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OPINIONS AND ORDERS

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OPINION, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (AUGUST 16, 2023)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOSEPH C. ANORUO,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

2023-1114

Petition for review of the Merit Systems Protection Board in No. SF-1221-22-0181-W-1.

Before: CHEN, CUNNINGHAM, and STARK, Circuit Judges.

PER CURIAM.

Dr. Joseph C. Anoruo seeks review of the Merit Systems Protection Board's ("MSPB" or "Board") final decision denying his request for corrective action. We affirm the Board's decision.

I

Beginning in 2003, Dr. Anoruo has worked at the Veterans Affairs Southern Nevada Healthcare System ("VASNHS") as a clinical pharmacist. After the VA issued a mandate to increase efficiency in pharmacy operations, some outlying clinic pharmacies were closed, resulting in Dr. Anoruo being reassigned as an outpatient pharmacist in Las Vegas. In 2019, Dr. Anoruo filed a complaint with the Office of Special Counsel ("OSC") challenging the VA's decision to close the outlying clinic pharmacies and alleging that certain policies relating to the mail order prescription system were delaying patient access to prescription medications, destroying thousands of dollars of prescription drugs, and causing the VA to expend significant resources to handle returned prescriptions. The VA investigated and substantiated Dr. Anoruo's allegations relating to the mail order prescription system and ultimately adopted changes relating to the mailing protocol for certain narcotics.

One of Dr. Anoruo's responsibilities as an outpatient pharmacist is to process pending prescriptions. Pharmacists are sometimes placed on "pending" rotations, during which the processing of pending prescriptions is their primary duty. Often, pharmacists on a "pending" rotation are called to cover other vacant rotations. Regardless of the type of rotation, pharmacists are expected to process pending prescriptions whenever they have time to do so.

Dr. Anoruo repeatedly failed to meet the performance standard for processing pending prescriptions (Dispensing/Drug Distribution Functions), an assessment which is measured by "dividing the total number

of pending prescriptions processed by the pharmacist during the fiscal year by the total number of days the pharmacist worked during the fiscal year." S.A. 4-5.[1] In 2018, successful performance required processing 125 pending prescriptions per day. That year, Dr. Anoruo processed an average of 76 prescriptions per day. In 2019 and 2020, successful performance required processing 120 prescriptions each day, but Dr. Anoruo only processed 100 and 104, respectively. Dr. Anoruo also failed to be rated as successful on another performance standard: Clinical Functions. In 2020, success required 4.8 notes per day, but Dr. Anoruo only completed 4.74 notes per day.

Starting in 2020, as a consequence of the Covid-19 pandemic, VASNHS permitted pharmacists to work remotely on some rotations. However, employees with unsuccessful performance evaluations, like Dr. Anoruo, were not eligible for telework. When the agency issued Dr. Anoruo's performance plan for 2021, Dr. Anoruo raised concerns regarding the alleged advantage other pharmacists had in filling pending prescriptions by working from home. The agency did not change his performance standards.

During Dr. Anoruo's mid-year performance evaluation in April 2021, his supervisor, Dr. Dale Hawkins, notified him that he was unsuccessful in meeting the performance standard for processing pending prescriptions. Dr. Anoruo refused to acknowledge receipt of

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[1] We refer to Dr. Anoruo's appendices by the docket number assigned by this court's CM-ECF system and page number citations are to those generated by the court's system. We refer to the government's supplemental appendix as "S.A." and cite to its internal page numbers.

this appraisal because Dr. Hawkins had not addressed Dr. Anoruo's previous concerns.

On June 8, 2021, Dr. Hawkins met with Dr. Anoruo and his union representative to discuss Dr. Anoruo's unsuccessful performance on the Dispensing/ Drug Distribution Functions metric. Dr. Hawkins recommended placing Dr. Anoruo on a Performance Improvement Plan ("PIP"). Dr. Anoruo disagreed, explaining that his low numbers resulted from unfair scheduling that left him with no "pending" rotations. On June 11, 2021, Dr. Hawkins placed Dr. Anoruo on a PIP, which gave Dr. Anoruo 90 days to demonstrate acceptable performance in processing pending prescriptions. Dr. Hawkins offered to meet with Dr. Anoruo biweekly to discuss Dr. Anoruo's work, but Dr. Anoruo disputed the PIP and refused to meet. After each attempted meeting, Dr. Hawkins emailed Dr. Anoruo his performance metrics, conduct Dr. Anoruo alleged was harassment. Dr. Anoruo ultimately failed his PIP. In November 2021, Dr. Anoruo was again rated unsuccessful on prescription processing performance, based on both qualitative and quantitative standards (i.e., Prescription Processing Qualitative Standards and Prescription Processing Quantitative Standards).

Earlier that same year, on March 7, 2021, Dr. Anoruo had filed a complaint with OSC alleging whistleblower reprisal. In particular, Dr. Anoruo contended that he had faced "numerous adverse personnel actions in retaliation for disclosing to [his] management about inequitable scheduling, false accusations, and evidence tampering." S.A. 606. On January 18, 2022, the OSC notified Dr. Anoruo that it had closed its investigation and he could file an individual right of

action ("IRA") appeal with the Board. Dr. Anoruo appealed to the Board.

After finding jurisdiction, a Board administrative judge ("AJ") held a five-day hearing to consider Dr. Anoruo's OSC complaints, including his 2019 complaint concerning VASNHS's mail order prescription system and his 2021 retaliation complaint. The AJ concluded that Dr. Anoruo established a *prima facie* case of whistleblower reprisal because he "engaged in the protected activity of exercising a complaint right" in several ongoing OSC complaints, including his 2019 complaint, but that the agency had met its burden in showing that it would have taken the personnel actions regarding Dr. Anoruo even if he had not engaged in whistleblowing activity, due to his repeated failure to satisfy the performance standards. S.A. 24, 87.

The AJ denied Dr. Anoruo's request for corrective action. Her decision became the Board's final decision on September 23, 2022. Dr. Anoruo timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1).[2]

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[2] Dr. Anoruo argues that the Board disregarded his allegations of discrimination based on national origin, race, and age. In IRA appeals, the Board's review is limited to "the merits of allegations of violations of the Whistleblower Protection Act." *Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323, 1327 (Fed. Cir. 2020) ("Discrimination claims may not be raised in that context."); *see also Marren v. Dep't of Just.*, 51 M.S.P.R. 632, 638–39 (1991) ("[T]he Board's jurisdiction to review IRA complaints based on personnel actions over which it otherwise does not have appellate jurisdiction is limited to adjudicating the whistleblower allegations."), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (table); 5 U.S.C. § 1221(a). If Dr.

II

In reviewing the record and the Board's decision, we must "hold unlawful and set aside any agency action, findings, or conclusions found to be – (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). We do not consider new evidence that was not presented to the Board. *See Oshiver ex rel. Oshiver v. Off. of Pers. Mgmt.*, 896 F.2d 540, 542 (Fed. Cir. 1990).

"An employee who believes he has been subjected to illegal retaliation must prove by a preponderance of the evidence that he made a protected disclosure that contributed to the agency's action against him." *Smith v. Gen. Servs. Admin.*, 930 F.3d 1359, 1365 (Fed. Cir. 2019). "If the employee establishes this *prima facie* case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *Id.* (internal quotation marks omitted); *see also* 5 U.S.C. § 1221(e). In evaluating whether substantial evidence supports the Board's findings, we consider "the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were

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Anuoro wants review of his discrimination claims, he may file a formal Equal Employment Opportunity Commission complaint.

involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

On appeal, Dr. Anoruo contests several of the AJ's findings of fact, including that the AJ made erroneous credibility determinations, failed to consider scheduling inequalities, relied on unreliable metrics, and failed to find a hostile workplace. Substantial evidence supports each of the AJ's determinations.

Appropriately, the AJ's findings rest in large part on her evaluation that Dr. Anoruo was not a credible witness. "The credibility determinations of an administrative judge are virtually unreviewable on appeal." *Bieber v. Dep't of Army*, 287 F.3d 1358, 1364 (Fed. Cir. 2002). After observing extensive testimony from Dr. Anoruo over multiple days, and also hearing the testimony of numerous other witnesses, the AJ provided express credibility findings and thoroughly explained her reasoning. *See* S.A. 10-22. For instance, the AJ concluded that Dr. Anoruo made inconsistent statements and had a "tendency to misread or misunderstand documents," which undermined his credibility. S.A. 16.

The Board also had substantial evidence to conclude that there were no scheduling disparities between Dr. Anoruo and other outpatient pharmacists. Instead, all outpatient pharmacists were pulled from "pending" rotations "in the same manner and with the same frequency." S.A. 32; *see also* S.A. 677. The AJ analyzed Dr. Hawkins' schedule for the 2021 fiscal year, which showed that Dr. Anoruo worked 28 "pending" shifts, which was equivalent to 53% of his possible pending

shifts. S.A. 33; *see also* S.A. 677. The AJ then carefully compared Dr Anoruo's shifts to those of other pharmacists and found that those who worked the same or fewer number, and approximately the same percentage, of pending shifts nonetheless filled more prescriptions than him. S.A. 33; *see also* S.A. 677.

Substantial evidence likewise supports the Board's findings that Dr. Anoruo did not suffer from a hostile work environment. He primarily argues that his Centralized Mail Order Pharmacy ("CMOP") errors should constitute a separate personnel action for purposes of his hostile work environment claim. We discern no error in the AJ's view that accepting Dr. Anoruo's argument "would result in inappropriately considering the same agency actions as two separate personnel actions" because "these errors were at least partially responsible for the appellant's challenged performance appraisal." S.A. 36-37. In any event, any error in the AJ's consideration of Dr. Anoruo's CMOP errors as a part of his challenge to his performance appraisal and not also as part of his hostile work environment claim was harmless. While Dr. Anuoro's rating for CMOP errors for 2021 was changed to successful by the agency, his overall rating remained unsatisfactory because he failed to meet the metric for pending prescriptions processed per day. *See* S.A. 615-16.[3]

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[3] Dr. Anoruo also argues that the AJ misapplied the Board precedent of *Skarada v. Dep't of Veterans Affs.*, 2022 MSPB 17, 2022 WL 2253877, at *5 (M.S.P.B. 2022), in connection with his claim of hostile work environment. *Skarada* states that "only agency actions that, individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities" will constitute a personnel action. *Id.* The AJ did not deviate from *Skarada* in considering whether each agency action, individually

Finally, substantial evidence supports the Board's finding that the agency presented clear and convincing evidence that similarly situated individuals who were not whistleblowers were also placed on a PIP, when they failed to meet the performance standard for processing pending prescriptions. *See, e.g.*, S.A. 86-87 (noting that another pharmacist was placed on a PIP for failing to meet pending prescription performance standard); ECF No. 56 at 12-13.

In short, the AJ reasonably held a multi-day hearing, after which she found Dr. Anoruo lacked credibility, and then carefully analyzed the testimony of all witnesses and the extensive record before her.[4] Her conclusions, including that the agency presented clear and convincing evidence that it would have taken the same personnel actions against Dr. Anoruo even absent his whistleblower activity, and that it had treated similarly situated nonwhistleblower pharmacists in a similar manner, were supported by substantial evidence. The Board did not err in rejecting Dr. Anoruo's claims.

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and collectively, amounted to a "significant change in duties, responsibilities, or working conditions." S.A. 26.

[4] Dr. Anoruo has repeatedly moved to file documents not previously included in the appendices. To dispel any potential confusion, we take this opportunity to make clear that we did fully deny his motion for reconsideration that was pending at ECF No. 57. That is, our order of August 1, 2023 (ECF No. 58), denied Dr. Anoruo's request to file his communications with OSC because he was unable to show that these documents were in the record before the Board. Accordingly, we now also deny his motion for reconsideration pending at ECF No. 62, for the same reasons.

III

We have considered Dr. Anoruo's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the Board's denial of corrective action.

AFFIRMED

INITIAL DECISION,
U.S. MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE
(AUGUST 19, 2022)

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DENVER FIELD OFFICE

JOSEPH C. ANORUO,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Agency.

Docket Number SF-1221-22-0181-W-1

Before: Samantha J. BLACK,
Administrative Judge.

INITIAL DECISION

INTRODUCTION

On January 20, 2022, the appellant filed an individual right of action (IRA) appeal, alleging the agency reprised against him based on prior protected whistleblowing activity. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over the appeal pursuant to 5 U.S.C. § 1221(a), (e). *See* IAF, Tab 19. I held the hearing the appellant requested on June 13-14, 2022,

June 30, 2022, and July 12-13, 2022; and the record closed at the end of the hearing. IAF, Tabs 57-60, 66-71, Hearing Recording (HR). For the reasons explained below, I DENY the appellant's request for corrective action.

ANALYSIS AND FINDINGS

Background Information

At all times relevant to this appeal, the agency has employed the appellant as a Clinical Pharmacist at the VA Southern Nevada Healthcare System (VASNHS). HR-2/3, appellant testimony. From approximately 2003 through 2016, the appellant worked at a pharmacy located at a clinic within VASNHS, which was not in Las Vegas. *Id.* However, the agency decided to close the clinic pharmacies, and to consolidate pharmacy operations in its Las Vegas location. *Id.* When this occurred, the appellant began work as an Outpatient Pharmacist with a Las Vegas duty location; he held that position through to the time of filing this appeal. *Id.*

The appellant disagreed with the agency's decision to close clinic pharmacies and consolidate pharmacy operations because he believed this decision would negatively impact patient care. HR-2/3, appellant testimony. He challenged the agency's decision in multiple venues, including in a Federal District Court case. *Id.*

In 2019, the appellant filed a complaint with the Office of Special Counsel (OSC) pertaining to alleged patient care impacts from the pharmacy consolidation. HR-2/3, appellant testimony; IAF, Tab 10, pp. 120-139. OSC referred the complaint to the agency for

investigation, and the agency's Office of Medical Inspector (OMI) conducted an on-site investigation at VASNHS in June 2019. IAF, Tab 10, pp. 120-139. While the appellant complained about the agency's decision to close the clinic pharmacies, the OMI investigation focused on three specific allegations in this investigation and report:

1. VASNHS's mail order prescription system is delaying patients' access to prescription medications.
2. VASNHS's mail order prescription system is resulting in the destruction of thousands of dollars' worth of prescription drugs.
3. VASNHS's mail order prescription system is causing the VA to expend significant resources replacing, processing, and destroying returned prescriptions.

IAF, Tab 10, p. 120. In its report to OSC, issued on September 12, 2019, OMI substantiated all three allegations and provided the following recommendations: change the mailing protocol for certain narcotics in conformity with agency policy, which includes not requiring a signature for narcotic deliveries; ensure mailers for narcotics are identical to those used for all other medication; develop procedures for better tracking and notifications of returned medications; and adopt standard packaging for medication mailing and use lower mail rates. IAF, Tab 10, pp. 120-122. The agency adopted these recommendations and changed their mailing procedures, which resulted in a lower cost per narcotic prescription mailed. HR-2, Tarman testimony.

After OSC reported the results of the investigation to the appellant, he responded, disputing certain factual

findings and characterizations in the OMI report. IAF, Tab 10, pp. 60-66. The appellant requested, among other proposed actions, that management be found guilty of abuse of power and obstruction of justice and "face the full weight of state and Federal law." IAF, Tab 10, p. 66. According to the appellant, he also requested additional information to respond to the report; as of June 2022, the appellant has not received the requested information from OSC and OSC confirmed his complaint is still considered ongoing. HR-2/3, appellant testimony.

While the appellant has been assigned as an Outpatient Pharmacist in Las Vegas, all outpatient pharmacists have been issued the same performance standards during each fiscal year. HR-1, Kim testimony; HR-4, Hawkins testimony. One of the metrics each year pertains to the processing of pending prescriptions. IAF, Tab 28, pp. 127-133, 175-179. While the specific numerical value the pharmacists are required to meet differs each year based on the number of prescriptions to be processed, the standard can generally be described as follows: exceptional performance is processing more than 110% of pending prescriptions daily; fully successful performance is processing between 90-110% of pending prescriptions daily; and unsuccessful performance is processing less than 90% of pending prescriptions daily. *Id.* Pharmacists' performance on this metric is ascertained by dividing the total number of pending prescriptions processed by the pharmacist during the fiscal year by the total number of days the pharmacist worked during the fiscal year (excluding days when the pharmacist was detailed or working on identified special projects). HR-2, Tarman testimony; HR-4, Hawkins testimony.

Outpatient pharmacists are scheduled on rotations that generally last one week. HR-1, Kim testimony; HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. Each of the tasks to be completed by an outpatient pharmacist at VASNHS is assigned to a specific rotation number. *Id.* A specific pharmacist is assigned to each rotation number each week, and pharmacists cycle through the rotation numbers. *Id.* Many of the rotations are designated as "float" rotations, where the pharmacists in that rotation may be called to cover another rotation based on service needs; for example, when a pharmacist calls out sick, a pharmacist assigned to a "float" rotation will be assigned to cover the now-vacant rotation. *Id.* Some of the rotations include processing pending rotations as a primary responsibility of the rotation (often referred to as "pending" rotations), but these rotations are also often designated as "float" rotations, such that assigned pharmacists are often called to cover other rotations. *Id.*

Pharmacists are expected to process pending prescriptions whenever they have time to do so, regardless of their assigned rotations. HR-1, Kim testimony; HR-2, J.P. testimony, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. The time a pharmacist has available to process pending prescriptions varies each day. *Id.* When a pharmacist is assigned to a rotation that is particularly busy, the pharmacist may have little or no time to process pending prescriptions on a given day. *Id.* When a pharmacist is assigned to a "pending" shift and is not required to cover any other

duties on a given day, the pharmacist would have a full shift to process pending prescriptions. *Id.*

During the appellant's time working in Las Vegas, he routinely failed to process the average number of pending prescriptions required to be fully successful on the applicable performance metric, while all other outpatient pharmacists met the metric. HR-2/3, appellant testimony; HR-2, Tarman testimony. In his performance rating for fiscal year 2018, the appellant was rated unsuccessful on the Dispensing/Drug Distribution Functions critical element of his performance rating, and was rated overall unsuccessful as a result; the appellant processed an average of 76 pending prescriptions a day, while fully successful performance required processing 125 pending prescriptions a day. IAF, Tab 28, pp. 115-120. Similarly, in his performance rating for fiscal year 2019, the appellant was rated unsuccessful on the Dispensing/Drug Distribution Functions critical element of his performance rating, and was rated overall unsuccessful as a result; the appellant processed an average of 100 pending prescriptions a day, while fully successful performance required 120 pending prescriptions a day. IAF, Tab 28, pp. 121-126.

In fiscal year 2020, the appellant's then supervisor Dr. Hyo Ju Kim rated the appellant as overall unsuccessful, and rated him unsuccessful on two critical elements: Clinical Functions and Dispensing/Drug Distribution Functions. IAF, Tab 28, pp. 127-133. As to the Clinical Functions element, the appellant had completed 4.74 notes per day, but the standard for fully successful performance on this metric was 4.8 notes per day. *Id.* As to the Dispensing/Drug Distribution Functions element, fully successful performance required processing an average of 120 pending prescriptions a

day, and the appellant processed 104 pending prescriptions a day. *Id.*

Beginning in 2020, as a result of the COVID-19 pandemic, the agency allowed pharmacists to telework at times, provided they met agency requirements to do so; teleworking was only permitted on certain rotations. HR-1, Kim testimony; HR-2, Tarman testimony; HR-4, Hawkins testimony. Under agency policy, employees with unsuccessful performance evaluations are not eligible to telework; because the appellant had consistently been rated unsuccessful, he was not eligible to telework. *Id.* Some outpatient pharmacists elected not to telework, despite being eligible. *Id.* In total, outpatient pharmacists were only allowed to telework for a relatively short period of time (i.e., less than 10 months total) because teleworking pharmacists were frequently required to report to their duty stations to cover on site duties, eliminating many of the advantages of telework. HR-2, Tarman testimony; IAF, Tab 10, pp. 90-96; Tab 28, pp. 186-189.

In December 2020, the agency issued the appellant his performance plan for fiscal year 2021. IAF, Tab 29, p. 32. In response to the plan, the appellant emailed his new supervisor,[1] Dale Hawkins, the following concerns about the performance standards:

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[1] The appellant initially sent his dispute of the performance element to ePerformance@va.gov, the automated email address for the agency's electronic performance evaluation system. IAF, Tab 29, pp. 31-32. The email to which the appellant responded stated "This is an autogenerated email; please do not reply," and provided information on where to seek assistance. *Id.* It appears no agency official received the appellant's original email.

Furthermore, on review of "Element 1: Prescription Processing Quantitative Standards (Critical Element), one considers the following standard unacceptable and requires further review,

" 1) Standard 1: Processes pending prescriptions:

Unsuccessful: Processes:< 11% of the daily average number of pending prescriptions processed Fully Successful:

Processes: +/- 10% of the daily average number of pending prescriptions processed

Exceptional: >11% of daily average number of pending prescriptions processed"

The above standard, did not take into account that pending prescriptions has been outsourced and some Pharmacists are giving undue advantage of working from home encountering no distractions such as phone calls or coving of lunches and thereby ramping up and processing high prescription numbers than others who are not given that opportunity.

Furthermore, the outsourced or remotely working pharmacists were instructed to leave problem prescriptions and those working from home tend to skim through the queue and skip problem orders leaving the problems prescriptions for the pharmacists inhouse.

This disparity also should be factored in to be fair, equitable and acceptable, therefore the <11% of daily average number of pending prescription processed is skewed and gives

> some pharmacists undue advantage over others.

IAF, Tab 29, p. 31. Hawkins did not change the appellant's performance standards for fiscal year 2021 based on the appellant's concerns. HR-4, Hawkins testimony.

In April 2021, Hawkins informed the appellant in his midyear performance evaluation that he was unsuccessful on the performance standard pertaining to processing pending prescriptions. HR-2/3, appellant testimony; HR-4 Hawkins testimony; IAF, Tab 28, p. 175. The appellant received this appraisal, but refused to acknowledge receipt of it because Hawkins had not changed the performance standards to address the appellant's previously stated concerns. *Id.*

On June 8, 2021, Hawkins met with the appellant and his AFGE union representative, Linda Ward-Smith, at the union office. HR-1, Ward-Smith testimony; HR-2/3, appellant testimony; HR-4, Hawkins testimony. The meeting was set to discuss the appellant's midyear performance evaluation. *Id.* During the meeting, Hawkins explained the appellant was failing to meet the processing pending prescriptions metric, and discussed placing the appellant on a performance improvement plan (PIP). *Id.* The appellant disagreed with Hawkins' assessment of his performance, and explained his argument that his low pending prescription numbers were the result of unfair scheduling that left him with no "pending" shifts. *Id.* Ward-Smith requested that Hawkins assign the appellant to some "pending" shifts to resolve the performance issue, but Hawkins declined because he believed doing so was unfair to the other pharmacists. HR-1, Ward-Smith testimony; HR-2/3, appellant testimony.

On June 11, 2021, Hawkins placed the appellant on a PIP. IAF, Tab 29, pp. 81-83. Under the PIP, the appellant would have 90 days to demonstrate acceptable performance on the processing pending prescriptions metric. *Id.* Hawkins agreed to meet with the appellant biweekly to discuss the appellant's work and assist him in prioritizing it. *Id.* The appellant disputed Hawkins placing him on a PIP. IAF, Tab 29, pp. 84-87.

Over the next 90 days, Hawkins attempted to meet with the appellant as set forth in the PIP, but the appellant refused. HR-4, Hawkins testimony. Each time the appellant refused to meet or was otherwise unable to meet, Hawkins emailed the appellant with his performance metrics for the relevant time period. IAF, Tab 28, pp. 225-231. The appellant responded to these emails – and to Hawkins' other attempts to work through the PIP with the appellant – by telling Hawkins his actions were harassment; the appellant explained that he had not agreed to the PIP, and he would not participate in it. HR-2/3, appellant testimony. The appellant failed the PIP, having not processed sufficient pending prescriptions to be in the fully successful range. IAF, Tab 28, p. 225.

In November 2021, Hawkins rated the appellant unsuccessful in his fiscal year 2021 performance rating. IAF, Tab 11, pp. 41-48. The appellant was rated unsuccessful on two critical elements: Prescription Processing Quantitative Standards and Prescription Processing Qualitative Standards. *Id.* The Quantitative standards pertained to the appellant's daily average of pending prescriptions processed (i.e., 134 processed on average per day, when fully successful performance required at least 147 per day), and the Qualitative

standards pertained to the appellant's error rate (i.e., 0.72% error rate, which was more than the 0.6% maximum error rate for fully successful performance on this metric). *Id.*

The appellant had filed a complaint with OSC alleging whistleblowing reprisal on March 7, 2021. IAF, Tab 1, p. 8. On January 18, 2022, OSC notified the appellant it had closed its investigation into his complaint, and explained his right to file an IRA appeal with the Board. IAF, Tab 1, pp. 8-9.

This appeal followed timely thereafter. IAF, Tab 1. On March 11, 2022, I found the appellant had established Board jurisdiction over a portion of his claim, and set further litigation dates. IAF, Tab 19. I held the hearing the appellant requested on June 13-14, 2022, June 30, 2022, and July 12-13, 2022. IAF, Tabs 57-60, 66-71. The record closed at the conclusion of the hearing. *Id.*

Applicable Law

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations: (1) he made a protected disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Kerrigan v. Department of Labor*, 122 M.S.P.R. 545, ¶ 10 n.2 (2015) (citing 5 U.S.C. §§ 1214(a)(3), 1221(e)(1)); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001)). The appellant previously demonstrated the Board's jurisdiction over delineated

portions of his claim, and thus this appeal. *See* IAF, Tab 19.

To prevail, the appellant must prove by a preponderance of the evidence he made protected disclosures or engaged in protected activity covered by the whistleblower laws and the protected disclosure or activity was a contributing factor in the agency's decision to take or threaten to take a personnel action. 5 U.S.C. § 1221(e)(1). If he does so, the agency must prove by clear and convincing evidence it would have taken the same action even absent the protected disclosure or protected activity. 5 U.S.C. § 1221(e)(2).

Credibility Determinations

Before I consider whether the parties met their respective burdens in this appeal, I find it appropriate to address certain credibility matters which impact the assessment of multiple pieces of evidence in the record.

As a general matter, I did not find the appellant a credible witness. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence;

(6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor).

The factor that weighs most heavily against the appellant's credibility is his own inconsistent statements. At various times throughout his appeal, the appellant made statements that directly conflicted with his own prior version of events. Sometimes this shift in testimony occurred after the appellant had elected to make a new or different argument.

One example of the appellant's testimony changing over time relates to his accounts of the June 8, 2021 meeting with Hawkins and his union representative. On February 24, 2022, the appellant submitted a declaration under penalty of perjury, wherein he described that meeting as follows: "On June 08, 2021, I met with my supervisor in the presence of 5 AFGE [American Federation of Government Employees] officials at the union office to discuss the proposed PIP and concluded that PIP was not necessary and condition not met." IAF, Tab 14, p. 16. During his direct testimony at the hearing, the appellant testified consistently with this prior statement. HR-2/3, appellant testimony. He testified that, during the meeting, he and his representative argued the conditions for a PIP are not met. *Id.* He testified about this meeting at length during two separate portions of his direct examination and, in both portions, he described a discussion about his performance on the pending metric and being placed on a PIP. *Id.* The appellant also testified that, when they left the meeting, Hawkins had agreed to provide the union with certain information they had requested about the appellant's "pending"

shifts and agreed no PIP would occur.[2] *Id.* When the appellant provided the agency with his recounting of how he spent his time beginning in June 2021, the appellant identified that, on June 8, 2021, he had a "Midyear/PIP meeting @ AFGE office 1-3 p.m." IAF, Tab 11, p. 36.

