UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 142

Docket No. AT-0752-05-0901-I-2

Marcus D. Smith,

Appellant,

v.

Department of Transportation,

Agency.

June 5, 2007

Elaine L. Fitch, Esquire, Washington, D.C., for the appellant.

Andrea Nash, Esquire, and Russell B. Christensen, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Chairman McPhie issues a separate, concurring opinion.
Member Sapin issues a separate, dissenting opinion.

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that reversed the agency's decision to suspend the appellant for 30 days and found that the agency discriminated against the appellant on the basis of his prior EEO activity. For the reasons set forth below, we GRANT the agency's petition, REVERSE the initial decision to the extent it declined to sustain charges 1-3 and found that the agency retaliated against the appellant for his prior equal employment opportunity (EEO)

activity, AFFIRM the initial decision to the extent it declined to sustain Charge 4, and SUSTAIN the 30-day suspension imposed by the agency.

BACKGROUND

¶2 Effective August 1, 2005, the agency suspended the appellant for 30 days based upon charges of unauthorized use of official government information, unauthorized use of official government documents obtained through government employment, unauthorized removal and possession of a personal government document, and misstating information for another's government claim. Refiled Appeal File (RAF), Tab 8, Subtabs 4a, 4b, 4f.

¶3 The appellant is employed as a Management & Program Analyst (Labor Relations Program Manager) in the Flight Standards Division of the Federal Aviation Administration's (FAA) Administrative Services Branch in Atlanta, a position he has held from September 1998 until the present. *Id.*, Subtabs 4a, 4m11 at 1. The appellant's second-level manager is Ms. Johnson and his first-line supervisor is Mr. Ellison. RAF, Tab 8, Subtab 4m11 at 1, Tab 35, Subtab 18 at 19. In August 2002, the appellant applied for a Supervisory Program Analyst position; however, Fred Walker, who is the Manager of the Flight Standards Division, Southern Region, selected Ellison for the position. RAF, Tab 8, Subtab 4m11 at 1-2, Tab 18, Subtab D at 1.

¶4 Prior to the time Ellison was appointed, the appellant's duties and responsibilities included the labor relations program, employee relations, most of the EEO program, all third-party investigations and hearings, and working closely with EEO and the General Counsel's Office on EEO matters. RAF, Tab 36, Transcript of the appellant's deposition (Tr.) at 69-70. Since Ellison was hired, the appellant has performed labor relations and EEO mediation work exclusively. *Id*. at 70. In his EEO work, the appellant works at the General Counsel's Office, attends hearings with attorneys, and assists attorneys in gathering documents requested in discovery. *Id*. The Labor Relations Program Manager position

description indicates that the position requires knowledge of, among other things, "Merit Systems Protection Board case law[] and the principles of conduct and discipline, and skill in applying this knowledge to a complex work environment and all associated arbitration's [sic] and/or other hearing forums." RAF, Tab 8, Subtab 4p at 2. The appellant is familiar with the EEO discovery process. RAF, Tab 36, Tr. at 70-71. For about 1 year during the 1990s, the appellant served in a collateral duty assignment as an EEO investigator. *Id*. at 71. As an EEO investigator, the appellant handled confidential material and "learned what to do with it," although he was not specifically trained in handling confidential material. *Id*. at 72-73.

¶5 Following his non-selection for the supervisory position, the appellant filed an EEO complaint alleging that his non-selection was the result of discrimination based upon his race (African-American) and reprisal for his prior EEO activity and that Dawn Veatch, an Acting Director, and Walker had created a hostile environment. RAF, Tab 19 at 1, 13-16. According to the appellant, Walker, who was friends with Ellison, made the selection, rather than Johnson, who was the branch supervisor and who had made selection decisions for other positions. RAF, Tab 8, Subtab 4m11 at 5-6, 8. The appellant maintained that the division practice was for first-line supervisors to make selections and that Walker departed from that practice when Walker himself selected Ellison for the position. *Id*. at 9.

¶6 Walker informed the appellant that he was not selected for the position because Walker needed an employee who, like Ellison, had expertise in a specific area. *Id*. at 2. Walker also told the appellant that there were issues with the appellant's performance and that Walker had never had performance issues with Ellison. *Id*.; RAF, Tab 36, Tr. at 23-24. The appellant stated that he had received an award for his performance, while Ellison did not receive an award for the same rating period. RAF, Tab 8, Subtab 4m11 at 6. The appellant maintained that Ellison had always identified himself as a white male, but when the Supervisory

Program Analyst position became available, Ellison changed his racial designation to Native American to gain advantage over a well-qualified minority. *Id*. at 3. The appellant alleged that Walker justified his selection of Ellison in part because he had to choose between two minorities to fill the position. *Id*. In addition, the appellant asserted that a review of the agency's Central Region's EEO files would reveal that Ellison filed an EEO complaint on September 20, 2001, in which he identified himself as a white male. *Id*.

¶7 On April 13, 2004, Ellison was deposed in the matter of the appellant's EEO complaint. RAF, Tab 8, Subtab 4m at 4. Based upon deposition questions posed by the appellant's attorney, it became apparent that private information regarding Ellison's EEO complaints, which Ellison filed while he was in his former position in another FAA region, had been compromised. *Id*. As a result, Ellison requested an investigation into the unauthorized release of information regarding his EEO complaints. *Id*. After an internal investigation by the FAA's Security and Hazardous Materials Division was completed, the agency proposed the appellant's suspension based on the report of investigation. RAF, Tab 8, Subtabs 4f at 1, 4m.

¶8 After considering the appellant's oral and written responses, the deciding official sustained all four charges with the exception of a single factual specification under Charge 2. *Id.*, Subtab 4b. This appeal followed. The appellant withdrew his request for a hearing, RAF, Tab 29 at 4, and the administrative judge issued an initial decision in which she found that the agency failed to prove any of the charges, that the appellant failed to prove his race discrimination claim, and that the appellant established that the agency suspended him in retaliation for his prior EEO activity, RAF, Tab 40, Initial Decision (ID). The administrative judge therefore reversed the agency action. The agency timely petitioned for review, and the appellant has filed a response opposing the agency's petition. Petition for Review File (PFRF), Tabs 3, 6.

ANALYSIS

Charge 1: Unauthorized use of official government information

Specification 1

¶9 The agency alleged that the appellant, without authorization, provided Department of Transportation (DOT) EEO investigators and his attorney, Tracy Gonos, with information regarding Ellison's EEO complaints. RAF, Tab 8, Subtab 4f at 1. The agency further alleged that Ellison's complaints were filed in another FAA region, that the appellant had no reason to possess the information, and that he was not authorized to use this information to further his own EEO complaint. *Id.* at 1-2. Although the appellant stated that he received this information via an anonymous letter, the agency alleged that he should have reported it to appropriate authorities. *Id.* at 2.

¶10 The agency's Standards of Conduct address the safeguarding and use of information, documents, and records as follows:

> Employees shall ensure the proper handling of Government records and shall not disclose or discuss any classified documents, or "For Official Use Only" information unless specifically authorized to do so, or as required, on a "need-to-know" basis, in the proper discharge of official duties. Examples of such information includes [sic] . . . EEO matters (e.g., complaints, settlement/resolution agreements, etc.). . . . In addition, employees shall not:
>
> a. Divulge any official information obtained through or in connection with their Government employment to any unauthorized person.
>
> . . .
>
> c. Use, or permit others to use, any official information for private purposes, which is not available to the general public.
>
> d. Remove official documents or records from files for personal or inappropriate reasons. Falsification, concealment, mutilation or unauthorized removal of official documents or records, either hard copy or automated, is prohibited by law.

> e. Disclose information contained in Privacy Act records, except as provided [in the order implementing the Privacy Act within the FAA].

RAF, Tab 8, Subtab 4n at 3-4.

¶11 The appellant claimed that, during the investigatory phase of his EEO complaint, he received in his office an agency routing envelope addressed to him and labeled "To be opened by addressee only." RAF, Tab 8, Subtab 4m8 at 6-7, Tab 36, Tr. at 89, 105. The envelope bore no return address and contained information that led the appellant to believe that Ellison had filed two EEO cases in which Ellison was identified as a "white male." RAF, Tab 8, Subtab 4m8 at 6-9, Tab 36, Tr. at 89, 103-05. The appellant provided this information to the EEO investigator with his interrogatories, and then destroyed the anonymous letter. RAF, Tab 8, Subtab 4m8 at 6-10, Tab 36, Tr. at 94-95, 101-03. The investigator included this information in the report of investigation, which was provided to the appellant's attorney and non-attorney NAACP representative. RAF, Tab 36, Tr. at 94-97.

¶12 The appellant conceded that whoever accessed Ellison's EEO files and sent him the information about Ellison's EEO cases "possibly released information that [they] shouldn't have" and "possibly" did something wrong. *Id.* at 86-87. The appellant admitted that he was not authorized to access Ellison's EEO files, if he "was doing that not as an employee, just generally doing it." *Id.* at 90. He further testified that it "probably would not be proper" to share this information anonymously. *Id.* The appellant explained that he did not attempt to access Ellison's EEO files because he "didn't think [he] had the authorization to get the entire case file." *Id.* at 113.

¶13 In declining to sustain this charge, the administrative judge determined that the agency must establish that the appellant used the documents in an unauthorized manner and that the appellant's providing the documents at issue to his attorney and the EEO investigator was not an "unauthorized use." ID at 3.

