No. _____

In the Supreme Court of the United States

ERIC KATZ,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX

Eric Katz
520 Lystra Preserve Dr
Chapel Hill, NC 27517
(559) 240-2999
erickatz21@gmail.com

Pro Se Petitioner

Twelfth day of February, MMXXV

United States Commercial Printing Company · www.uscpc.us · (202) 866-8558

APPENDIX

TABLE OF CONTENTS

(This page is intentionally left blank)

Appendix A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ERIC J. KATZ,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2022-1473

Petition for review of the Merit Systems Protection Board in No. DC-1221-20-0079-W-2.

JUDGMENT

KEVIN EDWARD BYRNES, Fluet, Tysons, VA, argued for petitioner. Also represented by GRACE H. WILLIAMS; RACHEL LEAHEY, FH+H, PLLC, Tysons, VA.

ELIZABETH ANNE SPECK, Commercial Litigation Branch, Civil Division, United States

Department of Justice, Washington, DC, argued for respondent. Also represented by BRIAN M. BOYNTON, ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY.

THIS CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (LOURIE, BRYSON, and REYNA, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

June 6, 2024
Date

United States Court
of Appeals for the
Federal Circuit Seal
/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

Appendix B

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ERIC JAMIE KATZ,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2022-1473

Petition for review of the Merit Systems Protection Board in No. DC-1221-20-0079-W-2.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, BRYSON[1], DYK, PROST, REYNA, TARANTO, CHEN,

---

[1] Circuit Judge Bryson participated only in the decision on the petition for panel rehearing.

HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[2]

PER CURIAM.

ORDER

On October 17, 2024, Eric Jamie Katz filed a petition for rehearing en banc [ECF No. 61]. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,
IT IS ORDERED THAT:
The petition for panel rehearing is denied.
The petition for rehearing en banc is denied.
The mandate of the court will issue November 26, 2024.

FOR THE COURT

November 19, 2024
Date

United States Court
of Appeals for the
Federal Circuit Seal
/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

[2] Circuit Judge Newman did not participate

Appendix C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

ERIC J. KATZ,
Appellant,

DOCKET NUMBER
DC-1221-20-0079-W-2

v.

DATE: November 15, 2021

DEPARTMENT OF JUSTICE,
Agency.

Kevin Byrnes, Esquire, Tysons, Virginia, for the appellant.

Christopher M. De Bono, Esq., and Jill McCann, Esq., Springfield, Virginia, for the agency.

BEFORE
Monique Binswanger
Administrative Judge

INITIAL DECISION

On October 22, 2019, the appellant timely filed the instant Individual Right of Action (IRA) appeal alleging the agency retaliated against him for protected whistleblowing. *See* Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. § 1221(a) and 5 C.F.R. § 1209.2. AF, Tab 25. I held the requested hearing on March 9-10, 2021, April 5, 2021, and May 7, 10, 2021. *See*

Refiled Appeal File[1] (RAF), Tabs 42-43, 45, 53, 55 (Hearing CDs Vols. 1-5).

For the following reasons, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The appellant joined DEA on May 12, 1996, as a GS-9, Series 1811 Criminal Investigator ("Special Agent"). RAF, Tab 21 at 9. As a condition of his employment, the appellant signed a Mobility Agreement, acknowledging that he may be subject to "frequent changes in posts of duty" and acknowledged that he is prepared to accept reassignments determined by management to be in the best interest of the agency. RAF, Tab 20 at 71. During his career with the agency, the appellant served in several locations both foreign and domestic. RAF, Tab 42 (HCD Vol. 1).

Selections above a certain grade within the agency go through the agency's Career Board process. RAF, Tab 42 (HCD Vol. 1). Generally, the agency announces vacant positions and invites current employees to express interest in the position. *Id.* The Career Board convenes to evaluate the position candidates and issues a decision selecting a particular candidate for the position. *Id.* The Career

---

[1] On June 11, 2020, I issued an Initial Decision dismissing the instant appeal without prejudice at the parties' request. AF, Tab 28. On October 9, 2020, the appeal was automatically refiled with the Board pursuant to that Initial Decision. RAF, Tab 1.

Board considers applicants' locations and the duration of their current positions in making selections. *Id.* One consideration is that agents are generally rotated out of the agency's Headquarters (HQ) location in Arlington, Virginia after several years stationed there and returned to a field position. *Id.*

After several different field office positions, on June 6, 2010, the appellant was selected to the GS-14 position of Deputy Chief of the Command Center & Crisis Preparedness Section ("Command Center") within the agency's Office of Operations Management (OM) at the agency's HQ. RAF, Tab 42 (HCD Vol. 1); RAF, Tab 20 at 70. The appellant reported directly to Andrew Large, Chief of the Command Center, until July 2018. From July 2018 to November 11, 2018, Homer "Chip" McBrayer served as the acting Chief. On or about November 11, 2018, Luke McGuire became the acting Chief of the Command Center and continued in that position for all times relevant to this appeal. RAF, Tab 43 (HCD Vol. 2). The appellant's second level supervisor during this time period was Miachel DellaCorte, OM Deputy Chief. RAF, Tab 45 (HCD Vol. 3). From approximately January 2019 through July 2019, his third level supervisor was Gregory Cherundolo, OM Chief. RAF, Tab 43 (HCD Vol. 2).

The CATS Program

As a Deputy Chief in the Command Center, the appellant served as the Unit Chief of the Force Protection (FP) Unit. RAF, Tab 19 at 21. The FP Unit was comprised of the appellant and three contractor employees. The appellant was responsible for administering the agency's Cellular

Abductor Tracking System (CATS) program and the three contractor employees that supported the program. *Id.* In its finished state, the CATS program is intended to operate technical devices installed in government vehicles (GOVs) in foreign countries that would aid in personnel security and recovery in the event of an abduction or other serious security events involving agency personnel. *Id.* During the relevant time period, the CATS program was in the process of developing the devices that would be installed in the overseas GOVs. RAF, Tab 19 at 21; Tab 42 (HCD Vol. 1). The appellant conceived of this device, initiated the program, and continued to manage the program and the contractors thereunder as development continued. RAF, Tab 42 (HCD Vol. 1). The appellant and CATS contractors worked directly with a technical team of engineers building the devices, which was undertaken by the Department of the Navy at its facilities in Dahlgren, Virginia, and the software development team, undertaken by Oracle in Northern Virginia.

Originally, Cherokee Nation Technology Solutions (Cherokee Nation) was the contractor providing the support personnel for the CATS contract. RAF, Tabs 42, 45 (HCD Vols. 1, 3). Cherokee Nation hired Jenna Guerra and Thomas Bordonaro and assigned them to work on the CATS contract. *Id.* Both Guerra and Bordonaro worked on the CATS project with the appellant for several years under this arrangement. *Id.* Cherokee Nation's contract with the agency was set to expire in or around September 2017. RAF, Tab 45 (HCD Vol. 3). In or around March 2017, OM decided not to renew

its contract with Cherokee Nation upon expiration of its term and began working with the agency's Contracts Office to obtain another contractor. *Id.* In coordination with the Contracts Office, in late-September 2017, OM entered into a direct-bid contract with Cloud Lake Technology, LLC (Cloud Lake) to provide administrative and professional services to OM's four sections, including the Command Center and the CATS program. *Id.* Cloud Lake was owned and operated in part by Barry Smallwood, a former DEA employee.

Cloud Lake subcontracted the CATS portion of the contract to Compass Strategies (Compass). RAF, Tab 42, 45 (HCD Vols. 1, 3). Compass Strategies was owned and operated in part by Zoran Yankovich, a former agency employee. *Id.* Compass hired Guerra and Bordonaro to continue their work on the project. *Id.* Compass also hired Edward Wezain and placed him on the CATS contract, with DellaCorte's review and approval. *Id.* In or around January 2018, Compass hired David Dongilli, also a former agency employee. *Id.* Dongilli had at one point served as the Acting Chief of Operations in OM and was the appellant's second level supervisor during a time in which the CATS program was in existence. *Id.*

At some point after the OM contract was awarded to Cloud Lake, Mina Hunter was assigned as the Contracting Officer Representative (COR) on the contract. RAF, Tab 42 (HCD Vol. 1). As the COR, Hunter served as the agency's contracting expert and liaison with Cloud Lake regarding contractual matters. *Id.*

In or around 2017, the Department of the Army informally agreed to provide office space to the

agency on Fort Bragg in North Carolina for the CATS project. RAF, Tab 42 (HCD Vol. 1). The appellant anticipated the Fort Bragg situs would be beneficial once the CATS devices were operational. *Id.* In particular, the appellant envisioned the CATS team would need to work closely with intelligence agencies already present on the base, and having a physical presence on the base would be useful in facilitating that relationship. *Id.* Furthermore, the agency would have access to the necessary data analysis infrastructure on Fort Bragg, which it did not independently possess, in the form of a command center within a secured facility, otherwise known as a SCIF. *Id.* However, until a secured space was needed, the Army permitted the agency to occupy non-SCIF office space on the base at no cost. *Id.*

Consistent with that intention, in 2017 the agency advertised a GS-1811-14 Staff Coordinator position in Fort Bragg, North Carolina. RAF, Tab 42 (HCD Vol. 1). The Staff Coordinator position was a non-enforcement position that would oversee the CATS program, as the appellant was currently doing. *Id.* Though the position was sited in North Carolina, it was nevertheless a Headquarters position within the Command Center reporting structure. *Id.* The position was to be announced and filled through the agency's Career Board process. *Id.*

The Appellant's Reasonable Accommodation and Transfer to North Carolina

On July 28, 2017, the appellant applied for the Group Supervisor (Assistant Special Agent in Charge) (ASAC), vacancy in the agency's Charlotte, North Carolina district office, identified by Vacancy

Announcement CMB-17-228-2 (Charlotte Position). RAF, Tab 20 at 69-70. The position was organizationally in the agency's Atlanta Division. The appellant was referred for selection as a Best Qualified Candidate for a lateral reassignment to the position. *Id.* at 69. On August 16, 2017, Heidi Crater, assistant to the Atlanta field office Special Agent in Charge (SAC), emailed the appellant to ask if he was going to submit his "bios" for the vacancy. RAF, Tab 20 at 68 and Tab 42 (HCD Vol. 1). The appellant responded that, "[d]ue to a personal issue I am going to have to withdraw from consideration" for the position. *Id.* On August 18, 2017, the Career Board recommended three preferred candidates for the position, none of which was the appellant. RAF, Tab 20 at 46. However, during its meeting on September 6, 2017, the Career Board selected the appellant for the position. RAF, Tab 20 at 26, 32.

From September 8-13, 2017, the appellant underwent radiation treatment with Stanford Health Care Department of Neurology (Stanford Neurology) for treatment of a diagnosed brain tumor. RAF, Tab 20 at 22. On September 9, 2017, the appellant submitted a written request for medical accommodation to Elizabeth "Kelley" Goode, the agency's EEO Officer. RAF, Tab 20 at 24. Therein, the appellant stated he has been diagnosed with a brain tumor and has been experiencing worsening side effects as a result of treatment. *Id.* He stated:

> Given DC Katz current condition and until full remission is achieved when he can return to enforcement related activities, the Neurologist at Stanford University recommends against

> extended commuting for work or medical care.