However, when the agency asked the appellant a question about the June 8, 2021 meeting, the appellant testified "We had a meeting on June 8. We did not discuss anything about PIP." HR-3, appellant testimony. When I asked the appellant about the apparent inconsistency between his prior testimony about a PIP being discussed during the June 8, 2021 meeting, the appellant remained adamant that a PIP was not discussed in the June 8, 2021 meeting. *Id.* He explained he was informed the meeting was his midyear performance evaluation and that was the purpose of the meeting; he said no PIP was discussed. *Id.*

After the appellant's testimony concluded, he submitted an additional statement, under penalty of

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[2] Neither Ward-Smith nor Hawkins recounted any statement by Hawkins that the conditions for a PIP were not met or that the agency had decided not to issue the appellant a PIP. HR-1, Ward-Smith testimony; HR-4, Hawkins testimony. Ward-Smith testified that, during the meeting, she asked Hawkins for additional documentation and to schedule an additional meeting with HR involved. HR-1, Ward-Smith testimony. Hawkins recalled leaving the meeting without any resolution, but certainly without indicating he would not issue the PIP. HR-4, Hawkins testimony. Hawkins presented the appellant with a PIP without providing the additional documentation or an additional meeting being held. HR-1, Ward-Smith testimony; HR-4, Hawkins testimony; IAF, Tab 29, pp. 81-83. I find no credible evidence supports the conclusion Hawkins agreed no PIP would occur or that no PIP was necessary in the June 8, 2021 meeting.

perjury, explaining his version of the events, in relevant part as follows:

> However, during the meeting Dale indicated his intention to place me on PIP, but when I presented facts to show that the low pending data is due to issues beyond my control such as disparity in scheduling and insufficient pending shift to meet the evaluation standard, and my notification on 12/15/2020, 12/16/2020, 01/072021 (Tab 29 page 31-33) and that PIP is not appropriate. As specified pursuant to AFGE/DVA master agreement Article 27 Section 8 (e) an employee shall not be held accountable for factors beyond their control. *See* Tab 28 page 174 of 467.
>
> Dale disputed my data and stated **this is not a grievance procedure** and promised to counter my evidence with additional data and promised to send same to the AFGE later. AFGE president advised him to offer more pending shifts to me in order to improve my pending numbers and he stated that it was not fair to other pharmacists. Also, see my communication with Dale when I received notification for PIP at Tab 14 page 24 of 30.
>
> The meeting of 6/08/2021 was for Midyear FY21 review and not a PIP meeting and no PIP was presented. The first meeting for PIP was scheduled on 6/11/2021 which I did not participate in.

IAF, Tab 64, pp. 4-5. In summary, the appellant explained that, in saying a PIP was not discussed in the June 8, 2021 meeting, he was actually testifying

that the meeting was not a "PIP meeting" wherein the official PIP was discussed.

I carefully considered whether the appellant's explanation resolved the conflict in his testimony, but ultimately concluded it did not. The specific testimony at issue here was as follows:

Q: [referring to the appellant's notation that he called in sick on June 14, 2021 "due to emotional trauma from 6/11/2021"] what was the emotional trauma on June 11 2021?

A: We had a meeting on June 8. We did not discuss anything about PIP. From nowhere, he sent me a notification for PIP and telling me my performance was below standards.

IAF, Tab 66, Recording 4, at approximately 18:00. In context, the appellant was not testifying about whether the June 8, 2021 meeting was an official PIP meeting. Instead, the appellant was explaining that he was shocked to receive a PIP on June 11, 2021 because one had not been discussed in the June 8, 2021 meeting.

At best, the appellant's conflicting testimony can be explained by the appellant's testimony to use exaggerated and absolute terms when describing matters. *See* HR-2/3, appellant testimony ("I'm always telling the truth;" "invariably my statement there is not wrong;" "saying I am not performing my job when I am doing exactly what I'm supposed to do"). Even if that were the case, the tendency results in the appellant's testimony being inaccurate and not credible.

After considering the appellant's testimony in context, as well as his numerous prior statements pertaining to the June 8, 2021 meeting, I find it more

likely that the appellant offered conflicting testimony because, when asked about a different element of the matter (i.e., his emotional trauma), the appellant's version of events shifted to support that claim.

The appellant similarly shifted his version of events on a more innocuous matter related to the garnishment of his wages. At his deposition, the agency presented the appellant with a copy of the March 13, 2018 letter from the Department of Justice, notifying him of his debt of $4,868.20 to the U.S. government and the steps the Department of Justice would take to recover it. *See* IAF, Tab 28, pp. 56-60, 69-70. He then provided the following testimony:

Q. Okay. All right. Did you call the U.S. Attorney's Office to ask them about this?

A. No, I did not.

Q. Did you see the phone number there below about midway down the page starts with 702? You didn't call that number?

A. No, I did not.

IAF, Tab 28, pp. 57-58. At the hearing, the appellant testified that, in March 2020, he filed for bankruptcy to save one of his houses from foreclosure. HR-3, appellant testimony. He explained his bankruptcy lawyer contacted the agency so the agency could be paid through that, but the agency did not respond. *Id.* He received the letter from the "Internal Revenue Office" in 2020 and he replied to them, saying "we are in pandemic right now, I am sorting things out, once we get everything straightened out, I will find a way to resolve the issue." *Id.* He said he didn't hear anything else from them, and was

curious to find out his wages were garnished. *Id.* On cross examination, the agency asked the appellant whether he called the number on the March 13, 2018 letter, and he testified he called the number when he received the letter. *Id.*

The appellant explained the discrepancy with his prior testimony as follows: during the deposition, he was testifying about whether he called the phone number on the 2018 letter when his wages were garnished, which he didn't; during the hearing, he testified that he called the number on the letter when he received it, and he did. HR-3, appellant testimony. He noted that he never received an opportunity to review the deposition transcript and make changes to it. *Id.* When I asked if the appellant had read the deposition transcript (which was submitted with the agency prehearing submissions more than two months before the hearing began), the appellant testified he had not reviewed it because I had not admitted the deposition transcript as evidence.[3] *Id.*

As to the appellant's hearing testimony that he called the phone number on the March 2018 letter,[4] I

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[3] I did not admit the deposition transcript as evidence in the appeal, but explained "the agency may use the document to refresh a witness's recollection or impeach a witness's credibility as appropriate." IAF, Tab 40, p. 10.

[4] In addition to the appellant's directly conflicting testimony about whether he called the number on the March 2018 letter, the appellant also testified to a March 2020 letter and call. HR-3, appellant testimony. Given that the facts underlying this appeal occur over several years, I consider it possible – and even common – for witnesses to innocently refer to the wrong year when testifying about something that occurred years ago. However, that seems unlikely given that the appellant's claimed response

find his testimony directly conflicted with his prior deposition testimony. I considered the appellant's explanation for the conflict, but find it unavailing. The appellant testified with clarity at his deposition he did not call the number on the letter, without limitation as to when he would have called; he then testified he did call the number. Similar to the appellant's testimony regarding the content of the June 8, 2021 meeting, I find the appellant's testimony changed here to fit the story he wished to tell at the hearing (i.e., he was diligent in addressing the debt he owed to the government, and the agency still decided to garnish his wages without notice).

Even in instances where the appellant's version of events was consistent, his version of events often reflected he misunderstood what was occurring in the workplace and his perceptions were notably inaccurate. For example, the appellant testified that, before the agency could place him on a PIP, both the appellant and AFGE had to agree to the PIP. HR-2/3, appellant testimony. He premised this claim on his review of the collective bargaining agreement provision pertaining to PIPs, which states as follows:

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to the Internal Revenue Service (IRS) regarded the pandemic, which began in roughly March 2020. Assessing the context and testimony together, I find the most likely possibility is that the appellant did not make any response to the March 2018 letter. Then, in March 2020, the IRS sent him a letter notifying him that the 2014 judgment against him was being added to the Treasury Offset Program. The U.S. Attorney attested that the appellant's liability had been added to that program on March 12, 2020. IAF, Tab 28, p. 68. The appellant may well have contacted the IRS in 2020 to say that he would figure everything out once the pandemic was over, but his wages were nonetheless garnished in accordance with that program.

> If the supervisor determines that the employee is not meeting the standards of his/her critical element(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and local union representative, a written PIP. The PIP will identify the employee's specific performance deficiencies, the successful level of performance, the action(s) that must be taken by the employee to improve to the successful level of performance, the methods that will be employed to measure the improvement, and any provisions for counseling, training, or other appropriate assistance. In addition to a review of the employee's work products, the PIP will be tailored to the specific needs of the employee and may include additional instructions, counseling, assignment of a mentor, or other assistance as appropriate. For example, if the employee is unable to meet the critical element due to lack of organizational skills, the resulting PIP might include training on time management. If the performance deficiency is caused by circumstances beyond the employee's control, the supervisor should consider means of addressing the deficiency using other than a PIP. The parties agree that placing the employee on 100% review alone does to not constitute a PIP.

IAF, Tab 28, p. 158. While no portion of the provision states the employee and union must agree to a PIP, and the appellant's union representative testified no

such agreement is required, the appellant remained adamant during 2021 and his testimony at the hearing that the agency was not permitted to place him on a PIP unless the appellant himself agreed to it. He further testified that, because he did not agree to the PIP, it violated an agency policy that required the agency to follow the collective bargaining agreement. HR-2/3, appellant testimony. Given its violation of agency policy, the appellant testified he understood the agency could not obligate him to participate in the PIP because doing so would further the agency's violation. *Id.* The appellant's perception that agency policy required his agreement before he could be placed on a PIP is incorrect and misplaced, and reflects the appellant's tendency to misread or misunderstand documents.

In another example, during the course of his testimony, the appellant repeatedly stated the PIP was "abandoned" and stated that "management knew the PIP had been abandoned." HR-2/3, appellant testimony. However, the appellant's perspective the PIP had been "abandoned" is entirely without support. Hawkins met with the appellant and his union representative on June 8, 2021 to discuss the appellant's poor performance and a coming PIP. HR-1, Ward-Smith testimony; HR-2/3, appellant testimony; HR-4, Hawkins testimony. On June 11, 2021, Hawkins issued the appellant a PIP consistent with Hawkins' prior assessment of the appellant's performance (and the appellant's two prior unsuccessful performance evaluations). IAF, Tab 28, pp. 232-233. No one at the agency ever informed the appellant the PIP was "abandoned", withdrawn, or otherwise inapplicable at any time after Hawkins issued it to the appellant. HR-

2/3, appellant testimony. During the PIP, Hawkins contacted the appellant bi-weekly about his performance under the PIP standards; at the end of the PIP, Hawkins informed the appellant he had failed the PIP. HR-4, Hawkins testimony; IAF, Tab 28, pp. 225-231. None of the agency's actions reflect the PIP was "abandoned," yet the appellant took the position it had been abandoned and repeatedly expressed frustration with the agency for its actions consistent with a PIP.

Consistent with these misperceptions or unsupported positions, the appellant repeatedly articulated to Hawkins that his emails to the appellant during the PIP about the appellant's performance were harassment. HR-2/3, appellant testimony; HR-4, Hawkins testimony. When Hawkins emailed the appellant about the PIP, the appellant told him to stop, and perceived each subsequent email about the PIP to solely be harassment. *Id.* He further alleged in this appeal that Hawkins emailing him about his performance was harassment because Hawkins did so in violation of the appellant's request Hawkins cease such communications. HR-2/3, appellant testimony. If the appellant genuinely believed his supervisor should not be allowed to email him about his performance while he was on a PIP, that belief was illogical and unreasonable; such a belief renders his testimony inherently incredible.

The appellant similarly misread other incidents, and testified with confidence as to attributed intent as a result of those erroneous perceptions. For example, the appellant testified the agency "tried to get [him] on conduct by Bryan sending him to Hyo Ju's office." HR-3, appellant testimony. Essentially, the appellant believed that, when a management official referred

the appellant back to his supervisor to address a concern, the agency was trying to "set him up" to eventually remove him for misconduct. The appellant testified his perception was based on an incident involving another employee, T.B. *Id.* The appellant testified that: several years ago, Bryan Tarman, Chief, Pharmacy Services, VASNHS, told T.B. to go speak with Kim in her office; T.B. is "not calm minded"; Kim "provoked" him; T.B. "blew off"; and the agency then charged T.B. with misconduct and forced him to resign. HR-2, appellant testimony. The appellant decided that, based on this incident, he would never meet alone with his supervisor (whether Kim or Hawkins). HR-2/3, appellant testimony. It is not clear the incident occurred as the appellant testified. Tarman was unaware of this claimed incident, and noted that, at the time, T.B. did not even report to Kim. HR, Tarman testimony.

Regardless, I find illogical the appellant's perception that, because one employee engaged in misconduct while meeting with his supervisor and was held accountable for that misconduct, the appellant should never meet with his supervisor. I find it equally unsupported that the appellant believed that, whenever Tarman told him to address his concerns directly with his supervisor, Tarman was somehow attempting to get the appellant removed for misconduct that the appellant could possibly engage in during a meeting with his supervisor. The more likely intent is that Tarman wished for the appellant to address his concerns to the person who had the power to most effectively address them.

The appellant also appeared to understand the text of the emails he received (or that he reviewed as

part of this litigation) in ways inconsistent with their plain language and the understanding of others who are knowledgeable about their contents. For example, in a September 17, 2020 email, Jason Cleveland, HR Specialist, told Kim to "continue to hold the course" with regard to managing the appellant's employment; the appellant read the email as instructing Kim to change course in her management toward the appellant. *See* IAF, Tab 28, pp. 361-362; HR-2/3, appellant testimony. The appellant understood the email to be telling Kim to "stop ignoring him." *Id.* But the plain text of the email does not communicate this, instead reminded Kim to "hold the course" and encouraged her to be sure she answered the appellant's questions and addressed his concerns. *Id.* Kim's response to Cleveland makes clear she had responded to the appellant's question as suggested (even before Cleveland's email). *Id.*

In a similar vein, the appellant testified Kim tried to "conceal evidence" of a scheduling disparity. IAF, Tab 28, pp. 407-409; HR-2/3, appellant testimony. On September 9, 2020, the appellant was assigned a task outside of the parameters of his rotation, and he told Hawkins and Kim he should not be assigned the task. *Id.* In response, Hawkins explained:

> There is no #9 rotation this week who is normally responsible for this task. I have to reassign to another evening shift and #8 gets the report when #9 is not here.

IAF, Tab 28, p. 408. The appellant disagreed, and told Hawkins it should be assigned to a float. *Id.* When Kim confirmed it was properly assigned to the appellant, the appellant questioned why no pharmacist was assigned to rotation 9 for the first time all year. *Id.*

Kim responded as follows: "AL/SL evening shift has never been covered. If #9 is absent, #8 has been assigned duplicate therapy." *Id.* The appellant produced schedules posted for the week in question: the first was posted in July 2020, which showed that the pharmacist who would have been assigned to rotation 9 on the week in question in September was on leave the entire week; the second was updated in September 2020 showing that employee was not on leave the entire week; and the third updated after the week in question showed the employee on leave the preceding week. IAF, Tab 28, pp. 380-387. The appellant testified the changed schedules show Kim lied in her email and then altered the schedules to conceal her lie. HR-2/3, appellant testimony. The basis of the appellant's perception is that Hawkins' email contradicted Kim's email. *Id.* But the emails do not conflict; both Hawkins and Kim explained no one was assigned to rotation 9 that week and the appellant – in rotation 8 – was thus assigned to cover work that otherwise would have been assigned to rotation 9.[5] The appellant's adamant claims to the agency beginning in 2020 that Kim

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[5] I also found Kim's explanation of the changes to the schedules compelling. The schedule is a living document that is updated on a consistent basis to both bring it into conformance with reality and to address changes in the actual leave and assignment schedules of the pharmacists. HR-1, Kim testimony. She denied changing this document to somehow win an argument with the appellant, and I found her highly credible in this regard. *Id.* Furthermore, the changes in the schedule did not lend support to Kim's email: in her email, she states she does not assign someone to cover AL/SL on rotation 8, so changing the schedule to show that the person assigned to that shift was *not* on leave after receiving the appellant's email would not support her statements, but instead make them inaccurate.

"concealed evidence" of a scheduling disparity are unsupported by the evidence he points to and inherently implausible under the circumstances.

Then, in this appeal, the appellant argued Kim did not deny concealing evidence of the scheduling disparity. HR-5, appellant closing statement. This is not accurate. During her testimony about this subject, Kim denied falsely changing the work schedule, which was the action the appellant alleged was concealing evidence. HR-1, Kim testimony. She agreed it *would be* subverting justice if she did the things the appellant claimed she did, but she denied doing them. *Id.* The appellant's inability to understand the distinction between a response to a hypothetical question and the response to a question about actual events casts doubt on the reliability of his perceptions.

I also considered other indicia of credibility, including the appellant's demeanor. The appellant testified with a level of assuredness consistent with truthful testimony.[6] However, the appellant remained

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[6] The appellant's testimony was set to begin following Tarman's testimony on the second day of the hearing. When Tarman concluded, around 3:30 p.m., PDT, the appellant asked to begin his testimony during the next hearing day because he was tired, had not slept in two days, and had "mental anguish." I confirmed the appellant did not have a medical condition that required accommodation. He indicated he was solely asking because he was tired and wished for me to consider that he was representing himself. When the appellant was asking to cease the hearing early for a second day in a row, he appeared quite awake and alert. At times when the appellant was questioning other witnesses during the day, he seemed focused and appeared a bit frustrated, but he did not appear stressed or tired during that time. He took long periods of pauses throughout his examination of witnesses to find what he was looking for and compose the areas about which he wished to question the witnesses. None of

equally assured when he was testifying to matters directly contradicted by compelling evidence in the record, which led me to believe the appellant's confident demeanor was not indicative of truthful testimony.

Ultimately, after considering the appellant's representations (both in testimony and before that), I find his testimony not generally credible. His statements were sometimes inconsistent with his own prior statements, and often inconsistent with the other evidence in the record. His analysis and assessment of the matters occurring around him were often incorrect as a factual matter or interpreted in a manner that was inherently implausible under the circumstances. In sum, I found the appellant's prior inconsistent statements (and apparent willingness to change his story as necessary to meet his own narrative), when coupled with the contraction of his testimony by other evidence in the record and the inherent improbability of the appellant's version of events, led me to conclude he was generally not credible.

On the other hand, I largely found the remainder of the witnesses relatively credible in their testimony about matters for which they had first-hand knowledge. The appellant argued none of the agency witnesses

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this changed in the 1.5 days of hearing I had observed of him by the time he requested to adjourn early because he was tired. Ultimately, while I believe the appellant wished not to proceed with his testimony on the second day of the hearing, my observations of his demeanor at the time were such that I did not believe he was impeded in any way from providing truthful and honest testimony at his best. This is particularly true because the appellant's subsequent testimony largely involved the appellant reading a previously prepared statement.

are credible because they contradicted themselves and provided testimony inconsistent with documents. HR-5, appellant closing statement. Where a witness has provided contradictory – or potentially contradictory – testimony on a matter of consequence, I address it specifically when that matter is discussed. However, in general, I found most of the appellant's examples of contradictions to be the result of the appellant not understanding certain distinctions. For example, both Meeta Patel, Deputy Chief, Pharmacy Services, VASNHS, and Hawkins testified that Patel would refer errors or issues with the appellant's processing of specific prescriptions to Hawkins, as his supervisor, to address. HR-3, Patel testimony; HR-4, Hawkins testimony. Hawkins testified that Patel never instructed him to counsel the appellant, which the appellant argued contradicted the reality of Patel referring errors to Hawkins. *Id.* Alerting a supervisor of a subordinate's error is not the same as instructing a supervisor to counsel a subordinate. I understood both Patel and Hawkins to have made this distinction in their testimony, but the appellant's argument does not acknowledge that distinction.

Overall, I found the demeanor of each of the management officials who testified – including Kim, Hawkins, Patel, Tarman, Kamilah McKinnon (Assistant Chief, Pharmacy Operations, VASNHS), and Isani – consistent with truthful testimony as well. I was surprised by the practiced patience each of these individuals had with the appellant, even when his lines of questioning became incomprehensible. They each appeared to be genuinely considering each of the appellant's questions and attempting to answer them meaningfully.

I nonetheless recognize that each of these management officials had an inherent bias in their testimony. All would potentially be held responsible if found to have taken actions against the appellant based on whistleblowing reprisal, and all have some obligation to have prevented any such reprisal. In addition, all of these individuals were – on at least some occasions – copied by the appellant on emails seeking assistance as to matters he deemed important. I factored this inherent bias into my consideration of their relative credibility, but still found each of these officials were more credible than the appellant, except as to matters I specifically address below.

The appellant proved by a preponderance of the evidence that he engaged in protected activity

The appellant's first requirement for a *prima facie* case of whistleblower reprisal is to establish he made or was perceived to have made a disclosure protected by 5 U.S.C. § 2302(b)(8) or have engaged in activity protected by 5 U.S.C. § 2302(b)(9). 5 U.S.C. § 1221(e)(1); *Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 7 (2013). Protected whistleblowing occurs when an appellant makes a disclosure he reasonably believes evidences any violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health and safety. *See* 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). Protected activity under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D) includes the exercise of any appeal, complaint, or grievance right granted by law, rule, or regulation with regard to remedying a violation of whistleblowing protection law or testifying for or otherwise law-

fully assisting any individual in the exercise of such right, cooperating with or disclosing information to the Inspector General, any other component responsible for internal investigation or review of an agency, or OSC, and refusing to obey an order that would require the individual to violate a law, rule, or regulation.

The appellant established Board jurisdiction over his claim the agency was reprising against him based on his "ongoing OSC complaints." IAF, Tab 19, pp. 4-6. During the period at issue here, the appellant had multiple "ongoing OSC complaints." HR-2, appellant testimony. The appellant filed numerous prohibited personnel practice complaints with OSC, alleging the agency reprised against him for prior whistleblowing activity. HR-2, appellant testimony. I find at least one of these complaints was likely "ongoing" with OSC during the period at issue.

However, the appellant's most notable "pending OSC complaint" pertained to a complaint the appellant submitted to OSC in 2019. The appellant complained to OSC that VASNHS's mail order prescription system was delaying patients' access to prescription medications; resulting in the destruction of thousands of dollars' worth of prescription drugs; and causing the agency to spend significant resources replacing, processing, and destroying returned prescriptions. IAF, Tab 10, pp. 119-121. OSC referred the complaint to the agency, and the agency's OMI investigated the complaint. *Id.* OMI conducted a site visit on June 24-27, 2019, and issued a report regarding its investigation on September 12, 2019. IAF, Tab 10, pp. 119-138. OMI substantiated the appellant's allegations, and provided a number of recommendations for the agency, including reducing the number of prescriptions for which a veteran

was required to sign for delivery and changing the mechanisms for mailing such prescriptions. *Id.* The agency adopted these recommendations, which resulted in lowered mailing costs for narcotics. HR-2, Tarman testimony. The appellant testified that, in 2022, he confirmed with OSC this complaint remains pending with OSC, and he is awaiting certain information he requested from OSC to respond fully to the OMI report. HR-2/3, appellant testimony.

Here, I find the appellant established by preponderant evidence he engaged in the protected activity of exercising a complaint right with regard to remedying whistleblower retaliation and/or cooperation with an ongoing OSC investigation as to his "ongoing OSC complaints." 5 U.S.C. § 2302(b)(9)(A)(i), (C). Accordingly, I find the appellant established he engaged in protected activity with his "ongoing OSC complaints."

The appellant established he experienced covered personnel actions

Section 2302(a)(2)(A) of Title 5 of the United States Code lists those matters considered to be personnel actions covered by the Whistleblower Protection Act. In this appeal, the appellant challenged – and established Board jurisdiction over – the following alleged personnel actions: placing him on a PIP; giving him "unacceptable" performance ratings; subjecting him to a hostile work environment; and garnishing his wages. IAF, Tab 19, p. 5. I consider whether the appellant established whether she experienced a covered personnel action – or the threat of a covered personnel action – in each of these instances in turn.

PIP

On June 11, 2021, the agency placed the appellant on a PIP. IAF, Tab 28, pp. 232-233. I find placement on a PIP involves threatened personnel action, such as reduction in grade or removal, and is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(viii). *See Gonzales v. Department of Housing and Urban Development*, 64 M.S.P.R. 314, 319 (1994).

Performance Appraisals

The agency issued the appellant performance appraisals in both fiscal years 2020 and 2021, which rated the appellant unsuccessful. IAF, Tab 28, pp. 127-132, 216-223. Each of these performance appraisals is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(viii).

Hostile Work Environment

The appellant established Board jurisdiction over a claim the agency subjected him to a hostile work environment at various times from approximately August 2020 through at least September 2021, including denying him approved leave, altering his work schedule, scheduling disparities/insufficient number of shifts to meet evaluation standards, charging him with unsubstantiated errors, conducting a fact-finding against him for harassment, and "micromanaging" to find reasons to discipline or remove him. IAF, Tab 19, p. 4.

The applicable statute does not define a "hostile work environment" as a personnel action. 5 U.S.C. § 2302(a)(2)(A). However, "any other significant change in duties, responsibilities, or working conditions" is a personnel action. 5 U.S.C. § 2302(a)(2)(A)(xii). "Although

the "significant change" personnel action should be interpreted broadly to include harassment and discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, only agency actions that, individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities will be found to constitute a personnel action covered by section 2302(a)(2) (A)(xii)." *Skarada v. Department of Veterans Affairs*, ___ M.S.P.R. ____, 2022 MSPB 17 (June 22, 2022). Accordingly, in assessing whether the appellant established that the agency took or threatened a covered personnel action with respect to what the appellant claims to be a hostile work environment, I must determine first what agency actions the appellant proved occurred by a preponderance of the evidence and then whether the specific agency actions, either individually or collectively, amount to a significant change in duties, responsibilities, or working conditions.

Denying the appellant approved leave

The appellant first alleged the agency denied him approved leave. I find he proved by preponderant evidence that, on at least one occasion, the appellant's request for annual leave was denied, and, on another occasion, 8 hours of previously approved leave was not coded as leave.

The annual leave request process for outpatient pharmacists contains two phases. Before the start of the calendar year, each pharmacist is allowed to request two weeks of annual leave for the calendar year; those requests are evaluated on a seniority basis. HR-1, Kim testimony. For example, if the appellant (who is

relatively senior) and a less tenured pharmacist requested the same two week period of leave, the appellant would have his leave approved, while the other pharmacist would be denied and have the opportunity to select a different two week period of leave during the calendar year. *Id.* After this anticipated leave calendar is complete, pharmacists may request other annual leave throughout the year, and seniority is not considered in approving those leave requests. *Id.*

The appellant testified that, in August 2020, he requested annual leave to travel after reviewing the "leave at a glance" and seeing his requested time was available. HR-2/3, appellant testimony. Kim denied his request and, when the appellant asked why it was not approved, Kim did not respond other than to tell him to check the denial sheet where an explanation is provided. *Id.* The appellant also testified that another pharmacist put in for leave at the same time and it was also denied; when that pharmacist asked for an explanation, Kim responded to that person. *Id.*

In November 2020, the appellant raised the issue of this leave denial (for dates in April 2021) with Tarman, and stated "I WILL NOT ACCEPT . . . THE LEAVE DENIALS UNLESS SUBSTANTIATED." IAF, Tab 29, pp. 44-45. Tarman responded that the appellant's two weeks of leave based on his seniority were granted, but the additional requests for April 2021 related to first-come, first-serve leave requests and the appellant was not guaranteed this time if others requested leave for the same weeks before the appellant did. *Id.*

The appellant also testified that, in April 2021, Hawkins told the appellant he had to work on days

when the appellant had already been approved for annual leave. HR-2/3, appellant testimony. The appellant told Hawkins that, if he was requiring him to work that day, Hawkins had to give the appellant good reasons to cancel his plans and work; according to the appellant, Hawkins told him it would be insubordination not to appear for work, and the appellant worked on the day in question. *Id.*

Finally, the appellant pointed to an instance in September 2021 when Hawkins canceled a day of his previously approved leave. HR-2/3, appellant testimony. The appellant had been approved for 80 hours of leave, but ultimately only took 72 hours of leave. *Id.* He found this to be part of a consistent problem, and complained to OSC about it. *Id.*

Kim testified she denied some of the appellant's leave requests, but did so because of coverage issues. HR, Kim testimony. This was consistent with how she approved/denied the leave requests of other individuals. *Id.* I found her testimony in this regard compelling and credible. While Kim could not remember specific instances of denying the appellant's leave (which occurred about 2 years before the hearing), I do not see a reason to question the credibility of her testimony that she treated the appellant consistently with other pharmacists in this regard.