The administrative judge reasoned that an EEO investigator may be required to access records of other agency employees who allegedly received more favorable treatment than the complainant. *Id.* at 3-4 (citing *Gill v. Department of Defense*, 92 M.S.P.R. 23 (2002)). The administrative judge noted that the appellant had not improperly accessed other employees' records to support his EEO claim and the facts of the present appeal were more analogous to a situation where an appellant "innocently comes by information used to support his EEO claim." *Id.* at 4-5. The administrative judge concluded that the appellant had not violated an agency directive to return the information and that the appellant was authorized to share the information with his attorney who was representing him in the EEO matter. *Id.* at 5-7.

¶14 On review, the agency maintains that the administrative judge interpreted the charges too narrowly. PFRF, Tab 3, Petition for Review (PFR) at 9. The agency complains that the administrative judge limited her analysis to the appellant's disclosures of official government information and failed to consider how the appellant obtained the information. *Id.* The agency argues that the "essence" of this charge includes how the appellant obtained and used the information and documents he disclosed. *Id.* According to the agency, the appellant disregarded agency regulations and procedures for handling or obtaining confidential personnel information and took advantage of his position to avail himself of information he believed supported his EEO claim. *Id.* at 10. The agency maintains that, rather than reporting the violation of agency rules for handling EEO information, the appellant converted the information for his own use. *Id.* at 11.

¶15 The agency must prove its charges by a preponderance of the evidence for the Board to sustain the agency's action against the appellant. 5 C.F.R. § 1201.56(a)(ii). Failure to support each element of a charge by the requisite burden of proof results in a finding that the entire charge must fall. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). The agency

correctly notes, however, that it is required to prove only the essence of its charge and that it need not prove each factual specification supporting the charge. *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table).

¶16 Here, the agency alleged that the appellant, without authorization, provided the EEO investigator and his attorney with information regarding Ellison's EEO complaints, that the appellant had no reason to possess the information, and that he was not authorized to use this information to further his own EEO complaint. RAF, Tab 8, Subtab 4f at 1-2. The appellant's testimony shows that he knew how to handle confidential EEO material, that he did not believe he had authorization to access Ellison's case file, and that it "probably would not be proper" to share this information anonymously. RAF, Tab 36, Tr. at 86-87, 90, 113. Thus, the agency has shown that the appellant was not authorized to possess the material and that he knew or should have known that Ellison's files were wrongfully breached. Moreover, the agency's Standards of Conduct make clear that the appellant was permitted to discuss the information regarding Ellison's EEO complaints only if the discussion was in the proper discharge of his official duties and that he was permitted to disclose the information only if he received authorization to do so. RAF, Tab 8, Subtab 4n at 3.

¶17 As the Board has recognized, "[i]t may well be that, if an employee innocently acquires incriminating documents in the course of pursuing a discrimination complaint, and does not subsequently misuse them, e.g., by disclosing them to a third party other than his attorney, his actions are protected." *Williams v. Social Security Administration*, 101 M.S.P.R. 587, ¶ 13 (2006) (citing *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998)). At the same time, an employee's conduct is not necessarily privileged or immune from discipline merely because it concerns a discrimination complaint. *See Bonanova v. Department of Education*, 49 M.S.P.R. 294, 299-300 (1991). Rather, the Board "must balance the purpose of the statutory provisions affording protection from

discrimination against Congress's equally manifest desire not to tie the hands of employers in the objective control of personnel." *Id.* at 300.

¶18 In *Williams*, the appellant filed an EEO complaint alleging that the agency's failure to promote him was the result of race discrimination. 101 M.S.P.R. 587, ¶ 2. During the discovery phase prior to his EEOC hearing, Williams used his access to agency computer systems to print other employees' workload reports and obtained copies of his co-workers' leave balance records, which had been left in the copy room. *Id.*, ¶ 3. The agency removed Williams for failing to comply with the rules and regulations regarding the authorized access to and disclosure of Social Security systems and records and for violating the Standards of Conduct. *Id.*, ¶ 5. When Williams grieved his removal, the arbitrator found that Williams improperly accessed and disclosed the documents in question but mitigated the penalty to a 90-day suspension because Williams did not do so for personal gain. *Id.*, ¶¶ 5-6. The Board found no legal error in the arbitrator's finding that Williams committed misconduct warranting discipline, as "[t]here is no question that [Williams] improperly accessed information on the agency computer system, and that he was aware of the rules and regulations related to the security and integrity of that information." *Id.*, ¶ 10.[1] The Board rejected Williams's contention that the anti-retaliation provisions of Title VII shielded him from discipline because he accessed and disclosed the documents in question in the course of an EEOC proceeding. *Id.*, ¶ 13. The Board found that these protections do not apply when the documents in question are improperly obtained. *Id*.

¶19 In contrast, an example of protected activity is found in *Kempcke*. There, after the appellant was assigned a computer previously used by a high-ranking human resources officer, he discovered documents that he believed reflected a

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[1] The Board will modify or set aside an arbitrator's decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Williams*, 101 M.S.P.R. 587, ¶ 9. Absent legal error, the Board cannot substitute its own conclusions for those of the arbitrator. *Id.*

pattern of age discrimination against himself and others while deleting old files from the computer's hard drive. *Kempcke*, 132 F.3d at 444. Kempcke was fired after he refused a direct order to return the documents and turned them over to his attorney. *Id.* In reversing a grant of summary judgment the district court made in the employer's favor, the U.S. Court of Appeals for the Eighth Circuit concluded that a reasonable factfinder could find that it was unlawful retaliation to fire Kempcke for engaging in protected activity under the Age Discrimination in Employment Act (ADEA). *Id.* at 445-47. The court concluded that Kempcke innocently acquired the documents, reasoning that the manner in which he acquired the documents was akin to an employee who was inadvertently copied on an internal memorandum or who discovers a document mistakenly left in an office copier. *Id.* at 446.

¶20 The Board has also recognized, however, that an employee who steals confidential company documents that may evidence discrimination has not engaged in protected activity that would support a retaliation claim if he is discharged for theft. *Williams*, 101 M.S.P.R. 587, ¶ 13 (citing *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996)). After he was denied a promotion, O'Day went into his supervisor's desk after hours to look for his personnel file. *O'Day*, 79 F.3d at 758. While "rummaging" through his supervisor's desk, O'Day discovered other documents he found interesting in a file that contained notes and memoranda about sensitive personnel matters and that was prominently marked "personal/sensitive." *Id.* After he was denied the promotion, O'Day was laid off as part of a general workforce reduction. *Id.* O'Day claimed that his conduct was protected activity under the ADEA because his purpose was to preserve evidence for his future lawsuit against the company. *Id.* at 762-63. In determining whether his conduct constituted protected activity under the ADEA, the court applied the same balancing test used to determine whether an employee's conduct constitutes "protected activity" under Title VII. *Id.* at 763. Accordingly, the court balanced the purpose of the act to protect

persons engaging in reasonable activities opposing discrimination against the desire of Congress not to tie the employer's hands in the control of personnel. *Id*. The court stated that it was "loathe to provide employees an incentive to rifle through confidential files looking for evidence that might come in handy in later litigation" and that the statute "protects reasonable attempts to contest an employer's discriminatory practices; it is not an insurance policy, a license to flaunt company rules or an invitation to dishonest behavior." *Id.* at 763-64.

¶21 Here, the appellant's responses during the deposition indicate he assumed that the person who accessed Ellison's EEO files and forwarded information from those files acted wrongfully. RAF, Tab 36, Tr. at 86-87, 90, 113. There is no evidence, however, to show that the appellant obtained the information regarding Ellison's EEO complaints as a result of his own wrongdoing. The agency's report of investigation did show that Ellison's EEO complaints were filed in the Central Region and that several employees in the Central Region knew the appellant on a professional basis; however, the report neither concluded that the appellant requested the information nor made a determination as to how the appellant came to receive the information. RAF, Tab 8, Subtab 4m at 1, 4-6, 17. Given the limited facts of record, we cannot eliminate the possibility that someone inadvertently directed the documents to the appellant. While the facts of this case present a close call, we find the facts in the record before us to be more analogous to those in *Kempcke* than to those of *O'Day*. For these reasons, we affirm the administrative judge's reversal of Specification 1 of Charge 1.

Specification 2

¶22 The agency alleged that the appellant orally provided, both to the EEO investigator and to his attorney private, official government information regarding the details of a proposed removal action against another FAA employee. RAF, Tab 8, Subtab 4f at 2. The agency alleged that the appellant did not obtain this information through the proper channels and was not authorized to use the information to further his EEO complaint. *Id.* According to the agency,

the appellant admitted that he obtained this information while performing his official government duties and used it to suggest a comparable punishment for alleged misconduct by Ellison that the appellant became aware of through the office rumor mill. *Id*.

¶23 In the course of his official duties, the appellant responded to a grievance and to a Congressional inquiry related to the proposed removal of an Aviation Safety Inspector based upon a charge of falsification of government documents. RAF, Tab 8, Subtab 4m1 at 11, Tab 36, Tr. at 113. Because the appellant believed that Ellison falsified official government forms by identifying himself as a Native American and that Ellison's actions were grounds for removal, he disclosed information about the Aviation Safety Inspector's removal to the EEO investigator and to his representative. RAF, Tab 8, Subtabs 4m1 at 11, 4m11 at 3.