Id. He explained that, due to the rare nature of the tumor and location, he requires specialized medical care for treatment and follow up. *Id.* He further explained that the only recommended medical care team for this type of condition in North Carolina is at the Duke University Health Skull Base Tumor Treatment Center in Raleigh, North Carolina ("Duke University"). *Id.* at 25. He stated that his neurologist recommended against extended commuting for work or medical care and that he was advised to live near Duke University. *Id.* at 24-25. Finally, he noted that he has applied for a non-enforcement position in Ft. Bragg, North Carolina. *Id.* at 25. He stated that placement in the position would allow him to live in the Raleigh area, within close proximity to both his duty station and medical team, "while he recovers from his medical condition." *Id.* On September 13, 2017, Dr. Steven D. Chang of Stanford Neurology issued a letter confirming the appellant's treatment at Stanford since July 2017. RAF, Tab 20 at 22. He stated:

> The patient already has symptoms unilateral hearing loss, tinnitus and dizziness/loss of balance. These symptoms may worsen for a period time after treatment and may compromise his daily activities, such as commuting which is not recommended as Mr. Katz undergoes this phase of his recovery.

Id.

On September 21, 2017, the appellant emailed Daniel Salter, SAC of the Atlanta Division, and

Dellacorte to advise them that he planned to seek a medical hardship transfer to the Raleigh area. RAF, Tab 20 at 23. The appellant stated he had been diagnosed with a medical condition and the only facility in North Carolina with the expertise to manage his care is at Duke University. *Id.* He further stated he had been advised to avoid long commutes to work and for medical appointments as a result of his condition. *Id.* He requested they support him in his transfer request. *Id.* On September 22, 2017, the appellant emailed Jonathan Schleffer, Executive Secretary of the Career Board, for guidance on the medical hardship process. RAF, Tab 27 at 20. He stated he could move to North Carolina but needed to be in proximity of his specialist at Duke University as he undergoes "adverse reactions from treatments." *Id.*

On September 27, 2017, Dr. Pamela Adams of the agency's Health Unit reviewed the appellant's medical documentation dated September 13, 2017 from Stanford Neurology and recommended the appellant be placed on a temporary medical advisory. RAF, Tab 20 at 21-22. On October 2, 2017, Deborah Lary, Chief of the Health Services Unit, issued a Medical Advisory for the appellant stating her recommendation that the appellant not participate in enforcement duties or operate a GOV until he is cleared by the Health Unit. RAF, Tab 20 at 19. The appellant was copied on the advisory. *Id.*

Concurrently, on September 29, 2017, the appellant's request for a reasonable accommodation to Goode was documented on "DOJ Form 100A Request for Reasonable Accommodation" as:

> Employee requests a transfer to the Raleigh area to a nonenforcement position. The position requested is Staff Coordinator, GS-1811-14, at Ft. Bragg, North Carolina. This will enable employee to receive treatment at the Duke University Health Skull Base Tumor Treatment Center and allow for a reasonable commute from the Raleigh area.

RAF, Tab 24 at 148. As the basis for the request, the form states:

> Employee has a unique type of brain tumor for which specialized care and treatment are required. Treatment is available at Duke University in North Carolina.

Id. On October 3, 2017, then-Acting Administrator Robert Patterson, signed a "DOJ Form 100B – Reasonable Accommodation Information Reporting Form," approving the appellant's request for reasonable accommodation and transfer to the Fort Bragg position. AF, Tab 5 at 16; RAF, Tab 20 at 24. The appellant also requested a reasonable accommodation of telework on an as-needed basis when his tumor symptoms and/or radiation treatment recovery rendered him unable to commute. RAF, Tab 24 at 145. On October 31, 2017, Large approved the appellant's telework accommodation request, and signed DOJ Form 100B to that effect. RAF, Tab 24 at 142-43, 147. In December 2017, the appellant reported to the Staff Coordinator position in North Carolina. RAF, Tab 42 (HCD Vol. 1). His supervisory chain of command within OM remained

unchanged. *Id.* Contractors Guerra and Edward Wezain, newly hired on the contract, also relocated to the Fort Bragg, North Carolina duty station. *Id.* Contractor Bordonaro continued to report at the agency's Stafford Training Center near Quantico, Virginia. *Id.*

In or around this time period, the appellant became unhappy with various changes that occurred under the new CATS contract. On November 3, 2017, the appellant emailed Large questioning the agency hiring Wezain as a third contractor on the project. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. On February 15, 2018, the appellant again emailed Large questioning the legality of the CATS contract award. See RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. The appellant believed Wezain did not have the requisite skills to assist Guerra with the data analytics portion of the contract work and that he required too much training. RAF, Tab 43 (HCD Vol. 2). On October 15, 2018, the appellant emailed COR Hunter and McBrayer to complain that Wezain did not have the necessary skills or training to work as an analyst on the CATS program, and that it would cost a lot of money to get him trained up. RAF, Tab 23 at 11-12. He suggested instead finding military-trained analysts with experience in similar analytics who could more effectively assist Guerra with her portion of the program. *Id.* Hunter responded that she would discuss the training issue with Cloud Lake. *Id.* That same day, the appellant completed a Customer Satisfaction Survey regarding Cloud Lake's performance on the contract. RAF, Tab 23 at 13. Threin, he rated Bordonaro and Guerra's work product highly, but stated Wezain does not have

adequate training or the requisite skills for the program. *Id.* at 13.

McGuire's Assessment of the CATS Program

On November 11, 2018, Luke McGuire entered on duty as the Section Chief of the Command Center and became the appellant's first level supervisor at that time. RAF, Tab 43 (HCD Vol. 2). Shortly thereafter, at DellaCorte's request, McGuire began an assessment of the programs within the Command Center, including the CATS program. *Id.* On December 3, 2018, the appellant requested authorization for travel to the Headquarters area for meetings related to the CATS program. RAF, Tab 29 at 11. The following day, McGuire emailed the appellant to approve the travel and requested the appellant give him a synopsis of the meeting topics. *Id.* McGuire stated "I'm interested in learning about all the different programs we're working on and so it helps me to know what's going on." *Id.* The appellant responded with a lengthy email regarding the anticipated meetings and background information on the topics. *Id.* at 10. In or around mid-December 2018, McGuire met with the team of naval engineers in Dahlgren and the Oracle software development team. RAF, Tab 43 (HCD Vol. 2). During his meeting with the naval engineers, the engineers reported their code name "Big Top" for the CATS program because it was a "circus." *Id.* They further reported frequent requirement changes that drove up the cost of the device. *Id.*

On January 10, 2019, the Navy's engineering team emailed McGuire, McBrayer, and the appellant with a detailed email regarding different camera options for the CATS devices; specifically, whether

the agency wanted to use internally or externally mounted cameras. AF, Tab 1 at 58. The team presented a series of considerations regarding this issue and indicated the internally-mounted cameras were the "most versatile solution from an installation perspective." *Id.* McGuire selected the internally-mounted camera option. *Id.* On January 14, 2019, the appellant emailed McGuire with a lengthy explanation as to why he did not believe an internal mount would work, based on prior field tests. *Id.* at 56-57. On January 15, 2019, McGuire responded that he considered the appellant's input but decided to move forward with the internal mount to avoid further delays and increased costs to the program. *Id.* at 56. He also asked the appellant to provide him with additional information regarding the CATS program. RAF, Tab 29 at 18. Specifically, he stated:

> I'm trying to get a handle on what's been accomplished to date, what's been spent and where we expect to be with this program in the near future. Please provide me with a detailed breakdown of how each of the three contract employees you've been overseeing support the CATS Program. I'd like to know what tasks each perform, what projects they were working on and where these projects were left when the lapse in government funding occurred on December 21, 2018.

Id. The appellant did not immediately respond to this request.

During this time period, the appellant also received emails from COR Hunter regarding his

Task Monitor duties and required COR certification courses. On January 9, 2019, Hunter emailed the appellant to ask if he had completed his COR Level 1 certification. RAF, Tab 20 at 12. She copied McGuire on the email. *Id.* Hunter was following up on her June 28, 2018 email to the appellant wherein she instructed him to register for the online training. *Id.* On January 23, 2019, the appellant provided Hunter with the certificate for one training class. *Id.* Hunter responded that he had been instructed to take three required classes and requested again that he complete them. *Id.* at 11. The appellant responded: "I'm working on it, I can't look at the computer screen for long periods of time. I'll get them done." *Id.* Hunter forwarded his response to McGuire. *Id.* During that time period, Hunter also reported to McGuire that she had concerns the contractors were not reporting their work hours properly. RAF, Tab 29 at 11.

On February 1, 2019, the appellant had still not yet responded to the request and McGuire again asked the appellant to provide the information. RAF, Tab 20 at 10. McGuire also requested the appellant provide any agreement that exists securing the agency's space on Fort Bragg. *Id.* That day, the appellant responded, with a copy to Hunter. *Id.* at 7-10. Therein, the appellant referenced verbal agreements that Guerra had secured regarding their space and support at Fort Bragg. *Id.* He confirmed that no formal agreement had been executed due to lack of funding. *Id.* He also referenced that Guerra and Bordonaro were liaising with other federal agencies. *Id.* Hunter responded:

> Based on your response below, contractors (Tom & Jenna) are working out of contractual scope of performance. As Task Monitor, you must be aware, that the contractors cannot represent Government Agency (DEA) or go into agreement with another agency or to solicit funding on behalf of the Government. It is violation and can be construed as "Personal Services". As a Contract Officer's Representative (COR) to administer and provide contract oversight, I have no choice but to report this to the Contract Officer and notify Cloud Lake.

RAF, Tab 20 at 7. Hunter copied McGuire on her response. *Id.* McGuire directed the appellant to stop all activity until further notice, and that he would reach out to the appellant the following Monday. RAF, Tab 24 at 108.

On February 5, 2019, McGuire and Hunter met with the appellant telephonically to discuss Hunter's assessment of the contractors' liaison activities. AF, Tab 1 at 33. During the call, McGuire confirmed the contractors were working outside the scope of the contract and that the appellant must ensure no further infractions occurred. *Id.* He further informed the appellant that McBrayer would be taking over the appellant's task monitor responsibilities over the contractors the following day. *Id.* McBrayer had completed the training required to conduct task monitor responsibilities.