With regard to the April 2021 leave request, I find no credible evidence the appellant's leave request had been approved. The appellant complained in November 2020 that the leave request had been denied and, in response to his complaints, the reason for the denial

was provided but no approval was granted.[7] IAF, Tab 29, pp. 40-45. The appellant's leave records reflect leave for that period was denied, and there is no separate indication it had ever been approved. IAF, Tab 28, pp. 456-457. While Hawkins did not testify about any allegation he told the appellant it would be insubordination to not work as scheduled on those days, I find that such a statement would have been appropriate if made. The appellant requested leave, his request was denied, and he was scheduled to work on those days; if the appellant failed to appear for work as scheduled, his actions would have been misconduct under the circumstances. I see no basis to find Hawkins warning the appellant of the implications of his actions to be inappropriate or unreasonable.

Finally, as to the appellant's September 2021 leave, the appellant was approved to take 80 hours of leave, which included 8 hours to be taken on September 9, 2021. IAF, Tab 16, p. 15; HR-4, Hawkins testimony. However, because September 9, 2021 was a scheduled day off for the appellant, Hawkins did not charge the appellant hours of leave for that day, and the appellant did not work that day. *Id.* In essence, because it was not a duty day for the appellant, no leave was necessary for him to be off that day. *Id.* While the appellant appears to be upset he only used 72 hours of leave, I find Hawkins' assessment the appellant should not be charged leave for non-duty days was

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[7] The appellant argued no other pharmacists were scheduled to be off during the requested period, but the schedule for that period shows two other pharmacists were on leave at the time. *See* IAF, Tab 10, pp. 93-94.

entirely appropriate, and did not reflect denying the appellant leave.

After considering all of the evidence in the record, I find the appellant established by preponderant evidence that, during the period at issue, some of his annual leave requests were not approved. I find he did not establish that these decisions regarding his leave have practical and significant effects on the overall nature and quality of his working conditions, duties, or responsibilities such that they constitute a personnel action covered by section 2302(a)(2) (A)(xii).

Altering the appellant's work schedule, scheduling disparities, and assigned the appellant insufficient number of shifts to meet evaluation standards

The appellant argued both that the rotation system itself created scheduling disparities and that he personally was impacted by the schedule in a way that was a disparity. Outpatient pharmacists working at VASNHS are assigned specific duties based on a rotational schedule. HR-1, Kim testimony; HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. Schedules set forth a specific number of assigned positions (e.g., 16 or 17), and identify what assignments are to be completed by the individual assigned to a given number; for example, if a pharmacist is assigned to rotation 1 on a given day, the pharmacist can check the bottom of the schedule to determine what duties are assigned to rotation 1, and then is expected to perform the duties assigned to rotation 1 during the hours associated with that assignment. *Id.* Generally, pharmacists are rotated on a weekly basis,

such that the pharmacist would serve in rotation 1 one week, rotation 2 the next week, and so on; when all pharmacists are present, one pharmacist would be assigned to each set of duties each day. *Id.*

Four of the rotations are identified as "float" rotations. IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. For each of these rotations, the schedule contains some duties the assigned pharmacist will perform, but the pharmacists in a "float" position are also required to "float" to other rotations as needed to assist with pharmacy operations. *Id.* Pharmacists in "float" positions are assigned to perform the work generally assigned to different rotations when another pharmacist is on leave, calls out sick, or is in training. *Id.* Pharmacists assigned to "float" rotations – who are not required to cover another rotation – often have significant time to complete pending prescriptions during their rotations. *Id.*

The rotation schedule ensures all outpatient pharmacists participate in all of the required activities of the department, and each of the service needs are met. HR-1, Kim testimony; HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. Given they participate in all pharmacy tasks, all outpatient pharmacists are assigned the same performance standards, and are assessed in their performance evaluations against the same metrics. *Id.*

For each year at issue in this appeal, one critical element of the outpatient pharmacist performance appraisal pertained to the processing of pending prescriptions, although the specific title of the element changed over time. IAF, Tab 28, pp. 127-132, 216-223. The applicable standard was generally as follows:

> Processes pending prescriptions:
>
> Unsuccessful: Processes: < 11% of the daily average number of pending prescriptions processed
>
> Fully Successful: Processes :+/− 10% of the daily average number of pending prescriptions processed
>
> Exceptional: >11% of daily average number of pending prescriptions processed

IAF, Tab 11, p. 41. Pharmacists are assessed against this standard by averaging the number of prescriptions the pharmacist processed during the rating period and dividing it by the number of days the pharmacist worked in the rating period. HR-2, Tarman testimony.

In each of the rotations on the schedule, pharmacists are expected to complete pending prescriptions when they are able. HR-1, Kim testimony; HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. The amount of time a pharmacist can work on pending prescriptions varies with each rotation, and with the specific circumstances present on a given day. *Id.* For example, when a pharmacist is assigned to a rotation involving "PADRs/flag orders/redundant flag orders", the pharmacist probably will only get an hour or an hour and a half during the day to perform pending prescriptions. HR-2, J.P. testimony. A pharmacist assigned to perform conversions may have time to perform pending prescriptions during the day, but if there is a "major conversion" going on at the time, the pharmacist would have to work on conversions all day, without time to perform pending prescriptions. *Id.*

The appellant broadly argued the scheduling system created scheduling disparities. The appellant presented evidence that, for each outpatient pharmacist, the number of pending prescriptions processed in a given month varied greatly. IAF, Tab 11, pp. 22-34. For example, one outpatient pharmacist processed 2536 pending prescriptions in October 2019, 1929 pending prescriptions in November 2019, and 5107 pending prescriptions in December 2019. IAF, Tab 11, p. 24. The appellant pointed to this as evidence of scheduling disparities. *See* HR-1, Kim testimony.

Kim explained the variation in the number of pending prescriptions processed each month by a given pharmacist is to be expected given that each pharmacist is rotating through different assigned duties on a given week, which means the time the pharmacist can spend working on pending prescriptions varies by design each week. HR-1, Kim testimony. To account for this, the quantitative measure for processing pending prescriptions is an average over a lengthy period of time and not merely an average taken each day. *Id.* I do not find the significant variations in pending prescriptions processed on a monthly basis by outpatient pharmacists reflected a scheduling disparity, but instead reflects a scheduling system that rotated duties across the available pharmacists.

The appellant also argued he personally was subjected to disparate scheduling because he was not given sufficient opportunities to meet the pending requirements. HR-2/3, appellant testimony. He explained that, while the agency schedule reflects the appellant was rotated among assignments in the same manner as other pharmacists, he was actually assigned very few "pending" shifts compared to other pharmacists

and, when he was assigned "pending" shifts, he was often pulled to perform other duties. *Id.* The appellant was adamant that the agency's printed schedule appears to be fair on its face, but the schedule is unfair in practice. *Id.*

Preponderant evidence reflects the appellant was indeed often reassigned from shifts where processing pending prescriptions was the primary assignment based on the needs of the service. For example, when another pharmacist was on leave or called out, the appellant would be asked to cover a different rotation. *See e.g.*, IAF, Tab 10, p. 92; HR-4, Hawkins testimony. As a result, the appellant did not work all of the "pending" shifts he was initially scheduled for or that would be expected if pharmacists merely rotated through each station without deviation.

However, the evidence is equally compelling that every other outpatient pharmacist was pulled from pending shifts in the same manner and with the same frequency. After the appellant filed a grievance charging the agency with disparate scheduling practices, Hawkins reviewed what actually occurred from October 1, 2020 through June 30, 2021 for all outpatient pharmacists in terms of possible "pending" shifts and how many of those possible "pending" shifts they actually worked. HR-4, Hawkins testimony; IAF, Tab 28, p. 172. Hawkins prepared a chart setting forth this information, which shows that nearly every outpatient pharmacist was consistently pulled from possible pending shifts to perform other duties that were needed.[8] *Id.* The appel-

[8] One of the identified pharmacists had a total of 5 possible pending shifts in this period and worked all 5 of those shifts. IAF, Tab 28, p. 172. Considering that the 18 other pharmacists had worked at least 21 pending shifts in that period, I do not find this

lant worked 28 pending shifts in that time period, which was 53% of his possible pending shifts. *Id.* Working 53% of the possible shifts was the lowest percentage worked among the pharmacists, but two other pharmacists also worked 53% of their possible pending shifts, and both of those pharmacists had processed significantly more pending prescriptions than the appellant. *Id.* Similarly, 8 other outpatient pharmacists worked less than 28 pending shifts in the identified time period, and 7 of those pharmacists had processed more pending prescriptions than the appellant. *Id.*

The appellant testified and argued the agency failed to assign him to pending shifts throughout fiscal year 2021. HR-2/3, appellant testimony; HR-5, appellant closing statement. He sought to have multiple witnesses review schedules during the hearing to identify when he was assigned to those shifts. I explained to the appellant I would conduct a detailed review of the schedules to assess whether he was, in fact, assigned to less pending shifts than his colleagues. Following the hearing, I conducted this review of the schedules in the record to assess whether the appellant was not assigned to pending shifts in a manner that was inconsistent with how other pharmacists were scheduled.

I find that, in the period from September 14, 2020 to July 16, 2021, the appellant was scheduled consistently with other pharmacists. IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. On several weeks when

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pharmacist not being pulled from assigned pending shifts to be a useful comparator to the appellant or the other identified pharmacists.

the appellant should have been scheduled for a "pending" shift based on the rotation, the appellant was not scheduled for such a shift. *Id.* (e.g., week of November 30, 2020, the appellant should have been scheduled for rotation 4, but was scheduled for two days on other rotations; week of January 18, 2021, the appellant should have been on rotation 11, but was scheduled for 5 instead; week of March 1, 2021, the appellant should have been scheduled for 17, but was scheduled for 12; week of March 22, 2021, the appellant should have been scheduled for 4, but was scheduled for 12; week of June 21, 2021, the appellant should have been scheduled for 2, but was scheduled to work 2 days on 13; week of July 5, 2021, the appellant should have been scheduled for 4, but was pulled to work on other rotations for 2 days). However, in each of these instances, the rotation the appellant should have been assigned to was a "float" rotation, and the schedule reflected there was an absence in another rotation that required coverage; in instances where the appellant should have been assigned a rotation that was designated as float 2, 3, or 4, the schedule also reflects those pharmacists who should have been assigned to other float rotations had already been pulled to cover over rotations or were themselves absent. *Id.*

The schedules reflect pharmacists who should be assigned to pending rotations are consistently pulled to cover other rotations. IAF, Tab 10, pp. 85-96; Tab 28, pp. 184-189. For example, the pharmacist who is supposed to be assigned to rotation 4, which was designated as the first float position, was consistently assigned to work a different rotation, often for the entire week, to cover for another absent pharmacist. *Id.* In addition, for a few months, rotation 11, which

had been a rotation assigned to processing pending prescriptions and second float, was entirely absent from the schedule when there were insufficient pharmacists to cover all the other rotations. *See e.g.*, IAF, Tab 10, pp. 94-95; Tab 28, p. 189.

In summary, a careful review of the schedules the appellant provided in this litigation – and which the appellant asserted would reflect both that he was not assigned to pending shifts and that other pharmacists were assigned to those shifts – reflects that the appellant was scheduled through rotations in a manner consistent with other pharmacists. That is not to say the appellant was not pulled from pending shifts to perform other work. He was. But all outpatient pharmacists were pulled from these shifts in the same manner. Accordingly, I do not find the evidence supports the conclusion that, assuming the schedule occurred as written, the appellant was denied the same opportunities as other pharmacists.

Finally, the appellant was not permitted to telework and argued that, as a result, he was not afforded the same opportunities to focus solely on pending prescriptions that teleworking pharmacists were granted. HR-2/3, appellant testimony; HR-5, appellant closing statement. Beginning in 2020, the agency permitted outpatient pharmacists to telework, provided certain conditions were met; pharmacists eligible to telework were only eligible to telework during certain rotations which lent themselves to remote performance, and teleworking pharmacists were still subject to recall to the facility to cover other rotations as needed. HR-1, Kim testimony; HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony. To be eligible to telework under agency policy, an employee

had to be performing at the fully successful level and had to have an appropriate internet connection and equipment to work remotely effectively. *Id.* The appellant had been rated unsuccessful in performance since at least November 2018. IAF, Tab 28, pp. 115-133. As a result, the appellant was ineligible to telework under agency policy. HR-1, Kim testimony.

The appellant argued that pharmacists who teleworked had a greater opportunity to complete pending prescriptions than those who did not, and the agency did not attempt to provide the appellant a comparable opportunity. Hawkins testified he believed non-teleworking pharmacists had the same opportunities to complete pending prescriptions as those who teleworked because all pharmacists completed the same rotations, whether at home or in the facility. HR-4, Hawkins testimony. The record also reflects pharmacists who elected to telework were still required to report to the facility to cover other rotations as needed. *See, e.g.*, IAF, Tab 10, pp. 86, 88-89; HR-2, Tarman testimony.

Significantly, even pharmacists approved to telework were not permitted to do so during the entire period at issue in this appeal. The opportunity to telework began as a result of the COVID-19 pandemic (i.e., after approximately March 2020), and schedules reflect no pharmacists were scheduled to telework after January 17, 2021. HR-2, Tarman testimony; IAF, Tab 10, pp. 90-96; Tab 28, pp. 186-189. Therefore, even if teleworking pharmacists had an advantage in processing pending prescriptions, that advantage applied for less than 10 total months, split over two performance rating periods.

After considering all of the evidence in the record, and all of the appellant's arguments, I find the appel-

lant did not establish by preponderant evidence that he was subject to scheduling disparities when compared with other outpatient pharmacists at the same facility. I also find that, given that most other outpatient pharmacists who worked fewer pending shifts than the appellant actually processed more pending prescriptions than the appellant, the appellant has not established the agency assigned him insufficient shifts to meet the evaluation standard. Ultimately, I conclude the appellant did not establish by preponderant evidence that his work schedule, the alleged scheduling disparities, and the alleged deficit of pending shifts had practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities.

Charging the appellant with unsubstantiated errors

The appellant also alleged the agency charged him with unsubstantiated errors. This argument appears to take two forms.

First, the appellant disagreed with the number of Centralized Mail Order Pharmacy (CMOP) errors the agency counted against him in his performance appraisal. Because these errors were at least partially responsible for the appellant's challenged performance appraisal, I find that considering the charging of these errors separately – as a part of a claimed hostile work environment – would result in inappropriately considering the same agency actions as two separate personnel actions. Accordingly, I do not consider the appellant's allegations that the agency overcharged him with CMOP errors as part of his hostile work environment claim.

Second, the appellant provided evidence that management officials would send him emails about alleged errors on a continuous basis, and he would be forced to respond to these alleged errors. HR-2/3, appellant testimony. The appellant testified about several instances in which the agency would identify something as an error in an email to him and, after he provided them evidence, the agency agreed it was not an error. *Id.* Two other pharmacists testified to similar experiences. HR-1, R.N. testimony; HR-2, J.P. testimony.

After considering all of the evidence on this issue, I find the agency often sent pharmacists, including the appellant, notice of alleged errors in their work. The agency ultimately agreed that some of these alleged errors were not actually errors, often based on the information a pharmacist provided in response to notice of the alleged error. In these instances, the pharmacist was not "charged" with an error in any metric. Nonetheless, I understand the appellant to be asserting that being made to respond to these accusations of error contributed to a hostile work environment, and I consider it as part of the claim.

Pharmacists work in an inherently regulated environment. A simple human error by a pharmacist could result in patients receiving incorrect medications and having an adverse reaction. As a result, agency systems identify possible errors or provide reminders as to as-yet-incomplete tasks to head off possible errors. *See* HR-1, Kim testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; *e.g.*, IAF, Tab 28, pp. 334, 358. As with any system designed to ensure near perfect accuracy, these notifications may be over inclusive; as a result, pharmacists have to spend time

addressing matters that may not actually be errors. The appellant admits that other pharmacists received the same type of error notifications as him, and were forced to respond to them as well. HR-2/3, appellant testimony.

After considering all of the evidence in the record, I find the appellant established by preponderant evidence that, during the period at issue, agency officials sent him notice he made alleged errors and provided him an opportunity to respond. In some instances, the agency officials agreed with the appellant's assessment that the alleged errors were not errors; in other instances, they did not. I find the appellant did not establish these agency actions had practical and significant effects on the overall nature and quality of his working conditions, duties, or responsibilities such that they constitute a personnel action covered by section 2302(a)(2) (A)(xii).

Conducting a fact-finding investigation against the appellant

In late 2020, Kim complained to her supervisors that she believed the appellant was harassing her in the workplace. HR-1, Kim testimony. Her supervisors referred Kim to human resources to determine what options were available to her to address her concerns. HR-3, Patel testimony. In November 2020, Alexander Isani, Deputy Chief of Staff VASNHS, referred Kim's complaint for a fact-finding investigation as required by agency policy. HR-1, Earley testimony; HR-5, Isani testimony.

In November 2020, Gail Earley, Administrative Officer, Pain Medicine, and Dr. Matthew Gibson, Chief, Medicine Service, conducted a fact-finding into

Kim's allegations about the appellant. IAF, Tab 28, pp. 239-409; HR-1, Earley testimony. Earley and Gibson interviewed the appellant, Kim, and two other agency employees as part of their investigation. *Id.* They also reviewed documents provided by Kim and the appellant. *Id.* In a report issued on November 20, 2020, Earley and Gibson made the following findings/ conclusions:

> The interview summaries and email evidence support the allegations. It is concluded Joseph Anoruo, Outpatient Pharmacist, knowingly violated both the Prevention of Workplace Harassment (non-sexual and sexual) MCM-EEO-18-03 and Employee Conduct MCM 05-09-17 polices resulting in workplace harassment (non-sexual) and created a hostile work environment in the Pharmacy Service at VA Southern Nevada Healthcare System. A minimum of 16 emails substantiate the allegations. Witnesses interview summaries and successful completion of TMS course VA8872 Prevention of Workplace Harassment support the examiners' conclusion that Dr. Anoruo was less than forthcoming in his answers during the fact-finding interviews. Lastly, Dr. Anoruo in his witness summary and in his own admission violated the Staff Relationship with Patients and Their Significant Others MCM 00-16-08. Due to the egregious nature of the offenses, the examiners recommend Joseph Anoruo's removal from his position as Outpatient Pharmacist at the VA Southern Nevada Healthcare System.

IAF, Tab 28, p. 239.

As part of the investigation, the appellant was interviewed for approximately one hour. IAF, Tab 28, pp. 282-285. Following the interview, the appellant sent documents to the examiners via email. HR-1, Earley testimony. The record contains no evidence the agency took any action to remove or otherwise discipline the appellant based on the results of the fact-finding, despite the recommendation.

I find preponderant evidence reflects the agency initiated a fact-finding investigation into allegations the appellant harassed Kim. However, I find the appellant did not establish this investigation had practical and significant effects on the overall nature and quality of his working conditions, duties, or responsibilities such that they constitute a personnel action covered by section 2302(a)(2) (A)(xii). Similar to the situation the Board examined in *Skarada*, "the investigations, although likely inconvenient, were not overly time-consuming, did not result in any action against the appellant or follow-up investigation, and appear to have been routine workplace inquiries."

Micromanaging to find reasons to discipline or remove the appellant

Finally, the appellant argued the agency micromanaged him throughout the applicable time period, attempting to find reasons to discipline or remove him. In discussing this claim, the appellant pointed to a few specific examples of micromanagement.

First, the appellant testified that, when he has called in to alert the agency he would be arriving late to work, he was instructed to report to a specific

person upon his arrival. HR-3, appellant testimony. The appellant believes that, as a professional, he should not be required to report to someone when he is late to work, but should instead be allowed to do his job. *Id.* I see no basis to find requiring a late-arriving employee to report to a designated individual to ensure proper documentation of the start of his work day inappropriate.

The appellant also identified as micromanaging and harassing behavior Hawkins' emails to him during the PIP. HR-3, appellant testimony. According to the appellant, even though management "knew the PIP was abandoned," Hawkins continued to notify the appellant about it on a biweekly basis, reminding the appellant he was on a PIP, the standards applicable to him, and his continued failure to meet those standards. *Id.* The appellant told Hawkins to stop sending him emails, and perceived Hawkins' continued emails to solely be aimed at making the appellant anxious and harassing him. *Id.* Communicating on a consistent basis with an employee on a PIP about the employee's performance on the PIP's requirements is one of the requirements of the PIP issued to the appellant – which was not abandoned at any time – and Hawkins' actions were consistent with appropriate supervisory support to an employee on a PIP.

The appellant also pointed to an August 27, 2020 email from Kim related to printing a prescription label as micromanaging. IAF, Tab 28, p. 358; HR-1, Kim testimony; HR-2/3, appellant testimony. On August 27, 2020, Kim emailed the appellant as follows:

> If you need to reprint a prescription label, please put a reason the reprint in necessary such as "printer jammed" or "label accidently

> thrown away" (you entered "reprint"). The comments entered by you, make it very difficult to determine why the reprint was necessary.
>
> All reprints are reviewed to trend diversion risks.

IAF, Tab 28, p. 358. Her email identified a specific reprinted label at issue. *Id.* The appellant responded to Kim's email, providing an explanation for the reprinted label Kim had identified. *Id.* According to the appellant, Kim "calmed down" after receiving the explanation. HR-2/3, appellant testimony. He perceived Kim's email to him as micromanaging because the label about which she was inquiring had been printed more than one month before, but the morning she sent the email, AFGE had requested Kim produce documents related to one of the appellant's concerns. *Id.* In essence, the appellant believed the timing of Kim's email reflected she was reprising against him based on the AFGE request for information; the appellant testified the email itself was not a bad thing, but what he believed motivated it was a bad thing. *Id.* I do not find the email to have been evidence of micromanaging or otherwise inappropriate. Even assuming Kim sent him an email reminding him he needs to include notes on his reprints in the future immediately after AFGE asked for information from her, I do not find her blandly worded reminder of the appellant's responsibility to be micromanaging or harassing.

Because the parameters and scope of the appellant's claim the agency micromanaged him was not clear, I also considered the appellant's other testimony broadly about his treatment from management during this

time period to assess whether it reflected "micro-management" that may have led to a significant change in working conditions, duties, or responsibilities. The evidence reflects that agency officials are frequently involved in communications with the appellant and other outpatient pharmacists regarding their work, including more complex matters they are required to decide and policies they are required to implement. Specific to the appellant, management officials often emailed the appellant in response to his inquiries and complaints, directly addressing the issues he raised. However, these actions were not consistent with a colloquial understanding of the term "micromanagement." While the appellant would obviously have preferred to have worked more independently, without having to interact with his supervisors, that does not render the agency's actions "micromanagement."

Considering all the possible instances of alleged micromanagement together, I find the appellant did not establish these actions had practical and significant effects on the overall nature and quality of his working conditions, duties, or responsibilities such that they constitute a personnel action covered by section 2302(a)(2)(A)(xii).

I considered each of the appellant's categories of agency actions he felt caused him a hostile work environment during the period at issue, and found none of these categories individually had practical and significant effects on the overall nature and quality of his working conditions, duties, or responsibilities such that they constitute a personnel action covered by section 2302(a)(2) (A)(xii). I must also consider whether the appellant proved by preponderant evidence that

all of these actions – considered collectively – met this standard. I find he did not. The appellant did not like the agency's methods of managing his work and scheduling his shifts, but all of the actions he established the agency took were similar in nature to those that all outpatient pharmacists experienced. In context, I find these matters did not have practical and significant effects on the overall nature and quality of the appellant's working conditions, duties, or responsibilities. Thus, I find the appellant did not prove the claimed hostile work environment was a personnel action.

Garnishment of wages

The final alleged personnel action was the garnishment of the appellant's wages. The appellant's wages from the agency were garnished sometime after March 2020. A "decision concerning pay, benefits, or awards" is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(ix). However, here, while preponderant evidence reflects the appellant's wages were garnished, the record contains no credible evidence *the agency* garnished his wages or *made a decision* concerning his pay.

On February 19, 2014, the United States District Court for the District of Nevada ordered the appellant to pay a Judgment of $4,868.20. IAF, Tab 28, pp. 69-94. In March 2018, the Department of Justice notified the appellant that the debt remained due, and provided the appellant 10 days to pay the debt or provide a completed financial statement. IAF, Tab 28, pp. 69-70. The letter explained as follows:

> Unless we receive the completed financial statement within ten (10) days from the date

> of this letter, we intend to take further legal action to collect your debt. This will result in a court order requiring you to appear before a United States Magistrate as a judgment debtor. The law also provides that this debt may be collected by such means as a garnishment of your wages, or a levy on your personal property. Your name will also be added to the Treasury Offset Program.

IAF, Tab 28, p. 69. On March 14, 2018, the appellant was also sent a Treasury Offset Notice, which provided that he had 60 days to dispute the legality of the debt or contact the Department of Justice to arrange payment. IAF, Tab 28, p. 68. The appellant did not forward payment. *Id.*

On March 12, 2020, the appellant's liability was added to the Treasury Offset Program (TOP), which provides collection for overdue debts owed to Federal and State agencies. IAF, Tab 28, p. 68. The TOP Notice is sent centrally, and no additional documents are generated. *Id.* The record contains no evidence the agency received notice the appellant had been placed in TOP or that the debt to the Department of Justice was being collected. *Id.* Agency officials consistently – and credibly – testified they were not aware the appellant's wages were garnished and had no involvement in any such action.

The appellant testified the agency was involved in the action because the lawsuit where he accrued the judgment was against the agency (and not the Department of Justice). HR-2/3, appellant testimony. He also testified no action could be taken involving his wages without human resources' involvement because they are responsible for paying his wages. *Id.* I find

these pronouncements by the appellant, based on assumptions about how Federal agencies work that are not supported by other evidence in the record, are insufficient to overcome the evidence that the appellant's wages were garnished following a process involving the Department of Justice (to whom the debt was owed) and the Treasury Offset Program.

After considering all of the evidence in the record, I find the appellant did not establish by preponderant evidence that *the agency* made a decision concerning his pay, benefits, or awards when the appellant's paycheck was garnished as part of the TOP. Accordingly, the appellant has not established the agency took – or threatened to take – a personnel action when the appellant's wages were garnished.

As explained above, I find the appellant established by preponderant evidence he was subject to covered personnel actions when the agency placed him on a PIP and rated him unsuccessfully on his FY2020 and FY2021 performance appraisals. As to all other matters over which the appellant established jurisdiction, I find the appellant has not established he was subject to a covered personnel action; having failed to meet this requirement of a whistleblowing reprisal claim, the appellant's claim he was reprised against when the agency took these actions ends here.

The appellant established by a preponderance of the evidence that his ongoing OSC complaints were a contributing factor in the personnel actions at issue

To prove protected activity was a contributing factor in a personnel action, the appellant only need demonstrate the fact of, or the content of, the protected

activity was one of the factors that tended to affect the personnel action in any way. *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 10 (2003). The most common way to prove a communication was a contributing factor in a personnel action is the knowledge/timing test, under which the appellant can meet his burden through evidence the official taking the action knew of the protected activity and took the personnel action within a period of time such that a reasonable person could conclude the activity was a contributing factor in the personnel action. *See* 5 U.S.C. § 1221(e)(1)(A), (B); *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, 12 (2006). The timing part of this test usually requires proof the action occurred within a year or two of the protected activity. *Ontivero v. Department of Homeland Security*, 117 M.S.P.R. 600, ¶ 23 (2012).

However, the knowledge/timing test is not the only way to prove protected activity was a contributing factor in a personnel action. The Board will consider any relevant evidence on the contributing factor question, including the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant. *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 13 (2016).

Here, I find the appellant established by preponderant evidence that the management officials with direct roles in the appellant's fiscal years 2020 and 2021 performance appraisals and placing the appellant on a PIP in 2021 – Kim, Hawkins, Patel, and McKinnon – were all aware that he had filed OSC

complaints or that he intended to file OSC complaints. Kim and Patel were interviewed by OMI in June 2019 as part of the investigation into the appellant's complaint. HR-1, Kim testimony; HR-3, Patel testimony; IAF, Tab 10, pp. 119-139. Patel was involved in the implementation of the recommendations of that report. HR-2, Tarman testimony; HR-3, Patel testimony. Hawkins was aware the appellant had filed a complaint at the time because the appellant, who was Hawkins' co-worker at the time, told Hawkins he was working on something to get things fixed. HR-4, Hawkins testimony.