¶24 The agency argues that the facts of the present case are analogous to those in *Williams*. PFR at 14-16. The agency maintains that it has the right to control the use of its property and to ensure that agency records are used for the purpose for which they were created. *Id.* at 20. The appellant counters by arguing that it is the EEO investigator's responsibility to "develop an impartial and appropriate factual record" and to gather evidence from whatever source she deems appropriate, including the complainant. PFRF, Tab 6 at 18 (quoting 29 C.F.R. § 1614.108(b)). Moreover, he asserts that he was instructed to provide information or documents that would support his claims and that his failure to cooperate with the EEO investigator may have subjected him to sanctions, including the dismissal of his case. PFRF, Tab 6 at 18-19. We find the appellant's arguments unpersuasive.

¶25 When asked whether the EEO investigator authorized him to take the information regarding the Air Safety Inspector's removal from the agency files, the appellant responded, "The EEO investigator asked me if I had any documentation to show hostile work environment or where I was being treated

differently to provide that information to her. So the answer is yes, she requested me to provide that." RAF, Tab 36, Tr. at 131-32. For that reason, the appellant asserted, he was authorized to provide the information regarding the Air Safety Inspector's removal to the EEO investigator. *Id.* In a sworn statement, the appellant indicated that he used the information about the Aviation Safety Inspector's proposed removal "in response to the questions asked by the investigator and part of the remedy that [he] stated [he] was seeking.[2] It was also used to show cited [sic] an example how the Agency should be consistent in their application of penalty for the same offense." RAF, Tab 8, Subtab 4m1 at 11-12. He disclosed this information to the investigator because he "had reason to believe that such disclosure was not only appropriate, but required pursuant to the instructions that [he] must cooperate fully with the investigator and disclose all information and/or evidence in [his] possession." *Id.* at 12.

¶26 The appellant relies upon *Gill v. Department of Defense*, 92 M.S.P.R. 23 (2002). PFRF, Tab 6 at 20. Appellant Gill was charged with making an unauthorized disclosure of confidential information in violation of the Privacy Act. *Gill*, 92 M.S.P.R. 23, ¶¶ 2, 16, 20. Specifically, the agency alleged that, during a meeting regarding her EEO complaint, Gill disclosed to the EEO counselor confidential information regarding two of her subordinates. *Id.*, ¶ 16. This information included medical documents, leave applications, a letter of requirement regarding the use of leave, time and attendance records, and a proposed disciplinary action against one of the subordinates. *Id.* The Board reasoned that Gill's disclosure to the EEO counselor related to her claim that she

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[2] The February 3, 2003 EEO Counselor's Report pertaining to the appellant's non-selection claim indicates that the appellant's requested remedies included that the agency, inter alia, retract Ellison's job offer and place the appellant in the Supervisory Program Analyst position. RAF, Tab 19 at 29, 33. In an August 2003 statement made in the course of the EEO investigation, the appellant additionally requested that the agency remove Ellison for falsification or providing false or misleading information on an official government document. RAF, Tab 8, Subtab 4m11 at 11.

was disparately treated concerning her request for a medical accommodation. *Id.*, ¶ 22. The Board concluded that Gill's disclosure to the EEO counselor fell within an exception to the non-disclosure provisions of the Privacy Act that allows disclosure of records to officers of the agency who need the record in the performance of their duties. *Id.* The Board further found that the agency had failed to prove that the disclosure was from a system of records. *Id.*, ¶ 23. Thus, the Board determined that the information Gill disclosed was relevant to her disparate impact claim and was made in response to a request of the EEO counselor. *Id.*, ¶ 22.

¶27 We cannot reach the same conclusion in the present case. In the course of his duties, the appellant was entrusted with access to information about proposed disciplinary actions against employees, and the appellant does not deny that he forwarded the information regarding the Air Safety Inspector's proposed removal to the EEO investigator. The appellant's assertion that this document was relevant to his EEO complaint misses the mark. The appellant complained that he was harassed and was not selected for the supervisory position because of his race and prior EEO activity. RAF, Tab 19 at 1, 13-14. Because the appellant had not been disciplined for making false statements, the discipline of another employee for that offense was not relevant to his claims. Although the appellant indicated that he sought Ellison's removal as a form of relief in his EEO complaint, he has not shown that Ellison's removal for falsification would be a remedy to which he was entitled. *See* 29 C.F.R. § 1614.501 (delineating remedies and relief available when discrimination is found).

¶28 The appellant's disclosure of confidential information regarding the Air Safety Inspector's removal is not protected activity. *See Williams*, 101 M.S.P.R. 587, ¶ 13 (citing *O'Day*, 79 F.3d at 763-64). The anti-retaliation provisions do not apply to a situation where the documents at issue are improperly obtained. *Id.*; *see also O'Day*, 79 F.3d at 763 ("'the purpose of [Title VII] to protect persons engaging *reasonably* in activities opposing . . . discrimination'"; "[a]n

employee's opposition activity is protected only if it is '*reasonable* in view of the employer's interest in maintaining a harmonious and efficient operation'"; that "activity must be '*reasonable* in light of the circumstances'") (emphasis added) (citations omitted). As discussed above, this is not a situation where the appellant innocently came across information which supported his discrimination claim. Further, the agency entrusted the appellant – in the course of performing his duties – with information regarding a proposed disciplinary action, and the appellant needlessly disclosed this information to the EEO investigator. In balancing the purpose of the statutory provisions affording protection from discrimination against Congress's desire not to tie the hands of employers in the control of personnel, we find that the agency has a strong interest in ensuring that information regarding proposed disciplinary actions remains confidential and ensuring that it is able to trust that employees who have access to such information will handle it properly. In addition, the appellant's actions here appear to have been taken in furtherance of a personal campaign to convince the agency to remove Ellison. The appellant cannot rely upon the anti-retaliation provisions as an insurance policy or a license to flaunt agency rules. *See O'Day*, 79 F.3d at 763-64. In balancing the agency's strong interest in maintaining the confidentiality of its personnel records with Congress's purpose to protect persons opposing discrimination, we find that the appellant's conduct does not constitute protected activity. *See Williams*, 101 M.S.P.R. 587, ¶ 13. For the above reasons, we sustain Specification 2 of Charge 1.

¶29 Having sustained Specification 2 of Charge 1, we sustain the charge. *See Burroughs*, 918 F.2d at 172 (where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge).

Charge 2: Unauthorized use of government documents obtained through government employment

¶30 The agency alleged that the appellant provided to DOT EEO investigators and to his attorney documents containing other FAA employees' private and personal information. RAF, Tab 8, Subtab 4f at 2. These documents included: (1) Merit promotion placement (MPP) selection lists; (2) "disciplinary/adverse actions/discussions of named Agency employees including a grievance response"; and (3) a personal memorandum addressed to the appellant's supervisor regarding "Unacceptable Supervisory Oversight." *Id.* The agency alleged that the appellant did not obtain these documents through proper channels and that he was not authorized to use the information to further his EEO complaint. *Id.* According to the agency, the appellant obtained the MPP selection lists and the disciplinary/adverse actions/discussions of named agency employees during the course of his duties and obtained the memorandum regarding his supervisor's performance from his supervisor's desk drawer while he was acting for his supervisor. *Id.* at 2-3. The agency maintained that the appellant's behavior violated its Standards of Conduct regarding the safeguarding and use of information, documents, and records. *Id.* at 3. The agency further explained that EEO investigators have proper channels by which they may obtain information relevant to an EEO complaint. *Id*.

¶31 The deciding official declined to sustain this specification as it pertained to the disciplinary/adverse actions/discussions of named agency employees. RAF, Tab 8, Subtab 4b at 5. The deciding official also explained that this charge did not include the MPP list relating to the appellant's non-selection but did sustain the charge as it pertained to three other MPP lists. *Id*. at 4.

¶32 As discussed in the Background section above, Walker was the selecting official for the supervisory position for which Ellison was chosen, while Johnson had acted as the selecting official for other positions. RAF, Tab 19 at 289-91. The appellant admitted that he attached to his response to interrogatories in his

EEO case three MPP lists for positions for which he did not bid. RAF, Tab 36, Tr. at 122, 126. He testified that he would guess that the lists are confidential but that he was not sure. *Id.* at 122-23. He admitted that another agency employee, such as an Aviation Safety Inspector, would not have authorization to review the MPP lists. *Id.* at 123-24. The appellant testified in his deposition that the MPP lists were relevant to his EEO claim and that the EEO investigator requested a copy of any merit promotion selection in which Johnson was the selecting official. *Id.* at 101, 126. When he went to a staffing specialist and explained the EEO investigator's request and told the staffing specialist that she could either provide the MPP lists to the EEO investigator or to the appellant, the staffing specialist provided the lists to the appellant. *Id.* at 126-27. The appellant faxed the lists to the EEO investigator and kept a copy at his home for his own records. *Id.* at 100, 127.

¶33 As to the letter that the agency alleged the appellant removed from Ellison's desk drawer, the appellant testified in his deposition that he was acting for Ellison while Ellison was out of the office. *Id.* at 17-18. Because he needed files that Ellison had in his office, the appellant telephoned Ellison and asked him where the files were. *Id.* at 18. When the appellant went into Ellison's office to retrieve the files, he found a supervisory oversight letter from Johnson to Ellison on top of the files. *Id.* The appellant read the letter and discovered that it was a negative letter in which Johnson chastised Ellison for poor performance. *Id.* at 18-19; RAF, Tab 8, Subtab 4m14. Walker had informed the appellant that his performance was one of the reasons for his non-selection and that Walker had never had performance issues with Ellison. RAF, Tab 36, Tr. at 23-24. Believing the letter was relevant to his EEO complaint, the appellant made a copy of it and replaced the original in Ellison's desk. *Id.* at 19-20. The appellant testified that he originally intended to make notes from the letter that could be used in a deposition. *Id.* at 19. Because he needed to get back to work, the appellant made a copy of it to keep for himself as a "memory jogger." *Id.* at 19-20. The

appellant admitted that his copying of the letter was not an act taken in furtherance of official agency business. *Id.* at 20-21.