On February 6, 2019, Bordonaro sent McGuire and email disputing Hunter's determination that he

was working outside the scope of the contract. AF, Tab 29 at 30-31. Bordonaro noted that the contract Statement of Work (SOW) specifically provided for him to be involved in liaison activities with other federal agencies and foreign governments. *Id.* He further alleged that DellaCorte was specifically aware and approved of his liaison activities. *Id.* Finally, he disputed the implication that the appellant had not been properly overseeing their work. *Id.* McGuire forwarded the email to Cloud Lake and expressed concern regarding the tone and content of the email. RAF, Tab 43 (HCD Vol. 2). On February 12, 2019, Compass fired Bordonaro. *Id.*

In or around February 2019, McGuire began having discussions with Hunter and Dongilli about relocating the CATS contract activity back to the Headquarters region. RAF, Tab 43 (HCD Vol. 2). McGuire also met with William Matthews, ASAC of the Stafford Training Center, to inquire as to whether the Training Center had office space to house the CATS program and its contractors. AF, Tab 19 at 22. Matthews agreed to share space with the CATS program. *Id.* McGuire also began coordinating with Hunter on a site visit the Fort Bragg site. *Id.* However, McGuire did not inform the appellant of the planned site visit. On February 26, 2019, McGuire contacted the agency's HR staff for guidance on the appellant related to this move. AF, Tab 23 at 6-7.

On February 27, 2019, the appellant emailed McGuire to inform him that Wezain gave notice of his resignation, effective March 15, 2019, due to the program being relocated back to Virginia. RAF, Tab 19 at 29. The appellant noted the lack of

communication with him regarding that decision. *Id.* He asked McGuire what his intentions were with respect to his medical situation and indicated the uncertainty was "causing [him] a great deal of unnecessary stress." *Id.* McGuire responded that he was also concerned about their communication and was "thinking of how it can be improved." *Id.* He stated, however, that if the appellant was experiencing stress he should contact the Health Services Unit and the Employee Assistance Program. *Id.* McGuire also emailed McBrayer to ask if the appellant had discussed any such stress with him. RAF, Tab 23 at 8. McBrayer responded to McGuire in the negative and cast doubt on the appellant's assertions. *Id.*

On March 5, 2019, the appellant emailed McGuire regarding his concern with the handling of the CATS contract, which he asserted to have "expressed in prior emails to [McGuire's] predecessor," who allegedly briefed the issue "up the chain of command." RAF, Tab 23 at 21. In particular, the appellant stated he expressed concerns of nepotism in the contract award and violation of federal contracting procedures, and that he had been thereafter retaliated against by way of reduction of responsibilities and alleged poor performance. *Id.* at 22. He stated "the issue has now come to a head," as Bordonaro has formally alleged the agency engaged in nepotism in awarding the contract to former agency supervisors in "direct violations of the FAR and federal law." *Id.* at 22-23. He stated he believed Bordonaro's complaint was now the subject of an IG investigation, and that he may have to be a witness "and possibly a proponent of that claim." *Id.* at 22.

He further stated Bordonaro had met with the FBI regarding these claims. *Id.* He clarified that his stress was due to his "fear that I am a witness to an improper contract award and am being retaliated against for raising serious questions about that award." *Id.* at 23. He stated his concern that he had a "duty to report what I know and what Bordonaro has told me, since it involves allegations of abuse, cronyism and illegality" and asked McGuire if they had a duty to make such a report "up the chain and to the Inspector General." *Id.* at 23.

On March 6, 2019, McGuire responded to the appellant's email by seeking clarification if the appellant was himself making an allegation or only passing on what Bordonaro had done. AF, Tab 23 at 21. The appellant responded: "It's both." *Id.* Accordingly, McGuire reported the appellant's allegations to DellaCorte, who reported the allegations to the agency's Office of Professional Responsibility (OPR). RAF, Tabs 43 and 45 (HCD Vols. 2 and 3). DellaCorte also reported the issue to Cherundolo for his awareness. *Id.*

On March 14, 2019, McGuire and Hunter made an unannounced visit to the CATS site on Fort Bragg. RAF, Tab 19 at 28-29. Neither the appellant nor Guerra were aware of or present for the visit. RAF, Tab 42 (HCD Vol. 1). McGuire arranged to have Wezain escort he and Hunter into the site. RAF, Tab 43 (HCD Vol. 2). During the visit, Wezain told McGuire that the appellant and Guerra rarely physically came into the office, approximately once every four to six weeks. *Id.* Wezain further told McGuire that the equipment was not secured because he did not have a key for the office. *Id.* After

McGuire concluded the site visit, he removed the agency's computer equipment from the site and brought it back to northern Virginia. *Id.*

The following day, McGuire notified the appellant of the unannounced visit and that he had removed the two desktops because the space was not secured. RAF, Tab 24 at 122. McGuire also asked where the appellant was the prior day during the site visit. *Id.* The appellant responded "As you are aware I have telecommuting authorization due to my reasonable accommodation and was working from home." *Id.* McGuire responded that he was not aware of any approved telework agreement for the appellant or his reasonable accommodation, and asked the appellant to provide him with the documentation regarding both. *Id.* at 121. The appellant agreed to do so shortly. *Id.*

Following that exchange, on March 15, 2019, McGuire emailed appellant notification that he was taking "corrective action" and required the following of the appellant:

> 1. You are required to use Fire bird whenever conducting official business on behalf of the DEA.
> 2. You are required to enable your Microsoft Lync so I may know whenever you're logged into Firebird.
> 3. You are to provide me with a daily report of all of your work activities performed, which will be due to me, by email, at the end of each day.
> 4. I expect your daily report to contain the following:

> • Work projects/activities and amount of time spent on each
> • Meetings, calls, or teleconferences and a list of the participants, their contact information and the topics discussed
> • If any documents are involved, include them in your email to me as attachments
>
> 5. If you claim any LEAP/AUO on your Time and Attendance in WebTA, you are to provide me with a detailed explanation of the work being performed and the specific hours spent performing that work.
> 6. Leave and/or travel requests .will be forwarded to me, well in advance, by email.
> 7. I will be the only person to approve your leave and/or travel requests, unless I have delegated, in advance, someone else to approve on my behalf.
> 8. I will be the only person to certify your WebTA entries after being validated by you, unless I have designated, in advance, someone else to approve on my behalf.

RAF, Tab 23 at 28. The appellant responded by notifying McGuire that he has a medical condition that is exacerbated by stress and that he filed an EEO complaint the prior week regarding McGuire's release of his medical information. *Id.* He further stated he has retained counsel and that his attorney would respond to McGuire the following week. *Id.*

McGuire responded, stating he was unaware the appellant had filed an EEO complaint, and that he was unaware of when the appellant started and ended his day. *Id.*

On March 18, 2019, the appellant provided McGuire with a copy of his reasonable accommodation that allows him to telework as needed, noting "your email seems to suggest you were unaware of this accommodation and that you thought I was not at my post last week." RAF, Tab 23 at 27. He further stated "As these were granted by the Agency, I should not have to defend them further and I consider your demands for additional information to be retaliation for my assertion of protected rights." *Id.* He accused McGuire of retaliation for his EEO activity and for his known support of Bordonaro's IG complaint regarding contracting violations. *Id.* On March 21, 2021, McGuire responded that he had met with the HR and EEO offices but that neither office had any records of the reasonable accommodation paperwork the appellant provided, and that the documents likewise were not in the appellant's personnel or Health Service records. AF, Tab 23 at 27. He requested the appellant forward to him any emails relating to his accommodation request and approval from September 2017. *Id.*

Thereafter on March, 21, 2019, McGuire emailed the appellant notification that he determined relocating the CATS program, including the appellant's position, back to the Headquarters area was in the best interests of the program and agency. RAF, Tab 19 at 19. McGuire further addressed the appellant's duties in the interim. *Id.* at

19-20. Specifically, he stated the appellant no longer had supervisory duties, as there were currently no assigned contractors to the CATS program. *Id.* at 19. He also reiterated the requirements he issued to the appellant in his March 15, 2019, though he removed the more specific requirements set forth therein as to what the appellant's daily report must entail. *Id.* at 19-20.

The Appellant's Reasonable Accommodation and Reassignment to Headquarters

The confusion over the appellant's accommodations continued. On March 28, 2019, Goode emailed Janelle Davis, an HR Specialist, regarding a meeting Davis participated in with agency management and Derek Orr, the agency's Disability Program Manager and Goode's subordinate. RAF, Tab 19 at 26. Therein, Goode recounted that the appellant had been granted a reasonable accommodation "via the process used for medical hardship requests submitted to the Career Board." *Id.* She stated the agency cannot remove an accommodation "from an employee who has performance issues" unless it causes an undue hardship. *Id.* She also stated it is "not generally the best approach" to remove an accommodation due to performance issues. *Id.* She concluded,

> If, as an organization matter, the decision is that the duties no longer need to be performed or there is not enough work for the employee, then we may start to look at reassignment in the location where he works so that the accommodation may remain in place.

Id. In response, Davis explained removal of the accommodation was not due to performance reasons. *Id.* at 25. Rather, she explained Orr had earlier determined the accommodation had become an undue hardship for the agency and the meeting was a follow up to that determination. *Id.* Davis further explained that HR had sought the meeting so as clarify the current accommodation in place and to retrieve any paperwork the EEO office had. *Id.*

On April 16, 2019, McGuire issued the appellant his Mid-Year Progress Review during an in-person meeting, and provided him with the written review the following day. RAF, Tab 23 at 30-33. The Progress Review recounted McGuire's assessment of the appellant's deficiencies in his management of the CATS program and contractors. *Id.* McGuire also noted the appellant's failure to timely complete assignments, such as COR training and several daily reports. *Id.* McGuire concluded the assessment with the following warning:

> Your sustained improvement is expected, and I will re-visit your performance after sixty (60) days, depending on the final outcome of the reasonable accommodation interactive process. Please be advised that if your performance fails to improve in the above-listed critical elements, a formal Performance Demonstration Plan (PDP)[2] will be initiated. In an effort to assist

---

[2] A Performance Demonstration Plan is also commonly referred to as a Performance Improvement Plan, or PIP. RAF, Tab 43 (HCD Vol. 2).

> you. I am available to discuss any concerns you may have regarding your progress in these areas, at any time.

Id. at 33. During the progress review meeting, the appellant alleged to McGuire that he and DellaCorte were retaliating against him for whistleblower activity. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. On May 15, 2019, the appellant submitted to McGuire a memorandum refuting his mid-year progress review. RAF, Tab 42 (HCD Vol. 1); *see also* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. He alleged therein that Compass failed to assign qualified personnel to the contract, that his CATS duties were removed, and that McGuire wrongly referred to his medical information in his performance evaluation. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1.

On April 23, 2019, McGuire issued the appellant a memorandum regarding the "Reasonable Accommodation Interactive Process." RAF, Tab 19 at 17-18. McGuire stated therein that the appellant had been transferred to his current position as a reasonable accommodation and that, given the transfer of that position back to Virginia, he wanted to engage in the interactive process so the appellant could continue to be accommodated. *Id.* at 18. McGuire requested the appellant contact Orr to coordinate that process. *Id.* Later that day, the appellant notified McGuire that he has "already begun the interactive process" with Orr and that he had his counsel were "awaiting the agency's recommendations for the reasonable accommodation." RAF, Tab 24 at 92. McGuire also contacted various agency divisions to determine if any had temporary, remote work that could be

assigned to the appellant while he sought a new position. RAF, Tab 19 at 13-14, Tab 24 at 98-104; *see also* RAF, Tab 43 (HCD Vol. 2).

