant's Exhibit G-2.

Alison indicated that, prior to the termination, he had a meeting with Dailey, Donald Lopez, and Elizabeth Scheffler, the Associate Director for Operations and Administration, in which the topic of the appellant's possible termination was raised and the reasons why that course of action should be taken. Alison believed that Dailey was aware of all of these incidents prior to that meeting because Alison is sure that he had "back and forth" conversations with Dailey during that period about the appellant. Alison could not recall who first suggested at the meeting that the appellant be terminated. Alison also could not remember if he ever heard anyone discuss the appellant's termination prior to that meeting. When asked, Alison could not remember if the subject of the

appellant's March 5, 2002 e-mail came up during the meeting, either. Later in his testimony, Alison acknowledged that the appellant's March 5, 2002 e-mail "was a factor" in the appellant's termination.

Maxwell testified that he did not speak with the appellant prior to his termination. Maxwell stated that Alison told him that some employees were disruptive in the workplace and that the appellant was part of a group of employees who were "bitching and moaning" at Garber. Alison, moreover, told Maxwell that the appellant "was not a team player." Although Maxwell said he had no personal knowledge of this, this was one of the prime reasons for appellant's termination. In addition, Maxwell stated that, of the group of employees who were not working well together, the appellant was "one of the few employees that was brought in and he was still in a probationary period."

Dailey confirmed that he received a copy of the appellant's e-mail to Secretary Small on the same date it was sent, March 5, 2002. Dailey remembered that, about two weeks before the appellant sent his e-mail, however, Alison told him that there were problems at the Garber facility and that he, Alison would look into them and report back to Dailey. Dailey recalled that the first time he heard the idea of the appellant's termination being discussed was at a meeting he attended with Maxwell, Lopez, Scheffler, and Alison. Dailey believed it was Alison, at that meeting, who first suggested that the appellant be terminated. They spoke for about five minutes about the appellant's attendance and other problems. Most, or all, of the information Dailey relied upon when he terminated the appellant "probably came" from Alison. Dailey believed that the appellant was a disruptive force in the workplace at Garber. Dailey was asked if he considered the appellant a "troublemaker." After much back and forth, Dailey eventually said "yes."

After considering the entire record, I find preponderant evidence that Alison, Maxwell, and Dailey either knew or constructively knew the appellant made a protected whistleblowing disclosure (at the very least, in his March 5,

2002 e-mail to Secretary Small). Further, Alison, Maxwell, and Dailey decided to terminate the appellant within approximately one month of the disclosure, *i.e.*, within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the discharge. *Conrad*, 99 M.S.P.R. at 645. I, therefore, find that the appellant established by preponderant evidence that his protected disclosure was a contributing factor in his termination.

The agency failed to establish by clear and convincing evidence that it would have terminated the appellant in the absence of his protected disclosure.

Even if an employee proves that a protected disclosure was a contributing factor in a personnel action, however, the Board may not order corrective action if an agency demonstrates by clear and convincing evidence that it would have taken the same personnel action absent the disclosure. 5 U.S.C. § 1221(e)(2). 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. It is a higher standard than preponderance of the evidence as defined in 5 CFR 1201.56(c)(2). 5 C.F.R. § 1209.4(d).

In determining if an agency has made such a showing, the Board will consider the following factors: 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 takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Alison and Dailey gave somewhat conflicting evidence to support the appellant's termination. For instance, they were inconsistent when they testified about who originated the idea of terminating the appellant. Dailey indicated that it was Alison who first suggested that the appellant be terminated. Dailey stated that the initial recommendation to terminate the appellant came from Alison, which was supported by Maxwell and Benton, and reviewed by Sheffler. Dailey

also said that he, Dailey, was the "final authority" concerning that decision. Alison acknowledged that he participated in the decision to terminate the appellant.

Alison, however, testified that, as of April 4, 2005, he did not intend to terminate the appellant – but on April 12th, he changed his mind because Dailey "told him that's what he should do." Alison also stated that it would not have been his position to make an independent conclusion to recommend the appellant's termination.[18]

Alison and Dailey both testified that part of the reason the appellant was terminated was because of his poor attendance record. However, they did not refute the appellant's claim that all of his requests for leave had been approved in advance by his supervisor. Alison also stated that this was the only time that time and attendance issues formed a part of the basis for terminating employees (the appellant and Hutton) under his supervision. Alison explained that another reason the appellant was fired was because he was counter-productive to the Smithsonian's mission. Dailey stated that, at the time, the NASM needed to have 68 airplanes at the Dulles facility by opening day. Dailey noted that the NASM got all this done on time and under budget, and all the airplanes were in pristine condition. The Smithsonian's reputation "was on the line," and so, Dailey suggested, the appellant was terminated because he was being disruptive in the workplace at such a critical time.

