UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 3

Docket No. DC-1221-04-0616-M-1
DC-0752-04-0642-M-1

Teresa C. Chambers,

Appellant,

v.

Department of the Interior,

Agency.

January 8, 2009

Mick G. Harrison, Esquire, Bloomington, Indiana, Richard E. Condit, Esquire, Washington, D.C., Paula Dinerstein, Esquire, Washington, D.C., and Adam Draper, Esquire, Washington, D.C., for the appellant.

Deborah S. Charette, Esquire, Washington, D.C., and Jacqueline Jackson, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

Chairman McPhie issued separate concurring opinion.
Vice Chairman Rose issued separate concurring opinion.

OPINION AND ORDER

¶1 In our previous decision in this case, we affirmed the initial decision as modified and sustained the appellant's removal. The U.S. Court of Appeals for the Federal Circuit has affirmed our previous decision in part, vacated it in part, and remanded the case to us for further adjudication. For the reasons stated below, we again AFFIRM the initial decision AS MODIFIED, we SUSTAIN the

removal, and we DENY the appellant's request for corrective action. We also DENY the motion the appellant filed after the court remanded these appeals to us.

BACKGROUND

¶2 Until her removal, the appellant was employed as Chief, U.S. Park Police (USPP). Removal Decision Notice at 1, Appeal File, Docket No. DC-0752-04-0642-I-1 (752 File), Tab 3, Subtab 4b. On December 2, 2003, the Washington Post published an article quoting and otherwise describing statements the appellant allegedly had made concerning her organization's need for additional resources. Dec. 2 Post Article, Appeal File, Docket No. DC-1221-04-0616-W-1 (IRA File), Tab 9, Subtab 4e. At 6:20 p.m. the same day, her immediate supervisor, Donald Murphy, the Deputy Director of the National Park Service, sent her an e-mail message instructing her that she was "not to grant anymore [sic] inerviews [sic] without clearing them with [him] or" the appellant's second-level supervisor, Fran Mainella, the Director of the National Park Service. *Id.*, Subtab 4f at 1; *see* Murphy Deposition at 9, IRA File, Tab 25, Ex. J.

¶3 On December 5, 2003, Mr. Murphy placed the appellant on paid administrative leave "pending the completion of a review of [her] conduct," and on December 17, 2003, he proposed to remove her based on the following charges: (1) Making improper budget communications with an Interior Appropriations Subcommittee staff member; (2) making public remarks regarding security on the federal mall, in parks, and on the parkways in the Washington, D.C., metropolitan area; (3) improperly disclosing budget deliberations to a Washington Post reporter; (4) improper lobbying; (5) three specifications of failing to carry out a supervisor's instructions; and (6) failing to follow the chain of command. IRA File, Tab 8, Attachment G (notice of placement on administrative leave); Proposal Notice at 1-5, 752 File, Tab 3, Subtab 4c. The appellant submitted a written response to the proposal to remove her, and, in a notice issued on July 9, 2004, the Deputy Assistant Secretary of the Interior for

Fish and Wildlife and Parks informed the appellant of his decision to sustain all six of the charges, and to remove the appellant effective the following day. 752 File, Tab 3, Subtab 4*l*; Removal Decision Notice at 1.

¶4 The appellant subsequently filed a complaint with the Office of Special Counsel (OSC), alleging that her placement on administrative leave, and the proposal to remove her, constituted reprisal for disclosures she had made to the subcommittee staff member mentioned in the first charge, to the Washington Post, and to Ms. Mainella during the period from November 3 through December 2, 2003. OSC Complaint, IRA File, Tab 1. On June 28, 2004, 6 days before the decision to remove her was issued, she filed an individual right of action (IRA) appeal with the Board's Washington Regional Office, challenging the proposal to remove her and the decision to place her on administrative leave. IRA File, Tab 1 at 1, 5.[*] On July 12, 2004, 2 days after the effective date of her removal, she filed an appeal of that action. 752 File, Tab 1.

¶5 The administrative judge to whom these appeals were assigned held a hearing and issued an initial decision. Initial Decision, IRA File, Tab 46. In that decision, she sustained four of the six charges, i.e., the charges of making public remarks regarding security in public areas (charge two), improperly disclosing budget deliberations (charge three), failing to carry out a supervisor's instructions (charge five), and failing to follow the chain of command (charge six). Initial Decision at 17-40. She also found that the appellant had failed to establish that she had made any disclosures protected under 5 U.S.C. § 2302(b)(8); and that, even if she had, the agency had established, by clear and convincing evidence, that it would have removed her in the absence of her allegedly protected disclosures. *Id.* at 4-17. In addition, she found the appellant's other affirmative

[*] Although OSC's investigation of the appellant's complaint had not been completed at the time the IRA appeal was filed, OSC subsequently notified the appellant, by letter dated July 9, 2004, that it had closed the investigation because of the filing of the appeal. IRA File, Tab 8, Subtab C.

defenses unsubstantiated; she found that the penalty of removal was reasonable in light of the sustained charges and other relevant factors; and she sustained the removal. *Id.* at 49-51.

¶6 The appellant petitioned for review of the initial decision. Petition for Review (PFR), PFR File, Tab 7. In our decision on that petition, we found that the appellant had failed to show any material error in the administrative judge's findings and conclusions concerning the merits of the charges; we concurred in the administrative judge's conclusions that the appellant had not made protected disclosures and that the appellant had not shown material error in her analysis of the appellant's other affirmative defenses; we found the penalty of removal reasonable; and we accordingly sustained that action. *Chambers v. Department of the Interior*, 103 M.S.P.R. 375, ¶¶ 12-44 (2006), *aff'd in part, vacated in part, and remanded*, 515 F.3d 1362 (Fed. Cir. 2008).

¶7 The appellant then filed a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit. *Chambers v. Department of the Interior*, 515 F.3d 1362, 1365 (Fed. Cir. 2008). That court affirmed our decision as it concerned the merits of the charges and the reasonableness of the penalty. *Id.* at 1365, 1370. It found, however, that we had applied an incorrect standard in evaluating the appellant's claim of reprisal for her alleged disclosures of risks to public safety. *Id.* at 1368. It therefore vacated our decision in part and remanded the appeals to us for application of the correct standard. *Id.* at 1365, 1368-69, 1371.

¶8 After the court remanded this case to us, the appellant filed a motion arguing that the merits of the sustained charges against her should be reconsidered. Motion to Reopen and Reconsider Decision, Appeal File, MSPB Docket No. DC-1221-04-0616-M-1, Tab 3. In support of this motion, she refers to a civil action she filed in a U.S. district court under the Privacy Act and Freedom of Information Act, and to the district court's decision in that action. *Id.* at 4; *see Chambers v. U.S. Department of the Interior*, 538 F. Supp. 2d 262

(D.D.C. 2008). The appellant argues that evidence developed in connection with that case "brings into question the validity of" certain charges on which her removal was based, as well as "the good faith of the agency . . . ." Motion to Reopen and Reconsider Decision at 4.

ANALYSIS

¶9 By remanding this case to us, the court has reinstated the appellant's arguments, on petition for review, regarding the nature and effect of her public-safety-related statements. All other issues in these appeals have been resolved. Pursuant to the Federal Circuit's instructions, we have reconsidered our previous analysis of the appellant's arguments, including our findings on whether the appellant made disclosures protected under 5 U.S.C. § 2302(b)(8). In doing so, we have applied the principles outlined in the court's decision in this case, as well as other relevant Federal Circuit and Board precedent.