While Patel testified credibly that she did not know what OSC was and did not know which entity was responsible for the 2019 investigation for which she was interviewed, I find she was otherwise on notice the appellant had initiated complaints with OSC. In September 2020, Jason Cleveland, a human resources employee, responded to an email from Kim, and referred to the appellant's OSC complaint as follows: "Any further action(s) will likely delay OSC's investigation even more." IAF, Tab 28, pp. 361-362. Patel was copied on the response. *Id.*

Finally, the appellant consistently referenced OSC in his emails to his management team. For example, on July 12, 2021, the appellant emailed Hawkins, McKinnon, Tarman, and Patel regarding his disagreement with Hawkins placing the appellant on a PIP. IAF, Tab 32, pp. 5-6. He stated:

> You all have been formally informed that I filed OSC case on 3/20/2021 which before OSC because of disparity in scheduling leading to unsuccessful performance appraisal rating, but you have continued to violate the

> law, VA rules and regulation including the AFGE master agreement. While it is your prerogative to do whatever you like, I advise that retaliation will not be welcomed.
>
> If by close of business tomorrow, the PIP is not withdrawn, I may chose to file a retaliation case against you

IAF, Tab 32, p. 5. Based on this email, I find Hawkins, Patel, and McKinnon were on notice the appellant had filed an OSC complaint.

The agency argued that the agency officials at issue here knew little – if anything – about the appellant's ongoing OSC complaints. I find this argument unpersuasive on the issue of whether the appellant met his burden to prove the knowledge prong of the knowledge/timing test. I find all of the management officials with meaningful roles in the personnel actions at issue were aware the appellant had engaged in OSC activity. I consider the varying level of information these individuals had about the ongoing OSC complaints when I assess below whether these individuals had a motive to retaliate against the appellant, but I find their knowledge the appellant had made and continued to make OSC complaints sufficient to meet the knowledge prong of the knowledge/timing test under the circumstances present here.

I also find the appellant proved by preponderant evidence that the officials who assessed his performance and placed him on a PIP took those actions within a period of time such that a reasonable person could conclude the appellant's ongoing OSC complaints were a contributing factor in the actions. Cleveland's email was sent less than two months before Kim

and Patel assessed the appellant's performance, and the appellant reminded Hawkins and McKinnon about his OSC complaints just a few months before they rated his performance. I also find Hawkins was aware of the appellant's ongoing OSC activity within the year preceding his decision to place the appellant on a PIP.

Accordingly, I find the appellant established by preponderant evidence that his ongoing OSC complaints were a contributing factor in both performance evaluations and the PIP based on the knowledge/timing test.

The agency demonstrated by clear and convincing evidence it would have taken the personnel actions even if the appellant had not engaged in protected activity

Because the appellant met his burden to establish a *prima facie* case of whistleblowing retaliation, the burden shifts to the agency to demonstrate by clear and convincing evidence it would have taken the identified personnel actions even if the appellant had not engaged in the identified whistleblowing activity. Clear and convincing evidence is the degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established, which is a higher standard than "preponderance of the evidence." 5 C.F.R. § 1209.4(e).

The factors relevant to this determination include 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 agency officials who were involved in the decision, and any evidence the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Ryan v. Department of the Air Force, 117 M.S.P.R. 362, ¶ 12 (2012). I must weigh these factors together to determine whether the evidence is clear and convincing as a whole, considering all of the evidence presented. *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012); *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶ 44 (2011).

As explained below, I find the agency established by clear and convincing evidence it would have rated the appellant unsuccessful in both fiscal years 2020 and 2021 and placed the appellant on a PIP even if the appellant did not have ongoing OSC complaints.

Strength of evidence to support actions

I first assess the strength of the agency's evidence in support of its actions. The agency contends all three personnel actions at issue relate to the same underlying matter: the appellant's poor performance. As a result, I consider collectively the evidence to support the actions. I find the agency had exceedingly strong evidence that the appellant was failing to meet the applicable performance standards in a manner that resulted in him being rated unsuccessful in fiscal years 2020 and 2021, and that led to Hawkins placing the appellant on a PIP in July 2021.

The appellant consistently failed to meet applicable measurable standards. Throughout fiscal years 2020 and 2021, the appellant was subject to the same performance standards as all of the other outpatient pharmacists at the VASNHS. HR-1, Kim testimony; HR-4, Hawkins testimony. In fiscal year 2020, Kim assessed the appellant failed to meet two specific performance standards. *See* IAF, Tab 28, pp. 127-133.

Kim rated the appellant unsuccessful on the critical element of Clinical Functions, based on his failure to meet the third standard under that element,[9] which was for Pharmacy Encounters with the following standard:

> Documents clinical pharmacy encounters, includes consults, notes, PADRS, accurately and completely:
>
> Unsuccessful: Completes an average of < 4.8 clinical pharmacy services related encounters daily in assigned areas
>
> Fully Successful: Completes an average of 4.8-5.6 clinical pharmacy services related encounters daily in assigned areas
>
> Exceptional: Completes an average of > 5.6 clinical pharmacy services related encounters daily in assigned areas

IAF, Tab 28, p. 127. Kim found the appellant was unsuccessful in this standard because he had "4.74 average notes written per day." IAF, Tab 28, p. 133.

Kim also rated the appellant unsuccessful on the critical element of Dispensing/Drug Distribution Functions based on the appellant's failure to meet the standard set forth for processing pending prescriptions, which was as follows:

> Processes pending prescriptions:

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[9] The performance standards explain as follows: "Elements with multiple standards: An unsuccessful rating on 1 standard equates to unsuccessful rating on the element." IAF, Tab 28, p. 127.

> Unsuccessful: Processes on average < 120 pending prescription orders daily
>
> Fully Successful: Processes on average 120-140 pending prescription orders daily
>
> Exceptional: Process on average > 140 pending prescription orders daily

IAF, Tab 28, p. 128. Kim determined the appellant processed an average of 104 pending prescriptions per day during the fiscal year. IAF, Tab 28, p. 133.

In fiscal year 2021, Hawkins also rated the appellant unsuccessful on two critical elements. IAF, Tab 28, pp. 216-223. First, Hawkins rated the appellant unsuccessful on the element of Prescription Processing Quantitative Standards, based on his failure to meet the first standard under that element, which was for "processes pending prescriptions" as follows:

> Processes pending prescriptions
>
> Unsuccessful: Processes: < 11% of the daily average of pending prescriptions processed
>
> Fully Successful: Processes: +/- 10% of the daily average number of pending prescriptions processed
>
> Exceptional: >11% of the daily average number of pending prescriptions processed

IAF, Tab 28, p. 216. At the end of the performance period, Hawkins explained the specific numerical values to be used in this standard[10] as follows:

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[10] Hawkins had already communicated roughly what these numbers would be to the appellant in the appellant's mid-year performance appraisal, in the June 8, 2020 meeting pertaining

> Final daily average of pending prescriptions processed for FY21: 134/day
>
> Exceptional: >147/day
>
> Fully Successful: 147-121/day
>
> Unsuccessful <121/day

IAF, Tab 28, p. 223. Hawkins determined the appellant processed 76 pending prescriptions per day during fiscal year 2021. *Id.*

Hawkins also rated the appellant unsuccessful in the critical element of Prescription Processing Qualitative Standards due to his failure to meet the second standard under that element for Pending Errors, which stated as follows:

> Verifies provider orders accurately without inappropriate or confusing directions, dosing or quantities, critical drug-drug interactions, significant duplicate drug therapy, non-formulary or restricted drugs without appropriate approval, flagging, or note, drug-allergy interactions, medication orders for an inappropriate indication, inappropriate dosing based on renal function, unapproved abbreviations, inappropriate provider comments, inconsistence between quantity and days' supply.
>
> Exceptional error rate: <0.3%
>
> Fully successful error rate: 03-0.6%
>
> Unsuccessful error rate: >0.6%

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to the appellant's performance and the potential PIP, in the PIP itself, and in biweekly emails sent during the PIP. IAF, Tab 28, pp. 216-223; Tab 29, pp. 81-92.

IAF, Tab 28, p. 217. Hawkins determined the appellant's error rate was 0.72%. IAF, Tab 28, p. 223.

By the time of the appellant's midyear performance appraisal in fiscal year 2021, Hawkins determined the appellant was failing the "processes pending prescriptions" metric. HR-4, Hawkins testimony; IAF, Tab 28, p. 223. At that time, the appellant had processed an average of 73 pending prescriptions per day. *Id.*

Hawkins determined that, because the appellant was failing a performance standard, the appropriate course of action was to place the appellant on a PIP. HR-4, Hawkins testimony. Hawkins assessed a PIP was appropriate based, in part, on his review of the master collective bargaining agreement, which provides:

> If the supervisor determines that the employee is not meeting the standards of his/her critical element(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and local union representative, a written PIP. The PIP will identify the employee's specific performance deficiencies, the successful level of performance, the action(s) that must be taken by the employee to improve to the successful level of performance, the methods that will be employed to measure the improvement, and any provisions for counseling, training, or other appropriate assistance. In addition to a review of the employee's work products, the PIP will be tailored to the specific needs of the employee and may include additional instructions,

> counseling, assignment of a mentor, or other assistance as appropriate. For example, if the employee is unable to meet the critical element due to lack of organizational skills, the resulting PIP might include training on time management. If the performance deficiency is caused by circumstances beyond the employee's control, the supervisor should consider means of addressing the deficiency using other than a PIP. The parties agree that placing the employee on 100% review alone does to not constitute a PIP.

IAF, Tab 28, p. 158. Hawkins scheduled the meeting on June 8, 2021 with the appellant and his union representative to consult with the appellant and the union regarding a written PIP for the appellant. HR-4, Hawkins testimony. Hawkins did not believe the meeting was a particularly effective consultation because the union solely took the position the appellant should not be placed on a PIP, instead of consulting on how to proceed with the PIP; Hawkins perceived the union's role was not to determine whether the appellant should be placed on a PIP – which Hawkins understood to be his role – but instead to consult on the contents of the PIP. *Id.* Thus, while Hawkins believes he satisfied the requirement in the master agreement to consult with the union and the appellant on the PIP, he essentially developed the terms of the PIP on his own due to the lack of meaningful input by the union and the appellant. *Id.*

On June 11, 2021, Hawkins provided the appellant a copy of a PIP by email. HR-2/3, appellant testimony; HR-4, Hawkins testimony; IAF, Tab 28, pp. 232-233. The PIP provided in relevant part as follows:

1. This is to notify you that your performance of the duties of your position as Pharmacist, 660, GS-12, in the critical element(s) entitled Prescription Processing Quantitative Standards is unacceptable.

2. Specifically, since the beginning of the appraisal period, your performance, as reviewed against several of the performance standards for one of the critical elements of your position, has been as follows:

Critical Element: Prescription Processing Quantitative Standards

Standard 1: Standard 1: Processes pending prescriptions:

Unsuccessful: Processes: < 11 % of the daily average number of pending prescriptions processed

Fully Successful: Processes :+/- 10% of the daily average number of pending prescriptions processed

Exceptional: >11 % of daily average number of pending prescriptions processed

Midpoint Daily average 132/day.

Fully Successful(+/-10% of the daily average) 145.2-118.8 pending/day

Actual Performance: Pending completed/day: 73.

3. You will be given 90 days to demonstrate acceptable performance. During that time you will be expected to meet all standards of the critical elements in your performance plan

> at the fully successful level. The standards are inter-related so that failure to meet one of the standards within an element will result in failing the entire element.

IAF, Tab 28, p. 232. The PIP also provided Hawkins would meet with the appellant every two weeks during the PIP to discuss the appellant's work and assist the appellant in organizing and prioritizing it. *Id.* This arrangement is consistent with the master collective bargaining agreement, which provides:

> Ongoing communication between the supervisor and the employee during the PIP period is essential; accordingly, the supervisor shall meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period. The parties may agree to a different frequency of feedback. The feedback will be documented in writing, with a copy provided to the employee. If requested by the employee, local union representation shall be allowed at the weekly meeting.

IAF, Tab 28, p. 158.

During the PIP, the appellant refused to meet with Hawkins regarding his performance. HR-2/3, appellant testimony; HR-4, Hawkins testimony. The appellant took the position the PIP violated agency policy, and he would not be required to participate in violation of such policy. HR-2/3, appellant testimony. He perceived that, before the agency could place him on a PIP, both he and the union had to agree to the PIP; here, because neither the appellant nor the union

had agreed to the PIP, it was, essentially, *ultra vires* and impermissible. *Id.*

Nonetheless, throughout the PIP, Hawkins emailed the appellant on a biweekly basis, setting forth the reason for the failure to meet in person to discuss the appellant's performance, setting forth the applicable performance standard, providing the appellant's most recent performance on that standard, and reminding the appellant he was free to discuss his performance with Hawkins at any time. IAF, Tab 28, pp. 225-231. The appellant asked Hawkins to cease sending these emails. HR-2/3, appellant testimony. When Hawkins continued to send the biweekly emails consistent with the PIP and the master collective bargaining agreement, the appellant told Hawkins he viewed his decision to continue sending the emails to be harassment and reprisal. HR-2/3, appellant testimony.

After considering all of the evidence in the record, I find the agency presented highly compelling and credible evidence that, during the period of time at issue, the appellant's performance did not meet the applicable performance standards. The appellant was unsuccessful in critical elements that were measured utilizing clear numerical formulas, which were applied to all outpatient pharmacists in a consistent manner. The record also reflects that, while the appellant frequently failed to meet certain critical elements (i.e., the elements pertaining to processing pending prescriptions), the overwhelming majority of other outpatient pharmacists routinely met these standards. IAF, Tab 28, p. 205; HR-2, Tarman testimony; HR-4, Hawkins testimony.

The appellant raised a number of arguments regarding the agency's assessment of his performance. I address his main such arguments here.

First, the appellant argued the performance standards themselves were not appropriate, arguing that the standards were not equitable, that the Office of Personnel Management (OPM) had not approved the standards as applied to him, and that the agency was assessing outpatient pharmacists on an impermissible metric. HR-5, appellant closing statement. I address these arguments here.

Throughout the period at issue in this appeal, the appellant expressed to management officials that he disagreed with the standards. On January 7, 2021, the appellant emailed Hawkins with the following concerns regarding the standard applicable to processing pending prescriptions:

> The above standard, did not take into account that pending prescriptions has been outsourced and some Pharmacists are giving undue advantage of working from home encountering no distractions such as phone calls or coving of lunches and thereby ramping up and processing high prescription numbers than others who are not given that opportunity. Furthermore, the outsourced or remotely working pharmacists were instructed to leave problem prescriptions and those working from home tend to skim through the queue and skip problem orders leaving the problems prescriptions for the pharmacists inhouse.

> This disparity also should be factored in to be fair, equitable and acceptable, therefore the <11% of daily average number of pending prescription processed is skewed and gives some pharmacists undue advantage over others.

IAF, Tab 29, p. 31. Tarman and Patel were also aware the appellant had made these or similar concerns about the performance standards known. HR-2, Tarman testimony; HR-3, Patel testimony. The performance standards were not altered in any way as a result of the appellant's identified concerns. HR-4, Hawkins testimony.

In April 2021, when Hawkins approached the appellant to sign his mid-year performance assessment, the appellant refused to sign the document unless Hawkins addressed[11] the appellant's concerns with the standards. HR-2/3, appellant testimony. Hawkins did not alter the standards, but instead notated that the appellant refused to sign the document.[12] HR-4, Hawkins testimony.

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[11] Hawkins had responded to the appellant's concerns and explained why the standards were fair and fairly applied. HR-4, Hawkins testimony. Thus, the appellant appears to be assuming "addressing" his concerns meant changing the standards applicable to him, and not merely responding to his concerns.

[12] The appellant believes Hawkins' notation was incorrect. HR-2/3, appellant testimony. He does not believe he refused to sign the document, only that he would not sign the document until the standards were changed. *Id.* I consider the appellant's decision not to acknowledge receipt of the mid-year performance assessment that Hawkins provided him – unless Hawkins altered the standard – to be a refusal to sign to acknowledge

In short, the appellant expressed – repeatedly and to multiple parties – that he did not agree with the metric set to assess successful performance of the processing pending prescription metric. The agency nonetheless did not alter the standard in any way, and never expressed to the appellant the standard was being changed to address the appellant's concerns.

I considered the appellant's argument, but do not find it lessens the strength of the agency's evidence in support of the personnel actions at issue here. I find quite credible and reasonable the agency's response to the appellant's concerns with the performance standards. The great majority of people were meeting the performance standards at the time, which led to a collective belief the performance plans were straightforward and easily attainable. HR-2, Tarman testimony. The outsourced processing of pending prescriptions did not negatively impact the appellant's ability (or the ability of any other outpatient pharmacist) to meet the pending prescription element because the average used to evaluate outpatient pharmacist prescription processing was based on the number of prescriptions that group processed, not including the amount processed by the outsourced pharmacists; as a result, the outsourcing assisted the agency in meeting its overall need to process pending prescriptions, but did not affect the appellant's performance metrics. HR-4, Hawkins testimony. Similarly, if outpatient pharmacists or those working solely on processing pending prescriptions leave behind the more challenging prescriptions for processing, all of the outpatient pharmacists working "in house" that day are left with the same assortment

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receipt. Thus, Hawkins' notation was appropriate and accurate under the circumstances.

of pending prescriptions to be processed; given that the overwhelming majority of outpatient pharmacists were "in house" on any given day, this is not a specific impediment to the appellant, and other pharmacists were not impeded by this in meeting their own performance metrics. *Id.* Finally, I find compelling Hawkins' assessment that non-teleworking pharmacists had the same opportunities as teleworking pharmacists to process pending prescriptions because they had the same rotations as the teleworking pharmacists. *Id.* In addition, as I describe above, the evidence reflects teleworking pharmacists were often called into the facility – and pulled from pending rotations – in precisely the same manner as non-teleworking pharmacists.

I do not doubt the appellant genuinely believes the performance standards are unfair and unreasonable, likely because the appellant has not ever been able to meet this standard during his time working at the Las Vegas facility, regardless of whether there was outsourcing or teleworking. Comparing the appellant's testimony to that of the other witnesses, I surmise the appellant is not able to meet the processing pending prescription metric because the appellant relies almost exclusively on the pending rotations to perform this task. All of the witnesses agree that individuals assigned primarily to process pending prescriptions on any given day will process more prescriptions than pharmacists assigned another primary responsibility. However, the consensus – except for the appellant – is that processing pending prescriptions is a secondary duty in all rotations; utilizing downtime in any rotation to process such prescriptions is a part of the job and how all the other outpatient pharmacists meet

the performance metric at issue. HR-1, Kim testimony; HR-2, J.P. testimony, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony. The rotation schedule throughout the applicable period echoes this expectation, explaining "All pharmacists must do pending! 60 pendings/hr, 4 PADRs/hr OR Combo of both".[13] *See* IAF, Tab 10, p. 85. Despite the appellant's inability to meet the standard, I do not find the standard itself unreasonable or unfair, particularly given the overwhelming evidence other outpatient pharmacists routinely meet the standard.

The appellant also argued the performance standards are improper because the agency did not prove that OPM approved them. HR-5, appellant closing statement. When an agency takes a personnel action against an employee for unacceptable performance under 5 U.S.C. § 4303, the agency must prove, among other matters, that the agency had a performance appraisal system approved by OPM. *See Santos v. National Aeronautics & Space Administration*, 990 F.3d 1355 (Fed. Cir. 2021). Here, the agency did not take an action against the appellant under chapter 43. As a result, the agency need not prove OPM approved its performance evaluation system. Regardless, in chapter 43 actions, the agency is required to prove OPM approved its performance appraisal *system*, not

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[13] This statement is present on the bottom of the rotation schedules the appellant placed into the record and on which he based the majority of his arguments in this appeal. *See* IAF, Tab 10, pp. 85-96. However, during the hearing, when this statement was mentioned and identified on the document, the appellant appeared to be reading the statement for the first time, and asked questions about it as if both the statement and the expectation were new to him. HR-4, Hawkins testimony.

the specific critical elements, performance standards, and metrics to be applied to a specific position at a specific location. Here, the appellant did not argue or present evidence that the performance management system was not approved by OPM, but instead argued that, when the agency set or changed the specific metrics to be applied to him as an outpatient pharmacist, none of the management officials at VASNHS contacted OPM for their approval. The appellant is factually correct; no one at VASNHS contacted OPM regarding the appellant's performance standards because OPM plays no role in setting or approving the specific performance standards applied to individual employees.

The appellant also alleged the agency was improperly considering errors flagged by the agency's CMOP in assessing outpatient pharmacist performance. R.N. testified that, at some time in the past, OMI learned the agency was using errors as part of performance management, and advised the agency not to do that. HR-1, R.N. testimony. She further testified that any error that affects the patient is supposed to be reported electronically to ensure process changes going forward. *Id.* She noted that, despite this, the agency uses this metric to assess all pharmacists and has been doing so for years. *Id.* The appellant testified that processing errors are supposed to be reported through the agency's Joint Patent Safety Reporting (JPSR), and reports in that system are not allowed to be used punitively under applicable guidelines. HR-2/3, appellant testimony. Both Tarman and Patel testified that no one had ever told them they were not allowed to use CMOP errors as part of pharmacist

evaluations. HR-2, Tarman testimony; HR-3, Patel testimony.

The appellant's argument – and R.N.'s understanding – conflates two different type of "errors." Agency employees are encouraged to make patient safety reports in JPSR, and reports there are to be used to improve agency processes and employee actions to ensure patient safety in the future. However, the CMOP errors at issue here are not patient safety errors reported in JPSR. HR-1, Kim testimony; HR-3, Patel testimony; HR-4, Hawkins testimony. CMOP errors occur when, after an outpatient pharmacist processes a pending prescription, the CMOP identifies an error in the prescription, including "inappropriate or confusing directions, dosing or quantities, critical drug-drug interactions, significant duplicate drug therapy, non-formulary or restricted drugs without appropriate approval, flagging, or note, drug-allergy interactions, medication orders for an inappropriate indication, inappropriate dosing based on renal function, unapproved abbreviations, inappropriate provider comments, inconsistence between quantity and days' supply." *See* IAF, Tab 28, p. 217. In this instance, the error was identified in advance of the prescription being sent to a patient, and was flagged as a routine part of the agency's prescription processes. HR-4, Hawkins testimony. These errors are not reported in JPSR, but instead are returned to the outpatient pharmacists for correction and re-processing. HR-3, Patel testimony. Thus, the agency is not using JPSR data to assess the performance of outpatient pharmacists – which is what R.N. and the appellant contend is not permissible – but is instead utilizing information obtained through its routine double-checking processes

to identify where outpatient pharmacists have made errors. Accordingly, I do not find the agency is impermissibly using JPSR error reporting to assess outpatient pharmacist performance, and I see no basis to find the agency's use of CMOP errors in performance assessment improper.

After considering the appellant's arguments about the appropriateness of the standards, I find the standards the agency applied to the appellant were reasonable and appropriate. I find little evidence to suggest any portion of the standards applied to the appellant in these personnel actions was improper or lacked necessary approvals.

The appellant also made numerous arguments about the agency's assessment of his performance in the personnel actions at issue, including arguments pertaining to the number of prior authorization drug requests (PADRs) he was required to work and the agency's assessment of his CMOP errors.

The appellant pointed out that, in fiscal year 2020, he completed the highest number of PADRs of any outpatient pharmacists, and far more than the pharmacist who completed the highest number of pending prescriptions in that year. HR-2/3, appellant testimony. He provided similar data for his performance in fiscal year 2021. *Id.* In essence, the appellant argued he was performing other tasks instead of processing pending prescriptions, which the agency did not take into account in assessing his performance.

I considered the appellant's argument in this regard, but do not find it compelling evidence the agency mis-assessed the appellant's performance on the provided metrics. The performance standards the

agency applies to outpatient pharmacists measure performance on multiple aspects of the outpatient pharmacist position, and the agency's rotation schedule is designed to spread the performance of the many duties of the position. As a result, I find the performance management system indeed took into account the appellant's performance on tasks other than processing pending prescriptions and CMOP errors, and the natural differences between each pharmacist's total of pending prescriptions and PADRs does not call into question the overall assessment. Tellingly, in both fiscal years 2020 and 2021, the agency rated the appellant fully successful and exceptional in some of his performance elements, which reflects that his quality performance in some metrics was considered. IAF, Tab 28, pp. 127-133, 216-223.

To the extent the appellant was arguing that, because of the high number of PADRs he was assigned, he was unable to process sufficient pending prescriptions, I find the evidence does not support that conclusion. The appellant submitted evidence reflecting listings of PADRs he processed in fiscal year 2021. IAF, Tab 33. However, Hawkins testified compellingly that most of the PADRs reflected on the appellant's list were "VISN [veterans integrated service network] PADRs" where the processing pharmacist is merely putting in the order for a PADR already processed by the VISN, which Hawkins assessed requires only slightly longer than processing a pending prescription and far less than processing a normal PADR. HR-4, Hawkins testimony. Thus, while the agency sets a general standard of processing 4 PADRs per hour (i.e., about 15 minutes each), the VISN PADRs took far less than 15 minutes to process, and the appellant's high

number of VISN PADRs was not an unreasonable amount of work to perform. *Id.* Accordingly, I do not see how the appellant's claim to having processed an unusual number of PADRs during fiscal year 2021 lessens the strength of the agency's evidence supporting its assessment the appellant was performing unacceptably.

I addressed above the appellant's challenge to the use of CMOP errors as a metric in his performance appraisal in general. The appellant also argued the agency incorrectly assessed his actual CMOP error rate in assessing his performance in fiscal year 2021, which resulted in what should have been fully successful rating on the applicable element being rated unsuccessful. HR-2/3, appellant testimony; HR-5, appellant closing statement.

For fiscal year 2021, the agency determined the appellant had 108 CMOP errors, which amounted to an error rate of 0.72%. IAF, Tab 28, pp. 205, 220. Because his error rate was greater than 0.6%, the appellant was rated unsuccessful on the critical element of prescription processing qualitative standards. *Id.* As calculated by the agency, the appellant's error rate was significantly higher than the error rate of any of the other outpatient pharmacists. IAF, Tab 28, p. 205.

The appellant testified that, by his own assessment, he had only 45 possible CMOP errors in fiscal year 2021. HR-2/3, appellant testimony. In questioning witnesses about this portion of his performance evaluation, the appellant referenced a self-assessment that set forth a reduced number of possible errors. *See, e.g.*, HR-2, Tarman testimony. However, after carefully reviewing the record, I did not see – nor did the appellant identify – a self-assessment document from the

appellant that sets forth his own evaluation of the 108 CMOP errors charged to him in fiscal year 2021. Nor did the appellant provide any additional evidence setting forth how he personally determined that 63 of the CMOP errors charged to him were not errors.

Furthermore, the appellant did not challenge the accuracy of these errors when he received notice of them during the fiscal year. HR-4, Hawkins testimony. Hawkins encouraged outpatient pharmacists to review their charged errors on a quarterly basis, and contest those which the pharmacist believed were not errors; he then reviewed the pharmacist's explanation and decided whether the matter should be counted as an error. *Id.* Other outpatient pharmacists challenged charged errors in this manner, and Hawkins removed matters originally considered errors from their error rate. HR-1, R.N. testimony; HR-2, J.P. testimony; HR-4, Hawkins testimony. The appellant did not do so.

The appellant testified that Tarman had determined the CMOP error issue was not about the appellant's performance, but instead a system error, citing to Tarman's response to the step 2 grievance of the performance evaluation. *See* HR-3, appellant testimony; IAF, Tab 32, p. 23. The cited portion of the grievance response was Tarman summarizing the appellant's argument. *See* IAF, Tab 32, p. 23. Tarman did not find the appellant's CMOP error rate was a system error, but instead found the appellant's CMOP percent error rate was appropriately identified as unsatisfactory for the year. IAF, Tab 32, pp. 23-24; HR-2, Tarman testimony.