¶34 In declining to sustain this charge, the administrative judge reasoned that the appellant's use of the documents was not unauthorized because neither the EEO investigator nor the appellant's attorney is an unauthorized person. ID at 8-9. The administrative judge determined that the appellant's EEO complaint was a public, not a private concern. ID at 8. Thus, she concluded that the manner in which the appellant used the documents was protected activity. ID at 9. As to the memorandum on Ellison's desk, the administrative judge further concluded that the appellant innocently found it in a place where he was authorized to be. ID at 9-11.

¶35 On review, the agency argues that the administrative judge failed to consider the circumstances of the appellant's conduct. PFR at 12. The agency maintains that "[t]he essence of the charge is that [a]ppellant rifled through [a]gency files to find information and/or documents he believed were relevant to his EEO case." *Id.*

¶36 For the following reasons, we find that the administrative judge correctly declined to sustain this charge as it pertained to the MPP lists. The appellant admitted that an FAA employee who did not hold his position would not have been permitted to access the MPP lists. Although the appellant was permitted to access MPP lists in the course of his duties, his access to the MPP lists at issue here was outside of his official duties. Nonetheless, we have declined to sustain similar charges under facts analogous to those of the present appeal. *See Gill*, 92 M.S.P.R. 23, ¶ 22. In *Gill*, we reasoned that the appellant "provided the records at the request of an EEO counselor in support of [her] claim that she was disparately treated concerning her request for a medical accommodation." *Id.* The appellant here testified that the EEO investigator asked him to obtain evidence to show that Johnson had been the selecting official for other positions. RAF, Tab 36, Tr. at 101, 126. The appellant's actions here, like Ms. Gill's, were

in response to an explicit request for specific information that the investigator apparently deemed necessary. In view of this unrebutted evidence regarding the investigator's specific request, we decline to sustain this charge as it relates to the MPP lists.

¶37 We do, however, sustain that portion of the charge pertaining to the letter found in Ellison's office. The appellant was entrusted with access to Ellison's office for the limited purpose of removing specific files, and he was not authorized to examine or remove any documents other than those files. The appellant has not provided a satisfactory explanation as to why the information regarding Ellison's performance after his selection was relevant to his EEO claim related to his non-selection for that position. The appellant's use of the memorandum found in Ellison's drawer is not protected activity. Although the record does not establish that the appellant "rifled" through Ellison's drawers in search of evidence, we find that he had access to Ellison's office for the express purpose of removing files he needed to perform his duties. We decline to find that the appellant's actions are protected activity where the memorandum was improperly obtained. *See Williams*, 101 M.S.P.R. 587, ¶ 13. Because the memorandum concerned Ellison's performance *after* his selection, the appellant's use of the information in the memorandum is not a reasonable action taken to contest the alleged discrimination. *See O'Day*, 79 F.3d at 763-64. Accordingly, we sustain Charge 2 as it pertains to the appellant's use of the memorandum found in Ellison's desk.

¶38 In summary, we decline to sustain that portion of Charge 2 pertaining to the MPP lists, but we do sustain the portion of Charge 2 pertaining to the appellant's disclosure of the memorandum found in Ellison's desk. Accordingly, we sustain Charge 2. *See Burroughs*, 918 F.2d at 172.

Charge 3: Unauthorized removal and possession of a personal government document

¶39 The agency alleged that the appellant removed from his supervisor's drawer a memorandum addressed to his supervisor and titled "Unacceptable Supervisory Oversight." RAF, Tab 8, Subtab 4f at 3. It further alleged that the appellant removed the document to photocopy it for his personal use and that there was no official reason or permission granted for the appellant to take this document. *Id.*

¶40 The administrative judge noted that the memorandum was clearly not intended for the appellant's possession but she concluded that the appellant came by the document lawfully. ID at 10. The administrative judge found that the facts of this case were distinguishable from cases in which the Board sustained similar charges because the appellant here did not improperly access the memorandum. ID at 10-11. She reasoned that the facts of the present case were analogous to those in *Kempcke*, and that the appellant's provision of the memo to the EEO investigator and his attorney was protected activity for which he cannot be disciplined. ID at 11.

¶41 On review, the agency argues that the administrative judge failed to address the appellant's secretive conduct in removing the letter and making a copy of it for his own use. PFR at 13. The agency maintains that the Board has previously sustained charges against an employee who, like the appellant here, knowingly made and retained photocopies of documents that he knew he should not have. PFR at 16-17 (citing *Heath v. Department of Transportation*, 64 M.S.P.R. 638 (1994)). The agency further argues that the appellant took agency documents for personal reasons, specifically to support his claims that he was discriminated against during the selection process. *Id*.

¶42 In *Heath*, the agency removed the appellant based on charges of violating the Privacy Act and committing theft of government property in violation of 18 U.S.C. § 641 when he photocopied and removed from the agency's premises a list of employee names and social security numbers, case review sheets, and an

office personnel roster. *Heath*, 64 M.S.P.R. at 641-42. Heath provided these documents to his attorney for use in his Board appeal of a prior performance-based removal. *Id*. The Board noted that Heath's actions constituted a serious violation of the agency's right to control the use of its property. *Id*. at 646. The Board further explained that the records at issue contained sensitive and personal information and that the appellant's actions interfered with the agency's responsibility to ensure that such records were used only for the official government purposes for which they were created. *Id*. The appellant's actions here raise similar concerns.

¶43 The evidence discussed under Charge 2 shows that the appellant admitted taking the document, photocopying it, and keeping a copy for himself. Thus, the agency has met its burden to prove its allegation by preponderant evidence. Moreover, for the reasons discussed under Charge 2, we conclude that the appellant was not engaging in protected activity when he copied the letter.

Charge 4: Misstating information for another's government claim

¶44 The agency alleged that the appellant made two statements concerning an incident between a co-worker, Mr. Spaulding, and Walker and that the first statement, which was used to support Spaulding's worker's compensation claim, was inaccurate. RAF, Tab 8, Subtab 4f at 3-4. The administrative judge declined to sustain this charge, as she found that the appellant's first statement was accurate because it was corroborated by other evidence. ID at 14-15. On review, the agency argues that the administrative judge misconstrued the charge and that the agency was required to prove only that one of the statements was inaccurate. PFR at 25-26. After reviewing the record, we find that the agency's petition for review shows no basis to disturb the initial decision on this issue.

First Amendment

¶45 The appellant argued below that the agency's disciplinary action violated his First Amendment rights. RAF, Tab 35 at 32. The appellant maintained that

challenging the agency's discriminatory practices was a matter of public concern and that it was the substantial or motivating factor in the agency's decision to discipline him. *Id.* at 33-35. The administrative judge, having declined to sustain any of the charges, did not address the appellant's First Amendment claim. ID at 19. Because we have sustained some of the charges, we will address this claim now.

¶46 The Supreme Court has recognized that public employees, like all citizens, enjoy a constitutionally protected interest in freedom of speech. *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Chambers v. Department of the Interior*, 103 M.S.P.R. 375, ¶ 33 (2006). Employees' free speech rights must be balanced, however, against the need of government agencies to exercise "'wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.'" *Mings v. Department of Justice*, 813 F.2d 384, 387 (Fed. Cir. 1987) (quoting *Connick*, 461 U.S. at 146); *Chambers*, 103 M.S.P.R. 375, ¶ 33. Thus, in determining the free speech rights of government employees, a balance must be struck between the interest of the employees, as citizens, in commenting on matters of public concern, and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568; *Mings*, 813 F.2d at 387; *Sigman v. Department of the Air Force*, 37 M.S.P.R. 352, 355 (1988), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989) (Table). In addressing the issue of whether employee speech is protected by the First Amendment, the Board must determine: (1) Whether the speech addressed a matter of public concern and, if so, (2) whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen. *Ledeaux v. Veterans Administration*, 29 M.S.P.R. 440, 445 (1985).

¶47 Speech that relates to any matter of political, social, or other concern to the community may be considered a matter of public concern. *See Connick*, 461 U.S.

at 146. Courts must examine the "content, form, and context of a given statement, as revealed by the whole record" to determine whether the speech qualifies as a matter of public concern. *Id*. at 147-48. In determining whether an employee's speech relates to a matter of public concern or to his own private interest, courts also consider the employee's attempts to make the concern public and the employee's motivation in speaking. *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997). Certainly, a discussion regarding racial relations or discrimination is a matter of public concern entitled to the full protection of the First Amendment. *See, e.g.*, *Connick*, 461 U.S. at 148 n.8 (speech protesting racial discrimination is "inherently of public concern"). In contrast, however, an EEO matter where the complaint is personal in nature and limited to the complainant's own situation is not a matter of public concern. *See Saulpaugh v. Monroe Cmty. Hosp*., 4 F.3d 134, 143 (2d Cir. 1993).