¶10 The two Board members do not agree on the issue of whether the appellant's allegedly protected disclosures are in fact protected under section 2302(b)(8). For reasons described in their separate concurring opinions, however, they have agreed on the disposition of these appeals. While Chairman McPhie would find that the appellant made some protected disclosures, he also would find that the agency presented clear and convincing evidence that it would have taken the same actions against the appellant in the absence of those disclosures. Vice Chairman Rose would find that the appellant made no protected disclosures, and she therefore would not reach the issue of whether the agency would have taken its actions in the absence of the appellant's allegedly protected statements. The Board members agree that, in light of their conclusions, the appellant's removal must be sustained, and her request for corrective action denied.

¶11 In addition, both Board members agree, in light of their conclusions in the case, that the motion the appellant filed with the Board after the court remanded these appeals to us must be denied.

ORDER

¶12 We hereby AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The appellant's removal is SUSTAINED, and her request for corrective action is DENIED.

¶13 This is the final decision of the Merit Systems Protection Board in these appeals. 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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, www.cafc.uscourts.gov. 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:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

CONCURRING OPINION OF NEIL A. G. MCPHIE

in

Teresa C. Chambers v. Department of the Interior

MSPB Docket Nos. DC-1221-04-0616-M-1, DC-0752-04-0642-M-1

¶1 This concurring opinion presents my view that certain statements the appellant made to the Washington Post and to an Interior Appropriations Subcommittee staff member were protected disclosures under 5 U.S.C. 2302(b)(8). I also conclude that, notwithstanding the appellant's protected disclosures, the charges against her should be sustained, the penalty of removal is reasonable, and the agency proved by clear and convincing evidence that it would have removed her even in the absence of her protected disclosures. For these reasons, I concur in the Opinion and Order in this case affirming the initial decision as modified, sustaining the removal and denying the appellant's request for corrective action. Finally, for the reasons explained below, I concur in the decision to deny the appellant's motion to reopen the record and to reconsider the Board's decision.

ANALYSIS

¶2 Under 5 U.S.C. § 2302(b)(8), an agency may not take a personnel action against an employee for disclosing information the employee reasonably believes evidences gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation, if the disclosure is not specifically prohibited by law, and if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

¶3 In her appeal, and before the U.S. Court of Appeals for the Federal Circuit, the appellant alleged that statements she made to the Washington Post, and

statements she made to an Interior Appropriations Committee staff member, were protected under 5 U.S.C. § 2302(b)(8) because they constituted disclosures of information she reasonably believed evidenced a substantial and specific danger to public safety. *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). In considering these allegations during the Board's prior adjudication of this appeal, the Board noted that the statements the appellant made to the Post reflected a policy disagreement concerning the allocation of resources, and the Board held that a policy disagreement could serve as the basis for a protected disclosure only if the legitimacy of a particular policy choice was "not debatable among reasonable people." *Chambers*, 103 M.S.P.R. 375, ¶¶ 21-22 (quoting *Lachance v. White*, 174 F.3d 1378, 1382 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000)). Applying this standard, the Board found that a reasonable person would not conclude that the choices of which the appellant was critical during her communications with the Post and the subcommittee employee were illegitimate, and that the appellant therefore had not shown that she had made a protected disclosure of a substantial and specific danger to public safety. *Chambers*, 103 M.S.P.R. 375, ¶¶ 23-25, 32.

¶4 In its decision remanding this appeal to us, the Federal Circuit indicated that a disclosure of information reasonably believed to evidence a danger to public safety could be protected under 5 U.S.C. § 2302(b)(8) even if the alleged danger was created by a policy decision; it noted that *White*, the decision on which the Board relied in stating the Board's holding regarding policy disagreements, concerned disclosures of information allegedly evidencing gross mismanagement; and it indicated that the holding in *White* on which the Board had relied was not applicable to disclosures allegedly believed to evidence dangers to public safety. *Chambers*, 515 F.3d at 1368-69. It therefore instructed the Board to reexamine the issue of whether, in her communications with the Post or with the subcommittee employee, the appellant made protected disclosures regarding alleged public safety dangers.

Whether the Appellant Made Protected Disclosures

¶5 *Chambers* set forth the factors that guide the Board in determining "when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA." These are (1) "the likelihood of harm resulting from the danger"; (2) "when the alleged harm may occur"; and (3) "the nature of the harm—the potential consequences." 515 F.2d at 1369. Consistent with these factors, the outcomes of past cases addressing whether particular disclosures revealed a "substantial and specific danger to public health and safety" have depended upon whether a substantial, specific harm was identified, and whether the allegations or evidence[1] supported a finding that the harm had already been realized or was likely to result in the reasonably foreseeable future.

¶6 The absence of any concrete example of past harm or detailed facts giving rise to a reasonable expectation of future harm is notable in the cases holding that particular disclosures were not protected. *See Herman v. Department of Justice*, 193 F.3d 1375, 1379 (Fed. Cir. 1999) (holding that a psychologist's complaints about the absence of a prison suicide watch room were unprotected, where an informal agreement provided access to a suicide watch room at an adjacent hospital, and his only allegation relating to the imminence of any hazard due to the informality of the agreement was that the hospital suicide watch room might not be available when needed "if someone 'dropped the ball' because of the vagaries of the informal agreement"); *Smart v. Department of the Army*, 98 M.S.P.R. 566, 577 (2005), *aff'd*, 157 Fed. App'x 260 (Fed. Cir. 2005) (unpublished), *cert. denied*, 547 U.S. 1059 (2006) (a security guard complained

[1] At the jurisdictional stage, non-frivolous allegations of a protected disclosure suffice; whereas, to prevail on the merits, an employee must prove by a preponderance of the evidence that she made a protected disclosure. *Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1382 (Fed. Cir. 2007), *cert. denied*, 128 S.Ct 247 (2007); *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). However, at both stages, the specificity of the facts -alleged or proven– has determined the outcome.

about receiving inadequate training, but specified neither any particular harm that had resulted from the training, nor facts sufficient to suggest a particular peril was likely to occur; the Board concluded that "[t]he appellant's disclosure was only speculation that there could possibly be danger at some point in the future"); *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, 662 (2004) (a security guard who complained about being permitted to load only three of four potential shells into his gun, failed to provide any concrete examples of actually realized dangers or allegations from which a specific potential future danger could reasonably be projected; his "speculation that there could possibly be danger at some point in the future" was deemed by the Board to be insufficient even to confer jurisdiction); *Sazinski v. Department of Housing & Urban Development*, 73 M.S.P.R. 682, 686 (1997) (an employee's complaint about a planned agency reorganization was held unprotected where he did not provide "a single reference to any particular hazard" and his safety and health claims did "not even rise to the level of vagueness"); *Prescott v. Department of Health & Human Services*, 6 M.S.P.R. 252, 259 (1981) (an employee who complained about the removal of the subject matters child abuse and neglect, and the developmental origins of violence, from the mission of the National Institute of Child Health and Development, but who offered no evidence or allegations concerning the impact of the putative policy change, was found to be unprotected).