Throughout May 2019, Orr, the appellant, and the appellant's attorney traded emails regarding the appellant's accommodations. On or about May 2, 2019, the appellant referenced a vacancy in the agency's Greensboro, North Carolina office for potential relocation. RAF, Tab 19 at 15-16. The vacancy was for an enforcement position and was to go through the Career Board process in or around June 2019. *Id., see also* RAF, Tab 19 at 11. On May 13, 2019, Orr responded to the appellant that his reasonable accommodation in 2017 was to be transferred to a non-enforcement position and that Orr would need updated medical documentation "in order to determine [his] ability to perform the essential functions of the enforcement position." *Id.* That same day, the appellant's counsel responded and disputed Orr's apparent contention that the appellant was not qualified for an enforcement position. *Id.* at 15. He further stated the agency had failed to provide evidence that the appellant's current accommodation was an undue hardship. *Id.*

On May 16, 2019, Orr reminded the appellant of the September 2017 medical advisory preventing him from returning to enforcement-related activities until his remission, and that the appellant subsequently requested transfer to a non-enforcement position in the Raleigh area. RAF, Tab 19 at 12. Orr therefore reiterated that the agency needed updated medical documentation that the appellant is no longer limited to non-enforcement positions. *Id.* The following day, the appellant

responded that he recalled in 2017 only expressing his need to work in proximity to Raleigh for treatment and observation. *Id.* at 11. He stated the Health Unit placed him on restriction after he informed them of his diagnosis, despite his doctors not requiring that restriction. *Id.* He further argued the agency had made no attempts to enforce that restriction in relation to prior transfer options. *Id.*

Orr responded that, regardless, he had to understand the appellant's functional limitations and requested the appellant provide updated medical documentation addressing his medical condition; the requested accommodation; and how the accommodation would help him to perform the essential functions of his position. RAF, Tab 19. at 10. He reiterated that the appellant's prior accommodation documentation indicates he had requested transfer to a nonenforcement position and that the agency would need updated medical documentation so that it does not "make accommodation decisions that are irrelevant to [his] needs." *Id.*

The appellant's counsel responded to Orr with a lengthy email disputing Orr's characterization of the appellant's circumstances, arguing the agency had withdrawn a previously granted accommodation in violation of the law. RAF, Tab 19 at 8-10. He accused Orr of "illegally and inappropriately demanding medical information" to determine if the appellant is fit for duty and accused Orr of retaliating against the appellant on behalf of McGuire. *Id.* Nevertheless, he stated the appellant sought only to work near Duke and be allowed to telecommute. *Id.* He further demanded Orr state

what medical evidence he seeks, who would review it, how it would be safeguarded, the purpose for which it was sought, and how it would be utilized. *Id.* at 9-10.

On May 23, 2021, Orr again emailed the appellant and his counsel, reiterating that he is requesting medical information only in connection with the appellant's request to be reassigned to an enforcement position. *Id.* at 7-8. Orr noted that the appellant must provide documentation establishing he can perform the essential functions of that position because he was currently under a medical advisory restricting him from placement in such a position. *Id.* He requested the appellant provide the documentation by May 31, 2019. *Id.* The following day, the appellant responded that "the only current accommodation I require is to attend medical treatment when necessary with my current treating specialist and to telecommute if any symptoms present themselves." *Id.* at 7. He stated the Greensboro position would meet those needs and that he would provide medical documentation supporting his request for that position. *Id.* However, he stated he was "confused" by Orr's request for medical information because the agency "already possesses such information" related to his condition and any limitations it would impose. *Id.* He also objected to the agency "abolishing" his current position and requested Orr identify any other positions the agency was considering for his reassignment. *Id.*

On May 30, 2019, Orr emailed the appellant and requested, for the third time, that the appellant provide documentation supporting his request to be

transferred to an enforcement position. RAF, Tab 19 at 6. In response to the appellant's statement that his accommodation need only allow for him to attend medical treatment with his current specialist and *ad hoc* telework when symptoms are present, Orr asked the appellant to state how often he receives medical treatments, the duration of those treatments, and his current restrictions, if any. *Id.* He further stated he was unaware of the appellant's current telework accommodation. *Id.* He asked the appellant to provide him with the documentation for that accommodation, the frequency of his telework, and the symptoms that require him to telework. *Id.* Orr reiterated that the appellant's most recent medical documentation on file was from September 2017 and that the updated medical documentation was necessary for the agency's accommodation decision. *Id.*

The following day, the appellant's counsel responded to Orr with a lengthy email containing numerous challenges and allegations of wrongdoing. RAF, Tab 19 at 4. Additionally, despite Orr having repeatedly explained the basis for the requests, the appellant's counsel again demanded to know why the information was sought and "how it will be used for any reasonable accommodation request," among other information. *Id.* He noted, however, that the appellant had separately provided Orr with the documentation requested. *Id.* at 5.

In fact, on June 3, 2019, the appellant provided Orr a letter from Dr. Chang at Stanford, dated May 28, 2019. RAF, Tab 18 at 65-66; Tab 28 at 10-11. The letter states the appellant's brain tumor diagnosis and that he will need "future periodic

scans and will need a specialist who is familiar with the disease process" to "monitor and the [sic] assess treatment response as he may experience symptoms periodically." *Id.* Orr forwarded the information to Lary. RAF, Tab 28 at 10. Orr also informed Lary that the appellant alleged the agency was not restricting his activities pursuant to the Health Unit's advisory. RAF, Tab 31 at 32. He requested she obtain from the appellant information needed to change his advisory status so that a broader search for a reasonable accommodation reassignment position could be undertaken. *Id.* Orr notified the appellant that he requested the Health Unit clarify his medical advisory status so as to determine options for his reassignment. RAF, Tab 31 at 33.

On June 11, 2019, Lary issued a memorandum to then-Chief of Operations Gregory Cherundolo recommending the appellant remain on restriction until receiving clearance from the Health Unit, pending receipt of additional medical documentation. RAF, Tab 18 at 68. The following day, Lary issued to the appellant a memorandum requesting that his treating physician complete a "Special Agents Functional Capabilities Questionnaire." RAF, Tab 18 at 68. In response, the appellant stated he would need to travel to California for an office visit with Dr. Chang and requested agency funding thereof. RAF, Tab 27 at 33. Lary clarified that the appellant did not need to travel; rather, she stated his treating physician should be able to complete the form or indicate on the form what he could not assess. *Id.* She further clarified "We need to know if you are still having the symptoms you complained about in the past." *Id.*

On June 28, 2019, the appellant provided the agency with the Functional Capabilities Questionnaire, completed by Dr. Chang on June 27, 2019. RAF, Tab 18 at 70-72. Dr. Chang cleared the appellant for all duties described therein. *Id.* at 72. Dr. Chang noted the assessment was based on his last clinic note for the appellant dated July 5, 2017 and his last review of the appellant's scans, performed on September 19, 2018. *Id.* Dr. Chang attached to the assessment his clinic notes for the July 2017 visit and a letter dated September 19, 2018 sent to the appellant's medical team: Drs. Michael Gertner of Stanford and Calhoun Cunningham of Duke. RAF, Tab 28 at 23-29. In the July 2017 visit notes, Dr. Chang stated the appellant may experience 6-18 months of exacerbated symptoms that may linger for a one-year period. RAF, Tab 28 at 27-28. In the September 2018 letter to the medical team, Dr. Chang stated the appellant was due for an audiogram the following month. *Id.* at 24. He further recommended that the appellant obtain a subsequent audiogram, brain MRI, and IAC protocol in one year. *Id.* He noted that the appellant would contact him (Dr. Chang) in the interim if he developed any additional symptoms before then. *Id.*

Pursuant to the appellant's submitted documentation, on July 3, 2019, Lary issued a memorandum to Cherundolo medically clearing the appellant for full duty. RAF, Tab 18 at 63. On July 11, 2019, Cherundolo advised the appellant that, effective July 21, 2019, he would be reassigned to the Confidential Source Section (CS) within OM and relocated back to Headquarters. RAF, Tab 26 at 71. On July 11, 2019, Orr contacted the appellant

regarding his medical clearance and stated he is under the impression the appellant now needs accommodation only as time off for periodic checkups. AF, Tab 18 at 61-62. The appellant did not respond to this email. However, the appellant's counsel responded that same day and stated the appellant "requires that his existing accommodations be continued." RAF, Tab 18 at 61.

On July 16, 2019, in response to McGuire's request for guidance, Lary emailed McGuire and Orr to confirm the appellant has been returned to full duty. RAF, Tab 31 at 39. She further stated:

> His medical condition is a chronic condition but unless he is having some sort of symptoms, it is not clear to me why he would need accommodation. And he has not provided any current medical documentation indicating he was currently experiencing symptoms. If he had, we would have recommended a continued restriction based on the symptoms.

Id. She noted, rather, that the appellant's most recent medical documentation states only that he "may experience symptoms periodically." *Id.*

Accordingly, on July 21, 2019, the appellant's reassignment to CS went into effect. AF, Tab 4 at 22. The position was sited at Headquarters but the appellant was permitted to temporarily report to the agency's Raleigh, North Carolina office, a 30-40 minute commute for him, while the agency arranged for his physical transfer back to Headquarters. RAF, Tabs 42, 43 (HCD Vols. 1 and 2). At some point, the

appellant's transfer was scheduled for April 1, 2020, approximately 8 months later. *Id.*

On July 24, 2019, Orr again followed up with the appellant, stating:

> Since I did not hear back from you, and consistent with the recently submitted medical documentation, at this time you are not in need of a reasonable accommodation to fulfill the essential functions of your newly assigned position. If this is not accurate, please get back to me.

RAF, Tab 18 at 61. That day, the appellant stated that his attorney had already responded to Orr that the appellant requires continuation of his current accommodations. AF, Tab 18 at 60. Orr responded, again asking what specific accommodations the appellant requires. *Id.* The appellant again responded stating he requires the continuation of his existing accommodations. *Id.* at 59. He further stated the had already provided the agency with the medical documentation necessary to support the request. *Id.* at 59-60.

On July 25, 2019, Orr responded and stated the appellant's recent documentation does not support his request and that the appellant must provide supporting medical information. *Id.* at 59. On July 25, 2019, the appellant provided Orr with a letter from Dr. Gertner, dated July 22, 2021. RAF, Tab 28 at 38, Tab 30 at 122. Therein, Dr. Gertner stated the appellant should continue to have access to treatment at Duke University, where they will "continue to monitor his recovery and perform

surgery if necessary." RAF, Tab 28 at 38. He stated therein:

> It is my recommendation that it is irresponsible and medically ill advised to remove this accommodation and prevent [the appellant] from having the access he needs to specialists who understand the disease process.