¶48 The appellant's EEO complaint alleged that he was not selected for the supervisory position as a result of racial discrimination and that he and other African-Americans in his division were subject to a hostile environment. RAF, Tab 19 at 14. The appellant's claim that he and other African-Americans in his division were subject to a hostile environment is arguably a matter of public concern. The appellant's actions for which he was disciplined, however, were not taken to further his protest of any broad discriminatory policies or practices of the agency or in an attempt to remedy pervasive discrimination; rather, some of the acts for which the appellant was disciplined related to his complaint that his non-selection resulted from racial discrimination. The appellant's other actions, such as his removal and copying of the memo in Ellison's office and his use of the Air Safety Inspector's proposed removal, do not relate to the appellant's EEO claim and were used in what appears to be the appellant's personal campaign to have Ellison removed. The appellant made no attempt to show that the actions for which he was suspended related to his claim that all African-American employees in his division were subject to a hostile environment. Thus, the

appellant's speech here was personal in nature, limited to his own situation, and is not a matter of public concern. *See Saulpaugh*, 4 F.3d at 143.

¶49 If we were to assume, arguendo, that the appellant's speech addressed a matter of public concern, we would find that the agency's interest in promoting the efficiency of the service outweighs the appellant's interest as a citizen. As noted in the notice of proposed suspension, in his position as a Labor Relations Program Manager, the appellant was entrusted with access to confidential or sensitive information on an almost daily basis. RAF, Tab 8, Subtab 4f at 5. Given the appellant's actions and the fact that he did not believe he had done anything wrong, the agency was rightfully concerned that the appellant demonstrated "a fundamental lack of understanding of [his] job responsibilities." *Id*. We agree with the deciding official's concern that the appellant's actions adversely impacted the agency's trust and confidence in the appellant. Thus, we find that the agency's action did not violate the appellant's First Amendment rights.

Fifth Amendment

¶50 The appellant also argued below that the agency violated his right to due process guaranteed under the Fifth Amendment. RAF, Tab 35 at 36. He maintained that the Fifth Amendment right to due process implicitly guarantees the right to retain counsel in civil litigation. *Id.* (citing *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980)). According to the appellant, "by requiring pre-clearance of documents and information, and thereby restricting the free flow of communications between [the appellant] and his attorney, the [a]gency is effectively precluding [the appellant] from obtaining sound legal advice on the merits or viability of his claim." *Id.*

¶51 The United States Court of Appeals for the Fifth Circuit has concluded that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. *Potashnick*, 609 F.2d at 1117. Similarly, the United States Court of Appeals for the District of Columbia Circuit has reasoned that a

client's interest in speaking freely with his attorney is interwoven with the right to effective assistance of counsel, and restrictions on speech between attorneys and their clients directly undermine the attorney's ability to provide sound legal advice. *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). However, our research has not uncovered a case in which our reviewing court has found a general constitutional right to counsel in civil matters, and the Board is not bound by the decisions of the Fifth Circuit, the District of Columbia Circuit, or United States district courts. *See Morgan v. Department of Energy*, 81 M.S.P.R. 48, ¶ 15 n.2 (1999); *Ruiz v. U.S. Postal Service*, 59 M.S.P.R. 76, 79 (1993).

¶52 Additionally, the cases upon which the appellant relies are inapposite to the appellant's Fifth Amendment argument in this matter. *Potashnick*, for example, concerned a trial court judge's ruling prohibiting a witness from consulting with his attorney in recesses that occurred during his testimony. 609 F.2d at 1117. Specifically, the Fifth Circuit concluded that the ruling:

> prohibited "any further conversations" with a witness once his testimony commenced, and the application of the rule barred the president and sole shareholder of defendant Port City from talking to his attorney for a period of seven days, including several overnight recesses. Judge Hand's denial of any attorney-client communication for such an extended period of time resulted in a significant deprivation of the effective assistance of counsel and thus impinged upon Port City's constitutional right to retain counsel.

Id. at 1119. Thus, *Potashnick* did not address the Fifth Amendment argument at issue here. The other cases upon which the appellant relies were decided on First Amendment grounds, rather than the due process issue upon which the appellant bases his Fifth Amendment argument. *Martin*, 686 F.2d at 32 n.36; *Jacobs v. Schiffer*, 47 F. Supp. 2d 16, 24 (D.D.C. 1999), *overruled on other grounds*, 204 F.3d 259 (D.C. Cir. 2000).

¶53 Furthermore, the appellant had other legal avenues available to him to obtain information and documents relevant to his EEO complaint. He did not need to resort to taking documents containing the private information of other

agency employees himself. The appellant only had access to such information and documents by virtue of his position as a Labor Relations Program Manager. Other employees would have had to follow a different path to obtain this information, and it was inappropriate for the appellant to use his official position to gain an advantage that other employees with EEO complaints would not have.

¶54 Instead of taking the information and documents himself, the appellant could have utilized the EEO investigation process. The regulations pertaining to that process provide a means by which a claimant may explain his theory of the case, and an EEO investigator may obtain official government information or documents relevant to that claim. The regulations specify that an investigator with the appropriate security clearances shall conduct the investigation and require that the agency grant routine access to personnel records in connection with an investigation and produce all evidence the investigator deems necessary. 29 C.F.R. §§ 1614.102(b)(6), 1614.108(c)(1), (d). Here, the appellant, by reason of the access his position provided to sensitive information contained in the agency's personnel files, circumvented the EEO investigative process and essentially conducted his own unauthorized investigation.

¶55 We further note that the suits in *Jacobs* and *Martin*, cases the appellant cites in support of his Fifth Amendment argument, arose because the employees in those cases realized that they could be subject to discipline for sharing sensitive agency information with their attorneys. *Martin*, 686 F.2d at 26-28; *Jacobs*, 47 F. Supp. 2d at 17-18. The *Jacobs* and *Martin* courts determined that the employees could share agency information with their attorneys while still protecting the government's interests, as long as certain safeguards were in place. For example, in *Martin*, the court noted from the outset that the case involved only oral communications with counsel and not the transmittal of government documents and that there was no evidence that the information would be provided to persons other than the employees' attorney. 686 F.2d at 27 n.5. The court reasoned that, under the Code of Professional Responsibility, the employees' attorney could not

disclose the matters discussed without their authorization and that the government could require the employees not to authorize such a disclosure. *Id.* at 34. In *Jacobs,* the court found that "Mr. Jacobs could show his attorney some, if not all, of the documents that he would like to disclose without violating any statute or regulation." 47 F. Supp. 2d at 20. The court further noted that, if the government's interests could not be protected by simply requiring Mr. Jacobs to instruct his attorney to keep all non-public information confidential, the government could seek a court order directing the attorney to do so. *Id.* at 23-24.

¶56 The appellant, who by virtue of his Labor Relations Program Manager position should have known to proceed cautiously when using the sensitive information at issue in this appeal, made no attempt to work with the agency or the courts to protect this information while pursuing his EEO complaint, as the litigants in *Jacobs* and *Martin* did. By the time the agency became aware of the appellant's actions, it was too late to allow the appellant to share information with his attorney while taking precautions such as those outlined in *Martin* and *Jacobs*. For example, the appellant testified in his deposition that he tried to make copies of the documents that were eventually the subject of the agency's charges to keep in a file at his home. RAF, Tab 36, Tr. at 100-02. It is not clear from the record what precautions, if any, the appellant took to safeguard this information when he transported it to his home and while he stored it there. This information potentially could be accessed by third parties who would not be bound by the Code of Professional Responsibility to keep it confidential.

¶57 The appellant contended that the required pre-clearance of documents and information would restrict the free flow of communications between the appellant and his attorney and would preclude him from obtaining sound legal advice on the merits of his claim. RAF, Tab 35 at 36. The above discussion shows that the appellant could have communicated with his attorney while still protecting the agency's interests.

¶58 Finally, we note that in *Martin* and *Jacobs*, the courts balanced the interests of the employee as a citizen with those of the government as an employer in a First Amendment analysis. *See Martin*, 686 F.2d at 31-32; *Jacobs*, 47 F. Supp. 2d at 21. Assuming *arguendo* that such a balancing test would apply in a Fifth Amendment context, we note that we performed this balancing test to resolve the appellant's First Amendment claim and concluded that his First Amendment rights were not violated. *See supra* ¶¶ 45-49. We also performed a similar balancing test to determine whether the appellant engaged in protected EEO activity and found that, with regard to the sustained charges and specifications, the appellant's actions were not reasonable actions taken to contest discrimination. *See supra* ¶¶ 28, 37.

¶59 Here, we agree that a claimant has a strong interest in being able to speak freely with his attorney regarding his EEO complaint. Yet, as we noted in our discussion on the merits of the charges, some of the information and documents at issue in this appeal were of limited or no relevance to the appellant's EEO complaint, *see supra* ¶¶ 27, 37, and the appellant, by virtue of his position as a Labor Relations Program Manager, knew or should have known this. The appellant's interests must be balanced against the agency's interest in protecting sensitive information regarding personnel matters. Agency employees who wish to file a grievance or who may be subjected to a proposed disciplinary action rightfully expect that the agency will protect any sensitive information contained in their files. If we were to accept the appellant's Fifth Amendment argument, agency employees may be reluctant to avail themselves of the opportunity to file a grievance or EEO complaint, or to respond to a proposed disciplinary action, as they could not be assured that their sensitive information would remain confidential. In fact, all private employee information contained in the agency's files could potentially be taken and used by employees with access to the information for their own purposes. We cannot approve such a result.

¶60 In balancing the interests of the appellant in discussing the merits of his EEO complaint with his attorney against the interests of the agency in protecting sensitive information, we conclude that, under the unique facts of this case, and particularly considering the manner in which the appellant obtained and handled the sensitive information, some of which was of little or no relevance to his EEO complaint, the agency's interest in protecting official government information outweighs the appellant's interests. The appellant could have obtained the information relevant to his EEO complaint through proper channels and then communicated that information to his attorney. Thus, for all the reasons discussed above, we decline to find that the suspension based on the sustained charges violated the appellant's Fifth Amendment rights.