¶7 In contrast, those cases where the employee's burden, either non-frivolous allegations or a preponderance of the evidence, was found to be satisfied, uniformly concerned specific allegations or evidence either of actual past harm, or of detailed circumstances giving rise to a likelihood of impending harm. *See Johnston v. Merit Systems Protection Board*, 518 F.3d 905, 907 (Fed. Cir. 2008) (an employee of an agency responsible for safely transporting nuclear weapons and other nuclear materials objected to a proposed change in policy that would have transferred responsibility for safety management "to personnel who lacked

appropriate education and experience in safety management"; the court held the employee's complaint to be protected because he provided detailed allegations concerning the rigors and risks associated with training lessons, including that the exercises take place in extreme weather and use live ammunition, and that serious injury had previously occurred during training exercises); *Woodworth v. Department of the Navy*, 105 M.S.P.R. 456, 463 (2007) (the Board held protected under section 2302(b)(8) an employee's complaint that workers who disassembled missiles were exposed to missile blast residue that contained "chemical elements and metal compounds which are harmful caustic, toxic, irritants and carcinogens", and that he personally had already experienced resultant "skin, eye, and nose irritation and that he suffered from many sinus infections which he believed were caused by exposure to the missile blast residue"); *Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996) (the Board held protected under section 2302(b)(8) an employee's complaint that a defective sandblasting hood caused the operator to breathe in too much toxic dust, and that as a consequence, he was already coughing up blood); *Braga v. Department of the Army*, 54 M.S.P.R. 392, 395 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table) (the Board held protected the complaint of a designer of body armor for soldiers that "the real-world threat levels from anti-personnel mines greatly exceeded the threat level he had been asked to design the [body armor] to meet, and that soldiers relying on the [body armor] for protection would therefore be in grave danger of being killed or maimed.").

¶8 Measuring the appellant's statements against the factors set forth in *Chambers* and in light of prior Board and Federal Circuit decisions addressing the issue, I would find that some, but not all, of the appellant's statements are protected. The Board affirmed all of the administrative judge's (AJ) findings and conclusions, relying on undisputed facts and the AJ's credibility determinations. *Chambers*, 103 M.S.P.R. at 382. Those findings, in turn, were upheld by the Federal Circuit on appeal. *Chambers*, 515 F.2d at 1370. The AJ

concluded that the appellant made the following statements to the Washington Post reporter:

- "The U.S. Park Police department has been forced to divert patrol officers to stand guard around major monuments," resulting in "declining safety in parks and on parkways."
- "traffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four."
- "In neighborhood areas . . . residents are complaining that homeless people and drug dealers are again taking over smaller parks."
- "Well, there's not enough of us to go around to protect those green spaces anymore."
- "[M]any officers have remained on 12-hour shifts, with only limited bathroom breaks for those guarding monuments."
- "`My greatest fear is that harm or death will come to a visitor or employee at one of the parks, or that we're going to miss a key thing at one of our icons."[2]

Initial Decision at 12, 25-26.

¶9 In light of the *Chambers* factors and prior cases, only the appellant's statements concerning the diversion of Park Police patrol officers from the Baltimore-Washington (BW) Parkway and national parks, and the resulting increase in traffic accidents on the BW Parkway and drug dealing and homeless vagrancy in smaller national parks, are protected under the WPA. These statements easily fall within those cases that have found disclosures to be protected. They are specific consequences that she alleged had already resulted

[2] The article attributes to "police" statistics showing that there had been 706 traffic accidents through October 2003, and a comparison of that data to prior years. The article also reports without attribution that arrests during a recent several month period declined 11% from the same period the prior year. There is no evidence that these specific traffic accident data and crime statistics were provided by Chambers, and they were not among the statements found by the AJ to have been made by Chambers. I therefore do not consider them.

from the diversion of Park Police patrol officers from the BW Parkway and the smaller national parks. These consequences, an increase in traffic accidents, drug dealing and homeless vagrancy, are objectively significant and serious dangers to public health and safety. The appellant's belief that they were so is therefore reasonable. Moreover, as in *Woodworth* and *Wojcicki*, these resulting perils were not merely speculative or imminent; they had already occurred. They are therefore not vague or speculative, but are specific and actual. In the context of these specific allegations, the appellant's more general reference to "declining safety in parks and on parkways" and her claim that "there's not enough of us to go around to protect those green spaces anymore", are also protected. Those statements summarize and are supported by her more detailed statements addressing the same subject matters. I do not believe that such general pronouncements alone would be sufficiently "specific and substantial" if made in isolation. Rather, I recognize that all of a putative whistleblower's allegedly protected statements must be viewed in the context in which they were communicated.

¶10 The appellant's belief that the diversion of Park Police away from the BW Parkway was the cause of the increase in accidents on the Parkway was also objectively reasonable. The appellant's immediate supervisor, Mr. Murphy, acknowledged that a change in "police staffing to patrol the highways" could affect traffic safety. Hearing Transcript, Sept. 8, 2004, at 122. In addition, the appellant is an expert in public safety who was intimately familiar with the areas under her jurisdiction. Her belief that increased crime in the smaller national parks was attributable to a reduction in police patrols was therefore also reasonable. For the foregoing reasons, I would find that the appellant's statements concerning decreased police patrols on the BW Parkway and the diversion of park police from national parks, and the resultant increase in traffic accidents, drug dealing and homeless vagrancy, constituted protected disclosures under 5 U.S.C. § 2302(b)(8).

¶11 The other statements attributed to the appellant in the Washington Post article are insufficient under the *Chambers* factors and in light of the case law. Officers being required to remain on duty for 12-hour shifts without bathroom breaks might create the potential for fatigue and distraction that would undermine an officer's effectiveness. But in the absence of a specific example illustrating a substantial public health or safety consequence of the long shifts, or a manifestation of such fatigue, the statements standing alone are insufficient. Also insufficiently specific are the appellant's stated fear of "harm or death com[ing] to a visitor or employee at one of the parks, or that we're going to miss a key thing at one of our icons." These vague and conclusory allegations standing alone are unprotected. In addition, they are not supported by more specific allegations that would evidence a reasonable basis for her stated fears. Although the appellant pointed to the specific dangers of increased numbers of homeless people and drug dealers in the parks, nothing in her statements evidences a reasonable basis from which to conclude that the exaggerated threats of "harm or death" are likely to befall a park visitor or employee as a result. These conclusory statements therefore differ from the ones relating to declining safety in the parks and on the parkways, which I found to be protected because they were supported by more specific statements evidencing their reasonableness.

¶12 The second communication before the Board on remand is the e-mail message the appellant sent on December 2, 2003, to Interior Appropriation Committee staff member Debbie Weatherly. In the e-mail, the appellant complains in relevant part that inadequate funding has resulted in inadequate staffing, and then identifies several alleged consequences. These are: (1) "Not only are our most recognizable parks in jeopardy, so are the people who travel to and from Washington, D.C., on our parkways"; (2) "we generally have only two officers working at any one time on the George Washington Parkway, a situation that also occurs on our other parkways"; (3) "We have had to turn our backs on drunk drivers, since making an arrest would require two officers off the street";

(4) the "staffing and resource crisis . . . will almost surely result in the loss of life or the destruction of one of our nations most valued symbols of freedom and democracy"; and (5) "the National Park Service's ability to protect these precious historical icons . . . or our guests who visit them or any of our other parks is increasingly compromised".

¶13 Under the *Chambers* factors and Federal Circuit and Board precedent, most of these statements are not protected. The appellant's general pronouncements that the national parks are "in jeopardy", and that the National Park Service's ability to protect historical icons and visiting guests "is increasingly compromised", are too vague and nonspecific to be protected. The appellant's prediction that inadequate staffing will result in the loss of life or destruction of a monument is too speculative. Unlike in *Johnston* and *Braga*, where allegations or evidence of detailed facts showed that the occurrence of a substantial peril was almost inevitable, the appellant's statements are divorced from any additional information by which her predictions can be judged. There may well be a staffing level below which reasonable predictions of likely harm could be made, but there is nothing in the appellant's statements to indicate she reasonably believed that level had been reached.