Id. He further stated the appellant should be permitted to telework as needed when symptoms arise. *Id.* He stated that "it is hard to predict with certainty when this will occur." *Id.* He confirmed, however, that the appellant was fit for duty. *Id.*

On August 1, 2019, Orr again emailed the appellant to notify him that additional medical documentation was necessary to review his request for continued accommodations of telework and assignment in the Raleigh area. RAF, Tab 18 at 56-58. He attached thereto a letter for the appellant to submit to Dr. Chang asking several questions regarding the nature of the appellant's need for follow-up care, including the frequency of future scans or other treatment required to be performed at Duke University. *Id.* at 57-58. The letter also asked his opinion on the feasibility of conducting necessary scans at another location, to be interpreted by medical professionals at Duke University. *Id.* Finally, the letter asked for specific information regarding the nature and frequency of the appellant's symptoms and limitations, as well as the extent to which telework would allow him to perform the essential functions of his position given those symptoms. *Id.* That day, the appellant's counsel

emailed a lengthy response to Orr and objected to the request for medical documentation. *Id.*

On August 16, 2019, per the appellant's request, the letter was readdressed to Dr. Gertner, who the appellant identified as the point of contact for all medical inquiries going forward. RAF, Tab 30 at 112-14. On August 25, 2019, Dr. Gertner directed a letter to Orr regarding the appellant's condition. RAF, Tab 18 at 51. Therein, he confirmed the appellant is fit for full duty and stated the appellant requires accommodation in the form of "a flexible work schedule, telecommuting and the ability to attend Duke's Skull Based Medical Treatment Program." *Id.* Regarding the appellant's symptoms, he stated the condition involves "balance disturbance, tinnitus and partial loss of hearing" as well as "vertigo, pressure in the ears/and or head, nausea and headaches." *Id.* He stated treatment for the tumor could extend "a decade or more." *Id.* at 52. He further stated that if the treatment is unsuccessful, the appellant would have to have brain surgery at Duke University, where his specialist practices. *Id.* Regarding the timing of the appellant's treatment, he stated the appellant was "due for his next surgical review, appointments, scans and diagnostic testing at Duke within the next 50 days." *Id.* He further stated the appellant requires "consistent monitoring and treatment by skilled personnel" and concluded:

> It is my professional medical opinion, which I state with medical certainty, that continued care at Duke is heavily indicated and it would be medically inappropriate and potentially harmful to [the appellant's] physical and mental

> well-being, to force him to relocate from the area, so long as he is continuing in his medical care.

Id. at 52. Dr. Gertner objected to providing further information to a non-medical professional and requested the agency provide for "physician to physician communication" in the event of any additional questions. *Id.* at 53.

On December 3, 2019, Orr emailed the appellant to notify him that the Health Unit's physician, Dr. Bahareh Bahador, would like to speak with Dr. Gertner in response to his August 2019 letter, and asked for the appellant's authorization for Dr. Gertner to speak with Dr. Bahador. RAF, Tab 28 at 42-43. Orr copied Lary, Dr. Bahador, and the appellant's counsel on the email. *Id.* On December 5, 2019, the appellant responded with a lengthy email requesting the "legal authority and rationale" for the request, requesting that his attorney be involved in the conversation, and asserting Orr could not directly contact him because he is represented by an attorney. *Id.* at 42. The conversation between Dr. Gertner and Dr. Bahador did not occur. RAF, Tab 43 (HCD Vol. 2).

The day prior, on December 4, 2019, the Career Board issued a memorandum approving the appellant's reassignment and change of duty station to CS and relocation to Headquarters. RAF, Tab 18 at 50. His relocated date was set for April 2020. RAF, Tab 42 (HCD Vol. 1). The appellant used available leave through March 31, 2020, on which date he retired from service. *Id.*

Applicable Law

To prevail in this appeal, the appellant must prove by preponderant evidence that (1) he engaged

in whistleblower activity protected by 5 U.S.C. §§ 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D); and (2) the protected activity was a contributing factor in the agency's decision to take or fail to take a "personnel action" as defined by statute. *See* 5 U.S.C. § 1221(a); *see also Runstom v. Department of Veterans Affairs*, 123 M.S.P.R. 169, ¶ 12 (2016); *Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428, ¶ 5 (2014) (citing *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 17 (2013)). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. See 5 C.F.R. § 1201.4(q).

Under the Whistleblower Protection Act (WPA), as amended, a protected disclosure under § 2302(b)(8) is one which the appellant reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 2302(b)(9)(a)(1) further protects an employee from reprisal for filing an OSC complaint alleging reprisal for making a (b)(8) disclosure. The test to determine whether an individual has a reasonable belief in the disclosure is an objective one: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced a violation of law, rule, or regulation. *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999). In other words, the appellant need not prove that the

condition reported established an actual violation of law, rule, or regulation. He must prove only that the matter reported was one which a reasonable person in his position would believe evidenced a violation. *Schnell v. Department of the Army*, 114 M.S.P.R. 84, ¶ 19 (2010).

The appellant must also prove by preponderant evidence that his disclosures or activity were a contributing factor to the personnel actions at issue. *Id.* An appellant may prove contributing factor by establishing the "knowledgetiming test" – i.e., that the official taking the action knew of the disclosures and took the action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. S*ee, e.g., Strader v. Department of Agriculture*, 475 Fed. Appx. 316, 321 (Fed. Cir. 2012).

The appellant may show that the decision-maker had either actual or constructive knowledge of the protected disclosure. *See Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶19 (2014), citing *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 22 (2010). Constructive knowledge of a protected disclosure may be established where an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action, known as the "cat's paw" theory. *Id.*, citing *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) ("if a supervisor performs an act motivated by [prohibited] animus that is intended by the supervisor to cause an adverse employment action, and if the act is a proximate cause of the ultimate employment action, then the employer is liable[.]").

If the appellant fails to introduce allegations and evidence to meet the "knowledge-timing" test, 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 or activity was personally directed at the responsible officials, and whether those individuals had a desire or motive to retaliate against the appellant. *Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 26 (2013).

Where the appellant meets his burden of proof, as set forth above, the Board must order corrective action unless the agency can establish by clear and convincing evidence that it would have taken the same personnel actions in the absence of the disclosure. *Carr v. Social Security Administration*, 185 F.3d 1318, 1322-23 (Fed. Cir. 1999); *see also Miller v. Department of Justice*, 842 F.3d 1242, 1258-62 (Fed. Cir. 2016). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(e). Clear and convincing evidence is a higher standard of proof than preponderant evidence. *Id.*

The appellant made protected disclosures under (b)(8) and engaged in protected activity under (b)(9)(A)(i)

The parties have stipulated that the appellant made protected disclosures and engaged in protected activity, as follows [in chronological order]:

> a. August 2017 the appellant has discussions with Large about CATS contract award issues

b. August 2017, Large, "on behalf of [the appellant] and himself" raised to Michael DellaCorte the improper assignment of the CATS contract to Cloud Lake and Compass Technologies;

e. November 3, 2017 the appellant emailed Large questioning the necessity of a new contract position and alleging selectee (Wezain) for the position is not qualified;

f. February 15, 2018 the appellant emailed Large questioning legality of CATS contract award;

g. October 15, 2018 the appellant emailed Mina Hunter (Contracting Officer Representative (COR)) and Homer McBrayer (Acting Section Chief) regarding waste of funds and contract violations vis a vis hiring Wezain;

h. January 29, 2019 the appellant called Supervisory Special Agent Crocker of the FBI on behalf of contractor Bordornaro, alleging violations and performance issues with the CATS contract

i. March 5, 2019 the appellant emailed McGuire alleging possible contract fraud and other violations regarding the CATS contract; unauthorized release of his confidential medical information; and reprisal against CATS contractor employees. The appellant further inquired whether he and McGuire had a duty to report these matters to the OIG;

j. March 18, 2019 the appellant alleged McGuire retaliated against him for EEO and whistleblowing activity;
k. March 21, 2019 the appellant emailed OPR regarding his concerns of CATS contract violations and retaliation for his reports thereof to the OIG and FBI;
l. March 26, 2019 the appellant has a telephone interview with OPR regarding contract violations, EEO violations, and reprisal;
m. April 4, 2019 meeting with DOJ IG regarding the appellant's concerns over CATS award, False or Misleading Declaration in Federal Lawsuit; Retaliation and Reprisal [also referred to as stipulated disclosure "c"];
n. April 17, 2019 the appellant alleges to McGuire that he and DellaCorte are retaliating against the appellant for his whistleblower activity;
o. May 15, 2019 the appellant refutes McGuire's assessment in his midyear performance evaluation and alleges Compass failed to assign qualified personnel to the contract, that his CATS duties were removed, and that McGuire wrongly referred to his medical information and accommodation in his performance evaluation;
p. May 21, 2019 the appellant protested to the OIG that the agency subjected him to an improper, de facto FFDE;

> q. May 22, 2019 the appellant filed an OSC complaint of whistleblower reprisal, with subsequent clarifications on June 4, 2019, June 10, 2019, July 19, 2019, and July 26, 2019 [also referred to as stipulated disclosure/activity "d"];
> r. On June 15, 2019 the appellant told the OSC and the OIG that the agency violated the law when it relied on the assessment of a registered nurse to determine whether he was fit for duty or needed accommodations.

See RAF, Tab 33 at 1-3 and Tab 17 at 4, n. 1. Accordingly, I find the appellant has met his burden of proof with respect to this element of the appeal. 5 U.S.C. § 2302(b)(8), (b)(9).

Personnel Actions

On February 7, 2020, I issued an Order Finding IRA Jurisdiction, wherein I found the appellant made a nonfrivolous allegation that his whistleblowing was a contributing factor to the following personnel actions:

> 1. September 13, 2017 selection to the Charlotte Position;
> 2. Significant change in duties, responsibilities or working conditions on March 14-21, 2019 when McGuire removed all equipment from his jobsite; removed his supervisory duties; required daily work reports; required leave requests submitted through McGuire; restricted LEAP/AOU; interfered with telework privileges; removed duties and responsibilities over CATS contract; and

> demanded excessive information in support of leave requests;
> 3. April 16, 2019 threat of PIP and discipline, and declining midyear review;
> 4. Reassignment actions identified as April 23, 2019 transfer of the CATS program back to HQ; July 12, 2019 transfer of the appellant's CATS position to HQ; July 21, 2019 assignment temporary duty station in Raleigh, North Carolina; and December 13, 2019 Career Board approval of reassignment back to HQ;
> 5. June 4, 2019 reevaluation of performance as part of threatened PIP;
> 6. De Facto Fitness for Duty Exam (FFDE).