Discrimination on the Basis of EEO Activity

¶61 The appellant argued below that the suspension was retaliatory because he was disciplined for engaging in protected EEO activity. RAF, Tab 35 at 36-47. He further maintained that there was a link between his protected activity and his suspension because the suspension ultimately resulted from Ellison's request for an investigation into the disclosure of sensitive information from his EEO complaints. *Id.* at 40-42. According to the appellant, Walker has a propensity to initiate investigations of employees who file EEO complaints. *Id.* at 43-44. The appellant asserted that Walker tried to convince John Allen, Deputy Director, Flight Standards Service, who acted as the proposing and deciding official, that the appellant made false statements and that Ellison urged Allen to remove the appellant. *Id.* at 45-46.

¶62 The administrative judge found that the appellant's provision of the information and documents at issue to his attorney and the EEO investigator was protected activity. ID at 18. According to the administrative judge, the agency knew of the activity and disciplined the appellant for providing information to the EEO investigator and his attorney; thus, there was a genuine nexus between the protected activity and the employment action. *Id.* She further reasoned that the

agency would not have brought Charge 4 against the appellant if it were not so upset with the appellant regarding his protected activity. *Id.*

¶63 For an appellant to establish a claim of retaliation for filing prior EEO complaints, he must show that: (1) He engaged in EEO activity; (2) the accused official knew of such activity; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) there was a genuine nexus between the alleged retaliation and the adverse employment action. *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Otterstedt v. U.S. Postal Service*, 96 M.S.P.R. 688, ¶ 21 (2004). Where, as here, the record is complete, the Board will not inquire as to whether the action under review "could have been" retaliatory, but will proceed to the ultimate question, which is whether, upon weighing the evidence presented by both parties, the appellant has met his burden of proving by preponderant evidence that the action under appeal was retaliatory. *See Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005). To establish a genuine nexus between the protected activity and the adverse action, the appellant must prove that the action was taken because of the protected activity. *Williams*, 101 M.S.P.R. 587, ¶ 12. This requires the Board to weigh the intensity of the motive to retaliate against the gravity of the misconduct. *Id*. The fact that the Board does not sustain the charges against the appellant does not per se indicate that the motive to retaliate outweighed the gravity of the charged misconduct. *Otterstedt*, 96 M.S.P.R. 688, ¶ 23. Rather, the Board must consider the gravity of the misconduct as it appeared to the deciding official at the time he took the adverse action. *Id.*

¶64 Here, it is undisputed that the appellant engaged in protected activity by filing an EEO complaint and that, as a result of the nature of the charges Allen was aware of the protected activity. RAF, Tab 8, Subtabs 4b, 4f, Tab 19. Allen's application of the *Douglas* factors makes clear that the sustained misconduct caused the agency to lose trust in the appellant and his ability to safeguard sensitive personnel and EEO materials. RAF, Tab 8, Subtabs 4b, 4f; *see, e.g.*,

Williams, 101 M.S.P.R. 587, ¶¶ 3, 12 (appellant's actions in providing his attorney for EEOC proceedings with workload reports accessed from agency computer systems and co-workers' leave balance records found in copy room "represents a serious violation of public trust"). Allen testified in his deposition that "HR" advised him during the proposal and notice process. RAF, Tab 35, Subtab 1 at 187-88. According to Allen, HR presented him with information showing that the appellant's actions conflicted with the Standards of Conduct. *Id.* at 188. He further explained that the penalty for the appellant's actions ranged from a 14-day suspension to a removal and that HR had advised that the appellant's removal was warranted. *Id.* at 191-92. Allen opined that the appellant's conduct was serious and that the appellant's actions in "doing whatever he needed to do to further his own case at the expense of others' private property, private information" raised concerns regarding the appellant's character. *Id.* For these reasons, we conclude that the appellant's conduct appeared serious in Allen's view.

¶65 The appellant's arguments focus on Ellison's and Walker's attempts to influence Allen. Ellison admitted that he met with Allen before the disciplinary action was imposed and that he "was trying desperately to influence Mr. Allen to terminate [the appellant's] employment." RAF, Tab 35, Subtab 4 at 23. Ellison testified in his deposition that Allen came to the Southern region for a managers meeting and agreed to meet with Ellison for 10 minutes. *Id.* at 21-23. Ellison told Allen that he was concerned about the appellant's returning to the work area because he did not trust the appellant and asked why he was not involved in the disciplinary process. *Id.* at 22, 24. Allen informed Ellison that he was not involved because he was too close to the situation and that it was being handled in Washington. *Id.* at 22. According to Ellison, Allen "made it very clear that it was going to be his decision." *Id.* at 25. Ellison also spoke to Walker about why he was not involved in the process. *Id.* Walker explained that the matter was being handled in Washington, he did not know anything about the process, and he

could not answer Ellison's questions. *Id*. Allen testified in his deposition that Walker attempted to convince him that the EEOC judge erred in not crediting his version of the incident with Spaulding, RAF, Tab 35, Subtab 1 at 155-57, and it is possible that this lobbying by Walker could have influenced Allen to sustain Charge 4.

¶66 Based upon the evidence summarized above, we find that Ellison's and Walker's attempts to influence Allen's decision were unsuccessful, and we find no evidence that Allen had a motive to retaliate against the appellant for his filing an EEO complaint against Walker. Further, although we have not sustained all of the charges, we find that the evidence of the seriousness of the appellant's misconduct that was before Allen at the time he made his decision was sufficient to outweigh any motive to retaliate against him and that there was no genuine nexus between the appellant's EEO activity and the suspension. *See Otterstedt*, 96 M.S.P.R. 688, ¶ 21. Although we did find that some of conduct with which the appellant was charged constituted protected activity, the record makes clear that the agency had legitimate reasons for taking disciplinary action as to the remaining charges. For all these reasons, we conclude that the agency had legitimate reasons for suspending the appellant. Thus, we reverse that portion of the initial decision finding that the agency retaliated against the appellant for his EEO activities.[3]

Penalty

¶67 When not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency.

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[3] Because the appellant has not filed a petition for review or a cross-petition for review challenging the administrative judge's ruling on his racial discrimination claim, we have not addressed that issue on review. *See* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely petition for review or cross-petition for review); *Dobert v. Department of the Navy*, 74 M.S.P.R. 148, 150 n.1 (1997).

Douglas v. Veterans Administration, 5 M.S.P.R. 280, 308 (1981). In such a case, the Board may not independently determine a penalty, but may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 44 (2006). The Board may impose the same penalty imposed by the agency based on a justification of that penalty as the maximum reasonable penalty after balancing the mitigating factors. *Id.* In this case, the agency has not indicated that it desires that a lesser penalty be imposed on fewer charges. RAF, Tab 8, Subtab 4b at 6.

¶68 Deputy Director Allen, who acted as the proposing and deciding official, explained that he considered the *Douglas* factors. RAF, Tab 8, Subtabs 4b at 6, 4f at 5-6. Allen appropriately considered the nature and seriousness of the offenses, and their relation to the appellant's duties, position, and responsibilities; the nature of the appellant's employment, including his fiduciary role; and the effect of the appellant's actions upon his supervisors' confidence in his ability to perform assigned duties. *Id.*, Subtabs 4b at 6, 4f at 5; *see Douglas*, 5 M.S.P.R. at 305. Allen explained his concerns that the appellant, as a Labor Relations Program Manager, was trusted with confidential or sensitive information on an almost daily basis and that he knew or should have known the importance of safeguarding such information. RAF, Tab 8, Subtab 4b at 6, Subtab 4f at 5.

¶69 Allen properly accounted for the appellant's 24 years of government service, his good work performance, his numerous awards, and his lack of prior discipline. RAF, Tab 8, Subtab 4b at 6, Subtab 4f at 5-6; *see Douglas*, 5 M.S.P.R. at 305. As to the consistency of the penalty with those imposed upon other employees for the same or similar offenses and with any applicable agency table of penalties, Allen indicated that the suspension was consistent with, or

even more lenient than, penalties the agency has imposed in similar cases. RAF, Tab 8, Subtab 4b at 6. The agency's table of penalties indicated that a first offense of unauthorized possession of government property is punishable by a 10-day suspension to removal. RAF, Tab 8, Subtab 4o at 4. A first offense of misuse of government information is punishable by a reprimand to a removal. *Id.* at 3. Finally, as to the clarity with which the appellant was on notice of any rules that were violated in committing the offense, the agency's Standards of Conduct placed the appellant on notice regarding the proper handling of the documents at issue. RAF, Tab 8, Subtab 4n at 3-4; *see Douglas*, 5 M.S.P.R. at 305. Moreover, it is undisputed that the agency's EEO files contain a neon statement on the front cover indicating that the information contained therein is to be treated in a confidential manner and stored in a secure area, and that employees who violate these safeguards are subject to fines and disciplinary actions. RAF, Tab 8, Subtab 4b at 2. Agency procedures for disciplinary files require that the files be kept out of public sight and locked when not be used. RAF, Tab 37 at 3. Finally, as Allen noted, there is nothing in the record to indicate that the appellant has expressed remorse for his behavior. RAF, Tab 8, Subtab 4b at 6. For all these reasons, we find that the sustained charges merited the penalty of a 30-day suspension imposed by the agency. *See Douglas*, 5 M.S.P.R. at 308.