¶14 On the other hand, the appellant's statements that patrolling the George Washington Parkway with only two officers had already required the USPP to "turn [their] backs on drunk drivers" in order to avoid requiring the officers to abandon their posts, identifies the specific cause of a specific and substantial risk to public safety that has already occurred. It is objectively reasonable to believe that a failure by Park Police officers to arrest suspected drunk drivers presents a substantial risk of harm to other drivers and pedestrians on the GW Parkway. Her statement that "people who travel to and from Washington, D.C., on our parkways" are "in jeopardy" is also protected because it summarizes in conclusory form her identification of the specific and substantial threat of lax drunk driving enforcement. Accordingly, I would find that the appellant's

statements in the December 2 e-mail concerning the number of officers patrolling the GW Parkway, the consequent decision not to arrest suspected drunk drivers, and the resulting jeopardy to parkway travelers, are protected under 5 U.S.C. § 2302(b)(8). The appellant's other statements in the e-mail are not protected.[3]

¶15 The remaining statements at issue here are those the appellant made to the subcommittee staff member during a telephone conversation on November 3, 2003. *See Chambers*, 515 F.3d at 1366. The staff member referred to this telephone conversation in an e-mail message she sent to the appellant's immediate supervisor on December 4, 2003, and she said in doing so that the appellant had "indicated to [her] that the Park Police were underfunded and understaffed." IRA File, Tab 9, Attachment 2. As the initial decision suggests, however, the evidence the appellant presented below regarding this communication concerned issues unrelated to her concerns about public safety. *See* Initial Decision at 7-8. That is, it concerned the issues of whether USPP had received proper credit for implementing recommendations made by an organization (the National Association of Public Administration) that had conducted a study of management and expenditures, and whether it was required to pay for a follow-up study by the same organization. *See, e.g.*, IRA Appeal File, Tab 1, Attachment A (the appellant's written response to the agency's

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[3] The Board's reviewing court has held that disclosures made through normal channels as part of the disclosing employee's normal duties are not protected under 5 U.S.C. § 2302(b)(8). *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001). The record shows that the appellant communicated with the subcommittee staff member in the course of her work, and that her predecessor also occasionally talked to that staff member regarding USPP needs. *See* Hearing Transcript, Sept. 8, 2004, at 223, 242. I see no indication, however, that communications such as the e-mail message at issue here, *i.e.*, appeals to a subcommittee staff member for increased funding and expressions of concern to her regarding the effects of a failure to obtain that increase, made up part of the appellant's normal duties. Moreover, the fact that information an employee disclosed is closely related to the employee's day-to-day responsibilities does not remove the disclosure of that information from protection under section 2302(b)(8). *See Marano*, 2 F.3d 1137 at 1142.

removal proposal) at 3-5; Hearing Transcript, Sept. 9, 2004, at 113-17 (the appellant's description of the conversation). The record includes little evidence regarding the appellant's November 3 statements regarding any other issues. Under these circumstances, the appellant has not established that she made protected disclosures in her telephone conversation with the subcommittee staff member on November 3, 2003.

Whether the Appellant's Placement on Administrative Leave, and the Order Restricting Her Authority to Grant Interviews, Constitute Personnel Actions

¶16 The appellant, in her IRA appeal, has challenged both Mr. Murphy's placing her on administrative leave on December 5, 2003, and his instructions 3 days earlier that she was not to grant any more interviews without his prior approval or that of the appellant's second-level supervisor. Actions such as these two are not independently appealable to the Board. They may, however, be the subject of an IRA appeal if they constitute "personnel actions," as that term is defined at 5 U.S.C. § 2302(a)(2)(A), and if the appellant has exhausted her administrative remedy with respect to those actions before the Office of Special Counsel (OSC). *See Diefenderfer v. Department of Transportation*, 108 M.S.P.R. 651, ¶ 15 (2008). In her initial decision, the AJ acknowledged that the appellant had exhausted her OSC remedy with respect to her placement on administrative leave, and she seemed to acknowledge implicitly that the appellant had done so with respect to the restrictions on her authority to grant interviews. *See* Initial Decision at 4-5. She also found that the former action constituted a "personnel action." *Id.* at 4. She found further that the restricting of the appellant's authority to grant interviews did not constitute a covered personnel action. The appellant alleged in her petition for review that this finding was erroneous. PFR at 141-42.[4]

[4] Because the Board found in its earlier decision that the appellant had made no protected disclosures, it did not address this allegation there. *See Chambers*, 103 M.S.P.R. 275, ¶ 32 n.5.

¶17 The agency has not challenged the AJ's finding that the appellant's placement on administrative leave was a personnel action, and I see no error in that finding. *See Special Counsel v. Internal Revenue Service*, 65 M.S.P.R. 146, 148 (1994). For the reasons stated below, I would conclude that the AJ erred in finding that limiting the appellant's authority to grant media interviews was not a personnel action.

¶18 The applicable definition of a "personnel action" includes "any . . . significant change in duties, responsibilities, or working conditions . . . ." 5 U.S.C. § 2302(a)(2)(A)(xi). In finding that Mr. Murphy's order did not constitute such a change, the AJ stated that there was "some evidence that [the] instructions merely reiterated requirements that applied to all agency employees," and she cited testimony by Mr. Murphy and by John Wright, the agency's senior public affairs officer. Initial Decision at 5. Nothing in that testimony, however, supports the proposition that the appellant had been subject to similar restrictions prior to December 2003. The cited testimony by Mr. Murphy consists essentially of his statement that "there exists [sic] two or three director's orders that refer to messaging that some employees rely on when responding to the press," and of his concurrence in the statement that "the best approach" for agency employees being questioned by the press was "to tell the truth." Hearing Transcript, Sept. 8, 2004, at 164. Moreover, while Mr. Wright testified that "policy makers . . . let the Public Affairs Office know" when they were speaking to the press, he also testified that this notification was not "always [done] in advance . . . ." Wright Deposition at 97-98, IRA File, Tab 43. Nothing in either official's testimony indicates that agency employees in general or the appellant in particular was required to obtain supervisory approval before granting interviews.

¶19 Perhaps the only significant indication in the record that employees in general often obtained advance supervisory approval of interviews is the deposition testimony of the appellant's second-level supervisor that such approval was "kind of our normal policy," Mainella Deposition at 88, IRA File,

Tab 25, Exhibit H. Even if advance approval was "kind of . . . normal" for other agency employees, however, it does not appear to have been the practice the appellant was expected to follow before December 2003. In its response to the order acknowledging receipt of the appellant's removal appeal, the agency stated that the appellant "was required to work, to a large extent, independently and to have frequent contact with Congressional staff, the media, and other law enforcement entities." 752 File, Tab 3, Subtab 1 at 18. Moreover, when Mr. Wright was asked a question in which he was to "assume[] that there had been put in place a requirement that [the appellant] not engage in any interview with the media until getting clearance from the Department," he testified that he was "not aware that there was anything that would have precluded" the appellant from engaging in interviews with the media without prior agency clearance. Wright Deposition at 99-100. In addition, the appellant's position description provided that she was responsible for making "statements clarifying or interpreting Service or Force policies and objectives through speeches . . . and the news media," and that her work was "reviewed only in the broadest sense for the effective accomplishment of objectives and adherence to policy." IRA File, Tab 25, Exhibit MM at 3. Evidently, therefore, the appellant was not required to obtain prior approval of her media contacts until Mr. Murphy issued his instructions on December 2, 2003.

¶20 Finally, I note that the restriction described in those instructions clearly was enforced, and that the enforcement significantly changed the appellant's duties and responsibilities during the brief time between issuance of the instructions and the appellant's placement on administrative leave. The morning after Mr. Murphy imposed the requirement for the prior approval of interviews, the appellant requested permission to participate in a live television interview on the Ellipse regarding the annual Pageant of Peace. IRA File, Tab 44 at 13. Mr. Murphy denied the request, stating that the "prohibition on interviews includes all interviews, this one . . . may not be granted." *Id.* The appellant's

responsibility for communicating with the news media – a responsibility that, according to her uncontradicted testimony, she exercised "on a regular basis," Hearing Transcript, Sept. 9, 2004, at 154 – appears to have been terminated as a result of Mr. Murphy's instructions.