AF, Tab 13. The appellant therefore must prove by a preponderance of the evidence that these alleged events constitute personnel actions under the WPA, as set forth in 5 U.S.C. § 2302(a)(2)(A). I find the appellant has met his burden of proof with respect to the first two alleged personnel actions, and his claim that he was reassigned. *Id.*

The appellant has failed, however, to prove the alleged threat of disciplinary action or a PIP with respect to his mid-year evaluation, or that the June 4, 2019 "reevaluation of performance as part of a threatened PIP" constituted a personnel action. The Board has held that agency memoranda merely informing an employee of his performance deficiencies and instructing him as to what corrective actions were required, but not threatening to take any disciplinary action against him, is not a

personnel action under the WPA. *See, e.g., Koch v. Securities and Exchange Commission,* 48 F. App'x 778, 787 (Fed. Cir. 2002) ("A wide range of agency rules, directives, and counseling measures contain the message, implicit or explicit, that failure to follow those directives or to meet expectations may have adverse consequences, including possible discharge.... [N]ot all such general statements ... constitute actionable 'threats' to take adverse action within the meaning of the Whistleblower Protection Act."); *King v. Department of Health and Human Services,* 133 F.3d 1450, 1453 (Fed. Cir. 1998) (Congress did not intend for the WPA to create an IRA appeal for every interim comment made in the workplace, written or otherwise, about the need for improvement). By contrast, the Board has held that placement of an employee on a PIP is a personnel action because a PIP by its very nature involves a threatened personnel action. *See, e.g., Hudson v. Department of Veterans Affairs*, 104 M.S.P.R. 283, ¶ 15 (2006).

Here, the record is clear that the appellant was not placed on a PIP; the appellant concedes this did not occur. RAF, Tab 42 (HCD Vol. 1). I find McGuire's notification to the appellant of his performance deficiencies and warning that continued deficiencies could result in a PIP is one step removed from constituting a threatened action. I find, therefore, the appellant failed to prove he suffered a personnel action in the form of a threatened PIP or disciplinary action. Furthermore, the appellant's mid-year progress review also is not a personnel action. *See King v. Department of Health and Human Services*, 133 F.3d 1450, 1453 (Fed. Cir. 1998). Nor

did the appellant prove that his performance was actually reevaluated on June 4, 2019, as alleged. Rather, the appellant himself testified that this did not occur. RAF, Tab 42 (HCD Vol. 1). Accordingly, I find the appellant failed to prove that he suffered a personnel action with respect to these claims.

The appellant has also failed to prove that the agency's alleged "*de facto* fitness for duty exam" constitutes a personnel action within the meaning of the WPA. The WPA, as amended, includes as a personnel action "a decision to order psychiatric testing or examination." 5 U.S.C. § 2302(a)(2)(A)(x). During the jurisdictional phase of this appeal, I found the appellant made a nonfrivolous allegation that the agency subjected him to a "*de facto* fitness for duty exam" that was not limited in nature and, therefore, could reach his mental health status. AF, Tab 7 at 29. The appellant failed, however, to establish the agency subjected him to psychiatric testing or evaluation. Rather, the documents and voluminous testimony of record, as set forth in detail above, establish the agency requested the appellant to provide specific information regarding his request to remain stationed near Duke University and for telework. The information sought was directly related to the alleged intermittent physiological symptoms caused by his brain tumor and follow up treatment thereof. I find nothing suggesting the agency actually or in a "*de facto*" manner ordered the appellant to undergo psychiatric testing or examination, nor did the appellant testify to any such order. Accordingly, the appellant failed to establish these requests constituted a personnel action under the WPA. 5 U.S.C. § 2302(a)(2)(A)(x).

Finally, regarding his reassignment allegation, I clarify that the appellant has established he suffered a personnel action with respect to a single reassignment: effective July 21, 2019, the appellant was reassigned to the Confidential Source Section with a duty station at Headquarters in Virginia. In connection with that reassignment, the appellant was assigned to report physically to the Raleigh office, in his CS position, until the agency effected his physical transfer back to Headquarters. I find the order to report to the Raleigh office constituted a significant change in working conditions and is therefore also a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii). Finally, on December 4, 2019, the Career Board approved the reassignment and issued the appellant a Travel Control Number (TCN) for the purposes of effecting his permanent change of duty station (PCS) (i.e., relocation) to Virginia. RAF, Tab 18 at 50. To the extent that this authorization was necessary to move the appellant's duty station from North Carolina to Virginia, I find this is also a significant change in working conditions and, therefore, a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii).

However, I find the April 2019 transfer of the CATS program, including the appellant's position, back to the Headquarters area is not a personnel action under the WPA. The appellant conceded in his testimony that it was the agency's right to move that position where it saw fit. RAF, Tab 42 (HCD Vol. 1). Despite the transfer of the CATS program back to Headquarters in March 2019, the appellant remained in his CATS position and teleworked in that position full-time from his home in North

Carolina until his reassignment to CS in July 2019. Accordingly, I find he suffered no separate personnel action with respect to the relocation of the CATS program.

With respect to the alleged events that I have determined not to constitute discrete personnel actions, I further find the appellant failed to prove by preponderant evidence that these matters constitute a "significant change in duties, responsibilities, or working conditions" such that they can be together considered a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii). Rather, these incidents are typical occurrences between a supervisor and subordinate that, while objectionable to the appellant, do not rise to the level of creating a hostile environment.

In particular, I find the appellant failed to establish the agency's requests for medical documentation to support his reasonable accommodation requests were burdensome or unreasonable. I find the agency sought medical information pursuant to the appellant's request to be placed in an enforcement position despite his ongoing medical advisory, and subsequently to support his request for reassignment to the Raleigh area for medical reasons. It is clear from the documents and credible testimony of record that the agency's requests became repetitive because the appellant failed to simply provide the information requested. *See*, e.g., RAF, Tab 19; *see also* RAF, Tabs 45, 53 (HCD Vols. 3 and 4). Rather, the appellant and his representative responded to the agency's requests with lengthy objections and challenges thereto. *See*, e.g., RAF, Tab 19.

I find it was reasonable for the agency to reconcile the appellant's September 2017 request for a medically-necessary non-enforcement position with his May 2019 request for reassignment to an enforcement position. I find unreasonable the appellant's arguments with Orr regarding his eligibility for an enforcement position, as the appellant was aware in May 2019 when he requested transfer to an enforcement position that he was not eligible due to the ongoing medical advisory. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458- 462 (1987). First, the appellant was copied on the September 2017 advisory itself. Furthermore, in November 2018, in response to the agency's notification that he was eligible to rotate back to a Field Office and request for his "8 point bio," the appellant explained his relocation for medical reasons and specifically stated "the Medical Unit has prohibited me from enforcement while I undergo this process." RAF, Tab 31 at 29. I find disingenuous the appellant's protests less than one year later that he was qualified for an enforcement position.

Furthermore, when the appellant stated he needed to continue to reside near Duke University despite being cleared for full duty, it was again reasonable for the agency to request information regarding the nature and frequency of his care there. The appellant's medical documentation, when finally provided, failed to provide those specifics. *See, e.g.*, RAF, Tab 19; RAF, Tab 28 at 38; Tab 18 at 51-53. During Orr's testimony on this issue, his frustration with the appellant's continual failure to provide that information was palpable and strikingly credible. RAF, Tab 53 (HCD Vol. 4); *see also Hillen,* 35

M.S.P.R. at 458-462. In carefully reviewing all of the record evidence regarding these various requests and communications, I find the appellant failed to establish that these communications, taken separately or in light of the other events alleged, constituted a hostile work environment under 5 U.S.C. § 2302(a)(2)(A)(xii).

Contributing Factor

As set forth above, I find the appellant established that he suffered the following personnel actions: (1) September 2017 selection for the Charlotte Position; (2) March 15, 2019 and March 21, 2019 emails (significant change in duties, responsibilities, or working conditions); (3) July 12, 2019 reassignment to CS; (4) July 21, 2019 assignment temporary duty station in Raleigh, North Carolina; and (5) December 13, 2019 Career Board approval of reassignment back to Headquarters.

The appellant failed to establish that his whistleblowing was a contributing factor to his selection for the Charlotte Position in September 2017. The appellant alleged that he made disclosures to Large and, through Large, to DellaCorte regarding his belief that the CATS contract was awarded improperly. The parties have stipulated that the appellant had a reasonable belief that he and/or Large made protected disclosures with respect to these communications. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. The appellant failed to prove, however, that DellaCorte was aware of his disclosures prior to the September 2017 reassignment to the Charlotte position.

The parties stipulated that Large made a protected disclosure when, in August 2017, "on behalf of [the appellant] and himself" he raised "to DellaCorte" the improper assignment of the CATS contract to Cloud Lake and Compass. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. The appellant admits he did not discuss his concerns with DellaCorte directly. Rather, he alleges Large relayed his concerns to DellaCorte in or around August 2017. RAF, Tab 42 (HCD Vol. 1). I find Large's hearing testimony does not support that allegation. Rather, Large testified that he recalled discussing the issue with DellaCorte's executive assistant, Robert Cash, but that he could not recall if he had raised the issue with DellaCorte directly. RAF, Tab 55 (HCD Vol. 5). Rather, he assumed Cash would have spoken to DellaCorte about it. *Id.* Large clarified during his testimony that this is what he meant when he told the appellant he had reported the issues "up the chain of command." *Id.* However, he testified he never heard back from either Cash or DellaCorte on the issue. *Id.* DellaCorte corroborated Large's testimony, himself testifying that he recalled Large reported to him only that the appellant was not happy Cherokee would no longer have the CATS contract. RAF, Tab 45 (HCD Vol. 3). DellaCorte credibly testified that Large did not raise any issues of improprieties with the contract award. *Id.*

Regardless, even if DellaCorte had been aware of the appellant's concerns, through Large, in August 2017, the appellant failed to establish that DellaCorte was responsible for his selection to the Charlotte position or that DellaCorte's knowledge could otherwise be imputed to the selection action.

The appellant does not allege that DellaCorte had any role in the selection process, as the position was within the Atlanta Division, over which DellaCorte had no operational authority. Furthermore, the appellant testified that the selection was made through the Career Board process, and both he and DellaCorte testified that DellaCorte was not serving on the Career Board at the time of this selection. RAF, Tabs 42 and 45 (HCD Vols. 1 and 3). The appellant further failed to present preponderant evidence that DellaCorte influenced any of those who did serve on the Career Board to select him for the position. Rather, the appellant testified that he is unaware of any conversation DellaCorte may have had with the Career Board regarding this selection. RAF, Tab 42 (HCD Vol. 1). DellaCorte credibly testified that he had no such conversations. RAF, Tab 45 (HCD Vol. 3). Accordingly, I find the appellant failed to establish that his protected disclosures were a contributing factor to the September 2017 reassignment.

With respect to the remaining personnel actions, I find the appellant established by preponderant evidence that that McGuire and DellaCorte were aware of his whistleblowing prior to those events by virtue of his March 5, 2019 email to McGuire described above, and that the actions all occurred less than one year after that email. Furthermore, the appellant established that McGuire sent the March 15, 2019 and March 21, 2019 emails at issue, and that both McGuire and DellaCorte were involved or otherwise set in motion in his reassignment to CS and associated personnel

actions. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411.