I understand the appellant perceived the agency miscalculated his CMOP reject error rate for fiscal year 2021 because the agency counted "errors" the

appellant did not think were errors. It is entirely possible certain CMOP rejects attributed to the appellant as errors were not actually errors; other outpatient pharmacists testified that happened all the time.[14] However, the appellant did not utilize the mechanisms available to him – and used by other outpatient pharmacists – to raise these concerns with Hawkins when alerted to the possible error. Nor did the appellant establish in this appeal that most of his counted errors were not errors at all. I do not find this argument impacts my assessment of the strength of the agency's evidence in support of its fiscal year 2021 performance evaluation of the appellant.

The appellant also contended Hawkins and other management officials refused to consider the appellant's self-assessment as part of his fiscal year 2021 performance appraisal, in violation of agency policy. Hawkins testified the appellant included a self-assessment as part of the e-performance system, which Hawkins considered. HR-4, Hawkins testimony. He attested the appellant's self-assessment was a reiteration of the appellant's prior arguments about the performance standards and how he should be rated fully successful. *Id.*

The appellant testified the agency refused to consider his self-assessment, which was a chart he compiled showing what rotation he was assigned to

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[14] CMOP errors are identified by pharmacists at the CMOP, who may not know which outpatient pharmacist processed the "error" they flagged. HR-4, Hawkins testimony. The appellant does not know any of these CMOP pharmacists personally, and there is no reason to believe any of these individuals are aware the appellant engaged in protected activity. *See* HR-2/3, appellant testimony.

and what work he actually performed each day from June 8, 2021 to September 30, 2021. HR-2/3, appellant testimony. Hawkins testified credibly he had not seen this "self-assessment" document before, and that he did not refuse to allow the appellant to provide a self-assessment as part of the evaluation process. HR-4, Hawkins testimony. I find it more likely true than not true that no agency official precluded the appellant from providing a self-assessment as part of the performance evaluation process in fiscal year 2021. I also find it more likely true than not true that the appellant did not provide the agency with a copy of the chart he referred to in this appeal as his "self-assessment" as part of anything he did submit; the document does not actually address any of the performance metrics on which the appellant was assessed or provide a cogent explanation for his failure to meet any of those metrics. It seems far more likely the appellant prepared and maintained this document during the period he was on a PIP, either for his own records or as part of the ongoing grievance pertaining to his claim the agency engaged in disparate scheduling practices. Regardless, even if the appellant had presented this chart regarding his work activities from June 8, 2021 to September 30, 2021 as part of a self-assessment in the performance appraisal process, I see nothing in the document that would have changed the assessment as to whether the appellant met the clearly established performance metrics. HR-2/3, appellant testimony; IAF, Tab 11, pp. 36-39.

Finally, the appellant argued he failed to meet the standards based on factors beyond his control. This argument is in some ways an extension of his disagreement with the standards. Essentially, the appel-

lant believed he is not responsible for his failure to meet the processing pending prescriptions performance standard because his failure is the direct result of the agency's scheduling practices, and the agency's failure to assign him sufficient pending shifts. The master collective bargaining agreement provides that: "If the performance deficiency is caused by circumstances beyond the employee's control, the supervisor should consider means of addressing the deficiency using other than a PIP." IAF, Tab 28, p. 158. As a result, the appellant believes both he should not have been assessed to be unsuccessful and the agency should not have placed him on a PIP because his failures are the result of the agency's rotation schedule and therefore beyond the appellant's control.

I explain above my finding that the schedules in the record reflect that the appellant and all other outpatient pharmacists were routinely pulled from rotations where the primary assignment was to process pending prescriptions to meet other pharmacy needs. The credible evidence in the record demonstrates this occurred to all outpatient pharmacists, and not only the appellant. Given that all but one other outpatient pharmacist was nonetheless able to meet the fully successful performance level for processing pending prescriptions despite being consistently pulled from rotations where processing such prescriptions was the primary assignment, I find the rotation schedule – whether as printed or as played out in practice – was not the reason the appellant failed to process sufficient pending prescriptions to be fully successful in that performance element. For the same reason, I do not find the agency failed to assign the appellant sufficient shifts where his primary responsibility was to process

pending prescriptions to enable him to meet the applicable metric at the fully successful level.

Relatedly, the appellant argued that, because his performance was actually a result of how the agency scheduled his pending shifts, the schedule itself was the issue; because no one other than Kim or Hawkins approved the schedule under which the appellant worked in fiscal years 2020 and 2021, no one can rely upon that schedule in taking action against the appellant. I find this argument unpersuasive for many reasons. First, as explained above, I do not find the rotation schedule was the reason the appellant did not meet the performance metric pertaining to processing pending prescriptions, and I also do not find the evidence reflects the rotation schedule was inequitable or unfair to the appellant. As a result, I find the appellant has not shown the schedule itself is the issue with his performance.

Regardless, an agency official need not have approved a schedule to take action based on performance failings or misconduct that occurred on that schedule. The appellant pointed to no credible evidence that any law, rule, or regulation would require an agency official to have approved a schedule to take action against an employee for performance or conduct that resulted from such schedule, and I know of none. Nor has the appellant provided any credible evidence any agency policy or procedure required this. In response to questions on this issue, Hawkins testified no one else has the authority to discipline the outpatient pharmacists. HR-4, Hawkins testimony. I understand Hawkins' testimony to mean that, as the supervisor for outpatient pharmacists, he alone had the authority to discipline those employees. However, if Hawkins

meant that he was the only person who could discipline the pharmacists based on the schedule because he is the only person who approved the schedule, I do not find any other evidence in the record to corroborate his understanding in this regard. The other supervisors and managers the appellant questioned about this matter were generally confused by the appellant's question, and did not affirm that not approving the schedule would limit the ability to take action against an employee based on the schedule. HR-2, Tarman testimony; HR-3, Patel testimony.

Ultimately, I find the appellant's argument that no one at the agency who did not specifically approve the outpatient pharmacists' schedule is permitted to address performance or conduct issues with employees when the employee's defense to the action is based on the schedule is so farfetched as to render it illogical. Numerous examples demonstrate the flawed logic of the argument. In the schedule context, an agency manager is not required to have personally approved an employee's schedule to discipline the employee for a failure to report to work as scheduled; the agency would indeed be required to prove the individual was scheduled to work, but not that the proposing or deciding official was the person who scheduled the employee or approved the schedule. In a context outside of scheduling, I consider it an analogous argument to say that an agency official could not discipline an employee for failing to properly complete an assignment if that official did not personally assign the employee the assignment; there is no requirement of personal factual involvement in this regard before an agency official can take action against an employee.

The appellant made two additional specific arguments regarding the agency's failure to allow him to perform rotations where processing pending prescriptions was his primary responsibility. He argued Hawkins inappropriately denied the appellant's request (and the union's suggestion) at the June 8, 2021 meeting that the appellant be allowed to have additional pending rotations, and he argued Hawkins improperly added responsibilities to rotation 16 in September 2021 right when the appellant was to be assigned to that rotation, which impeded the appellant's ability to process pending prescriptions. I consider these arguments in turn.

During the June 8, 2021 meeting, the appellant and the union asked Hawkins to allow the appellant to improve his performance by simply assigning him to process pending prescriptions as a primary responsibility. HR-1, Ward-Smith testimony; HR-2/3, appellant testimony; HR-4, Hawkins testimony. Hawkins denied that request. HR-2/3, appellant testimony; HR-4, Hawkins testimony. The appellant testified Hawkins said it would be unfair to the other employees, but Hawkins was not certain he said that. *Id.* If, as the appellant argued, the reason the appellant was not meeting the standard for processing pending prescriptions was because the agency had not assigned him any pending shifts, while allowing other outpatient pharmacists to have many such shifts, the appellant's proposed solution may indeed have been a fair and reasonable approach. However, as explained above, the evidence reflects the appellant was treated consistently with all other outpatient pharmacists with regards to pending shifts, and was still failing to meet the applicable metric. As a result, allowing the appellant to work additional pending shifts because he was

failing would indeed have been unfair to other outpatient pharmacists who were required to meet their pending prescription numbers by processing pending prescriptions on a continuous basis, as the agency expected; it would also have required other outpatient pharmacists to perform and cover other, perhaps less desirable, rotations solely to allow the appellant greater opportunity to process pending prescriptions uninterrupted than his colleagues were allowed. I do not find Hawkins' unwillingness to pull the appellant out of the established rotation schedule to allow him more opportunities to process pending prescriptions than his colleagues was somehow improper or impacted the strength of the agency's evidence in support of its assessment of his performance.

Finally, I consider whether Hawkins' decision in September 2021 to change the specific tasks assigned to be performed in rotation 16 inappropriately impeded the appellant's ability to meet the processing pending prescriptions element of his performance appraisal. On August 26, 2021, Hawkins announced changes to the duties assigned to rotations 4 and 16. IAF, Tab 30, p. 66. Starting September 12, 2021, the duties of rotation 16, which had previously been "PADR5/Lobby Close & Check after 4:30pm," changed to the following: "PADRs /Pendings > 3 days old/Flagged Orders/Lobby Close & Check after 4:30pm". *See* IAF, Tab 10, p. 96; Tab 16, pp. 15-16. The appellant contested the change to the rotation occurring immediately before he was assigned to the rotation:

> Secondly and per the following communication from you which begins with my rotation week on 9/12/2021, you changed rotation 16 from "potential pending rotation" to non-

> potential pending rotation by including flagged orders and Pendings > 3 days that makes it practically impossible to process pending prescriptions because flagged order processing requires contacting providers individually, cumbersome and takes a lot of time?
>
> Please, note that I reviewed this duty rotation for greater than 1 year and it has never been changed except for tour of duty change from 8pm to 6:30pm and minor component (SAIL) delisting. This change also is not fair and equitable because it is introduced at the tail end of the evaluation period where my pending numbers is an issue.

IAF, Tab 16, p. 15. Hawkins explained the change to the appellant at the time as follows:

> Station 16 will now handle the Pendings >3 days/Flagged Orders that Station 8 used to handle. This is in no way meant to be unfair to anyone. I made the change in consideration of multiple employee suggestions. The request was that the pair who work on Pendings>3 days/Flagged Orders would have better communication and greater efficiency if they were stationed next to each other physically and could communicate face to face. The duty; Pendings >3 days/Flagged Orders literally states you will be processing pendings. I do not know how you would consider this a "non-potential pending rotation."

Id.

I find highly credible Hawkins' explanation that he changed the duties of rotation 16 to meet the needs of the pharmacy service, and not to impact the appellant's ability to meet his performance metrics.[15] HR-4, Hawkins testimony. While the appellant perceived Hawkins' actions to be directed at him personally, I find it far more likely that – similar to how pharmacists were routinely pulled to cover other rotations – Hawkins was consistently attempting to utilize all of the outpatient pharmacists within his department to meet the needs of the organization.

In conclusion, after considering all of the evidence in the record, I find the agency presented exceedingly strong evidence in support of its decision to rate the appellant unsuccessful in fiscal years 2020 and 2021, and place the appellant on a PIP in 2021. During that period, the appellant failed to meet clear, objective, numerical performance metrics, which his colleagues were able to meet consistently. While the appellant attributes his failure to meet this metric to agency actions, the evidence does not support the appellant's claims. Instead, the evidence reflects the appellant was given similar opportunities to meet the performance standards as all other outpatient pharmacists, but nonetheless failed to meet the standards. I find this factor weighs heavily in favor of the agency.

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[15] By the time the rotation duties had changed, the appellant had already concluded – and failed – the PIP. HR-4, Hawkins testimony; IAF, Tab 28, pp. 225. In addition, the appellant's average processing of pending prescriptions was so low by September 16, 2021, that it may have been numerically impossible for the appellant to meet that performance metric even if he only processed pending prescriptions for the final two weeks of the fiscal year.

Existence and strength of motive to retaliate

I next consider the existence and strength of any motive to retaliate by the management officials involved in the personnel actions at issue. I begin by considering what the management officials with a role in the personnel actions at issue actually knew about the appellant's protected activity.

Kim assessed the appellant's performance for fiscal year 2020, and Patel was the approving official on that assessment. IAF, Tab 28, pp. 133. In fiscal year 2021, Hawkins was the rater, and McKinnon served as the approving official. IAF, Tab 28, pp. 216-223. And Hawkins placed the appellant on the PIP. HR-4, Hawkins testimony; IAF, Tab 28, pp. 232-233.

Kim testified she knew about the OMI investigation, and the appellant consistently referenced he was filing complaints. HR-1, Kim testimony. She did not initially know what OSC was, but she "googled it" after the appellant mentioned it. *Id.* She was never interviewed by OSC, nor did she have any communications with OSC at all. *Id.* Finally, she did not know anything specific about the appellant's complaints. *Id.*

Patel similarly testified she was not aware of any specific "cases" the appellant filed against the agency, but admitted to receiving emails where the appellant's OSC complaint or his intent to file one was discussed. HR-3, Patel testimony. She did not know what OSC stood for, and did no research to figure out what it was. *Id.* Patel had been interviewed for many things, but could not recall if OSC was one of them; she explained she appears for scheduled interviews and answers the questions without asking who is actually investigating. *Id.*

Hawkins was aware the appellant had filed a complaint because the appellant, who was Hawkins' co-worker at the time, told Hawkins he was working on something to get things fixed. HR-4, Hawkins testimony. Then, after Hawkins issued the appellant a PIP, the appellant informed Hawkins he had filed a complaint with OSC regarding that and other matters. IAF, Tab 32, p. 5.

McKinnon was also copied on the appellant's July 12, 2021 email where he informed everyone he had filed an OSC case, and noted that, if the PIP was not withdrawn by the next day, he may "chose to file a retaliation case against you." *Id.* However, McKinnon testified she did not know what OSC was, and learned about the complaints due to her involvement with this case. HR-5, McKinnon testimony.

At various times during the appeal, the appellant has taken the position that numerous management officials actually drove the reprisal against him, with the appellant's theory changing over time. He pointed to Tarman as a main actor in the process. HR-2/3, appellant testimony; HR-5, appellant closing statement. He also testified that all of Hawkins' actions were because Patel required Hawkins to take action against the appellant and because Kim, who was driven by retaliation against the appellant, trained Hawkins. *Id.* The appellant also pointed to Isani as supporting reprisal. *Id.* Finally, the appellant claimed Kendell Gamblin, Employee and Labor Relations Specialist, was an integral part of the reprisal because he drafted

the PIP and was involved in other personnel actions against him.[16] *Id.*

I find little evidence to suggest that Tarman or Isani played any role whatsoever in the appellant's performance appraisals in fiscal years 2020 and 2021, or on the appellant being placed on a PIP. I also find little evidence Patel played any role in the fiscal year 2021 performance appraisal or placing the appellant on a PIP in 2021. The evidence regarding who actually assessed the appellant's performance (and how they did so), and who actually decided to place the appellant on a PIP, is quite clear and highly credible. The appellant's allegations of higher-level involvement in these matters amount to nothing more than his own vague allegations of deeply rooted retaliatory motive and conspiracy, which I do not find credible or persuasive. In some instances, the appellant complained about his performance appraisals and the PIP to these higher-level officials, but much to the appellant's chagrin, the officials did not insert themselves into the personnel action, instead referring the appellant back to the appropriate officials to address the issue or not responding.

To ensure a complete record, I nonetheless reviewed and considered the motive for reprisal of these additional individuals about whom the appellant

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[16] The record reflects Gamblin provided Hawkins advice during the PIP process, including providing Hawkins a template of a PIP document and informing Hawkins of his responsibilities regarding the process. HR-4, Hawkins testimony. However, I find compelling Hawkins' unequivocal testimony that he decided to place the appellant on a PIP. HR-4, Hawkins testimony. I find little evidence to support the notion Hawkins' own decision was actually influenced by Gamblin substantively.

claimed retaliatory involvement. Tarman was interviewed as part of the OMI investigation, was briefed on the results of the investigation, and was part of implementing the recommendations. HR-2, Tarman testimony. However, he testified he did not know the appellant initiated the complaint that brought OMI to investigate those matters. *Id.* Tarman stated he was not aware the appellant filed a complaint in March 2021, but noted the appellant always said he was going to file complaints with "a bunch of agencies." *Id.*

Isani credibly denied knowledge of the OMI investigation and report, or of any complaint by the appellant that led to the investigation. HR-5, Isani testimony. Isani expressed credible surprise that no one from his then-current service – Pain Medicine – was interviewed by OMI, given the subject matter of the complaint. *Id.* He also explained, with patience and clarity, that he was not aware of any OSC complaints by the appellant and would not have been, unless he was directly implicated or necessary to the subject matter, given the agency's practice of keeping OSC investigations close-hold and limited to those with a need to know. *Id.* While the appellant argued Isani's testimony in this regard was implausible, I find it entirely plausible that Isani would not have been made aware of the investigation, the report, or the implementation of the recommendations, given when these matters occurred, and given the scope of the findings and recommendations to a single unit within Isani's control that had its own internal management structure.

Gamblin was aware the appellant had filed OSC complaints in the past, and had been involved in agency response to those complaints. *See, e.g.*, IAF,

Tab 28, pp. 361-364; Tab 32, pp. 5-6. The appellant also routinely emailed Gamblin – or at least copied Gamblin – on emails where he asserted he had or would be filing an OSC complaint. *Id.*

In sum, I find that all of the agency officials who played a role in the personnel actions at issue (and all of the agency officials the appellant contends influenced those actions, except for Isani) were aware the appellant had filed or intended to file OSC complaints at some time.

The appellant argued the agency officials' collective "amnesia" about OSC is not credible. HR-5, appellant closing statement. I disagree both that the officials claimed amnesia about OSC and that their lack of knowledge about the appellant's complaints was not credible. All of the management officials at issue admitted the appellant referenced making complaints frequently in his emails to them, and thus all of these officials were indeed aware the appellant had made or intended to make complaints. But I also find highly credible Kim's description of the impact the appellant's repeated references to complaining actually had on her; she testified that it became "almost background noise" because it came up a lot during appraisals and in emails. HR-1, Kim testimony.

While the appellant filed multiple complaints with OSC, there is no evidence in the record that OSC ever contacted anyone at VASNHS. When the appellant's complaint to OSC regarding prescriptions was investigated, it was investigated by OMI, an internal agency organization, and not by OSC; none of the individuals who actually interviewed agency employees as part of that investigation was employed by OSC, and there is no evidence any of those

individuals notified the people they were interviewing that the original complaint was made to OSC. IAF, Tab 10, pp. 119-138.

None of the agency officials at issue here suffered any consequence as a result of any of the appellant's OSC complaints. The appellant's 2019 OSC complaint was referred to the agency for investigation, and the agency subsequently issued a report substantiating three of the appellant's allegations. IAF, Tab 10, pp. 118-138. The recommendations set forth in the report – and adopted and implemented at VASNHS – resulted in a change to the handling of specific types of mailed prescriptions that saved the agency money. HR-2, Tarman testimony. None of the findings identified specific wrongdoing by an individual; none of the recommendations included corrective or disciplinary action for any individual. IAF, Tab 10, pp. 118-138. Kim, Patel, and Tarman all testified no action was taken against them as a result of the OMI investigation; Hawkins and McKinnon were not in their supervisory roles at the time. HR-1, Kim testimony; HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; HR-5, McKinnon testimony; IAF, Tab 10, p. 138.

The remainder of the appellant's OSC complaints seem to not have been referred to the agency for investigation, nor does the record contain any agency or OSC findings with respect to these other complaints (other than the findings related to the appellant's OSC complaint which forms the basis of this appeal). As a result, I also find no evidence any agency official suffered a consequence with respect to any of the appellant's other ongoing OSC complaints.

I conclude the management officials at issue here had little motive to reprise against the appellant based on these complaints (other than the inherent motive to reprise against individuals who repeatedly identify actions as reprisal or "threaten" to complain, which I discuss below). The appellant contended all of the management officials have a significant motive to reprise against him based on the complaint that led to the 2019 OMI report as follows: the complaint challenged the closing of the clinic pharmacies and is ongoing; and when OSC decides the complaint, it will decide whether the agency must reopen the clinic pharmacies. Thus, according to the appellant, his complaint to OSC had the practical effect of removing the agency's decision-making authority about whether to operate the clinic pharmacies, and agency officials are aware of – and fear – this possible ultimate decision. I find little evidence to support this argument.

The appellant perceives his 2019 complaint directly challenges the agency's decision to close the clinic pharmacies. HR-2/3, appellant testimony. When OSC referred that complaint to the agency for investigation, the agency's OMI investigated and issued a report. IAF, Tab 10, pp. 118-138. However, OMI did not frame its investigation as one regarding the propriety of closing the clinic pharmacies, but instead identified specific allegations about the drug mailing system and provided specific recommendations regarding that system that the agency has adopted.[17] IAF, Tab 10,

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[17] The report recognized that the source of the appellant's concern with the prescription mailing system was the closing of the clinic pharmacies. *See* IAF, Tab 10, p. 128 ("The whistleblower indicated that because of the closing of pharmacy locations in 2016 at the four CBOCs, to consolidate pharmacy services in the

pp. 119-139. Thus, while I recognize the appellant intended for his complaint to be an indictment of the agency's decision to close the clinics, and force a referendum on that issue, the evidence in the record reflects neither OSC nor the agency understand that to be the issue.[18]

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main hospital. Veterans suffered due to issues with the mail order pharmacy system"). And the report provided background information on the shift from the clinic pharmacies to a consolidated pharmacy operation, along with the agency's reasons for the change. But OMI did not look specifically at whether the clinic pharmacy closure was somehow a violation of law or even poor decision making.

[18] In September 2020, the appellant responded to the OMI report. IAF, Tab 10, pp. 60-66. In addition to disputing the findings and characterizations within the OMI report, the appellant also made the following claims and arguments: agency managers since 2004 have abused their authority and obstructed justice, including inflating claimed purchase prices to justify the clinic closures, breaking into the appellant's locker, preventing the appellant from following a court order, and colluding with a judge to ridicule the appellant's character during a call because the appellant would not accept a settlement. *Id.* The appellant proposed the following actions:

1. Reopen at least 3 of the farthest primary care Clinic Pharmacies about 25-30 miles or more from the VA main Pharmacy, specifically Southeast, Southwest and Northeast Primary Care Pharmacies.
2. To offer 10 hour premium shift to both inpatient and outpatient pharmacies
3. If the pharmacies remain consolidated, Veterans should be paid travel time for picking up medications.
4. Supplemental investigation in order to show that VA expend significant amount of money through partial and reprint prescriptions replacement fills as presented

Furthermore, there is no credible evidence that, even if the complaint were indeed viewed as calling into question the decision to close the clinic pharmacies, OSC – as opposed to the agency – would decide whether to reopen those pharmacies. OSC referred the appellant's complaint to the agency, who investigated it and decided on its own recommendations to address the matter. The record contains no evidence OSC has the authority (or the desire) to order the agency to make different decisions about its pharmacy operations. Instead, OSC refers complaints to the agency for the agency to assess internally and report back its findings.[19]

> FOIA [Freedom of Information Act] documents attached as attachment 3.
>
> 5. The management found guilty of abuse of power and obstruction of justice to face the full weight of state and Federal law.

He testified that OSC assured him this complaint remains open and has not been decided. HR-2/3, appellant testimony. However, the record contains no evidence the additional matters the appellant sought to have investigated or the proposed actions he requested were sent to the agency for investigation, consideration, or action.

[19] OSC's own website describes its process as follows:

> Federal law establishes a unique process for disclosures made to OSC. This process is intended to protect the confidentiality of the whistleblower and ensure that the alleged wrongdoing is investigated and, where necessary, corrected. In brief, when a whistleblower disclosure is filed with OSC:
>
> The Special Counsel may require an agency head to investigate and report on the disclosure;

Put simply, the appellant's perception that OSC will ultimately decide whether the agency should undo an operational decision implemented in 2016 is not grounded in fact. The appellant's adamant and confident belief his complaint removed the agency's decision-making over its own operations is an example of the appellant's failure to understand the matters occurring around him. As relevant to the inquiry here, I find no evidence to support the appellant's argument that this ongoing OSC complaint has stoked significant retaliatory motive against him by agency officials who are concerned their capstone achievement of closing the outpatient pharmacies will be undone due to the appellant's complaints.

However, I recognize an inherent motive to reprise against an individual who complains about agency operations, who complains that agency actions are retaliatory, or who expresses an intent to file complaints about management officials if the official does not take a specific requested action. Here, the appellant consistently informed management officials

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> After the investigation, the Special Counsel sends the agency's report, the whistleblower's comments, and the Special Counsel's determination as to the completeness and apparent reasonableness of the agency report and any corrective action, to the President and congressional oversight committees; and
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> The information transmitted to the President is made public on OSC's website.
>
> OSC does not have independent investigative authority in these cases. However, Congress has given OSC an important oversight role in reviewing government investigations of potential wrongdoing.

See https://osc.gov/Services/Pages/DU.aspx.

either that he had filed a complaint with OSC or that he intended to do so. With respect to the PIP, after Hawkins issued the appellant the PIP, the appellant emailed Hawkins, McKinnon, Tarman, and Patel regarding his disagreement with Hawkins placing the appellant on a PIP, and stated:

> You all have been formally informed that I filed OSC case on 3/20/2021 which before OSC because of disparity in scheduling leading to unsuccessful performance appraisal rating, but you have continued to violate the law, VA rules and regulation including the AFGE master agreement. While it is your prerogative to do whatever you like, I advise that retaliation will not be welcomed.
>
> If by close of business tomorrow, the PIP is not withdrawn, I may chose to file a retail-ation case against you

IAF, Tab 32, p. 5. The appellant solely expressed his intent to exercise an available (and protected) complaint procedure. I nonetheless find that supervisors and managers whose actions are met with allegations of reprisal and statements of intent to have "cases" filed against them have an inherent motive to reprise against the employee making the statements. As a result, I find all of the management officials with a role in the personnel actions at issue here had some inherent motive to reprise against the appellant for his ongoing OSC complaints based on the appellant's own references to those complaints and to his perception the agency was reprising against him.

As to the majority of the management officials, I find this inherent motive existed, but was minimal.

However, with respect to Kim, I find she had a greater motive to reprise against the appellant for his repeated statements he intended to file OSC complaints. In the months immediately preceding her transfer to a different agency facility at the end of 2019, Kim believed the appellant was harassing her in the workplace based largely on his unprofessional tone and language in his communications with her. HR-1, Kim testimony. She raised the issue to her supervisors, who referred her to human resources to determine whether or how to file a complaint. HR-3, Patel testimony. Kim ultimately filed a complaint, which was investigated through a fact-finding investigation. HR-1, Kim testimony; IAF, Tab 28, p. 239. The investigators concluded the appellant "knowingly violated both the Prevention of Workplace Harassment (non-sexual and sexual) MCM-EEO-18-03 and Employee Conduct MCM 05-09-17 polices resulting in workplace harassment (non-sexual) and created a hostile work environment in the Pharmacy Service at VA Southern Nevada Healthcare System" referencing "a minimum of 16 emails." IAF, Tab 28, p. 239. The investigators recommended the appellant's removal, but the agency did not remove the appellant. *Id.*

At least some of the emails which Kim identified as harassing also included references to the appellant's intent to file OSC complaints. *See* IAF, Tab 28, p. 363. For example, in September 2020, the appellant complained about having been assigned certain matters he believed should not have been assigned to him; when the appellant was not satisfied with Kim's explanation of why the matters were assigned to him and how he could timely complete them, the appellant described Kim's actions as "continued harassment"

and wrote as follows: "I WILL DO MY BEST TO WORK ON ASSIGMNETS AS I HAVE ALREADY STARTED, but may be filing another EEOC and OSC complaint for your deliberate actions and attempt to subvert justice." *Id.* Kim forwarded this email to her supervisors and human resources with the following message:

> Please see continued threats and harassment from same employee. I have not heard back from anyone regarding this employee and his abusive and threatening behavior.
>
> Please address as his ongoing behavior is inappropriate.

IAF, Tab 28, p. 362.