¶21 Under the circumstances described above, I would find that both the appellant's placement on administrative leave and Mr. Murphy's imposition of restrictions on her communications with the news media constituted "personnel actions" subject to review in the appellant's IRA appeal.

Whether Protected Disclosures Were a Contributing Factor in Any Personnel Action

¶22 In order to prevail on a claim of reprisal for making disclosures protected under 5 U.S.C. § 2302(b)(8), an appellant must show by preponderant evidence that the disclosures were a contributing factor in the agency's personnel action. 5 U.S.C. § 1221(e)(1); *Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996). An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

¶23 The AJ considered the "contributing factor" issue despite her finding that the appellant had made no protected disclosures. She found that the statements by the appellant that had been reported in the Washington Post on December 2, 2003, were a contributing factor in the appellant's placement on administrative leave and in her removal. Initial Decision at 15-16. This finding was based on the timing of the actions in relation to the appellant's statements, and on evidence that Mr. Murphy, who was the official who took both actions, was aware of those

statements. *Id.* at 15. The agency has not challenged this finding, and I see no error in it.

¶24 The evidence shows, based on the same "knowledge and timing" test, that the appellant's statements to the Post reporter were a contributing factor in the restrictions Mr. Murphy placed on the appellant's authority to give interviews. As I indicated above, Mr. Murphy imposed those restrictions on the evening of the day the Post published its article. Furthermore, in imposing the restrictions, he referred to statements the Post had attributed to the appellant. That is, he instructed the appellant that she was not to "reference the President's 05 budget under any circumstances," IRA File, Tab 9, Subtab 4f, and he subsequently clarified that his "reference to the 05 budget was made in the second column of the" Post article. *Id.*

¶25 The record does not show that the appellant exhausted her OSC remedy with respect to the disclosures she made to the subcommittee staff member on December 2. *See* IRA File, Tab 1 (complaint filed with OSC). I therefore have not considered whether those disclosures were a contributing factor in the appellant's placement on administrative leave or in the restrictions Mr. Murphy placed on the appellant's authority to give interviews. I conclude, however, that they were a contributing factor in the appellant's removal. Although it is not clear that Mr. Murphy had read the message itself at the time he proposed that action, the subcommittee staff member sent him an e-mail message of her own on December 4, 2003, referring to the appellant's message, criticizing the appellant, and stating that the "Committee has been extremely generous in increasing the National Park Police budget over the last several years." IRA File, Tab 9, Attachment 2. [5] Mr. Murphy was aware, therefore, of the appellant's December 2

[5] In her December 4 message to Mr. Murphy, the staff member referred to an e-mail message the appellant had sent her "[j]ust the other day"; she described the message as including a request for "more money and staff"; and she referred to another topic mentioned in the appellant's December 2 message, *i.e.*, the implementation of

e-mail disclosures as of December 4, just 13 days before he proposed her removal.

Whether There is Sufficient Evidence to Sustain Charge 2 and to Find that the Removal Penalty Remains Reasonable, Notwithstanding the Appellant's Protected Disclosures

¶26 The agency brought six charges against the appellant; charge numbers 2, 3, 5 and 6 were sustained both in the initial decision and in the Board's previous decision in this case; the U.S. Court of Appeals for the Federal Circuit has affirmed the Board's decision with respect to the merits of the charges against the appellant; and the court also has upheld the Board's conclusion that removal was a reasonable penalty in light of the sustained charges.

¶27 My conclusion that certain of the appellant's statements to the Washington Post and to Ms. Weatherly were protected under 5 U.S.C.§ 2302(B)(8), has no bearing on charges 3, 5 or 6. The appellant's conduct and statements that formed the bases of charges 3, 5 and 6 are unrelated to the statements I concluded are protected. However, the AJ's decision to sustain charge 2, making public remarks regarding security on the Federal mall, and in parks and on the parkways of the Washington, D.C. metropolitan area, was based in part on the appellant's protected disclosures to the Washington Post. The AJ sustained charge 2 based on her finding that the appellant improperly told the Post reporter that: (1) there were two officers patrolling the BW Parkway; (2) there were not enough officers available to protect the national parks; (3) a force of 20 unarmed security guards would begin serving around the monuments in the next few weeks; and (4) there

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recommendations made as a result of the management study mentioned above. IRA File, Tab 9, Attachment 2; *see* IRA File, Tab 9, Subtab 4i at 1 (the appellant's message, referring to the implementation of the recommendations). Moreover, the staff member acknowledged at the hearing that the message to which she had been referring, in her December 4 message, was "[p]erhaps" the appellant's December 2 message. Hearing Transcript, Sept. 8, 2004, at 243. Evidently, therefore, it was the appellant's December 2 disclosures that the staff member conveyed to Mr. Murphy.

would eventually be a combination of two guards and two officers at the monuments. Initial Decision at 23-26. I concluded that the first two statements are protected. I concluded that the two statements disclosing the security staffing around the monuments are not protected.

¶28 Preliminarily, I would find that the non-protected statements made by the appellant to the Washington Post were alone sufficient to sustain charge 2. The appellant's immediate supervisor Donald W. Murphy testified that information concerning security staffing at monuments was from a document labeled "law enforcement sensitive", a designation that the information should not be released to the public. Ag. Ex. 4; Tr. I at 32-33. He further testified that the release of information concerning staffing at the monuments was particularly troubling because it placed the officers in jeopardy and compromised the security of the monuments. Tr. I at 33-34. This testimony is sufficient to sustain charge two by preponderant agency evidence. *See Greennough v. Department of the Army*, 73 M.S.P.R. 648, 657 (1997) (proof of one or more of the supporting specifications is sufficient to sustain the charge); *Hicks v. Department of Treasury*, 62 M.S.P.R. 71, 74 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table) (the agency is required to prove only the essence of its charge).

¶29 The evidence shows that removal remains a reasonable penalty for the four sustained charges, notwithstanding the narrowing of the bases for sustaining charge 2. The AJ concluded that removal was within the range of reasonable penalties for the four sustained charges. Initial Decision at 49-51. Her conclusion was based on the testimony and July 9, 2004 decision letter of Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, who sustained the charges and imposed the removal penalty. AF 752 tab 3, subtab 4b; Tr. II at 9-18. The fact that certain, but not all, of the appellant's statements underlying charge 2 have been found to be protected only minimally impacts the reasoned analysis of the *Douglas* factors performed by Mr. Hoffman. His decision letter and testimony establish that the appellant's

improper disclosure of budget deliberations, repeated failures to carry out a supervisor's instructions, and unprotected disclosure of security staffing numbers around the national monuments, was the principal conduct upon which he based the removal decision. AF 752 tab 3, subtab 4b; Tr. II at 17-18 (identifying the "disclosure of budget numbers", "disclosure of security and staffing numbers at the icons" and "the failure to carry out instructions" as the three most important charges that together warranted removal). *See also* Murphy Deposition at 374-376, IRA File Tab 39 (identifying the appellant's disclosure of "staffing levels and profiles" contained in document assessing security at "National Park Service Icons" as the conduct underlying Charge 2). The Board affirmed the AJ's determination that removal was reasonable, for reasons unrelated to the specific disclosures I would find to be protected. *Chambers*, 103 M.S.P.R. at 394 (finding removal to be reasonable based upon the appellant's position of trust, her repeated breach of that trust, her lack of remorse and poor potential for rehabilitation, her prior discipline, and the deciding official's justifiable loss of confidence in her). The Federal Circuit similarly affirmed the Board's decision based upon conduct that I would not find to be protected. *Chambers*, 515 F.3d at 1369-70 (court focused on the appellant's disclosure of the unprotected monument staffing information, her improper disclosure of budget information and her repeated failures to carry out her supervisor's instructions). These analyses are not materially impacted by my conclusion that certain of the appellant's statements to the Washington Post were protected, and I would therefore reaffirm the reasonableness of the removal penalty notwithstanding that conclusion.