Cherundolo was the deciding authority for the appellant's July 2019 reassignment to CS. RAF, Tab 43 (HCD Vol. 2). Cherundolo testified that he was aware of the appellant's allegations regarding the CATS contract prior to the reassignment, as DellaCorte had brought the claims and OPR referral to his attention. *Id.* The appellant therefore established his whistleblowing was a contributing factor to that decision based on Cherundolo's knowledge alone. Additionally, the appellant established that McGuire and DellaCorte's actions influenced Cherundolo's decision to reassign the appellant. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411. Cherundolo testified that McGuire and DellaCorte met with him to discuss McGuire's assessment of the CATS program and recommended that the CATS team lead position may not be the best fit for the appellant. RAF, Tab 43 (HCD Vol. 2). I find the knowledge-timing test likewise satisfied with respect to Cherundolo's decision to have the appellant report to the Raleigh office following that reassignment, as that decision was a direct result of the appellant's reassignment. The appellant testified that his position in CS dealt with classified information and that he was not able to perform classified duties from remote location. RAF, Tab 42 (HCD Vol. 1). Therefore, Cherundolo had to direct the appellant to a particular agency facility until his relocation to Headquarters was effected.

Likewise, I find the appellant has satisfied the knowledge-timing test with respect to the December

2019 approval of his reassignment and relocation back to Headquarters. The appellant does not allege that any of the members of the December 2019 Career Board were aware of his protected disclosures or activities. *See generally*, RAF, Tab 42 (HCD Vol. 1). However, I find that this action was the direct result of Cherundolo's reassignment of the appellant in July 2019 and, therefore, Cherundolo's knowledge of the appellant's whistleblowing, as well as McGuire and DellaCorte's, constitutes the Board's constructive knowledge thereof. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411.

While the appellant has satisfied his burden of proof with respect to establishing his March 5, 2019 disclosures were a contributing factor to these personnel actions, I find it prudent to briefly discuss the appellant's later protected disclosures and activities as well. At the outset, I find McGuire, DellaCorte, and McGuire were aware of that DellaCorte referred the appellant's March 5, 2019 allegations to OPR for investigation. RAF, Tabs 43 and 45 (HCD Vols. 2 and 3). Accordingly, I find it reasonable to conclude that they were likewise aware that the appellant had an interview with OPR at some point regarding those allegations, as the parties stipulated occurred on March 26, 2019. See RAF, Tab 33 at 4 and Tab 17 at 4, n. 1.

Likewise, both McGuire and DellaCorte testified that they were aware the OPR complaint was referred to the agency's OIG and that OIG had investigated the claims as well. RAF, Tab 43 (HCD Vol. 2). Hence, I find it reasonable to conclude that they would be aware the appellant made similar disclosures to the OIG during that inquiry, as the

parties have stipulated occurred. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. Cherundolo testified that he only recalled the OPR referral and did not recall anything about an OIG investigation. RAF, Tab 43 (HCD Vol. 2). The appellant has not presented evidence rebutting that credible testimony. *See Hillen,* 35 M.S.P.R. at 458-462. Regardless, as discussed above, McGuire and DellaCorte's knowledge may constitute Cherundolo's constructive knowledge thereof as well. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411. Accordingly, the appellant established these stipulated protected disclosures or activities were contributing factors to the personnel actions that followed.

Nevertheless, there is no indication any of the management officials were aware that the appellant complained to OIG in May 2019 that he was subjected to a "*de facto*" fitness for duty exam or in June 2019 that the agency improperly relied on the agency's registered nurse (Lary) in making fitness for duty or accommodation decisions. *See generally*, RAF, Tabs 43 and 45 (HCD Vols. 2 and 3). Accordingly, I find the appellant failed to establish these stipulated protected disclosures were a contributing factor to the personnel actions at issue.

The appellant also established McGuire was aware of his April 2019 and May 2019 stipulated disclosures during the appellant's mid-year progress report and rebuttal thereto, wherein he alleged McGuire and DellaCorte were retaliating against him, as the disclosures were made directly to McGuire. RAF, Tabs 42 and 43 (HCD Vols. 1 and 2). As discussed above, his knowledge may constitute DellaCorte and Cherundolo's constructive knowledge

thereof as well. Accordingly, the appellant established these stipulated protected disclosures or activities were contributing factors to the personnel actions that followed. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411.

Finally, the appellant has not presented evidence that McGuire, DellaCorte, or Cherundolo were aware of his OSC complaints in May and June 2019 at any time prior to the events at issue. These complaints were stipulated to have occurred in the two months prior to Cherundolo's decision to reassign the appellant. However, Cherundolo credibly testified without contradiction, that he did not recall being aware of the OSC complaint prior to the reassignment action. RAF, Tab 43 (HCD Vol. 2). The appellant did not question McGuire or DellaCorte regarding their knowledge or timing thereof. *See generally* RAF, Tabs 43 and 45 (HCD Vols. 2 and 3). Nor did the appellant present other testimony suggesting any of these officials would have been aware of his protected activity prior to the events at issue. *See generally*, RAF, Tab 43 (HCD Vol. 2). Accordingly, I find the appellant failed to establish his OSC complaints were a contributing factor to the personnel actions at issue.

The agency proved by clear and convincing evidence that it would have taken the same actions even absent the appellant's protected disclosures and activity

Where the appellant has proven his whistleblowing was a contributing factor to one or more personnel actions, the Board must order corrective action unless the agency can establish by clear and convincing evidence that it would have

taken the same personnel actions in the absence of his disclosures. *Carr*, 185 F.3d at 1322-23; *Miller*, 842 F.3d at 1258-62. When determining whether the agency has met this burden, the Board considers the following factors: (1) the strength of the agency's evidence in support of the action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. *Id.* The Board must consider all the pertinent record evidence in making this determination. *See Miller*, 842 F.3d at 1258-62; *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012); *Mattil v. Department of State*, 118 M.S.P.R. 662, ¶ 25 (2012). The Board does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence, but rather weighs them together to determine whether the evidence is clear and convincing as a whole. *See Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 14 (2015).

While the appellant established that his whistleblowing was a contributing factor to the actions at issue, in weighing the *Carr* factors together, I find the agency has proven by clear and convincing evidence that it would have taken the same personnel actions even absent the appellant's whistleblowing.

Carr Factor 1

I find the agency has presented strong evidence to support the personnel actions at issue. In analyzing the evidence pertaining to this factor, I

find it relevant to consider the events leading up to the personnel actions at issue. As discussed in detail below, I find that McGuire's actions prior to his knowledge of the appellant's whistleblowing substantially formed the basis for the actions he took after he became aware of the whistleblowing, and that this is strong evidence supporting the agency's contention that he would have taken those same subsequent actions had he been unaware of the whistleblowing.

First, I find that McGuire was unaware of any of the appellant's protected disclosures or activities prior to March 5, 2019. McGuire consistently and credibly testified that the appellant's March 5, 2019 email was his first knowledge of the appellant's protected disclosures or activity and I find no credible evidence of record rebutting his testimony. RAF, Tab 43 (HCD Vol. 2). The appellant does not allege that he personally informed McGuire of his allegations or activities prior to that date and testified that he had "no way of knowing" if McGuire was aware of his earlier whistleblowing. RAF, Tab 42 (HCD Vol. 1).

The appellant suggests McGuire may have been aware of his whistleblowing by virtue of his conversation with Bordonaro in or around January 2019. *Id.* The appellant testified that Bordonaro and McGuire shared a car ride between work sites, during which Bordonaro "briefed" McGuire on "issues" with the CATS contract. *Id.* However, the appellant was not present for this car ride and cannot testify as to the details discussed therein. *Id.* For his part, Bordonaro testified that he told McGuire he did not understand why Cherokee

Nation was replaced on the contract and that he was concerned the replacement contractor was comprised of former DEA officials. RAF, Tab 53 (HCD Vol. 4). However, Bordonaro did not testify that he referenced the appellant during this conversation. *Id.* Nor did the appellant otherwise present evidence that McGuire associated the appellant with any disclosures Bordonaro may have made during that conversation. I therefore find Bordonaro's conversation with McGuire did not put McGuire on notice of any whistleblowing on the appellant's part at that time.

In reviewing McGuire's actions prior to March 5, 2019, I find he had determined the CATS program was not on the right track and that the appellant was not the right person to fill the Team Leader role well before he learned of the appellant's whistleblowing. I find credible McGuire's testimony that, upon his entry into the Deputy Chief position, DellaCorte gave him a general directive to review the Command Center programs and provide recommendations for any changes he felt beneficial. RAF, Tab 43 (HCD Vol. 2). McGuire further credibly testified that DellaCorte did not give specific instructions as to how his assessment should be done or any expected or suggested outcome thereof. *Id.* DellaCorte corroborated this testimony, credibly testifying that he asked McGuire to assess all of the programs within the Command Center, to include the CATS program, and that he did not have any involvement in the assessment beyond that directive. *Id.* The appellant has failed to rebut this credible evidence. I further find the testimony entirely plausible, as there is nothing unusual about

DellaCorte's directive to McGuire as an incoming supervisor and I find no credible evidence that the directive was a means of targeting the appellant. *See Hillen,* 35 M.S.P.R. at 458-462.

Regarding his assessment, McGuire testified that he spoke with the agency's vendors at Oracle and the Department of the Navy for information on the status of the program shortly after he arrived on duty. RAF, Tab 43 (HCD Vol. 2). McGuire credibly testified that he became concerned about the program after these conversations, noting that the Navy had taken to referring to the program as the "Big Top," in reference to a circus, due to continual scope and budget increases. *Id.* Those concerns are consistent with and reflected in the Navy's January 10, 2019 email regarding selection of the cameras, the appellant's disagreement on that issue, and McGuire's assessment that controlling the cost of the project was a bigger factor at that time. AF, Tab 1 at 58. McGuire testified that the Navy also reported Guerra had damaged the prototype devices by cutting the cables out of the test vehicles rather than uninstalling them properly, leading to additional time and cost for repair. RAF, Tab 43 (HCD Vol. 2). Finally, McGuire testified that he spoke with COR Hunter regarding the contract, who reported concerns that the appellant was not properly certifying contractor work hours and that he had failed since June 2018 to complete required Task Monitor training. *Id.* The appellant testified that he had only one time failed to include particular language certifying the contractors' timesheets. RAF, Tab 42 (HCD Vol. 1). However, I find his testimony, even if true, does not bear on the effect Hunter's

reported concerns, even if exaggerated, had on McGuire at the time of the events at issue.

I find credible McGuire's testimony that his concerns about the CATS program continued to grow as he gathered more information. RAF, Tab 43 (HCD Vol. 2). As detailed above, in short sequence, various events occurred in January and February 2019 leading up to his March 2019 site visit. For example, after his conversations with the vendors and Hunter, McGuire reached out to the appellant in mid-January 2019 for a breakdown of the program and activities of the contractors. The appellant failed to provide that information for approximately two weeks, until McGuire again asked for the information. On February 1, 2019, when the appellant did respond and detailed the contractors' activities, Hunter immediately informed both McGuire and the appellant that the contractors were acting outside the scope of the contract with their liaison activities.