In the emails Kim identified in her harassment complaint, the appellant exhibited unprofessional and disrespectful word choice and tone in his communications. *See* IAF, Tab 28, pp. 297-364. But, in discussing the emails, Kim referred to the appellant's intent to file complaints as "threats." I find the appellant's unprofessional tone and his accusations against Kim were often wrapped up with the appellant's notices to Kim he would be filing complaints against her. Under these circumstances, Kim's perception the appellant was harassing her was at least partly a perception his notices of future complaint filings were directed at her unprofessionally. In light of this, I find Kim had a greater motive to reprise against the appellant for his frequent references to filing OSC complaints than the other management officials.

I nonetheless do not find Kim's motive to reprise was significant. In her testimony, Kim differentiated her concern with the appellant's disrespectful tone

from his references to complaints filed (or to be filed). HR-1, Kim testimony. During this testimony, her demeanor was calm and poised; in general, she seemed unphased, even when she was fielding questions from the appellant that were accusatory in nature. These matters led me to believe that, even if she did view the appellant's repeated statements of intent to file OSC complaints as "threats," her real concern was the appellant's unprofessional tone, and her motive in initiating a harassment complaint was not retaliatory.

The appellant pointed to numerous matters he contended reflected a motive to reprise against him in these personnel actions. I address some of the matters not addressed elsewhere in the decision here.

The appellant pointed to the agency's refusal to allow him to have upper-level management review of his performance appraisal as reflective of retaliatory intent. The record reflects that, when an employee is rated unacceptable on a performance evaluation, the performance management system in use at the relevant time period required a higher-level approval of the appraisal automatically. HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony; IAF, Tab 28, pp. 127-133, 216-223. And the appellant received that higher level review of his unacceptable performance rating in both fiscal years 2020 and 2021. HR-3, Patel testimony; HR-5, McKinnon testimony; IAF, Tab 28, pp. 127-133, 216-223. While the appellant wanted a further review by an even-higher-level management official, the agency's processes did not provide for that, outside of the grievance process. HR-2, Tarman testimony; HR-3, Patel testimony; HR-4, Hawkins testimony. However, the appellant was able to – and did – grieve his performance appraisal. *See* IAF, Tab

28, pp. 173-174. I do not find the agency refusing to provide the appellant an additional level of management review over his performance appraisal, which was not contemplated in the agency's system, to be evidence of retaliatory intent under the circumstances.

The appellant also contended the agency's decision to place him on a PIP without the agreement of the union or the appellant, or without the input of the union as required, was evidence of retaliatory intent. As explained above, I find the agency was not required to obtain the agreement of either the union or the appellant before placing the appellant on a PIP. I also find Hawkins sought the union's input on the PIP through the meeting on June 8, 2021, meeting his obligations under the collective bargaining agreement. I do not find the process followed in deciding to issue – and then issuing – the appellant a PIP reflected retaliatory intent.

The appellant also interpreted as retaliatory Hawkins' refusal to allow the appellant to address his performance deficiency in processing pending prescriptions in the manner the appellant thought most appropriate: assigning the appellant to solely process pending prescriptions until he caught up. In the appellant's mind, assigning him to pending shifts would have resolved the issue, and Hawkins' refusal to allow this resolution reflected retaliatory intent. I disagree. All outpatient pharmacists rotated through different assigned stations, such that all outpatient pharmacists shared the burden of performing all of the assigned tasks. Removing the appellant from the rotation system and allowing him to dedicate his work time solely to one specific task would have improved the appellant's pending prescription numbers, but it would also have

meant the appellant was not performing the full range of the tasks assigned to incumbents of his position and he was not actually carrying his portion of the overall work of the department. Given that Hawkins' goal was to ensure that *all* of the needs of the outpatient pharmacy department were met, I do not find his decision to require the appellant to meet the performance standards assigned to all outpatient pharmacists and to perform all of the rotations while meeting them was inappropriate, unfair or retaliatory.

Next, the appellant argued Kim admitted to concealing evidence regarding the disparity in scheduling between outpatient pharmacists. Contrary to the appellant's assertion in this regard, Kim did not admit to concealing evidence during her testimony. She did admit that she continually updated the outpatient pharmacists' schedule because it was a living document that required changes when circumstances changed. HR-1, Kim testimony.

Underlying this contention is the appellant's claim that Kim's email on September 9, 2020 reflected Kim actively changing the outpatient pharmacists' schedules for that week to make it appear as though the appellant was not being required to cover two different rotations, when, in fact, he was. The record reflects that, due to the annual leave of another employee for at least a portion of that week, the appellant was required to perform certain duties that would otherwise have been assigned to a different rotation. IAF, Tab 28, pp. 407-409. Both Hawkins and Kim confirmed that was the case at the time. *Id.* The schedules show that the employee was first scheduled to be on leave, then not scheduled to be on leave, then again shown to be on leave for that week. IAF, Tab 28,

pp. 380-387. However, I find no evidence to support the appellant's argument that the change to that employee's leave dates – even if erroneous – somehow reflected an attempt to conceal evidence or retaliatory animus. Given that both Hawkins and Kim forthrightly explained the appellant was assigned to perform the work of both rotations that week (and why) when the appellant asked, the changes to the schedule that week were not "evidence" of a scheduling disparity, nor did the changes somehow support a false version of what the appellant was assigned to perform. Given the appellant's strong fixation on the schedules pertaining to this week of work as reflecting significant wrongdoing by Kim, I carefully examined all potential improper motivations for Kim's changes to the schedule, but found none of them plausible. Instead, I find the appellant misperceived the situation, which did not reflect concealing evidence or any animus against the appellant.

The appellant also argued that the timeline on which the agency investigated Kim's harassment complaint against him reflected retaliatory animus. When the agency receives a complaint of harassment, the complaint is directed to the EEO/Harassment officer, who will refer it to the appropriate party to initial a fact-finding; under agency policy, the fact-finding must be initiated within 3 days. HR-5, Isani testimony. Kim sent an email to Isani claiming "continued threats and harassment" by the appellant on September 17, 2020, and Isani forwarded that email to the individual conducting the fact-finding on November 10, 2020. IAF, Tab 28, pp. 240-242. The appellant understood this to mean the agency did not initiate a fact-finding investigation into the allegations for two

months, in contravention of agency policy. However, Isani testified his November 10, 2020 email was likely not his first communication with the fact-finder, and she had likely already been appointed to the investigation earlier. HR-5, Isani testimony. From the documents in the record, it is not clear precisely when Isani initiated the fact-finding investigation. It is also not clear that Kim's September 17, 2020 email was her harassment "complaint" as opposed to evidence in support of her complaint. Both Patel and Tarman testified that, when Kim told them she felt she was being harassed, including in her September 17, 2020 email, they referred her to human resources to see what her complaint options were. HR-2, Tarman testimony; HR-3, Patel testimony. As a result, it seems likely Kim subsequently followed up with human resources regarding her harassment concerns and the harassment investigation process was triggered thereafter. The inquiry may still have been initiated more than three days after the complaint, but likely not two months after.

Regardless, I do not find the timeline to investigate Kim's complaint reflected retaliatory animus given what ultimately happened with the complaint. After the investigation concluded the appellant created a hostile work environment and the appellant should be removed, the agency did not remove the appellant. If the agency was motivated to investigate the appellant because of retaliatory animus, I see no reason to believe the agency would not have then taken the recommendation to remove him and followed through on disciplinary actions against him based on the same animus. The agency's decision not to do so reflects a lack of animus.

Finally, the appellant testified management regarded him as a troublemaker. HR-2/3, appellant testimony. In support of this, the appellant pointed to two pieces of evidence: a statement he heard from a co-worker, and a statement made by the agency representative in this appeal. First, the appellant testified someone told J.P. not to associate with him because he is a troublemaker. HR-2/3, appellant testimony. However, the appellant did not ask J.P. about this when she testified. HR-2, J.P. testimony. Given the appellant's overall lack of credibility, I do not find his testimony regarding this comment J.P. allegedly made, without any corroborating evidence from J.P., credible or persuasive.

Second, the appellant testified the agency representative called him a "deviant" in a submission to the Board. HR-2/3, appellant testimony. I reviewed the documents in this appeal, and was not able to locate any reference to the appellant as a "deviant." He testified it occurred in a pleading filed around March 24, 2022. *Id.* The agency did not make a submission that day, but I searched agency submissions both before and after that date, and did not locate the use of the word "deviant" in any agency submission.

On the other hand, multiple agency witnesses denied either referring to the appellant as a troublemaker or having heard that. Earley testified that no one she interviewed in her fact-finding referred to him as such. HR-1, Earley testimony. Tarman denied telling anyone the appellant was a troublemaker. HR-2, Tarman testimony. When the appellant asked Patel about whether she thought he was a troublemaker, she denied perceiving him this way, and seemed genuinely

surprised and confused by the question. HR-3, Patel testimony.

I also considered whether any of the appellant's arguments discussed in assessing the strength of the agency's evidence in support of its actions – or any of the evidence the appellant evinced in support of those arguments – reflected any retaliatory animus against the appellant. I find they did not.

The record also contained evidence that what he perceived as mistreatment began before he filed OSC complaints. Negative agency actions against the appellant started well before the whistleblowing activity at issue here. The appellant testified the agency began taking unjustified and improper actions against him beginning as early as 2004. HR-2/3, appellant testimony. For example, the appellant applied for and was denied student loan repayment in 2004, which he contested and ultimately won. *Id.* Similarly, in about 2010, the appellant sought to manage an infectious disease clinic, but Tarman denied it. *Id.* All of these agency actions preceded the appellant engaging in any protected activity.

Similarly, the appellant testified at length about harassment and reprisal starting the day he moved to the hospital in 2016. HR-2/3, appellant testimony. According to the appellant, he also failed the performance metric related to processing pending prescriptions in each performance period since 2016. *Id.* He referred to the agency's actions against him since he moved to the Las Vegas facility as "a constant attack." HR-2, appellant testimony. The appellant testified the agency charged him with absence without leave his first week working at the Las Vegas facility, and it did not stop after that. *Id.* Many of these actions occurred well

before the appellant filed any complaints with OSC, although the actions at Las Vegas may have occurred after the appellant filed a district court lawsuit challenging the agency's decision to close the outpatient pharmacies.

Ultimately, after considering all of the evidence in the record, I find the agency had limited motive to reprise against the appellant for his ongoing OSC complaints. All of the management officials, except Isani, knew the appellant had filed OSC complaints (or intended to do so), and had some inherent motive to reprise against him on that basis. However, the appellant's complaints did not impact any of these management officials' careers, or result in investigations into their actions as supervisors or management officials, or otherwise cause them an inconvenience. I find this factor weighs against the agency, but not significantly.

Similar actions to non-whistleblowers

Finally, I consider whether the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

R.N. and J.P. testified to receiving notice of errors they did not think were errors. HR-1, R.N. testimony; HR-2, J.P. testimony. Both described having to contest these errors on a periodic basis to ensure non-errors were not factored against them in their performance. *Id.*

J.P. testified she did not meet the pending prescription performance standard in fiscal year 2021, and the agency placed her on a PIP related to that element. HR-2, J.P. testimony. When she successfully

completed the PIP, she was rated successful on that performance metric. *Id.* The agency thus took similar actions against J.P. and the appellant when they failed to meet the pending prescription performance standard.

The appellant argued J.P. was a whistleblower as well, but I do not find J.P. was a protected whistleblower under the circumstances present here. J.P. testified that, before Christmas 2021, she was asked to work the holiday. HR-2, J.P. testimony. She volunteered to work Christmas Day, but ultimately worked Christmas Eve after working the scheduling out with a co-worker. *Id.* She testified she voiced concern to management about that assignment. *Id.* While I understand J.P. contested the holiday work schedule, I do not find she engaged in protected whistleblowing when she did so. Furthermore, given that the performance period ended on September 30, 2021, it seems likely Hawkins would already have assessed J.P.'s performance on the pending prescription metric and determined she should be placed on a PIP before J.P. voiced any concerns regarding working over Christmas, given that the Christmas work was not pre-scheduled. *See* HR-3, Patel testimony.

I conclude the agency took similar actions against the appellant's non-whistleblower co-workers, and this factor weighs in favor of the agency.

CONCLUSION

After considering the evidence as a whole and each of the factors, I find the agency has proven by clear and convincing evidence it would have taken all of the personnel actions at issue in this appeal even if the appellant had not made his ongoing OSC

complaints. I find the evidence in support of the agency's assessment of the appellant's performance in fiscal years 2020 and 2021, and decision to place the appellant on a PIP, was so strong as to leave little doubt the agency took the action without regard to the appellant's ongoing OSC complaints. The agency also took similar actions against similarly situated non-whistleblowers. The evidence in support of the agency's stated reasons for its actions outweigh any limited retaliatory motive. As a result, I find the appellant is not entitled to corrective action.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

/s/ Samantha J. Black
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on September 23, 2022, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for

review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of

fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only

use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing

by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

Notice to Agency/Intervenor

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

Notice of Appeal Rights

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing

time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within 60 calendar days of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals

for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within 30 calendar days after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). 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. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within 30 calendar days after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3)Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302 (b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal

Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://wwwmspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

EXCERPTS OF RECORD ON QUESTIONS WITH CORRESPONDING ANSWERS 1-PER MSPB HEARING TRANSCRIPTS, RELEVANT SELECTIONS (JUNE 21, 2024)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
No 1 First St NE, Washington, DC 20543
(202) 479-3000

JOSEPH ANORUO,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS, AGENCY,

Agency.

SUPREME CASE NO:
CAFC CASE NO: 23-1114-KH
MSPB CASE No: SF-1221-22-0181-W-1
OSC CASE No: MA-21-00959

Petition for writ of Certiorari-
Statement of Facts and excerpts of Record

EXCERPTS OF RECORD ON QUESTIONS WITH CORRESPONDING ANSWERS 1-PER MSPB HEARING TRANSCRIPTS:

SF-1221-22-0181-W-1

Tab 68-1 - SF220181W1_2022-07-25_01HAWKINS202207120958

Q 1. Do you believe that rotation 2, 4, 4T, 7T, 11, 11T, 13T, 14T, 16T, and 17T are the main float and pending rotations?

A 1. There are primarily pending stations, which it looks like this time were 2, 4, and 11, . . . 17

Q 2. What does the T on the schedule represent?

A 2. Telework.

Q 3. What do they do?

A3. They do pending prescriptions remotely and other projects as needed

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Q 4. So based on this schedule, there-are people that has T on them and there are people that doesn't have T on them. Do you consider this fair and equitable?

A4. Yes

Q 5. So, if those people are doing pending and there are people that doesn't have that opportunity, and are not doing pending, would you consider the schedule to be fair and equitable?

A 5. Yes, because it rotates.[1]

Q 6. Okay. From October 1 through September, can you look at the schedule on my schedule tab and see if any of those rotations, the T, the 2, the 4, the 17 and the 11, are included in my schedule?

A 6. AJ interjected, " . . . Dr. Anoruo before, I will review the schedule. I don't need him to review it and tell me how many times you were on the schedule in a particular shift, that's the thing I can do. He's explained the schedule. *He has confirmed which schedule shifts are primarily pending prescription shifts. So that's all the information you need from him. I'm going to review these schedules and hopefully I'll find somewhere in the record where the entirety of that this year that you're focused on is present and I will determine how many weeks you were assigned to those shifts*. So, there's no need for him to go through this incomplete record and identify that. So you can move on to your next question. Dr. Anoruo. as I indicated to you before, I will review all of the schedules. I will look for these shifts that you have identified and obtained evidence primarily pending. (See App.51a; App.51a-52a)

Cross Examination: Steven Funderburk, (OGC) (38:14):

Q 7. Alright. Yeah, tab 10, page 85. So that language there about everyone doing 60 pendings an hour or four PADR, can you explain what that means?

[1] See App 283a-287a.

A 7. That means during downtime or during your pending shifts, that's what you need to do is be working on pending's or PADR.

Q 8. How long has that been on the schedule if you know?

A 8. Since at least 2017 when I started and it been before that.

Q 9. So why would that be duplicate if at #4 the possible rotation for #4 was 66 and the possible rotation for #5 is 71. The actual pending process is 35 on number four and 41 on number. So, can you explain that to me? I didn't understand it. (See SAPPX677)

A 9. So, #4, the total pendings was 24,537 and it was just an error of transcription that was not caught by anyone including the union until we reviewed this. At this point. 24, 537 was #4

Q 10. Do you possibly know if there is another error on this report?

A 10. There are no other errors in this report.[2]

Q 11. So, if somebody called out 3 days, it should be 50 instead of 53 on number 18

A 11. . . . Let me correct myself? That's not counting in those shifts. So, there's 53 shifts possible, but if you were not there, that doesn't count as a possible shift because you're not there. So, I'm sorry,

[2] See Q&A 11-17; 20-25

Q 12. AJ questioned, "Is it fair to say that possible pending shifts, all the shifts that person could have were was scheduled for, could have been scheduled for on the rotation system during that time period and then anything they didn't actually work because they were pulled because they called out sick is deducted and then you ultimately get to the actual pending shifts worked?

A 12. Yes, yes![3] [4]

Q 13. Does the facility who decided that because somebody was unsuccessful in the performance appraisal, decided not to put them on telework. Does the facility know that that is going to affect the Pending number?

A 13. I can't speak for the facility, but I would assume probably not. This decision was made prior to me and I didn't make it and neither did anyone in pharmacy specifically. This is leadership in the VA that decided who's teleworking and we're going to go for it.

Q 14. Did you also alter the schedule?

A 14. I adjusted the schedule, yes.

Q 15. When you adjusted the schedule, did you think about the impact on some pharmacists?

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[3] Dale Hawkins neglected deduct all the times he and Hyo Ju Kim pulled me from pending shifts for the need of the pharmacy. See App.51a; App.51a-52a.

[4] CMOP rejects are system rejects and not reviewed by CMOP pharmacists-sent back to facilities for review.

A 15. Ask and answer.

Q 16. This chart you presented here, the last column, the only things you excluded are days volunteered for in CCN, VC and inpatient. Does this include when you pull somebody according to facility needs?

A 16. No

Q 17. Do you have any ledger to determine how often you pull pharmacists according to facility needs?

A 17. No.

Q 18. Have you reviewed any of the PADR orders from VISN and found some issues with the prescriptions with the order and then you must contact the provider?

A 18. I have not because I do not Do those at all

Q 19. Are the pharmacists responsible to verify the entire order before they put it in to make sure that everything is in sync?

A 19. Correct.

Q 20. Late shift rotations: 10 to 6:30 shift stations? 8, 9, 15, and 16. Do you consider these rotations as pending rotations too?

A 20. Yes.

Q 21. So, these are included in your pending rotation shifts, Right?

A 21. Yes.

Q 22. Let's go to tab 32. I think it's page 25. Are you familiar with that data?

A 22. Yes (33:13):

Q 23. You had me as having, 108 CMOP (consolidated Mail Order Pharmacy) rejects, is that correct?

A 23. Correct @(33:30):

Q 24. Did you review all other CMOP rejects?

A 24. No

Q 25. You did not review it?

A 25. No

Q 26. Why not?

A 26. CMOP rejects are reviewed by a pharmacist at CMOP[5].

Q 27. On Friday, November 5, 2021, 12:47 PM Dale wrote, "During the employee appraisal yesterday you requested 2 items: Regulation stating use of CMOP (Central Mail Order Pharmacy) prescription error rate as a performance measure. Review of final performance appraisal for Joseph Anoruo outside of the service. (Footnote-see Doc 21.1 pp 3-6)

A 27. Answers:

"CMOP error rate is not an approved assessment tool for pharmacists in the VA. No other VA outpatient pharmacy in the continental US uses CMOP reject error rate as a performance standard because it does not follow national and PBM guidance and a processing error."

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[5] CMOP rejects are system rejects and not reviewed by CMOP pharmacists-sent back to facilities for review

Q 28. So, since you did not review this, how would you charge me for an error you didn't review, you don't even know anything about

A 28. It has been reviewed by another pharmacist and it needs correcting for it to go out properly.

Q 29. Did any of these pharmacists bring in errors to you and you corrected; you reviewed and corrected and took it out?

A 29. Yes.

Q 30. Did you do the same to me?

A 30. No

Q 31. Didn't I tell you that when you, when we were meeting in your office that the CMOP rejects I have is not correct that I've reviewed it out of 108, I have only 44 potential errors.

A 31. Yeah, that was after the timeframe was done.

Q 32. What was the timeframe?

A 32. Fiscal year 21. It was after September. Uh, I can't go back and review when the, the numbers are already finished. You have the entire year. Actually, I recommend that people do a quarterly is send in any disputes they may have and then we review 'em.

Q 33. Do you know what? There is a self-assessment period that we're supposed to do that

A 33. You're supposed to do it during the time of the year that you're in, what it's already done.

Q 34. What policy are you referring to?

A 34. There's no policy.[6]

Q 35. The CMOP returns, are those always sent by pharmacists or pharmacy technicians at CMOP,

A 35. They're reviewed by pharmacists.

Q 36. Is that your understanding?

A 36. Yes.

Q 37. Is that the CMOP policy?

A 37. I don't know their policy, but it is my understanding

Q 38. Steven Funderburk, (OGC) tab 28 page 232, okay, do you recognize this document?

A 38. Maybe? Yeah. (28:20):

Q 39. Is that the actual performance improvement plan for Dr. Anoruo?

A 39. Yes.

Q 40. Okay. And did you, presumably you had some assistance in putting this together?

A 40. Yes, I worked together with Ken Gamblin on this document[7].

Q 41. Do you remember telling me on that discussion that this is your first time of knowing what a

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[6] Contrary to that see-VA handbook chapter 50 13, section 8. TAB 28 page 416.

[7] Dale admitted that after the meeting on 6/08/2021, Ken Gamblin advised him to ignore the outcome of the Midyear review and issue PIP, drafted the PIP and advised him to issue it to me.

PIP is? You didn't even know what a PIP is @(01:30:27)?

A 41. Right: (01:30:27)

Q 42. On June 8th when we met at the union office, why did we go there@(01:30:27?

A 42. (01:31:49):The plan was to present you the PIP with input from the union.

Q 43. Is that what your email you sent said?

A 43. What email that I sent says,

Judge Samantha Black (01:32:20):

Dale Hawkins (01:32:26):

Q 44. Did you send the appellants an email to schedule the meeting.

A 44. Yes. It was a joint, uh, between us and the union. I believe a lot of people were on it to facilitate a meeting that was acceptable to everybody and time and place.

Judge Samantha Black (01:32:36):

Q 45. Did you tell him in that email or calendar invite or, or whatever that the plan for that meeting was to provide him the PIP with the input of the union?

A 45. Dale Hawkins (01:32:45): Yes.[8]

Q 46. In that email or in discussion?

A 46. I don't recall without seeing in front of me whether it was a discussion or was any email

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[8] See Q/A #48-49.

invite. But I assume that an email invite would've the topic of discussion.

Judge Samantha Black (01:35:26):

can you bring up tab 29 Page 74

Q 47. Mr. Hawkins, is this the email that you sent to schedule a meeting, uh, with the appellant that ultimately ended up being on June 8th, 2021?

A 47. Dale Hawkins (01:36:13): Yes.

Q 48. Okay. And does this email, uh, say that you're going to give the appellant a PIP during that meeting?

A 48. Dale Hawkins (01:36:20): No.

Q 49. What does it say is the purpose of the meeting?

A 49. To midyear FY 21 review.

Steven Funderburk, (OGC) (20:00):

Dale Hawkins, Supervisor (20:05):

Q 50. Okay. Did you have a couple of employees that were unsuccessful?

A 50. *I did. There was two at midpoint, one of them retired and then there was just one at the end of the year*

Q 51. Which, okay. And that was Dr. Anoruo?

A 51. Yes.[9]

[9] See CAFC inconsistent determination at App.9a (that employee is not similarly situated-was rated successful in 2021, but was placed on PIP in 2022 for unknown reason Q/A 236-240

QUESTIONS TO DR. PATEL

Q 52. Okay. Alright, Stephanie, if I could have you pull up tab 16, page 19. All right, and have you scroll through that. All right. Dr. Patel, do you recognize this email?

TESTIMONY OF DR. PATEL

A 52. I sure do.

Q 53. Was that unusual for you to be involved in a leave request?

A 53. Probably because Dr. Kim either was on long-term leave and Dr. Hawkins wasn't available, so I was just stepping in to process his leave.

Q 54. Tab 10, 119. Dr. Patel, are you aware of this particular report that was done back in 2019?

A 54. Dr. Meeta Patel (11:36): So, this is one of those interviews we've had.

Q 55. In December 2019, 2020, and even in 2018, I identified the issues we have in the pharmacy concerning schedules. I sent emails and communications on those issues, which include scheduling, disparities input whenever you have opportunity to do pending. I mentioned it to you a couple of times. Did you at any time address those issues I raised?

A 55. Dr. Kim: Yes.

Q 56. Do you have evidence of that; your review

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and the PIP did not comply with AFGE/DVA procedure Article 27 section 10A)

A 56. I don't have the evidence with me. Dale probably had some evidence. I know that he went through it with a union[10].

Dr. Joseph Anoruo (24:46):

Let's go to tab 30, page 67.

Cross examination by Dr. Anoruo

Dr. Joseph Anoruo (01:01:17):

Q 57. How did you come about that? Numbers that 60 per hour, you said you inherited this, is that correct?

A 57. Yes.

Q 58. How did you come about the 60 prescriptions per hour?

A 58. Because I inherited it and that is the way it has been and it's the amount of work we need to do to keep on pace to get the orders done.

Q 59. Is that supported by any national policy, VA policy or anything?

A 59. No, there's no policy behind that.

Q 60. You also admitted that one may not do 60 prescriptions per hour depending on this rotation. Is that correct?

A 60. Yes,[11]

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[10] The union denied reviewing the schedule with Hyo Ju Kim, however during Step 3 grievance procedure, the Union requested information to assist it to review the schedule and Dale declined the request and the schedule was not reviewed by the Union.

[11] See App283-287-new addition.

Q 61. Depending on the rotation and what is on the queue,

A 61. Yes.

Q 62. If the schedule is supposed to be followed rotation 1, 2, 3, 4, 5, 6 sequentially and it's somehow not followed that way, do you think it is going to reflect on the metrics

A 62. Hypothetically? Yes.

Q 63. Can the scheduling affect the standards?

A 63. Dale Hawkins, Supervisor (01:07:51): Yes.

Judge Samantha Black (01:07:53):

Q 64. Is that why the agency rotates everyone?

A 64. It is rotated to ensure fairness . . . And that everyone gets an opportunity to go through every station.

Q 65. That is the standard. That is what the facility projects, but if that is not happening, would that affect the standard? AJ interjected!

Judge Samantha Black (01:08:32):

Okay. Mr. Hawkins, in a hypothetical situation in which the agency didn't actually rotate its pharmacist through the rotations, but instead did something different or targeted one employee, would that affect that employee's ability to meet the metrics

A 65. Dale Hawkins, Supervisor (01:08:46): Yes.

Q 66. When you offered the people to work from home, did you give a comparable opportunity to those people working in the hospital?

A 66. I did not offer anyone to work from home.

Q 67. That you inherited it as well. Is that about Correct?

A 67. Yes.

Q 68. So those people working from home under you, were you aware of that?

A 68. Yes.

Dr. Joseph Anoruo:

Q 69. On the week of page 87, 11/16 through 11/20, did you pull me out of this rotation 2 to 13 to cover for Guz?

Steven Funderburk (OGC):

I'm going to note my objection because it's kind of impossible to tell without names on the page who is which.)

A 69. I do not. And when people are moved, they're march to where they moved. And to be fair, this was still when he was doing the other schedule, so I wouldn't recall.

Okay. Can we go back to tab 29, page 54?

Samantha Black:

Fair enough. But I think it's clear from reading the page before I feel confident saying that the individual assigned to rotation two during the week of 11/16 is the appellant[12]. Do you have

[12] Without looking at the facts, AJ relied on Agency misrepresentation that I worked rotation 2 when I was pulled to rotation 13 covering for Gus who was pulled to inpatient/vaccine Clinic and indirectly advised Dale to state that he did not have any

any recollection as you sit here today, Mr. Hawkins in November of 2020, pulling the appellant from his pending shift?

Q 70. Okay. Can we go back to tab 29, page 54?

A 70. Yeah, I can see it.