That being said, there is some evidence that Alison and Dailey suffered a significant consequence because of the appellant's protected whistleblowing disclosure. Dailey was not the subject of any of the appellant's disclosure of misconduct, but his and other employees' complaints lead to an investigation

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[18] *See also* AF, Tab 38, Subtab 7 (excerpt from Alison's November 20, 2003 deposition) (Alison indicated that Dailey and Sheffler were the primary decision makers regarding the termination).

conducted by the OIG. Later, he was admonished for his actions and reimbursed the government. Alison testified that he wrote a rebuttal to the findings in the OIG's report and gave it to Burke. Although both gentlemen retained their jobs, they were embarrassed by the adverse findings in the OIG report and by the allegations of mismanagement and wrongdoing, which the appellant reported to the Smithsonian's Secretary.

Also, I note that Investigator Robert J. Johnson testified at the hearing that he believed management officials should have received some type of discipline for the various acts of impropriety contained in the OIG report. In addition, John K. Lapiana, who works as a Senior Program Officer for Burke, a high-level agency official, testified that he did some research into what the scope of penalties might be appropriate for Dailey, Alison, and Reese, based on their alleged misconduct detailed in the OIG report. Thus, while no disciplinary action was taken, the Smithsonian, at one point, at least contemplated the possibility of taking some action against these individuals. Further, the testimony and documentary record is replete with evidence that clearly shows that agency officials, especially Alison, were not pleased with the appellant's actions and that many employees believed that the appellant's termination was a "miscarriage of justice." All of this suggests that Alison and Dailey had a motive to retaliate for the appellant's protected whistleblowing disclosure.

The agency also did not present evidence that other probationary employees, other than Hutton (who also claimed to be a whistleblower and was terminated soon after the appellant), was terminated for the same reasons given to the appellant. In fact, Dailey testified that he was unaware of any other probationary employees who had excessive approved leave who were terminated. Likewise, Alison testified that the appellant and Hutton were the only two employees he ever recommended be terminated during their probationary periods.

Given the totality of the testimony and evidence presented, I find that the agency has failed to meet its high burden of proof and show by clear and

convincing evidence that it would have terminated the appellant's employment absent his whistleblowing. I thus find that the appellant established a *prima facie* case that the agency engaged in reprisal and his request for corrective action is granted.[19]

DECISION

The appellant's request for corrective action is GRANTED.

ORDER

The agency is ORDERED to reinstate the appellant to his position of GS-9 Museum Specialist. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

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[19] The Smithsonian introduced evidence that it discovered, after the appellant's termination, which it argued might indicate that he would have been found unsuitable for employment. The appellant objected to the introduction of this "after-acquired evidence." I have not considered this evidence for several reasons, one of which is that it does not pertain to the issues before me in this IRA appeal.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at http://www.mspb.gov/mspbdecisionspage.html.

FOR THE BOARD: _____
Daniel Madden Turbitt
Administrative Judge

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the

agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

NOTICE TO APPELLANT

You have requested consequential damages and attorney fees with respect to your IRA. A request for consequential damages and a motion for attorney fees must be decided in an addendum proceeding. 5 C.F.R. §§ 1201.203(b), 1201.204(d)(1). You must file any motion for attorney fees and costs and any motion for the initiation of an addendum proceeding to decide your request for consequential damages as soon as possible after the Board's decision becomes final but no later than 60 days after the date on which the decision becomes final. 5 C.F.R. §§ 1201.203(d), 1201.204(e)(1).

This initial decision will become final on **October 12, 2006**, 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), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.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 be 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 electronic filing 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. *See* 5 C.F.R. § 1201.4(j).

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 received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

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.

NOTICE TO THE PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will then be referred to the Special Counsel “to investigate and take appropriate action under [5 U.S.C.] section 1215,” based on the determination that “there is reason to believe that a current employee may have committed a prohibited personnel practice” under 5 U.S.C. § 2302(b)(8).

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.