¶70 For the reasons set forth above, we REVERSE the initial decision to the extent that it declined to sustain charges 1-3 and found that the suspension was imposed in retaliation for the appellant's prior EEO activity. We AFFIRM the administrative judge's finding that the agency failed to prove charge 4. We further FIND that the agency's action did not violate the appellant's First and Fifth Amendment rights, and we SUSTAIN the agency's imposition of a 30-day suspension.

ORDER

¶71 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar

days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

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.

FOR THE BOARD:

_____
Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.

CONCURRING OPINION OF NEIL A. G. MCPHIE

in

Marcus D. Smith v. Department of Transportation

MSPB Docket No. AT-0752-05-0901-I-2

¶1 According to the dissent, the appellant cannot be disciplined for using confidential personnel records to which he had access as part of his official duties in furtherance of his own EEO complaint. I disagree.

¶2 Nothing in Title VII of the Civil Rights Act, and nothing in the rules governing federal-sector EEO complaints, indicates that an employee who works in the human resources field should have an advantage when he files his own EEO complaint because he has access to the confidential personnel records of other employees. The appellant committed misconduct because he used confidential documents involving other employees in a way that was inconsistent with the terms of his official access to those documents. It is one thing for an EEO complainant to disclose to an EEO investigator, or to his attorney, documents that pertain directly to him and to which he has access on the same terms that any other employee would have access to similar documents that relate to such other employee. It is quite another thing to do what the appellant did here, namely, disclose confidential records that did not pertain directly to him and that were not available to employees outside the human resources office. The appellant was not authorized to investigate his own EEO complaint, and I disagree with the dissent's suggestion that he was entitled to act as if he had such authority.

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Neil A. G. McPhie
Chairman

DISSENTING OPINION OF BARBARA J. SAPIN

in

Marcus D. Smith v. Department of Transportation

MSPB Docket No. AT-0752-05-0901-I-2

¶1 The agency suspended the appellant for 30 days based on charges of unauthorized use of official government information, unauthorized use of government documents obtained through government employment, and unauthorized removal and possession of a personal government document.[1] The administrative judge declined to sustain all of the charges and found that the agency retaliated against the appellant for his prior equal employment opportunity activity. The majority reverses the initial decision to the extent that it declined to sustain the three above described charges and found retaliation for prior EEO activity. I respectfully disagree.

¶2 The conduct at issue in each charge arose from the appellant's pursuit of his EEO complaint alleging that his non-selection for a supervisory position was the result of discrimination based upon his race (African-American) and reprisal for his prior EEO activity. The appellant innocently came upon the information and documents at issue during the course of his work and conveyed the information and documents to no one other than the EEO investigator and to the attorney representing him in his EEO complaint. In these circumstances, I agree with the analysis and findings in the initial decision issued by Administrative Judge Pamela B. Jackson. I adopt as my dissenting opinion the relevant portions of her decision, which are set forth below. (ID pp. 2-11and 18-19)

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[1] The agency also charged the appellant with misstating information for another's government claim. The Board unanimously agrees with the AJ's finding that the agency failed to establish this charge and it is not further discussed in this opinion.

The agency has failed to establish that the appellant engaged in unauthorized use of official government information.

¶3 The agency has failed to establish that the appellant engaged in unauthorized use of official government information.

¶4 The factual basis of the agency's charge is largely undisputed and based upon disclosures the appellant made within the context of pursuing an Equal Employment Opportunity (EEO) complaint against the agency. The record reflects that on February 14, 2003, the appellant filed an EEO complaint regarding the agency's failure to select him for the position of Supervisory Program Analyst. In support of his complaint, and in response to a request for supporting documentation from the EEO investigator, the appellant provided to the EEO investigator, and later to his private attorney, information regarding two EEO complaints filed by his immediate supervisor, James Ellison. The appellant states that he learned the details he disclosed regarding Ellison's EEO complaints from an anonymous letter someone placed under his door.

¶5 During the EEO process, the appellant also disclosed to the EEO investigator, and later to his private attorney, details regarding a proposed removal action against another employee. The appellant came by such information during the course of his official duties.

¶6 The agency alleges that the appellant's act of disclosing the details of Ellison's EEO complaints and disclosing the details of the disciplinary action of another employee to the appellant's attorney[2] and the EEO investigator

[2] In its proposal and decision letters, the agency alleged that the appellant engaged in misconduct by disclosing to attorney Ganos details regarding another employee's EEO complaint and proposed discipline. For the first time in its closing brief, it also argues that the appellant committed misconduct by disclosing such information to an attorney Bonvillan. Inasmuch as the appellant was not charged with such misconduct, the agency's allegations have not been considered in this decision. *Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, 673 (2001) (The Board must adjudicate the charge brought by the agency and not a different charge that could have brought but was not.).

constituted "unauthorized use of official government information." The agency makes no claim that the appellant's disclosures violated the Privacy Act, and in fact, concedes that EEO complaints cannot be withheld pursuant to the Privacy Act. *See* Agency Decision Letter, Appeal File, Tab 1.

¶7 In order to prevail on this charge, the agency must establish that the appellant used the documents at issue in an "unauthorized" manner. In agreement with the appellant, for the reasons stated below, I find that providing the documents at issue to one's attorney and an agency EEO investigator is not an "unauthorized use," and further, is protected activity.

¶8 In *Gill v. Department of Defense*, 92 M.S.P.R. 23 (2002), the Board considered whether the appellant had violated the Privacy Act when she provided to an EEO investigator confidential records concerning another employee, including medical documents, a letter of requirement regarding leave usage, and a proposed disciplinary action. The Board found that the appellant had not violated the Privacy Act by providing such documents to the EEO investigator. Although the instant case does not involve an alleged violation of the Privacy Act, the Board's rationale in *Gill* is instructive, and in my view, applicable to the facts of the instant case. In *Gill*, the Board noted:

> Federal agencies, including the U. S. Postal Service, are required by Equal Employment Opportunity Commission (EEOC) regulations to adopt procedures that allow for pre-complaint processing of EEO complaints by EEO Counselors. *See* 29 C.F.R. §§ 1614.104 and .105. In the course of counseling a complainant, an EEO counselor may be required to review agency records, including records of those who allegedly received different, more favorable treatment that the complainant. EEOC Management Directive 110, Appendix A, § D.2.b. Thus, in requesting that the appellant provide records to support her claim of disparate treatment, the EEO Counselor was acting within the scope of her duties at the time, and she had a need for these records in the performance of these duties.

Id. at 31.

¶9 Although the appellant in the instant matter provided documents to an EEO investigator rather than to an EEO counselor, the above-outlined requirements and procedures are nevertheless equally applicable to an EEO investigator. *See* 5 C.F.R. § 1614.108. I, therefore, conclude that an EEO investigator is authorized to receive and review agency documents. Accordingly, I find that when the appellant provided the documents at issue to the EEO investigator, such did not constitute "unauthorized use."

¶10 In coming to the above conclusion, I have considered the cases cited by the agency, including *Williams v. Social Security Administration,* 101 M.S.P.R. 587 (2006). In that decision, the Board upheld an arbitrator's decision which found that the appellant could be disciplined for improperly accessing other employees' work load records even though the appellant used the records to support his EEO claim. I find Williams to be distinguishable from the facts of the instant case, in that the appellant here has not been charged with improperly accessing employee records; nor is there any evidence that he did such. Furthermore, the Board in *Williams* not only recognized a distinction between the employee who innocently comes by information used to support his EEO claim and one who improperly accesses such information, but the Board, citing *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998) also acknowledged that providing such information to one's attorney may be protected activity. *Id. at* ¶ 13.

¶11 I have also considered the agency's argument that the information the appellant disclosed was irrelevant to the appellant's EEO claim. Although the agency may be correct in its conclusion, the applicable regulations provide that it is up to the EEO investigator to make such determination, and not the agency. *See* 5 C.F.R. § 1614.108(c)(1).[3] Thus, the fact that the agency may deem the

[3] Title 5 C.F.R. § 1614(c)(1) provides:

information irrelevant is not determinative of whether the EEO investigator is authorized to receive or review it.

¶12 Regarding the issue of whether the appellant was authorized to disclose the information at issue to his attorney, I have considered *Clark v. Equal Employment Opportunity Commission,* 42 M.S.P.R. 467 (1989), cited by the agency. In that case, the appellant removed confidential files from the EEOC offices in violation of the confidentiality provisions of Title VII of the Civil Rights Act. He provided them to his attorney, and refused to return them after being instructed by the agency to do so. The Board found discipline to be appropriate for the appellant's conduct. I find the facts of the instant case to be distinguishable from those of *Clark.*

¶13 In the instant matter, the agency has not identified any law which the appellant's disclosure violated; nor is there any evidence that the appellant failed to obey any agency directive. I, therefore, do not find *Clark* to be controlling in the instant matter.

¶14 Furthermore, as the appellant points out, individuals have a right to be represented by counsel during the EEO process. The record reflects that the investigation of the appellant's EEO complaint took place between August and October 2003, Appeal File, Tab 19, and the EEO Report of Investigation (ROI) was issued sometime in the late fall of 2003. App. Ex. I, p. 387. The ROI contained appellant's allegations referencing Ellison's EEO complaint and the proposed removal of the other employee. Agency File, Tabs 4m9 and 4m11. The appellant retained counsel on March 12, 2004, after his disclosure to the EEO investigator and after the ROI was issued containing the appellant's disclosures. App. Ex. 6. The record reflects that the appellant provided his attorney with a

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> The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

copy of the EEO ROI which referenced Ellison's EEO complaint, and the appellant's attorney reviewed that ROI on March 29, 2004.[4] App. Ex. 8.