Q 71. What does this say there?

Dale Hawkins:

A 71. "Yes, the appraisal was already reviewed by upper-level management before presented to you."

Q 72. Is that consistent with what you told us before?

A 72. Dale Hawkins: Yes.

Q 73. Why is this so?

A 73. Because it wasn't presented to you at the time that I asked you to present it to you. The process moved along, but you did not ever sign it, look at it, meet about it, so I had to be submitted as, "Employer refused to sign."

Q 74. You have earlier stated that Camilla signed it after we met. Is this the same statement correct with what you told us before?

A 74. Well, we didn't actually meet for you to sign on this.

Q 75. If you go back up to page 53. Have you reviewed that?

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recollection, and Dale did as she advised. This was a harmful error and was included in the 28 pending shifts used in the performance appraisal rating. See A 69.

A 75. Dale Hawkins: Yes.

Q 76. Did I ask you to name the person that reviewed it before you presented it to me?

A 76. Yes.

Q 77. What was the response?

A 77. Right there on this page, 53.

Q 78. What I said is my work activities, my work duties between October, between December 2020 and what I presented in 2021, were they the same?

A 78. I was not really a part of the 2020 appraisal year, so I'm not sure if they're the same.

Q 79. Samantha Black: Okay. Did you meet with Dr. Anoruo in October of 2021 to discuss his performance appraisal?

A 79. Dale Hawkins: We tried.

Samantha Black:

Q 80. The answer to the question is a yes or no. Did you meet with him?

A 80. Dale Hawkins: No.

Q 81. Did he raise to you in October of 2021 any particular issues with regard to either the performance appraisal system or his performance appraisal specifically?

A 81. Dale Hawkins: Yes[13].

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[13] See Q&A (79 & 80) is inconsistent with answer. Appellant did not meet or discuss anything about performance appraisal in October with Dale. Records shows that appellant was not at work

Q 82. Okay. What issues did he raise with you broadly? I know you don't have anything in front of you to refresh your recollection and the specifics. What issues did he raise to you?

A 82. That his appraisal was unfair and he should be marked successful.

Q 83. Is this safe to state that my request to send my performance appraisal to upper-level management in 2021 was not honored by you?

A 83. Dale Hawkins: No.

Q 84. Samantha Black: Mr. Hawkins, I understand from your emails and testimony here today that Camilla McKinnon reviewed the appellant's performance evaluation and concurred with the rating.

A 84. Dale Hawkins: Yes.

Q 85. After that happened, Dr. Anoruo asked for an upper-level management review. Did you refer the appraisal at that time for any additional upper-level management review?

A 85. I did not.[14]

Q 86. Dr. Joseph Anoruo (40:17):

> . . . Most of the times the facility pull you to do something else, they will say we are doing it according to the hospital pharmacy needs. . . . Do

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between October 5 to October 15, 2021, and do not recollect any direct discussion with Dale in October 2021 except e-mail communication survey around 10/29/2021

[14] Contrary to this, Appellant performance appraisal of 2019 was reviewed by Dr Isani on January 9,2020, see Doc 21.1 pp3-7.

you consider those pharmacy needs when you're doing performance appraisal at the end of the year?

Dale Hawkins: (41:43):

A 86. Yes. Needs of the pharmacy are considered during appraisal.

Samantha Black: (41:38):

Mr. Hawkins, you can go ahead and answer that.

Dr. Joseph Anoruo (41:54):

Q 87. How do you consider those?

A 87. You'd have to be more specific than that,

Q 88. Samantha Black: (42:03):Mr. Hawkins. do you consider, for example, in looking at employee's specific performance on a, on a metric that, oh, well, that employee may have had, may have failed in that metric because we pulled them so many times for the needs of the pharmacy. You ever look at that?

A 88. Yes[15]. Um, and I think this example here on the evidence kind of shows that where people were in community care rotation or vaccine clinic or inpatient training, and we have an adjusted numbers column, uh, specifically for the pendings because that's what this was, you know, the, the dispute and even when volunteering and doing these extra tasks and taking the time out from those areas, this is what they accom-

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[15] Dale did not consider all the times I was pulled according to the pharmacy needs. See App 51a-52a.

plished during their regular time, uh, not doing extra tasks or, or volunteer rotations.

Q 89. If you go to AFGE Master agreement, article 27, section 10 A, can you, uh, let's go. Page 36.

A 89. @ (45:11): Yes.

You read anything there that says that if the performance is beyond employee control, he shouldn't be held accountable for that@ (44:11)?

Q 90. . . . let's look at tab 11, page 52. You have me as number 18 on the list, is that correct? On the name tile? You also calculated possible pending shift to be 53, is that correct?

A 90. (01:14:28): Yes.

Dr. Joseph Anoruo (01:14:46):

Q 91. You calculated actual pending shift worked as 28 within this period. Is that correct?

A 91. (01:14:43):Yes.

Q 92. How did you get those numbers? From where, what schedule?

A 92. This was based from 10/01/2020 to 6/30/2021. And it was based on the schedule to that point. And it was for stations 2, 4, 7, 11, 13, and 17.[16]

Q 93. So those are the things you consider as the pending shifts.

A 93. Those are where you can get the most.

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[16] See question/answer 19 & 20 which included rotations: 8, 9, 15, 16.

Q 94. Did you issue an unsuccessful performance at present to me in 2020?

A 94. Dr. Kim (49:57): Yes.

Q 95. What was the ground for that?

A 95. There were two elements that were, unsuccessful in the metrics. One for pendings and one for notes written.[17]

Q 96. Based on all what we discussed. Assignment of excessive amount of work, the over assignment of PADR, the combination of rotation changes, not scheduling me for pending ships. Do you think any of those would have affected my pending number?

A 96. No, I did not.[18]

Q 97. I believe we discussed a situation earlier about the pending numbers and their assignments and the time constraints in doing all those things. Is that correct?

A 97. Dr. Kim (52:32): Yes.[19]

Q 98. Going through the same rotation. That looks good in paper, but not the same way in practice. Do you think it is fair?

A 98. Again, everybody was assigned the same rotation as being the float, and you were pulled with the service needs as the float When we broke it,

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[17] See Q/A at 123-129.

[18] See Q/A: 6, 62, 63, 65, 283-287.

[19] See, Q/A: 96 above.

when we broke it down and looked, um, to make sure that people were being pulled, everybody was being pulled very similarly.

Dr. Joseph Anoruo (53:06):

Q 99. Dr. Anoruo (53:06): I asked you to provide me that document. Did you say you don't have anything about it?

A 99. "I do not have any evidence"

Q 100. Dr. Joseph Anoruo (02:52):

Dr. Kim? based on this rotation, what are those float positions?

A 100. Float seven, float 11, float 14, float 16, and float 17. Is that correct?

Q 101. Okay. From October of September 2019 to April 2020, see if you can see any of those floats on my name positions[20]

A 101. Dr. Hyo Ju Kim (06:21):

Yeah, so he was, he was number 14 and then, which is a float. And then also he was number 11, which is showing a float as well.

Samantha Black: (06:05): No, the Yes, but the legend at the bottom changes every week. At least in the couple we've looked at, there have

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[20] Dr. Kim stated that I worked rotation 11 float pending rotations on 9/28-10/02/2020 which is a lie because I had AL/SL on 9/28-9/30/2020 and worked **rotation 3** on 10/02/ 2020 (b/c scheduled rotation 3 was off) and were assigned to do conversions due to covid lock down and low pending prescriptions entered by providers on the queue" see SAppx632.

been different, different numbers assigned. So that's what I'm trying to figure out.

Q 102. Dr. Joseph Anoruo (06:36): 11[21] and 14[22] does not show float in there. And I was not present for that shift. Okay.

A 102. Samantha Black[23]: (06:44):Actually, Dr. Anoruo, if, if this schedule shows what you were assigned to in any given week, I'm not having Dr. Kim go through and tell me each time you were assigned to float. Okay. So you can go on with any questions you have for her that is not just here.

Q 103. Dr. Kim, what does the "T" on the shift represent?

A 103. I believe we're allowing folks to pharmacists to telework at that time.

Q 104. Dr. Anoruo was not allowed to telework, is that correct, Dr. Kim?

A 104. Yes, that's correct.

Q 105. Samantha Black: (11:07):Okay. So from October 1st, 2020 through November 26th, 2020, do

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[21] Rotation 11 is pending and clinic orders (I was pulled to work in other areas of need and was not scheduled to pending shift). It is also different from 11T which was telework-processing pending prescriptions.

[22] Rotation 14 is window counseling at Lobby Room #6 and 14T = Is telework- Processing pending.

[23] AJ undermined that appellant routine activity for 9/28/2020 to 10/02/2020 was not shown on the schedule (See SAppx632, doc 34-2, pp 453).

you have any recollection as you sit here today as to whether you assigned Dr. Anoruo to pending shift?

A 105. Dr. Hyo Ju Kim (11:17): I do not have any recollection. They worked their rotation, so I don't know what rotation he was working during those that time

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Q 106. On August 4th, 2020, you also sent me an email about processing nutritional supplements based on new guidance that it has to go through nutritionist, do you remember that email?

A 106. Dr. Hyo Ju Kim (27:07):

Yes. I believe I saw it.

Q 107. Do you remember that prior to that email pharmacists were already allowed to process those prescriptions and send it to the patients without nutritionist?

A 107. Dr. Hyo Ju Kim (27:23):

I believe that there was an email sent out way prior by, Dr. Meeta Patel about the changes.

Q 108. Samantha Black: (28:38):

I'm gonna ask her some questions. So, Dr. Kim, is it your understanding that at the time he processed the prescription, it was not consistent with the guidance that was applicable?

A 108. Dr. Kim (28:46): Correct.

Q 109. Samantha Black: (28:47):

And then it was at some point you detected that and brought it to his attention, but the guidance had changed in the interim?

A 109. Dr. Hyo Ju Kim (28:54):

I believe the guidance had already changed by the time that he processed the prescription and I had let him know that it had already changed, prior to him processing the nutritional supplement.

Q 110. Go back to tab 28, Page 305. Do you see my email there?

A 110. Dr. Hyo Ju Kim (28:16):

. . . I don't believe that that was actually correct in what he's saying.

Q 111. What was the issue date of the prescription?

A 111. Dr. Hyo Ju Kim (33:17): 5/30/2018.

Q 112. When was the email she sent?

A 112. Dr. Hyo Ju Kim (33:25): 6/28/2018.

Q 113. Doesn't my processing of the prescription precede that email?

A 113. Dr. Hyo Ju Kim (33:36): Yes, it does.

Q 114. Why would you charge me for that or send the e-mail?

A 114. Dr. Hyo Ju Kim (33:42):

You can see the email as well. It's not a charge, it's just a reminder. there's no charge.

Q 115. Samantha Black: (33:52):

Dr. Kim, understanding it was not a charge. Why is it that you sent, the reminder email?

A 115. Dr. Hyo Ju Kim (33:57):

I could have definitely been mistaken of the date. I'm not sure. I'm gonna take this one up as an error on my end, as an error on the date.

Q 116. Dr. Joseph Anoruo (01:50:04): Did you put out a premium shift for pharmacies to volunteer for on October 20th, 2019?

A 116. So, the offer was, or the voluntary email was sent out to all staff if they would, volunteer to do a seven on seven off shift? We were thinking about piloting a seven-on-seven off shift, which never occurred.

Q 117. Did I volunteer for the position?

A 117. Dr. Kim (01:51:42):Yes.

Q 118. Do we know why the shift was not offered? Is that relevant?

A 118. Black: (01:52:38): It's not

Q 119. Judge Black: (01:30:19): Dr. Kim, is there a self-assessment process?

A 119. Yes. Self-assessment is voluntary and is not required by the VA.

Q 120. When an employee presents to you his self-assessment are you required to look at it?

A 120. Yes. If the, if the employee sends over a self-assessment, then the pharmacist or the supervisor can look at it and apply it to their evaluation.

Q 121. Dr. Joseph Anoruo (24:03):

What did you find out after all about that VIONE training?

A 121. Dr. Hyo Ju Kim (24:09):

Uh, each pharmacist was assigned or scheduled to attend VIONE training. Um, attendance was taken by the trainer, and I was, it was reported that you did not attend the VIONE training when you were scheduled to go to the VIONE training. I later on found out that you, listened over the shoulder with another pharmacist who was training on their scheduled time.

Q 122. Judge Black: Okay. Do you think any of the content of your email to him was wrong and specifically telling him that this could be used against him in his performance evaluation? Did you think that was wrong or problematic?

A 122. I do not because he was made aware that service provided training must be completed a hundred percent, um, on his appraisal.

Q 123. Dr. Joseph Anoruo (01:14:48):

Did the limitation of patients coming to the pharmacy affect counseling of patients in the outpatient pharmacy and affect the note encounter?

A 123. Dr. Hyo Ju Kim (01:15:07): The number of notes that were written by the pharmacist with interactions in the lobby did change.

Q 124. Would that affect the note encounter number?

A 124. No. No.[24]

Q 125. Why not?

A 125. There are many other opportunities to write notes, not just from the lobby.

Q 126. You have to assign those positions, right?

A 126. Again, you're working on a rotation. I don't, there was no change in the rotation, with the COVID-19, other than that the lobby was closed, but you still had opportunity to counsel and put in notes and everybody was still assigned to the rotation. So, I didn't make any special assignments

Q 127. On average, most outpatient pharmacies get their notes from counseling. Is that not correct?

A 127. Dr. Hyo Ju Kim (01:16:13):

That's correct.

Q 128. Dr. Joseph Anoruo (01:16:15):So don't you think if you limit the amount of patients that come in, the note encounter would drop

A 128. Dr. Hyo Ju Kim (01:16:21):

The note encounter would drop for those types of notes, but there were also notes that can be written for conversions. Uh, counseling was done over the phone. There were interactions that were being done over the phone. so there were other plenty of other note opportunities available

[24] Inconsistent answer-see A123 above

Q 129. Dr. Joseph Anoruo (01:16:39):That you have to be assigned to those positions for you to do it. Is that correct?

A 129. And everybody was assigned because everybody went through the rotations.

Q 130. let's look at page 25-26. Samantha Black: (10:53): What is the policy for unsigned notes according to the MCP 126 you sent me.

A 130. Dale Hawkins: (11:19): Notes must be signed at time of entry,

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Q 131. Correct. Does this say that you can be disciplined if you don't sign the note after 30 days,

A 131. (11:41):It should say something like that, I believe for providers. I don't have it in front of me though.

Q 132. You sent me a copy of that. Okay. Does it say that employee can be disciplined if they don't sign the note after 30 days?

Judge Samantha Black: (12:09): Is it in the record?

Dr. Anoruo (12:12): No, it's not.

Samantha Black: (12:16): If it's to impeach his, uh, credibility with respect to that answer or to refresh his recollection, you can, uh, show it to him.

Dr. Joseph Anoruo (12:23): Okay.

Samantha Black: (12:24): But it's not in the record. It's not evidence I'm considering, but you can show it to him if it will impeach his credibility or refresh his recollection.

A 132. No, it does not say that on the MCP,

Q 133. Samantha Black: (16:47):

Mr. Hawkins, your outpatient pharmacists is one of their performance metrics related to unsigned notes or note signing?

A 133. Hawkins: (16:55): Yes.

Q 134. Samantha Black: (16:56): Which metric is that?

A 134. I believe in timeliness, uh, standards.

Samantha Black: (17:06):

Q 135. During the time that you have been the appellant supervisor, have you at any point marked him as less than fully successful in the timeliness standard?

A 135. I can't remember the previous year, but this year, yes. the timeliness is not there.

Q 136. So, in fiscal year 2022, he is having issues with timeliness, is that what you're saying?

A 136. Yes

Q 137. Okay. If, I was to tell you that in 2021 in the performance evaluation we looked at before, his timeliness metric was fully successful, do you have any reason, to doubt that?

A 137. No. You can have, a few instances, one to two or one to three, I believe, still being fully successful.

Dr. Joseph Anoruo (22:14):

Q 138. Okay. Yeah. That says the provider may be subject to disciplinary action for entries not signed within 30 days. So, he is citing it to be used or threatened to use it in performance appraisal is not, is that not a disciplinary action?

Dale Hawkins: (22:35):

A 138. it's a performance standard or performance action requirement.

Q 139. So when, when you threaten an action that is considered a prohibited personal practice. you threaten to use this in performance appraisal outside what is recommended, I think that is, a violation of the MCP.

A 139. Now, the union doesn't think that, and they're the ones who approve of your performance standards.

Q 140. Dr. Joseph Anoruo (23:18):

You sent me this, this is what we are basing it on. So, we are basing it on the MCP which you sent to me, and this clearly stated here that provide may be subjected to disciplinary action for entries not signed within 30 days. Simple. Is that correct?

A 140. Dale Hawkins: (23:40): Yes. That's what the MCP says[25].

Q 141. Samantha Black: (35:11):

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[25] Despite these obvious facts, Dale has being harassing me for notes I did not finish the same day.

Dr Anoruo was assigned the unusual 17 pages of conversation to do in one day which was never assigned to any other pharmacist.

A 141. Dr. Hyo Ju Kim (32:25):

Yes, I recall the CMOP rejects that came through for the metformin recall.[26]

Samantha Black: (35:11):

Q 142. Dr. Kim is the document that's being shown to you now the CMOP reject that was assigned to Dr. Anoruo that he was referencing before?

A 142. Dr. Hyo Ju Kim (35:19):

Yes. There was a major metformin recall where we were having to national recall were converting from a 90-day supply to a 30-day supply. There was a concurrent losartan recall at the same time. So, he's probably mentioning the losartan recalls and then the remainder of the, day-to-day CMOP reject that we get.

A 146. Dale Hawkins: (37:28): <u>There's no policy</u>.

Dr. Joseph Anoruo (49:27):

Okay, let's also look at 27 Section 8E

Dale Hawkins: (52:00): Reviewed

Q 147. Okay. Based on what is read here, when I communicated with you about the disparity and schedule on January 7th,2021, or to the leadership on the 15 and 16th of December 2020 did you make any changes or referred it

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[26] She lied that it was only metformin, but when evidence was presented, she concurred-see Q/A at 141.

to someone. Did you show, send me any writeup that you amended the schedule, you change it or everything is not substantiated like you stated?

A 147. No, I didn't send you a memorandum to change your schedule or your shift on the schedule.

Q 148. No. What I'm saying, did you send any memorandum that the concern I raised has been addressed and how you addressed it?

A 148. These were addressed through grievances with the union through three steps. So it's all in writing there[27].

Q 149. So, you said you didn't change the standards when you added people to work from home. Did that affect other employees?

A 149. Dale Hawkins: (55:34):That was not me who had people work from home or not work from home? That was before my time.

Q 150. But you inherited it when you came in, is that now correct?

A 150. Dale Hawkins (55:43): Yes.

Q 151. Dr. Joseph Anoruo (55:43):

. . . Okay. Let's look at, VA handbook chapter 50 13, section 8. TAB 28 page 416. Did you consider it (Self-Assessment reviewed)

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[27] Grievance proceeding occurred after the rating of unsuccessful and not relevant, though issue raised was not completely addressed during the grievance process contrary to what Dale Hawkins stated.

A 151. Dale Hawkins: (58:12): Yes.[28]

Samantha Black: (58:38):

Q 152. Before the grievance? (AJ chirmed in)

A 152. Dr. It's not clear to me you heard him. He said yes. So, he answered the question.

Q 153. Dr. Joseph Anoruo (58:47):

He earlier said he didn't receive any documents from me. And what did he receive? What did you consider this time around?

A 153. Samantha Black: (58:59):Yeah, Mr. Hawkins. Go ahead and answer that. What self-assessment did you consider Dale Hawkins: (59:08):

In relation to the performance plan? The performance appraisal?

Q 154. Samantha Black: (59:13):

Yeah. So you gave him his appraisal at the end of fiscal year 2021?

A 154. Dale Hawkins: (59:14): Yes.

Q 155. Samantha Black: (59:15):Did the appellant submit a self-assessment to you? As part of that performance appraisal process?

A 155. Dale Hawkins: (59:24): Yes.[29]

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[28] Contrary to this see Q/A #33-34.

[29] Contrary to this on 10/29/2021, Dale indicated that I was unavailable to acknowledge the recent task (self-assessment) Doc 34-2 pp 535. Also see pp.519; 534-541. Appellant did not submit any self-assessment in e-performance.

Q 156. Earlier you said self-assessment, it's supposed to be turned within the year that what I turned was late, so you couldn't consider it. Can you tell me what's the variation between the two statements?

A 156. Uh, well I don't know what the variation that you're alluding to.

Q 157. Earlier on I asked you about self-assessments. You said it has to be considered within the same year and that you did not consider it because it was outside the year.

A 157. That was self-Assessment on your performance standards is different than you disputing CMOP rejects after the fact. They're not the same[30].

Q 158. Dr. Joseph Anoruo (55:15):

TAB 28, Page 360-364: You sent this email to Alexander Asani, Jason Gamblin, Kendall Bryan Tarman. Mr. Patel. Did you copy me in this email?

A 158. Dr. Kim (56:45): No.

Q 159. Dr. Joseph Anoruo (01:03:59):Yeah, I'm, I'm looking for the, the, the time the schedule was posted. Okay. Right here it appeared again. Yeah. Hold on, hold on, hold on. You went past. Alright. All right. Right here. Look at the, the time this schedule was posted. 7/31/ 2020.

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[30] Initially he said there was no policy for self-assessment and now says that my CMOP self-assessment is not self-assessment for lack of knowledge of the fact and lack of training by pharmacy leadership as he admitted.

Look on top over there and see what John (JQ) was on vacation throughout the period. Up to here. 9/8/ 9/9 &9/10, 9/11, 9/12 all the way up. John was on vacation, is that now correct?

A 159. Dr. Hyo Ju Kim (01:05:29):

Yes. It's showing that he's off.

Dr. Joseph Anoruo (01:05:33):

Q 160. Okay, move on. Let's move to another schedule. You can see that you edited the schedule on the 10th after I had told you that John is not on the schedule. It also shows when you edited it, everything is on the schedule here. Let's go back up. See on the 10th, you're gonna see where John was put back on the schedule on the 9/9 & 9/10 . Is that not correct? Yes.

A 160. I see that John is off and then John is on and then John is off that there were updates made to the schedule. Yes.

Q 161. When did you make the update? On the 9th & 10th and the 17th.

A 161. Okay. Um, yes, the schedule shows when I updated it last I had it timestamped.

Q 162. Dr. Joseph Anoruo (01:09:03):

My question is, she considered my communication with her that I said she subverted justice if this is what happened. Is that not subversion of justice saying something that is not on the record?

A 162. If I were to do that? Yes[31].

Q 163. Based on our policy, our Las Vegas policy. Are you stating that weekends are not counted for PADR late

A 163. Again, Joseph? I'm not in charge of the PADRs. If you wanna refer, I believe that weekends don't count. Um, but if I need to be corrected, I will stand to be corrected. But again, I was not in charge of the PADR at the Las Vegas VA.

Q 164. Do you remember when I asked Roseanne about assignments of PADR and she referred me back to you?

A 164. I'm not sure what incident you are referring to.

Samantha Black: (01:19:14):

Q 165. Uh, that being said, it doesn't, that I've admitted this document in this case does not make it.

A 165. It's relevant because it is admitted in this case. The record is here. For the first time, I saw this last week[32].

Samantha Black (01:20:34):

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[31] I presented compelling prima facia evidence of attempt to conceal scheduling disparity with preponderance of evidence in support including Dale's statement that no pharmacist was scheduled; John's supporting evidence that he was off throughout the period at issue and did not come to work.

[32] It involves discrimination, so this board is authorized to review but neglected review and abandoned discrimination charge- It should transfer it to appropriate court and not to dismiss.

Q 166. Why else? Uh, would you say it's relevant here?

Dr. Joseph Anoruo (01:25:41):

A 166. Yeah. Oh, no, I thought that's why we are here. . . . This issue was raised and that is part of those harassment allegations that we have to investigate in this, this, and this is part of harassment.

Q 167. Can you refer to page 362 of that document, first paragraph? Is that not the case?

Samantha Black: (01:35:23)[33]:

A 167. Did you understand at any point that management wanted you to be disciplining him or wanted you to be taking whether official disciplinary action or not, but that they were telling you should be taking these actions?

Q 168. What did you answer when, Steve asked you question about background noise, about the email

A 168. Steve mentioned the OSC and the cases open and the complaints open. Was it considered background noise? And I said that you mentioned it quite a bit in your emails and verbally.

Q 169. So what was considered the background noise then? That's what, can you clarify that? I didn't get it right.

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[33] AJ chirmed in and prevented her from answering the question to avoid disclosing the real issue and she did not answer the question appellant posed to her but clearly stated.

A 169. . . . the background noise of you mentioning OSC complaints and, other complaints, the EOC and whatever, I don't know other acronyms. was that considered background noise, which I said that you did mention it quite frequently in your emails and verbally.

Q 170. Didn't that infuriate you, that is what you mentioned here. That's why you, filed a harassment because I mentioned I filed OSC and all that.

A 170. No, that is not the reason that I filed harassment or, *I didn't file harassment. I talked to my supervisors about the harassment*[34], but that is not the reason. OSC and OMI have nothing to do with me complaining to my supervisors about the harassment.

Q 171. Can you go in and change the schedule, order the schedule to shift somebody or to make somebody's pending rotation? Uh, pending to below.

A 171. I suppose it could be manipulated if I, if you wanted to like anything else.

Q 172. So, in multiple occasions pharmacist, numbers that is posted by Bryan does not reflect what the pharmacist does? Does that not show manipulation of the number or is it a mistake?

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[34] This shows that fact-finding was a reprisal for the OIG and new OSC response/complaint with additional disclosures of 2million dollars waste in 9/13/2020 and 11/08/2020 respectively and on 11/10/2020 fact-finding was initiated by Dr. Isani.

A 172. Well, Bryan pulls it at a certain time of the day. So, if they did more after that, then I guess the numbers could be different.

Q 173. Dr. Joseph Anoruo (01:34:49):The numbers can be different. But if it's 500 numbers within two hours, wouldn't you suspect if something is wrong.

"For instance, my October 2020 only review, the Pending number metric reported that I processed about 800 prescriptions, but just about few days my name appeared on the pharmacist list that processed 100 prescriptions and above, shows that I processed over 900 prescriptions not including days I processed less than 100 prescriptions a day. This demonstrates that the pending metric is subject to manipulation and cannot be trusted."

Thank you. Let's look at tab 11, page 36 through 39.

Samantha Black:

A 173. I'm not sure exactly what you're getting at here. I know Bryan pulls the numbers at the end of the day, uh, using the Vista finishing reporting. I'm not exactly sure what you're getting at.

Q 174. Mr. Hawkins, have you seen this document before?

Samantha Black:

A 174. Dale Hawkins: No.

Q 175. At any time did Dr. Anoruo provide you a copy of this document?

A 175. Dale Hawkins: No.

Dr. Joseph Anoruo:

Q 176. Did I inform you about my self-assessments that's supposed to be included in the performance appraisal.

A 176. You did a self-assessment on the performance appraisal.

Q 177. What is it?

A 177. Yes. You did a performance assessment. You did your own evaluation on the appraisal

Q 178. Okay. Mr. Hawkins, is this document the performance self-assessment that Dr. Anoruo provided you?

A 178. *No, it is electronic. It's on the e-performance program. I've not received this document.*[35]

Q 179. That is not my question, Your Honor. My question is, did I tell you when you invited me in your office . . . .

A 179. Dr. Anoruo, he answered your question. He said you did one. Okay, so Mr. Hawkins, I understand Dr. Anoruo provided you a self-assessment, that it is not the document that is on the page in front of you. After you provided him with his performance appraisal, did he tell you that he had anything else to add to his self-assessment or any additional documents that

[35] Another clear lie and misrepresentation on 10/29/2021, Dale submitted my ePerformance self-assessment issued on 10/01/2021 and noted that I was unavailable to sign, so where and when did appellant do his self-assessment in ePerformance.

he wanted included with his performance evaluation?

Dale Hawkins: No. No.

Q 180. Dr. Joseph Anoruo: Did you say no?