Whether the Agency Would Have Taken the Actions in the Absence of the Protected Disclosures

¶30 When an appellant has shown that protected disclosures were a contributing factor in the personnel actions she is challenging, the Board will order corrective action unless the agency establishes by clear and convincing evidence that it

would have taken the same personnel actions in the absence of the disclosures. 5 U.S.C. § 1221(e)(2); *Horton*, 66 F.3d at 284. In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of a protected disclosure, the Board will consider the strength of the agency's evidence in support of its action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, and any evidence that the agency has taken similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Fulton v. Department of the Army*, 95 M.S.P.R. 79, 85-86 (2003), (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)); *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d).

¶31 The agency has shown by clear and convincing evidence that it would have taken the same disciplinary actions against the appellant for her conduct underlying charges 3, 5 and 6, and the sustained portion of charge 2, even in the absence of her protected conduct.

¶32 In her Initial Decision, the AJ assumed, *arguendo*, that all of the appellant's statements to the Washington Post and Ms. Weatherby were protected, and concluded that the agency could have shown by clear and convincing evidence that it would have placed appellant on administrative leave and ultimately removed her from her position, even in the absence of her allegedly protected statements. In so finding, the AJ relied upon the strength of the evidence supporting the appellant's placement on administrative leave and proposed removal, and the absence of any motive to retaliate on the part of the agency official who took these actions. Initial Decision at 16-17. The AJ's analysis is compelling, and I hereby adopt it as my own. I also reiterate that the decision letter and testimony of Mr. Hoffman establish that the removal penalty,

in particular, was motivated by the agency's concerns about conduct and statements unrelated to the appellant's protected disclosures. AF 752 tab 3, subtab 4b; Tr. II at 9-18.

¶33 The findings on the merits of charges five and six also lend strong support to a conclusion that the agency would have removed the appellant in the absence of her protected disclosures. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (it is appropriate to consider the strength of the agency's evidence in support of its personnel action when determining whether the agency has shown by clear and convincing evidence that it would have taken that action in the absence of the employee's protected disclosure). Mr. Murphy was clearly angry about the appellant's actions underlying charge six, *i.e.*, the charge of failing to follow the chain of command. On August 25, 2003, he sent the appellant an e-mail message stating that her actions were "unacceptable," "a breach of supervisory protocol," and "totally inappropriate"; that, because she had waited until he and the appellant's second-level supervisor were out of town to take the actions at issue in that charge,[6] he could "only assume [the appellant's] intentions were nefarious"; that she was "insubordinate"; and that certain aspects of her conduct "only [made her] insubordination all the more egregious." IRA File, Tab 1, "Charge 6" Subtab at 11.

¶34 The record includes other evidence that, whether because of the actions at issue in charge six or for other reasons, Mr. Murphy continued to exhibit dissatisfaction with the appellant well after he sent the August 25, 2003 e-mail. During a telephone conference that was held on November 26, 2003, less than a week before the Post published its December 2 article, he criticized the appellant in a manner that prompted her to ask Mr. Murphy's supervisor to discipline him

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[6] The misconduct at issue in this charge is the appellant's having convinced the agency's Deputy Secretary to cancel Mr. Murphy's instructions to detail one of her employees to another office, without having first appealed the matter to her second-level supervisor. Proposal Notice at 5.

and to caution him "not to discuss his evaluation of [the appellant] or of [her] performance with . . . persons who have no legitimate need to know." IRA File, Tab 1, "Appendices" Subtab, Attachment B at 1-2. In making that request, the appellant stated that this was "not the first time that [Mr.] Murphy ha[d] said or written emotionally charged words about" her; that he had previously impugned her character in writing; that she had been "slandered by him" on "several" occasions; that he had created an "increasingly hostile work environment"; and that she "would expect . . . that a formal public apology be made by him . . . during [the] next . . . conference call." While the record includes no more specific information about the exact nature of Mr. Murphy's remarks, the appellant's reaction to them, and her reference to "the increasingly hostile environment" Mr. Murphy allegedly had created, strongly suggest that neither the publication of the Post article on December 2, 2003, nor the appellant's e-mail message to the subcommittee staff member on the same day, marked the beginning of a sudden deterioration in an otherwise positive working relationship.

¶35 There is also clear and convincing evidence that the agency would have imposed restrictions on the appellant's authority to communicate with the news media, even in the absence of her protected disclosures. In his e-mail and voice mail messages to the appellant apprising her of the restrictions, Mr. Murphy expressed concern only with the appellant's reported comments relating to the agency's budget, and specifically identified only the agency's budget as a topic she was not to address. *See* AF 1221 tab 9, subtab f (December 2, 2003 e-mail from Mr. Murphy to the appellant instructs her not to "reference the President's 05 budget under any circumstances"); IRA File, Tab 1, "Charge 2" Subtab at 33 (Mr. Murphy's e-mail messages to the appellant complain that her interviews were inconsistent with "what we want to be saying on our budget" and instruct the appellant not to do "any more of these interviews on our budgeting and the lack of funding for the U.S. Park Police"); *see also* Murphy Deposition at 226-27

(Murphy's acknowledgment that the transcription of his voice-mail message was accurate). None of Mr. Murphy's communications to the appellant concerning her past comments or the restrictions imposed on her future statements concern any of her protected safety-related disclosures. These facts overcome any inference that might otherwise arise from the agency's having imposed restrictions on the appellant's media communications shortly after her protected disclosures to the Washington Post and Ms. Weatherby.

¶36 Furthermore, other evidence in the record shows that Mr. Murphy felt he had an obligation to prevent the appellant from making additional inappropriate budget-related statements in public. He testified in his deposition that he was concerned that media reports regarding the appellant's statements were "sending a message that others were reading, particularly Congress, who felt they had been quite generous and supportive of the United States Park Police, and these kinds of statements, rather than helping a particular agency or division or office get additional funding, often have the opposite effect, and that's why communicating the right message and the way you communicate it is so important . . . ." Murphy Deposition at 262-63. At the hearing in this case, when asked why he believed placing the appellant on administrative leave was proper, he testified that "some of the things that were being communicat[ed] and represent[ed] were actually having a negative impact on our ability . . . to effectively negotiate our budget and complete the budget process for the National Park Service." Hearing Transcript, Sept. 8, 2004, at 88.[7]

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[7] The record suggests that Mr. Murphy's concerns about the appellant's budget-related statements may have been heightened by statements the subcommittee staff member made in her December 4 e-mail message. In that message, the staff member referred to increases in appropriations that her committee had approved in recent years, as noted above, and she suggested that the appellant did not appreciate the committee's generosity. *See* IRA File, Tab 9, Attachment 2. She also closed her message by offering "to work with [Mr. Murphy] to correct this situation as soon as possible." The subcommittee staff member indicated at the hearing that she "[a]bsolutely" believed that the appellant and other public officials had a right to contact her and communicate

¶37 As noted above, the AJ found that the charge of improperly disclosing budget deliberations to a Washington Post reporter was substantiated; the Board upheld that finding in its previous decision in this case; and the U.S. Court of Appeals has now affirmed this aspect of the Board's decision. The impropriety of the appellant's public statements regarding the budget is a settled matter, therefore, and the agency's reliance on those statements in disciplining the appellant cannot be regarded as reprisal prohibited by 5 U.S.C. § 2302(b).