¶15 Inasmuch as the information at issue was disclosed in the EEO ROI and the EEO investigator was authorized to receive the information, in my view, there can be no serious claim that the appellant was not authorized to share the information with counsel who represented him in the EEO process. The matters disclosed, while sensitive and confidential, did not concern matters of national security, trade secrets, litigation strategy, or any other type of information which might normally require special treatment in the litigation process. In fact, the information disclosed concerned general personnel matters which are rather routinely disclosed in the EEO process. The agency has cited to no law, rule, or regulation, of which the appellant ran afoul when providing the information at issue to his attorney. Although in its decision letter the agency cites to "P.L. 93-579," or the Privacy Act, for the proposition that personal data is to be treated in a confidential manner, it also admits in the same letter that the documents at issue could not be withheld from the EEO investigator pursuant to the Privacy Act.

¶16 Given that the EEO investigator chose to make the disclosures a part of the EEO ROI, given that the appellant is entitled to representation by counsel in the EEO process, and inasmuch as the agency has not shown that the information disclosed is entitled to any special protection within the EEO process, I can find no support in the law for the agency's theory that the appellant was not authorized to make his attorney in the EEO process aware of the information in the ROI. I, therefore, find that providing the information to the appellant's attorney was not an unauthorized use.

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[4] The record does not reflect whether the appellant orally informed his attorney of the existence of Ellison's EEO complaints prior to March 29, 2004. The appellant states that he informed his attorney of the information at issue sometime between January and March 2004. Agency File Tab 4m1.

¶17 Furthermore, I agree with the appellant that making an attorney aware of the evidence one views as supportive of one's claim is an essential part of having effective assistance of counsel. *See Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). Thus, I would come to the same conclusion even if the information at issue were not contained in the ROI, so long as the information were disclosed to the attorney in a responsible manner within the context of the EEO process.

¶18 Based upon the above, I find the agency has failed to establish that the appellant made unauthorized use of official government information when he provided the information at issue to his counsel and the EEO investigator. I further find that providing that information to the EEO investigator and his counsel was protected activity. The charge, therefore, cannot be sustained.

The agency has failed to establish that the appellant engaged in unauthorized use of government documents obtained through his government employment.

¶19 The agency alleges that the appellant engaged in the unauthorized use of official government documents obtained through his government employment when he provided to the EEO investigator and his attorney Merit Promotion Placement (MPP) Selection Lists and a memorandum addressed to the appellant's supervisor from his supervisor concerning, "Unacceptable supervisory Oversight."

¶20 The appellant does not deny that he obtained the above-identified documents through his government employment and provided them to the EEO investigator and his private attorney. Concerning the memorandum to the appellant's supervisor, the appellant admits that he obtained that document while acting in his supervisor's stead. The appellant states that he found the memorandum in his supervisor's desk drawer while looking for a file on which he had had been instructed to work.

¶21 The agency alleges that the appellant violated the HRPM 4.1 Standards of Conduct which states that employees shall not divulge any official information obtained through or in connection with their Government employment to any

unauthorized person, shall not release any official information in advance of the time prescribed for its authorized issuance,[5] and shall not use any official information for private purposes which is not available to the general public.[6]

¶22 As discussed above, the Board has previously recognized that an EEO investigator is authorized to receive agency documents in the performance of his/or her duties. I, therefore, do not find that the appellant provided the documents to an unauthorized person or engaged in an unauthorized use when he provided them to the EEO investigator. Furthermore, I do not find that the appellant used the documents for a private matter when he provided them to the EEO investigator. Although the appellant submitted the documents in support of his personal EEO complaint, the EEO process and allegations of discrimination in the work place are not, private concerns; rather, they are, like whistleblower complaints and other prohibited personnel practices, matters of public concern. *See Alexander v. Gardner-Dever Co.*, 415 U.S. 36, 45 (1974). I, therefore, find that that the agency has failed to establish that the appellant violated the agency standards of conduct by providing the documents at issue to the EEO investigator. Moreover, for the reasons discussed above, I find that the appellant's counsel was not unauthorized to receive the documents, and providing the documents to his attorney was not an unauthorized use. Accordingly, I find that the agency has failed to establish that the appellant used official documents in an unauthorized manner. I further find that the manner in which the appellant

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[5] The agency makes no argument that "the release of any official information in advance of the time prescribed" was involved in the instant case. Inasmuch as that portion of the standards appears to be irrelevant to the facts at issue, that portion of the standards has not been discussed herein.

[6] As far as I can determine, the record does not contain a copy of the agency's standards of conduct. Thus, the above recitation reflects the agency's representation of what the Standards of Conduct provide. There appears, however, to be no dispute regarding the agency's representation.

used the documents was protected activity. The charge is, therefore, not sustained.

The agency's charge of unauthorized removal and possession of a personal government document cannot be sustained.

¶23 It is the memorandum to the appellant's supervisor, Jim Ellison, from Ellison's supervisor, Leisa Johnson, the subject of which was, "Unacceptable Supervisory Oversight," which forms the basis of charge three. The agency alleges that the Ellison's personal copy of the document was a "personal government document," which the appellant was not authorized to remove or copy. As indicated above, the appellant does not deny that he obtained the document from Ellison's desk drawer. He does not deny that he did not have express permission from Ellison to remove it. He argues, however, that because he found the document in a place where he was authorized to be at a time when he was authorized to be there, he violated no rules by copying the memorandum. He states that he believed the document to be relevant to his EEO complaint because he had been informed that the reason he did not get the position for which he had applied was because he had exhibited "unacceptable supervisory oversight," though he had not been previously informed of this shortcoming; yet, Ellison had been selected for the position, and there was documentation that he engaged in the same conduct. In the appellant's view, the document was proof that the agency's stated reason for his non-selection was pretextual. He, therefore, copied the document and provided it to the EEO investigator.

¶24 The agency likens the appellant's behavior in the instant case to the appellant's behavior in *Heath v. Department of Transportation*, 64 M.S.P.R. 638 (1994), in which the Board found the appellant violated a criminal conversion statute, 18 U.S.C. § 641, when he photocopied and retained agency documents to defend a threatened performance action. I find the facts of the instant case distinguishable from those of *Heath*. The most obvious difference is that the appellant in this matter has not been charged under 18 U.S.C. § 641; nor has he

been charged with any other form of conversion. The other major distinguishing factor is what the appellant did with the documents. In *Heath,* the appellant planned to use the documents to defend against an employment action, whereas here, the appellant provided them to an EEO investigator, and ultimately his attorney who represented him in the EEO matter – a protected process.

¶25 The question presented here is whether the agency can discipline an employee for providing information in the EEO process when the information provided was clearly not intended for the employee's eyes or possession but which the employee nevertheless came by lawfully. In my view, the agency cannot.

¶26 I am quite aware that one's protected activity does not shield one from discipline for engaging in wrongdoing, *see O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996), but the facts of the instant matter are different from those cases in which the Board has found discipline to be appropriate even though the conduct at issue was intertwined with protected activity. For example, as discussed above, the instant matter is distinguishable from *Clark v. Equal Employment Opportunity Commission,* 42 M.S.P.R. 467 (1989) and *Williams v. Social Security Administration,* 101 M.S.P.R. 587 (2006), because the appellant in the instant matter violated no law in obtaining the information; nor did the appellant here engage in insubordination. In the instant case, the appellant's access to the document was not improper. As he points out, he inadvertently came by the document in a place he was authorized to be.

¶27 In agreement with the appellant, I find the facts of this case on point with those in *Kempcke v. Monsanto Company,* 132 F.3d 442 (8th Cir. 1998). In that case, an employee innocently happened upon employer records he believed evidenced age discrimination and gave them to his lawyer. When he refused to return the documents, the agency fired him for insubordination. The court overturned a summary judgment ruling, finding that when documents have been innocently acquired, and not subsequently misused, there has not been the kind of

employee misconduct that would justify withdrawing otherwise appropriate protection under the Age Discrimination in Employment Act of 1967 (ADEA).

¶28 In the instant matter, the appellant came by the memorandum at issue innocently, and he did not subsequently abuse the document but gave it to the agency EEO investigator and his attorney – two individuals entitled to receive them. I find such to be protected activity for which the appellant cannot be disciplined. The charge is, therefore, not sustained.

The appellant has established that the agency discriminated against him on the basis of EEO activity.

¶29 To establish a prima facie case of retaliation for filing an EEO complaint, the appellant must show that: (a) he engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the protected activity and the adverse employment action. *See Cloonan v. United States Postal Service*, 65 M.S.P.R. 1, 4 (1994). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Id.* at n.3. If the appellant meets this burden, the agency must show that it would have taken the action even absent the protected activity. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1989).

¶30 In the instant case, I have found that appellant's act of providing the information and documents at issue to his attorney and the EEO investigator was protected activity. It is undisputed that the agency knew of the appellant's activity and disciplined the appellant because he provided certain information to his attorney and the EEO investigator. I, therefore, find that there was a genuine nexus between the appellant's protected activity and the employment action. Although the fourth charge was not based upon the appellant's protected activity, given the only evidence to support the agency's assertion that the appellant's first

statement was inaccurate was the appellant's second statement, which the appellant provided at the agency's request to "clarify" his earlier statement, I frankly find it hard to believe that the agency would have disciplined the appellant for changing his story to favor the agency if the agency had not been upset with the appellant regarding the first three charges. The record evidence does not support a finding that the agency would have disciplined the appellant had he not engaged in the protected activity. I, therefore, find that the appellant has established his claim of discrimination based upon his having engaged in protected EEO activity.

_____
Barbara J. Sapin
Member