A 180. Dale Hawkins: Correct. Dale Hawkins:

Q 181. I didn't tell you that I have the self- assessment that's supposed to be included for upper management review.

A 181. Whatever you may have added on there, if nothing else was provided.

Q 182. Did I request upper -level management review?

A 182. Dale Hawkins: Yes.

Q 183. Why was it not approved?

A 183. It was approved by Camilla McKinnon, and that is per the e-performance system that the supervisor, my supervisor, reviews the performance review when it's unsuccessful.

Q 184. Was that before or after our meeting?

A 184. I don't know the timeframe.

Q 185. Did Ms. McKinnon review your evaluation of Dr. Anoruo's performance before you presented it to Dr. Anoruo?

A 185. No[36].

Q 186. At what time did Camilla review it?

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[36] Lie. It was reviewed by Kamilah on 11/3/2021 and he presented it to me on 11/04/2021.

Hold on one second, Dr. Anoruo I'm just trying to clear this up.

Okay. Ms. Sergen, would you mind going to page 47?

A 186. I don't recall. That would be on the e-performance record. It was after it was submitted by myself, and then the next step would go to her for review. I don't know exactly the time it was completed, and it's not showing here.

Q 187. As I see it, Mr. Hawkins, it indicates that Camilla McKinnon concurred with the recommended rating on November 3rd, 2021. Based on your testimony before, would that be the date that you believe that she reviewed this document?

A 187. Dale Hawkins: Yes.

Q 188. And is there a place on this document where I can see where and when the appellant received it?

Funderburk, Steve (OGC):

Judge, I would note that there's another copy of this in tab 28 on page 222.

A 188. I don't think we can see it from this document.

A 189. Okay, if we're looking at tab 28, page 222, it shows that, where it says, "Employee receipt of performance appraisal under a signature of employee," it says, "Dale Hawkins, employee, declined to sign in November 10th, 2021." Would that have been the date that you provided this appraisal to Dr. Anoruo?

A 189. Dale Hawkins: No, it was provided before then.

Q 190. Then, when did you invite me to come in for a full-year appraisal?

A 190. Sometime in October[37]

Dr. Joseph Anoruo (01:07:43):

Q 191. Dale did not follow the DVA/AFGE Master Agreement Article 27, section 10 (A) for the development of a written Performance Improvement Plan (PIP). He was asked, "did not follow the DVA/AFGE Master Agreement Article 27, section 10 (A) for the development of a written Performance Improvement Plan (PIP)"

A 191. (01:07:41): Yes[38].

Q 192. What did AFGE tell you?

A 192. They disputed the PIP all together[39].

Q 193. And when was that?

A 193. At our meeting with the union that we all had.

Dale Hawkins: (01:08:06):

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[37] It is a lie because he invited me for performance review per record on 11/04/2021 and I invited the Union to go with me and submitted my ePerformance on 10/29/2021 with a note that I was unavailable.

[38] AFGE denied receiving any request from Dale Hawkin. He was acting on instructions from Ken Gamblin.

[39] AFGE disputed discussing PIP at midyear meeting and differed it to HR with additional evidence requested

Before June 6th [6/8/2021]. I don't recall. Or June. June 11th. I'm sorry. That's when it issued on June 11th. So that was the week before.

Dale Hawkins, Supervisor (20:05):

Q 194. Okay. Did you have a couple of employees that were unsuccessful?

A 194. *I did. There was two at midpoint, one of them retired and then there was just one at the end of the year*

Q 195. Which, okay. And that was Dr. Anoruo?

Okay. Stephanie, if I could have you it go to page 232

Steven Funderburk, (OGC) (28:20):

A 195. Dale Hawkins, Supervisor (20:14): Yes.

Q 196. All right. Do you recognize this document?

A 196. Yes

Dale Hawkins, Supervisor (28:33):

Q 197. Is that the actual performance improvement plan for Dr. Anoruo?

A 197. Yes, I worked together with Ken Gamblin on this document.

Q 198. Okay. And did you, presumably you had some assistance in putting this together?

Steven Funderburk, (OGC) (29:46):

A 198. He was unsuccessful at midpoint and that was a requirement and as he said before, I wasn't familiar with this, so I had to contact Ken and

ask what it was about, how it works and so on and so forth. And then we went from there.

Q 199. *Okay. And did you have another employee that you placed on a PIP during this period?*[40]

A 199. Dale Hawkins, Supervisor (29:53): Yes[41](*see* #194 above)

Q 200. Okay. Did they participate in the PIP?

A 200. Yes, they did.

Q 201. Okay. And did they successful, successfully completed?

A 201. They completed it but not successfully.

Q 202. You also stated that you would have approved of giving me pending opportunities. Was that not supposed to be contained in the PIP you sent?

A 202. I would've worked with you to maximize your potential

Q 203. I specified in A FGE policy. Was that not supposed to be included to help the one improve in the PIP?

A 203. Well, since you or the union had no further input, it was just a standard. These are your numbers and we're going to meet and talk

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[40] Inconsistent statement on similarly situated pharmacist he placed on PIP. He admitted I was the only employee at the end of the year and claimed he placed another individual on PIP.

[41] This was lie per record because JP was placed in PIP in 2022 which is not within the period.

about it and we can discuss at that point ways forward.

Q 204. What did you say? We don't have input,

Dr. Joseph Anoruo (51:12):

A 204. Dale Hawkins, Supervisor (51:06):Correct. There was no input in creating the PIP between the union and yourself.

Dale Hawkins, Supervisor (51:18):

Q 205. Did you ask for any input after that meeting?

A 205. No, because we already had the meeting and their input was to not do it, which is not their job.

Q 206. What is the union job? According to the master agreement on PIP,

A 206. According to this section on pip, it is to help formulate the performance and improvement plan along with the employee and the supervisor

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Dale Hawkins, Supervisor (51:51):

Q 207. Didn't that say that you have to be done in consultation with the union and the employee?

A 207. It says literally ask for their input but is not required.

Q 208. Where did you read that from?

A 208. Master agreement[42].

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[42] AFGE/DVA Master Agreement Article 27 Section 10(A) states, "if the supervisor determines that the employee is not meeting standards of his or her critical element(s). the supervisor shall identify the specific performance related problem(s). After

Q 209. So, when you did that [denied my approved annual leave] I was approved for 80 hours when you did that. Doesn't it bring my leave to 72 hours instead of 80 hours because I must work and when I worked on the weekend, you didn't offer me extra day of leave. Is that not the case?

Dr. Joseph Anoruo (02:13:50):

Let's go back to that tab 30, page 57. If you read number two. I believe it's number two.

A 209. It's 80 hours[43]. Either way you cut it because you're not working Monday through Friday. You're working Monday through Thursday, Friday off work Saturday, there's your five days, and then you have five days the following week, which is 80 hours for the two weeks. So you were not shortchanged on hours or pay or leave. In fact, you saved yourself eight hours a leave.

Q 210. Mr. Hawkins actually receive Dr. Anoruo's email. Did you believe that it was appropriate for him to have identified Meeta[44] in order to, for continuing care?

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this determination, the supervisor shall develop in consultation with the employee and local union representative, a written PIP. Contrary to Dale's statement, "shall" is a mandatory command.

[43] Clearly shows that Dale Hawkins and AJ mischaracterized and misrepresented the claim which is denial of approved leave based on rotation that was in existence since 2017 in violation of seniority and leave policy and CAFC misapprehended same.

[44] Meeta is clinical pharmacist, Certified Diabetes Educator, deputy chief of pharmacy, overseas all clinical activities in the

A 210. No, it's completely inappropriate and makes no sense.

Dale Hawkins (02:15:50):

Q 211. So, what does the policy say on number two?

A 211. Well, your part that you put says individual employee names are not to be included in health record documentation unless the purpose is to identify practitioners for continuing care.

Q 212. So, don't you regard Meeta as a practitioner.

A 212. I regard her as an administrator. She is most definitely not taking care of this patient's nutritional needs as you're stating,

MR. FUNDERBURK: Stephanie, could I have you turn to tab 16, page 67?

Q 213. Q Dr. McKinnon, do you have any familiar -- familiarity or knowledge about the incident listed on the lower righthand corner of this chart from September 29th of 2021?

A 213. : A Yes.

Q 214. Could you give us an overview of what occurred?

A 214. A On that particular day, Dale Hawkins, who's the outpatient supervisor, was not on station that day. So, if my supervisors are not on station, then I fill in for them. So, on that particular day, he was not there. I pulled Joseph to go to work on pending. And the technician supervisor pulled him back to the

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pharmacy and gave a written instruction on the prescription to convert. 'Per Meeta"

window, to go do pendings. And she wasn't supposed to, because I was managing the workflow. And so he went back to the window, and I told him to go back and do pending. So, it was a miscommunication with the—with the technician.

Q 215. So the miscommunication that happened here—was it between me and the management or the management?

A 215. The miscommunication was between Danielle and I. Danielle should not have moved you from your station.

Q 216. So, do you see coordination issues, problems with the management here?

A 216. I would not say there's a coordination issue. But Danielle sometimes does coordinate the workflow. And that particular time, she decided to coordinate the work—the workflow and move you based on the windows.

Q 217. JUDGE BLACK: Dr. McKinnon, is it fair to say that, with respect to this instance we're talking about on September 29th of 2021, the Appellant didn't do anything wrong?

A 217. NO! (after several evasive responses)

Q 218. Do you think the push and pulling around from 8 a.m. to around 10:00, cleaning the computers here and there, would have affected my pending numbers in those two hours?

A 218. No!

Q 219. Why not?

A 219. Because it doesn't take that long to log in and out of a computer.

Q 220. So, even if it is one minute, would that affect somebody's pending number?

A 220. No!

Q 221. Your honor! can we do a closing statement after, let give us a day to do the closing statements? . . . give us a day to do the closing statements?

A 221. Samantha Black: (02:37:11): Why?

Q 222. Because we have to review all these things and we make a closing statement. It would be unfair for me to interview witnesses tomorrow and make a closing statement tomorrow.

A 222. Why would it be unfair?

Q 223. Dr. Joseph Anoruo (02:38:35): Okay.

A 223. No, that your request is denied

Q 224. DR. ANORUO: Okay. Can we look at tab 28, page 361-362? Can we look at that, please?

A 224. JUDGE BLACK: No. That's outside the scope. JUDGE BLACK: So, if you would like for him to look at the September 17th email and then the email where he ultimately sends it to factfinding, that's tab–

Q 225. DR. ANORUO: Your Honor, I believe the top email is necessary for him to answer the question.

A 225. JUDGE BLACK: Hold on one second, Dr. Isani. I'm going to place you in the waiting

room and figure out if this is within the scope. I'll bring you back once we have an answer on that.

Q 226. DR. ANORUO: My question is Dr. Isani saw this email, reviewed this email before he sent that notification on 11/10/2020, two months after the issue. So, he needs to see if he reviewed this email to tell us why he recommended factfinding after HR has already decided on it.

A 226. Dr. Anoruo, what's your question?

JUDGE BLACK: Okay. I think this is outside the scope. He was not asked about these emails, and he described the process he utilized to initiate the factfinding.

Q 227. DR. ANORUO: Can we look at 240? Did you send any other message to Gail except this?

A 227. No. This should be the only one that—before I initiate going ahead and having a factfinding.

Q 228. I asked you if there was any other documents you sent to Gail. You said no.

A 228. In this case here, you're looking at it—did I say, this is all I have, Gail? That's going to assume that—again, I have to make an assumption that I've already initiated this. If I get the email, I send it over. If Gail's asking for something, she's looking for information. You have 3 days to initiate the fact finding.

Q 229. Why did it take you two months when it is required to be done in three days?

A 229. Because this is not a high profile one for me.

Q 230. So, is it safe to say that you are violating the harassment protocol by not following the previous rule, since this was sent to you in September, and you didn't report it until November 10th?

A 230. No.

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70. Agency offered 7 days and 7 on shift but because I volunteered for the position and had seniority, the canceled the offer and when I asked Dr. Kim about it, she told me that I was unsuccessful in the preceding year and was not qualified for the shift.

Dr. Anoruo:

Q There was a time they offered us premium shifts—assignments to work seven days on, seven days off. And some of us volunteered for this position. I volunteered for that position. It was not given to me. Do you remember that post?

A: I never got offered that either. . . . but nothing ever came of it.

Q: Did you apply for that position? Did you re—volunteer to do it?

A: Yes. Yes.

Jennifer Paulson's Testimony:

Q 231. How often do you process pending prescriptions when you're on that particular rotation?

A 231. A: Very few.

Q 232. Occasionally on that [non-pending rotations other than checking], what pending opportunities do you have?

A 232. A: little more than checking, but still not a whole lot.

Q 233. Most of the time when you're on that rotation (non-pending rotations), do you normally make it to a daily report that your name comes up in the daily report Bryan sent out every day.

A 233. Do I? No, not usually; Once in a while, I can.

Q 234. On rotation 8, which is the closing/PADR; the old pending before the flag orders. The redundant flag orders and all that. How is your opportunity to do pendings in that shift?

A 234. I'd say, you know, you could probably get an hour or so maybe an hour and a half of pending time out of the whole shift.

Q 235. So, for all the evening rotations, that applies to pending . . . like rotation 9?

A 235. Yea

PIP

Q 236. Why were you placed on PIP?

A 236. Because the pending weren't acceptable numbers.

Q 237. What year was that?

A 237. I had a 90-day one. It was—I want to see February to April.

JUDGE BLACK: Okay. Dr. Paulson, February to April of what year?

THE WITNESS: This year.

JUDGE BLACK: Thank you.

So that's 2022.

BY DR. ANORUO:

Q 238. What about last year?

A 238. Not—last year, no, I did not. The PIP for this year was because of last year's – end of year evaluation e—eval? Because last year, I had three months of CCN and so they had taken that into account . . . . I was still successful last year, but that was, I guess, dependent upon how I did on my PIP. And since I did great on the PIP, they marked me fairly successful last year.

Q 239. Who told you that PIP was given to you by employee relations?

A 239. Dale told me that.

Q 240. Did you get the union involved in that? did Dale tell you to advise the union about it before they give you the PIP.

A 240. No. No.

CMOP REJECTS

Q 241. Sometimes you are assigned CMOP reject error and you review it. It is not an error. Have you seen such a situation before?

A 241. Yes.

Q 242. What do you do in that situation?

A 242. I, personally, put it in an email to Dale so that I dispute it and then he will investigate it. And then he will tell me if it's not an error that is removed from my numbers.

Q 243. Do you see that often?

A 243. I do. I look at them every month. And every month I send Dale an email of the ones that I believe are legitimate errors and every month he looks into them and every month, at least a few are removed from my count.

Q 244. Based on this schedule, what does the T on the schedule represent? You can see 4T, 7T, 11T, and all that.

A 244. Judge Black: . . . Do you have an understanding of what that "T" means?

THE WITNESS: No,

JUDGE BLACK: Would it refresh your recollection to tell you that another witness indicated to me that means that person would be teleworking that day?

THE WITNESS: Oh. Yeah. I didn't really get to do that, so I didn't know that[45].

Dr. Nakimera Hearing Testimony:

Q 245. : Does this mean that pending shift is subjective

A 245. Correct. It varies every single day. Numbers, problems, quantity of pendings in the queue;

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[45] Because like Joseph she was not allowed to do it until they manipulated metrics and added 3602 prescriptions to her pending numbers in her October & November 2020 metrics because she was in community care. See SAppx 0369. In the same October my number was suppressed to 814 (Sappx 367) despite that the captured daily output provided by Bryan for 6 days showed I had over 900 prescriptions SAppx371-408.

how many pharmacists on the queue. There's a lot that—that can go on, on a daily basis.

Q 246. Have you heard about the scheduling disparities in the pharmacy against me?

A 246. Yes!

Q 247. JUDGE BLACK: I'm sorry. One moment, Dr. Anoruo. Dr. Nakimera, I apologize. How is it that you became aware of scheduling disparities in the pharmacy as they pertain to Dr. Anoruo?

A 247. Thank you. Well, I became aware of them because he did let me know that they put him on that performance improvement plan, and it was due to pendings. If you don't meet it today, you will meet it as you go along. The more shifts you get for pendings, the more likely you are to meet that goal. If you're not doing enough pending shifts, the chances are that you will not meet those goals.

Q 248. But have you heard or learned that there is scheduling problems in the pharmacy?

A 248. Yes. From you, because you brought it to my attention as a colleague, even before I actually took it to the Union that were not being scheduled for pending shifts, and I had to intervene.

MR. FUNDERBURK: I would object. Excuse me, Dr. Nakimera.JUDGE BLACK: That it sustained[46].

Q 249. Dr. Nakimera, based on your recent encounter with the safety and OSC, what can you tell me about CMOP rejects in the pharmacy performance using it in terms of performance standards?

CMOP REJECTS

BY DR. ANORUO:

A 249. That is one of the discoveries that actually happened when the Office of Medical Inspector came to our department, and they found out that management had been using errors as part of it—of evaluating or in appraisals of employees and they were advised not to do that.

Q 250. Can you say on the record what you remember in that discussion?

Ward-Smith Linda Testimony:

A 250. I remember a meeting in the Union office, and I believe that was Dale, you, myself, and I believe Bob, the chief steward. And the meeting was called I believe to issue a PIP. But we were not aware of what the meeting subject was going to be prior to us entering the room. So, when we got into the meeting, Dale, I believe, had paperwork to have you sign off on starting a PIP which the Union was not made

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[46] AJ erred to sustain the objection because personal knowledge include what you hear or learn.

aware of prior to that meeting, if I recall that correctly.

Q 251. During the discussion of my performance, which was the pending data, and CMOP rejects, did I mention that my pending number was low and did you ask Dale to offer me a designated pending shifts so that I can improve my numbers?

A 251. Yes, I do recall stating that.

Q 252. Do you remember what Dale said?

A 252. To be honest, I don't remember the exact verbiage. What I recall is us ending the meeting without anybody signing off on the PIP. So, I believe, because of what we asked for, that was going to happen, because the meeting ended.

Q 253. Do you remember them saying that given the extra pending shifts to increase my number was not fair to other employees?

A 253. A: I don't remember if he stated that or not. I'm Sorry.

Q 254. According to the schedule I presented that day were there people that were assigned to telework and do only pending at home?

A 254. Yes.

Q 255. Do you remember me stating that I was not assigned to telework, and they gave reason because my performance was unsuccessful at present?

A 255. Yes.

Q 256. Do you remember me stating that because I was not given that opportunity, and the pharmacy did not even offer any opportunity in the pharmacy to do the same pending. Like, they offered people that we're working from home.

A 256. Yes, I remember you stating that.

Q 257. Do you remember that I said that my pending number was low because I was not assigned a fair and equitable number of pending shifts to improve the pending data?

A 257. Yes.

Q 258. Do you remember me presenting evidence that shows that the first pending shift I was assigned was on May 5th, 2021?

A 258. Okay. I don't remember the date, but I do remember you showing data about your pending shift.

Q 259. Did Dale dispute my assertion that I was not given enough pending shifts?

A 259. I don't recall if he disputed it or not. I know that there was a dispute at the meeting, but I cannot recall if, based on the data you presented, he agreed or not. So, I cannot recall him stating that.

Q 260. Do you remember why you asked him to provide further documents?

A 260. I remember asking for further documents for one. PIP should be with the Union involved, right, according to our contract . . . We asked for HR to come because we just felt like the

whole process was not done right for a PIP meeting[47].

Q 261. Was that information you requested presented to you before the PIP was issued?

A 261. No.

Q 262. *So, did you consent to the PIP?*

A 262. *No.*

Q 263. JUDGE BLACK: Ms. Ward-Smith, is it your understanding that under the applicable Union contract, the Union has to consent to the PIP before the Agency issues it?

A 263. No

Q 264. JUDGE BLACK: Can you explain?

A 264. Okay. So, the contract language, I would have to look at it verbatim, but the PIP is, I don't want to say formulated, but the Union, the employee, and management are to be involved in the -making of the PIP.

Q 265. Linda, do you remember why you filed the grievance? A: The grievance was filed because it was our opinion, the Union, that the PIP was not done in accordance with the master agreement. Which states that the Union should be involved in the process.

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[47] Dale invited me for a Midyear review at which PIP can be identified and considered by AFGE Article 27 section 9 (C) as was the case here, but calling that a PIP meeting section 10 (A) is a violation of 18 U.S.C § 1001.

A 265. The grievance was filed because it was our opinion, the Union, that the PIP was not done in accordance with the master agreement. Which states that the Union shall be involved in the process.

Q 266. When Dale came to the [pharmacy] AFGE office, did he ask you for suggestions on how to start the PIP, and you did not provide that information?

A 266. I don't recall Dale asking the Union any questions. I don't recall that.

Q 267. Did any management official ask you any questions about the PIP

A 267. I don't recall – I don't recall management asking the Union questions about formulating the PIP.

Q 268. Do you remember why you requested to place the grievance on hold until OSC make their final determination?

A 268. JUDGE BLACK: Dr. Anoruo, just so you know, that doesn't matter. That's not before me. It's not relevant.

Cross examination by Funderburk (OGC):

Q 269. Does the Union, I suppose in a perfect world, is it your role to make recommendations regarding how to improve the employee performance in that PIP meeting[48]?

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[48] The notice Dale sent out between 6/1/2021 to 6/8/2021 to the Union and the Appellant was for a midyear review and not a PIP

A 269. Yes.

Q 270. Did you send any proposals to Dale Hawkins to include in the PIP?

A 270. I wasn't given the opportunity, No.

Q 271. Okay. But you—you could have sent him some via email, though, correct?

A 271. We were supposed to have a meeting, and at the meeting would be my understanding that we would have a discussion and do proposals based on what the employee is deficient in. Because the employee was stating that there was discrepancies as far as his performance all together, it would have been difficult at that time to develop a PIP if there's a discrepancy on what the PIP really—it—what the question of what the poor performance was. If it was something beyond the employee's control, based on scheduling, based on not having opportunities to even perform the duty, then no amount of, you know, proposals from the Union, except give them more time to do the required duty, would have helped in that situation.

Q 272. Did you review the PIP paperwork[49] at any time? Either then or after?

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meeting and for Dale to state that his intent was to issue a PIP is a violation under 18 U.S.C § 1001 (a) (c). See Q&A 42-49 above.

[49] The document Dale presented was not a PIP paperwork, rather midyear performance data.

A 272. My recollection of the meeting was Dale presented something[50]. Joseph's disputed, based on schedule. And then the meeting was kind of ended abruptly, and we were going to reconvene the meeting with HR with data.

Q 273. Okay, let's go to tab 10, 1 1 9. You said you did not know who filed this complaint?

A 273. Dr. Meeta Patel (43:24): Yeah.

Q 274. Dr. Joseph Anoruo (43:27):Were you aware about the locker breakage incident that was brought to your office?

A 274. Funerburk, Steve (OGC): Yes, I would object as outside the scope of the accepted claims Judge Black (43:38):

Sustained. It's both outside the scope of the accepted claims. It's also outside the scope of direct examination. So it doesn't relate to this document.

Q 275. Dr. Joseph Anoruo (43:53): I don't get it.

A 275. Judge Samantha Black (43:56):

So, one, you are currently [00:44:00] limited to asking questions of the subject matter that Mr. Funderburk asked her because you're redirect. He did not ask her whether she knew of any complaint pertaining to your locker. This is an OMI investigation started by an OSC complaint that doesn't pertain to that issue. So it's outside the scope to ask her about investigations or complaints or other matters

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[50] Midyear evaluation data was presented and not PIP document.

pertaining to [00:44:30] that locker because Mr. Funderburk did not ask her about that.

Judge Samantha Black (44:42):

Q 276. Dr. Joseph Anoruo (44:35): Okay. Because this report was incident to that locker breakage incident (*the evidence from the locker was the bases of the ongoing OSC complaint and a judge in the EEOC complaint determined that it was relevant in the proposed removal*)

A 276. This report? No, sorry, I understand that's your argument Dr. Anoruo I disagree. It is outside the scope of what he asked her.

Q 277. Judge Samantha Black (45:06): Dr. Patel, did you receive this report?

A 277. Dr. Patel (45:10): The actual report? I got some action items. Don't recall seeing this, the specific exact report51.

Q 278. Funderburk (11:14):

Alright Stephanie, could I have you pull up tab 10, page 119. Alright. Dr. Patel, are you aware [00:11:30] of this particular report that was done back in 2019?

A 278. Dr. Joseph Anoruo (11:49): Your Honor, I'll object to this because this is outside the range.

Judge Black (11:57):

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51 Contrary to this lie, see #280 & 281. The chief of pharmacy cannot get this report and the person that supervised drafts pharmacy policies and the changes remembers portion of the report but denies receiving the report.

Overruled. He's not asking [00:12:00] her about a personnel action. So, this would be outside the range if he was asking her about a personnel action. I was supposed to is that he's asking her about something related to one of your OSC complaints, which you have indicated. This is an ongoing OSC complaint. So even though this report was in 2019, you have indicated this is an ongoing OSC complaint that is within my jurisdiction in this case. Accordingly, this is within the scope. You can proceed with your question Mr. Funderburk52.

Q 279. Funderburk, (OGC) (12:27):

Could I have you scroll down [00:12:30] to page 120? Alright. And so Dr. Patel, go ahead and read that first paragraph and that should give you some background and let me know when you're done.

A 279. Dr. Meeta Patel (12:58):Okay.

Q 280. Alright. And [00:13:00] then Stephanie, if I could have you go to page 1 38. Alright, and then Dr. Patel, if you could just scan through the interviewee list and see if you see your name anywhere.

A 280. Dr. Meeta Patel (13:16):I should be, yep, I'm there because I remember this. Yeah.

Q 281. MSPB tab 59-5@(01:01:26):

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52 Appellant asked questions related to the same OSC complaint and AJ determined that it was outside the scope. double

Funderburk, Stephen (OGC): Okay. Uh, were you, um, did you read this report after it came out?

A 281. (01:01:33): Mr. Bryan Tarman: Uh, yes.

Q 282. Judge Black (01:19:05): Okay. Are you aware that Dr. Anoruo has filed OSC complaints in the past?

A 282. Mr. Bryan Tarman (01:19:11): No.[53]

Q 283. Dr. Joseph Anoruo:

Do you believe that this production report reflects on the schedule?

Dale Hawkins:

A 283. Possibly. Without seeing the schedule, I'm not sure. I would just say that there are 12 weeks in a quarter and there's 16, 17 rotations so that you will not fully go through all the stations in one quarter.

Samantha Black:

Q 284. Mr. Hawkins, let me just ask you this basic questions. Is it fair to say that you would expect a pharmacists would process more pending prescriptions on any given day in which they're assigned to process any prescriptions as a primary duty than when they're assigned to any other duty?

A 284. Dale Hawkins: Yes.

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[53] Contrary to this see, tab 28, pp. 361-362, 323-326; Case 23-1114, doc 34-2, pp505-515)

Samantha Black:

Q 285. And is it fair to say there may be other rotation assignments that given that particular assignment and the case or amount of work of that assignment on the given day that a pharmacist assigned to that rotation on that day may not process any pending prescriptions or may process? Very few.

A 285. Dale Hawkins: Very few, yes.

Samantha Black:

Q 286. Okay. So is it fair to say that you would expect someone's amount of pending prescriptions process to vary based on what particular assignment they were doing on any given day?

A. Dale Hawkins: Yes. Yes.

Samantha Black:

Q 287. And so that what rotation they're assigned to and what rotation they actually perform in any given week would likely reflect in the amount of pending prescriptions that they have processed in that particular time period?

A 287. Dale Hawkins: Yes.

FY 2021 SCHEDULE REVIEW
CORRECTED DATA FOR JOSEPH ANORUO

Rotations	Joseph (as entered)		Joseph (Correct Data)
1	16.5	→	11.5
2	10	→	2
3	11	→	15
4	3.5	→	2
4T		→	0
5	14	→	14
6	15.5	→	21
6/7	4	→	N/A
7	5	→	4.5
8	6	→	6
9	7.5	→	15
10	15	→	20
11	2	→	0
11T		→	0
12	20.5	→	22
13	14	→	24
14	20	→	20
15	5	→	5
16	10	→	13
16T			
17			
17T			
CCN			
Inpt			
COVID Vaccine Prep			

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