¶38 Under the circumstances described above, the personnel actions at issue here were taken as a result of the appellant's improper disclosure of budget deliberations and her other proven misconduct. The evidence also shows that the appellant's protected statements regarding safety risks were not a strong motivating factor in any of those actions; and I therefore conclude that the agency would have taken all three actions in the absence of the appellant's protected disclosures.

Consideration of the Appellant's "Motion to Reopen and Reconsider Decision"

¶39 By motion dated June 4, 2008, the appellant moved the Board to reopen the record in this matter for the consideration of putative "new evidence" developed during the course of a civil action she filed in the U.S. District Court for the District of Columbia under the Privacy Act and Freedom of Information Act. Motion to Reopen and Reconsider Decision, Appeal File, MSPB Docket No. DC-1221-04-0616-M-1, Tab 3 ("Motion to Reopen"); *see Chambers v. U.S. Department of the Interior*, 538 F. Supp. 2d 262 (D.D.C. 2008). She points specifically to evidence "concerning Chambers' receipt of a fully positive performance evaluation for the period in which the events underlying charges five and six occurred, with no reference to those events or negative comments of

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budget- and safety-related concerns such as those expressed by the appellant. Hearing Transcript, Sept. 8, 2004, at 232. It seems likely, however, that her message caused Mr. Murphy to be apprehensive about the effect of the appellant's statements on the agency's future appropriations.

any kind." Motion to Reopen at 4. According to the appellant, the preparation of the performance evaluation "brings into question the validity of charges five and six, and undermines any claim that they would have been brought absent the protected disclosures, since the agency did not appear to be concerned with the matters charged until after Chambers' protected disclosures." *Id*. The appellant further contends that the appraisal's disappearance "under circumstances that are suspicious", calls into question the good faith of the agency, and may even suggest that it intentionally removed or destroyed evidence favorable to the appellant. *Id*.

¶40 In support of her Motion, the appellant references the District Court's decision, and appends the deposition testimony of Terrie Fajardo, who, during the appellant's employment with the National Park Police, was Chief, Human Resource Operations, National Park Service, Washington Office. Ms. Fajardo testified that she prepared a performance appraisal for the appellant at the request of Mr. Murphy that covered the period October 1, 2002 – September 31, 2003, and that the appellant was deemed to have "satisfactorily performed and achieved all of the critical elements necessary for her position." Fajardo Deposition at 30-33, 124-125, Appeal File, MSPB Docket No. DC-1221-04-0616-M-1, Tab 3, Exhibits A & B. The appellant urges that the Board reopen the record to accept this "new evidence" because it is "relevant, material, and has the potential to change the outcome with regard to Chambers' dismissal." Motion to Reopen at 4.

¶41 The Board has authority to reopen, on its own motion, appeals in which it has rendered a final decision. *See* 5 U.S.C. § 7701(e)(1)(B); 5 C.F.R. § 1201.117. And it may open a closed appeal even after the Federal Circuit has issued a decision reviewing the Board's final decision. *Anthony v. Office of Personnel Management*, 70 M.S.P.R. 214, 218 (1996). The Board's authority to grant a motion to reopen is discretionary, and is "required only in unusual and extraordinary circumstances." *Id*. at 219, citing *Lauer v. Department of*

Transportation, 65 M.S.P.R. 224, 226 (1994). In exercising its discretion, the Board "will balance the desirability of finality against the public interest in reaching the right result." *Golden v. U.S. Postal Service*, 60 M.S.P.R. 268, 273 (1994). Good cause must be shown, such as an intervening event, or the discovery of misrepresentation or fraud after the issuance of the initial decision. *Anthony*, 70 M.S.P.R. at 219. In the case of new evidence, it should be of such weight as to warrant a different outcome. *Parkinson v. U.S. Postal Service*, 58 M.S.P.R. 393, 397 (1993), *aff'd*, 31 F.3d 1177 (Fed. Cir. 1994) (Table). In any case, "the Board will not reopen an appeal where the party requesting reopening fails to exercise due diligence under the particular circumstances of the case." *Anthony*, 70 M.S.P.R. at 219. In this regard, the right to seek reopening upon the discovery of new evidence should be exercised within a reasonable period, measured in weeks, rather than years. *Id*. at 218.

¶42 The appellant's motion must be denied under these standards. To begin with, the evidence she offers is not new. Although Ms. Fajardo did not testify in this proceeding, evidence was presented that established the principal facts to which she would attest. Mr. Murphy testified that he finalized a performance appraisal for the appellant that covered the period October 2002-September 2003. Murphy Deposition at 18-25. Mr. Murphy also conceded that the incidents underlying charges 5 and 6 had never been presented to the appellant "in a performance appraisal of any kind" or "in a performance improvement plan of any kind." Hearing Transcript, Sept. 8, 2004, at 99-110; Agency Exhibit 3, IRA File, Tab 28. Ms. Fajardo's proffered testimony offers nothing new to that record. She would redundantly testify only that the appellant's performance appraisal covered the period during which the incidents underlying charges 5 and 6 occurred, and did not reference the incidents.

¶43 It also appears that the appellant did not exercise due diligence in her efforts to discover the substance of the performance appraisal or to bring Ms. Fajardo's testimony to the Board's attention. Mr. Murphy testified at length

concerning the preparation of the performance appraisal. Murphy Deposition at 18-26. Yet the appellant's counsel chose not to ask Mr. Murphy to reveal the substance of the evaluation.[8] Mr. Murphy's August 2004 deposition testimony also revealed that Ms. Fajardo had seen the appellant's performance appraisal. Murphy Deposition at 22-23. Thus, the appellant was aware no later than that date, almost a month before the hearing in this matter, of the potential relevance of Ms. Fajardo's testimony. Yet the appellant neither deposed Ms. Fajardo in connection with this proceeding, nor called her as a witness. The appellant then deposed Ms. Fajardo in connection with her District Court case in October and November 2005 – over a year later. That is the testimony she now seeks for the first time to present to the Board. Yet the Board did not even issue its first Opinion and Order in this matter until September 2006. The appellant offers no explanation for not seeking to reopen the record during the intervening year between Ms. Fajardo's deposition and the Board's decision, and instead waiting *three years* before seeking to introduce this evidence. Rather than falling even remotely within the required "reasonable period" for offering putative new evidence, this delay demonstrates a gross absence of due diligence on the appellant's part.

¶44 Even if the evidence were new and the appellant had exercised due diligence in seeking to present it to the Board, I would still deny the motion because the evidence is not material and would have no impact on the outcome of the case. The inference that the appellant contends should be drawn from the evidence has already been rebutted by other undisputed record evidence. The appellant argues that Mr. Murphy's failure to mention in the performance

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[8] The appellant filed a motion to compel production of the performance appraisal, but as noted by the judge, the appellant's motion did "not include a showing of relevancy." Summary of Prehearing Conference at 2, IRA File, Tab 32. The judge denied the motion because the appellant had not shown that the request was "relevant and material." *Id*. at 3.

appraisal the incidents underlying charges 5 and 6 establishes that the agency was not "concerned with the matters charged until after Chamber' protected disclosures." Motion to Reopen at 4. But Mr. Murphy prepared a memorandum dated September 3, 2003, in which he references the appellant's having been "uncooperative with OSC investigation and getting her officers to comply with my directive to complete the personnel process", having "[r]efused to inform Pamela Blyth of detail and cooperate to set parameters", and having taken "[m]onths to produce critique of Constitution Gardens Tractor incident." Hearing Transcript, Sept. 8, 2004, at 99-110; Agency Exhibit 3, IRA File, Tab 28. These issues, which are described in greater detail in the memo, refer to the incidents underlying charges 5 and 6. This evidence demonstrates that Mr. Murphy was concerned with these matters well before he became aware of the appellant's protected disclosures. Mr. Murphy's August 25, 2003 e-mail to the appellant, in which he was highly critical of her failure to follow the chain of command in connection with the detailing of Ms. Blyth, further confirms that Mr. Murphy took that issue seriously before the appellant made her protected disclosures. IRA File, Tab 1, "Charge 6" Subtab at 11.

¶45 The inference the appellant would draw from the performance appraisal's silence regarding the appellant's conduct underlying charges 5 and 6, must implicitly be predicated upon a finding that such conduct, if it were of concern to the agency, necessarily would have been referenced in the appraisal. But Ms. Fajardo's testimony itself belies that assumption. According to Ms. Fajardo, "[t]he performance appraisal deals with performance. It doesn't have anything to do with conduct issues, because how a person behaves or what a person does is not in that document. Those are the duties they are supposed to perform." Motion to Reopen, Exhibit B at 145. Moreover, Ms. Fajardo's testimony is consistent with the generally recognized rule that a performance evaluation is not normally expected to address instances of misconduct, and that adequate performance is therefore irrelevant to an analysis of removal for misconduct. *See*

Price v. Veterans Administration, 13 M.S.P.R. 107, 110 (1982) (holding that there is no inconsistency between the appellant's being awarded a within-grade salary increase for acceptable performance on the same date he was removed for misconduct, because adequate duty performance "is irrelevant to his removal for misconduct"); *Lemons v. Department of the Air Force*, 12 M.S.P.R. 239, 243-44 (1982) (the appellant was subject to dismissal for unauthorized absence despite evidence that his overall performance had recently been rated satisfactory).

¶46 To the extent that the appellant argues that the appraisal's alleged loss or destruction under suspicious circumstances is an independent basis for reopening the record, she is mistaken. To begin with, as an evidentiary matter, no such finding was made by the District Court. Rather, the District Court expressly failed to make any "definitive factual finding" as to whether a performance appraisal was even completed. *Chambers*, 538 F. Supp. 2d at 267. In any event, where, as here, proffered testimony is not material, even evidence of fraudulently altered records, and of false testimony designed to conceal the alteration, does

not warrant reopening a prior Board decision. *Anderson v. Department of Transportation*, 46 M.S.P.R. 341, 355 (1990), *aff'd*, 949 F.2d. 404 (Fed. Cir. 1991)(Table).

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Neil A. G. McPhie
Chairman

CONCURRING OPINION OF MARY M. ROSE

in

Teresa C. Chambers v. Department of the Interior

MSPB Docket Nos. DC-1221-04-0616-M-1, DC-0752-04-0642-M-1

¶1 I agree that the Board should sustain the appellant's removal, deny her request for corrective action, and deny her motion to reconsider the merits of the sustained charges against her. In my view, the appellant has failed to show that she made any disclosures that are protected under the Whistleblower Protection Act (WPA).

¶2 As the U.S. Court of Appeals for the Federal Circuit noted in its decision remanding this appeal to us, the appellant has argued that the statements she made to the Washington Post, and statements she made to a staff member of a congressional appropriations subcommittee, are protected under the WPA, i.e., under 5 U.S.C. § 2302(b)(8), because they constitute disclosures of information she reasonably believed evidenced a substantial and specific danger to public safety. *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). In those statements, the appellant expressed her belief that, due to underfunding, the U.S. Park Police (USPP) lacked adequate staff; that inadequate staffing posed a danger of increased traffic accidents on parkways for which the Park Service was responsible; and that inadequacies in funding and staffing were interfering with USPP's ability to protect the public from activities such as drug dealing in parks. *See* Washington Post Article, Appeal File, Docket No. DC-1221-04-0616-W-1 (IRA File), Tab 9, Subtab 4e; IRA File, Tab 9, Attachment 2 (staff member's message describing the appellant's statements to her). The appellant also stated that her "greatest fear [was] that harm or death [would] come to a visitor or employee at one of our parks . . . ." *Id.*, Tab 9, Subtab 4e.

¶3 Section 2302(b)(8) protects an employee's disclosures of information the employee reasonably believes evidences a substantial and specific danger to

public health or safety. 5 U.S.C. § 2302(b)(8)(A)(ii), The proper test for determining whether an employee had a reasonable belief that her disclosures evidenced misconduct under the WPA is whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA . . . ." *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 16 (2008) (citing *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000)).

¶4 Where an employee's statements reveal evidence of dangers to public health and safety that are both substantial and specific, the Board has held that the statements may be protected. In *Woodworth v. Department of the Navy*, 105 M.S.P.R. 456, ¶ 17 (2007), for example, it found that an employee's alleged disclosure of evidence that workers' exposure to allegedly carcinogenic missile blast residue – exposure that the employee claimed had already caused various specific medical conditions – would be sufficient, if proven, to establish that the employee engaged in protected whistleblowing; and in *Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996), it found that an employee made protected disclosures by revealing evidence that the agency's sandblasting practices had caused him to cough up blood, and that it was exposing other workers to similar health hazards. Similarly, in *Braga v. Department of the Army*, 54 M.S.P.R. 392, 398 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table), it found that an employee had made protected statements when he disclosed evidence that the equipment he was asked to design would fall far short of protecting its intended users from the anti-personnel mine threats to which they were exposed.

¶5 I see nothing comparable in the statements at issue here. As the court indicated, *see Chambers*, 515 F.3d at 1368, allocating resources to one area of law enforcement necessarily increases risks in another area. The funding limitations to which the appellant referred would predictably have this effect.

The appellant's general references to the various categories of harm that could result from inadequate funding or staffing no more reveal a substantial and specific danger to public safety than do other general predictions related to resource allocation that the Board has found unprotected. *See, e.g.*, *Smart v. Department of the Army*, 98 M.S.P.R. 566, ¶¶ 17-18 (2005) (noting, with respect to statements that public safety was at risk because of inadequate security at a prison, that "revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing is not a protected disclosure of a substantial and specific danger to public health or safety"), *aff'd*, 157 F. App'x 260 (Fed. Cir.), *cert. denied*, 547 U.S. 1059 (2006); *id.* ¶ 18 (mere speculation that the resource-allocation decisions prompting the employee's statements could possibly pose danger at some point in the future does not constitute a protected disclosure); *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 15 (2004) (the employee's "speculation that there could possibly be danger at some point in the future" as a result of security guards' alleged ammunition shortages, and as a result of their alleged inability to fully load their weapons, was not protected). Instead of making disclosures within the scope of 5 U.S.C. § 2302(b)(8), the appellant has made statements comparable to those that, according to the legislative history of that section, Congress did not intend to protect. *See* S. Rep. No. 95-969, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743 ("general criticism by an employee of the Environmental Protection Agency that an agency is not doing enough to protect the environment would not be protected under" section 2302(b)(8)).

¶6 In the absence of a showing that the appellant disclosed information she reasonably believed evidenced a substantial and specific danger to public safety, I see no need to address the issue of whether the appellant was affected by personnel actions other than her removal. For the same reason, I see no need to address the issue of whether, in the absence of her statements to the Washington Post and the subcommittee staff member, the agency would have removed the

appellant or taken any other action against her. Moreover, because I would not reach the latter issue, and because I am not persuaded that the appellant's motion for reconsideration casts doubt on the agency's good faith or the credibility of her witnesses, I concur in the decision to deny that motion.

¶7 Finally, because the appellant has made no protected disclosures, because the Federal Circuit has upheld the Board's findings regarding the merits of the charges on which the removal was based, and because it has upheld the Board's findings regarding the reasonableness of the penalty in light of those charges, I concur in the decision to sustain the appellant's removal and deny her request for corrective action.

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Mary M. Rose
Vice Chairman