There was considerable debate about Hunter's conclusions during hearing testimony. Hunter repeatedly and consistently testified that, as described by the appellant, the contractors were improperly meeting with other agencies and soliciting funds without agency officials present, and therefore improperly representing the government at these meetings. RAF, Tab 42 (HCD Vol. 1). I find her testimony credible and supported by other credible evidence of record. *See Hillen*, 35 M.S.P.R. at 458-462. I further find credible both Hunter and McGuire's testimony that they consulted her supervisor, Contracting Officer Jacqueline Schottler, and her supervisor, John Girard, regarding the

contractors' activities and that both Schottler and Girard agreed with Hunter's assessment. *Id.; see also* RAF, Tabs 42 and 43 (HCD Vols. 1 and 2). The appellant, McBrayer, and Bordonaro testified that the contractors' liaison activities were specifically included in the contract statement of work and that the contractors' actions thereunder were appropriate. RAF, Tabs 42, 55, 55 (HCD Vols. 1, 4 and 5). I find their testimonies consistent in that they earnestly believed the contractors' actions were appropriate. *See Hillen,* 35 M.S.P.R. at 458-462. Regardless, I assign more weight to Hunter's credible testimony, as she is the agency's COR and has more knowledge of the appropriate parameters regarding liaison activities than the other witnesses. *Id.* While the personal experiences of the rebuttal witnesses indicate the contractors had been performing these types of activities for some time, I find that does not rebut the agency's strong evidence supporting McGuire's reliance on Hunter's assessment, which was confirmed by higher authorities within the Contracts Office. *Hillen,* 35 M.S.P.R. at 458-462. I therefore find strong evidence supporting McGuire's subsequent actions based on Hunter's advice.

Hunter also credibly corroborated McGuire's testimony regarding the basis for his decision to remove Task Monitor duties from the appellant. She explained she had copied McGuire on her emails with the appellant regarding Task Monitor training in December 2019, and her corroborating testimony that she informed McGuire during this time that the appellant had delayed completing the training for six months. RAF, Tab 42 (HCD Vol. 1). I find notable that these concerns were raised during the same

time period that Hunter also reported the contractors' improper liaison activities and the appellant's failure to properly certify their timesheets. I therefore reasonable and credible McGuire's testimony that he decided to remove the Task Monitor duties from the appellant and reassign them to McBrayer, who had already completed the Task Monitor training. RAF, Tab 43 (HCD Vol. 2); *see also Hillen*, 35 M.S.P.R. at 458-462.

Given the various issues McGuire had been informed of with respect to the CATS program by early-February 2019, I find credible his testimony that he questioned the program's situs in North Carolina rather than Headquarters and the appellant's administration thereof. *Id.* McGuire credibly testified that he had all but determined after gathering this information that the CATS program should be relocated back to Headquarters for better oversight. *Id.* His testimony is consistent with other credible evidence of the timing of that preliminary determination. McGuire credibly testified he discussed the matter with ASAC Matthews of the Stafford Training Center in February 2019, who confirmed the Center had space it could house the CATS program. *Id.* It is also consistent with McGuire's credible testimony that he discussed the matter with Dongilli of Compass to determine the feasibility of providing contract support in the Headquarters area. *Id.* That testimony is further consistent with the appellant's February 27, 2019 email stating Wezain had resigned after Dongilli informed him the program would be relocated back to Headquarters. RAF, Tab 19 at 29.

I note that McGuire agrees he did not make the formal decision to relocate the CATS program back to Headquarters until after his March 14, 2019 site visit to Fort Bragg. RAF, Tab 43 (HCD Vol. 2). McGuire credibly testified that wanted to see the space for himself before making the final decision. *Id.* However, as McGuire and Hunter credibly and consistently testified, the site visit was repeatedly delayed throughout January and February 2019 due to scheduling conflicts. RAF, Tabs 42 and 43 (HCD Vols. 1 and 2). McGuire testified that Wezain's notice of resignation in late-February 2019 was the catalyst for getting the trip scheduled shortly thereafter. RAF, Tab 43 (HCD Vol. 2). McGuire credibly testified that he was on leave in early-March 2019, and that the visit was therefore scheduled to coincide with Wezain's resignation date thereafter. *Id.* The appellant has presented no credible evidence rebutting this testimony or any evidence suggesting McGuire and Hunter conducted the site visit on March 14, 2019 because of his March 5, 2019 protected disclosure. *See Hillen,* 35 M.S.P.R. at 458-462.

McGuire credibly testified that the Fort Bragg site visit confirmed his inclination to move the program back to the Headquarters area. RAF, Tab 43 (HCD Vol. 2). He stated that the agency's space on the base was unsuitable. *Id.* He testified that the Ground Intelligence Support Activity (GISA) compound within which the office was found was secure, with identification checkpoint and an escort required for entry. *Id.* However, he described the agency's space therein as a small, unsecured office within a building that was not occupied by 47 GISA

intelligence officials[3] and that it did not appear the agency had any interaction with GISA at that site. *Id.* Hunter credibly corroborated the office space was a very small, perhaps a little bigger than a closet, and unsecured. RAF, Tab 42 (HCD Vol. 1). McGuire likewise testified that Wezain reported the CATS office space was not locked and that he did not have a key to the space. RAF, Tab 43 (HCD Vol. 2). He further testified that Wezain reported he was frequently the only person in the office, as both Guerra and the appellant only came into the office every 4-6 weeks. *Id.* I find their testimonies credible and consistent with the undisputed evidence that McGuire and Hunter removed all of the agency's computer equipment from the office after this visit. *See Hillen,* 35 M.S.P.R. at 458-462.

The appellant disputes McGuire's characterization of the Fort Bragg site and testified that the working relationship with GISA would be essential once the CATS devices were operational and the agency took up the offered space within the SCIF on base. RAF, Tab 42 (HCD Vol. 1). However, the appellant's testimony does not refute that the space the agency occupied in the meantime was not in a SCIF and did not appear integrated with other entities on base. *Id.; see also Hillen,* 35 M.S.P.R. at 458-462. The potential future usefulness of secured space on Fort Bragg notwithstanding, I find credible and reasonable McGuire's assessment of the CATS

---

[3] There was some dispute amongst the witnesses as to whether the building was primarily occupied by maintenance or IT staff. I find the dispute immaterial, as none of the witnesses indicated that either group of employee was critical or even related to the CATS program.

program's current space based on the status of the program at that time. *Id.*

DellaCorte credibly corroborated McGuire's testimony regarding the sequence of events prior to McGuire's knowledge of the appellant's whistleblowing. RAF, Tab 43 (HCD Vol. 2); *see also Hillen*, 35 M.S.P.R. at 458- 462. He testified that McGuire had spoken with him at least as early as February 2019 regarding his intention to bring the CATS program back to Headquarters given the concerns he had in his assessment. *Id.* DellaCorte testified that this solution became "clearer and clearer" to McGuire as time went on, and culminated in the March 2019 site visit, where McGuire learned the program was not embedded with the other intelligence agencies on the base, as was the intention when the program initially relocated there. *Id.*

Accordingly, I find that, though the decision to bring the CATS program back to Headquarters was formally made after the appellant's March 5, 2019 protected disclosures, McGuire's actions and determinations prior to the appellant's whistleblowing, based on his assessment of the program, are strong evidence supporting his decision to relocate the program following his site visit to Fort Bragg. I further find it strong evidence McGuire would have taken that same action even had the appellant not engaged in whistleblowing in the interim. I further find it strong evidence, along with the evidence discussed in more detail below, supporting the personnel actions that followed. That the appellant's March 5, 2019 email occurred prior to the Fort Bragg visit does not detract from the

strength of the agency's evidence supporting the basis and timing for the visit on a later date and the actions taken as a result thereof.

March 15-21, 2019 emails

The events described above led up to McGuire's March 15, 2019 and March 21, 2019 email directives to the appellant. Given those prior events, I find strong evidence supporting McGuire's directives in these emails. At the time the emails were sent, McGuire had just visited the Fort Bragg site to find the appellant absent without apparent explanation. I find credible McGuire's testimony that he was unaware of the appellant's telework accommodation at that time, as it is consistent with the contemporaneous emails of record showing his confusion. RAF, Tab 43; *see also Hillen,* 35 M.S.P.R. at 458-462. Additionally, Large credibly testified that he did not clear the telework accommodation with his supervisor (DellaCorte) at the time he granted the request; rather, he worked directly with Goode in reviewing and granting the request. RAF, Tab 55 (HCD Vol. 5). He further testified that he would have returned the signed form to Goode and could not recall if he retained a copy. *Id.* I therefore find credible that McGuire was unaware of the appellant's telework arrangement at the time of the site visit and believed the instructions set forth in his March 15, 2019 were both reasonable and necessary for supervising a remote employee.

Even after the appellant explained his absence on the day of the site visit, I find credible McGuire's testimony that the requirements of the email were nevertheless reasonable. Though the email at first glance appears imposing, much of the instructions

therein simply restate general agency practice with respect to administrative matters, such as using Firebird to conduct agency business, requesting approval for travel and leave requests, correctly coding telework hours on time and attendance forms, and noting that McGuire is the appellant's approving official for these administrative matters. RAF, Tab 19 at 19-20. The items that were not generally required for the appellant prior to this email were that he sign into Lync to show his availability during the workday, that he account for his AUO, and that he provide McGuire with a daily report of his activities. *Id.* While I find that these requirements constituted a significant change in the appellant's responsibilities and therefore constitute a personnel action, I also find the requirements objectively reasonable and supported by strong evidence.

By all indications, signing into Lync was simply a matter of clicking a button on one's computer when beginning the duty day. *See generally,* AF, Tabs 42 and 43 (HCD Vols. 1 and 2). There is no indication this took more than a few seconds of time or that it was burdensome in any way. I further find it an entirely reasonable requirement for a remote employee. Regarding AUO reporting, the appellant testified that he had never been required to accurately report when he worked these hours; rather, he stated he had always been permitted to simply record two hours of AUO per day on his timecard, the amount agents were required to average per day over the course of the year. RAF, Tab 42 (HCD Vol. 1). McGuire, however, testified that it was a "misnomer" for agents to believe they only had to be "available" for duty to receive credit

for working AUO hours; rather, he stated the hours had to be specifically worked. RAF, Tab 43 (HCD Vol. 2). I find his testimony credible and consistent with the appellant's testimony that, regardless of when reported, agents must actually work the hours they are paid as AUO over the course of the year. *See Hillen,* 35 M.S.P.R. at 458-462; *see also* RAF, Tab 42 (HCD Vol. 1). Given the appellant's remote status, I find it was reasonable for McGuire to have included this in his instructions to the appellant.

Regarding the daily report, the appellant argued that the level of detail he was required to include was burdensome. First, I note that McGuire revised his initial instructions as set forth in his March 15, 2019 email in the subsequent March 21, 2019. With respect to the daily report, his first email required the appellant to include numerous specific details about much of his daily activities and communications. RAF, Tab 23 at 28. However, his March 21, 2019 email removed those requirements and did not delineate anything in particular that the appellant must include in his daily report. RAF, Tab 19 at 19-20. I find this requirement objectively reasonable given the paused state of the CATS program during this time period and the appellant's remote status. McGuire credibly testified that he simply needed to be kept informed of what the appellant was doing during the workday. RAF, Tab 42 (HCD Vol. 1). I find his testimony inherently reasonable and therefore credible. *See Hillen,* 35 M.S.P.R. at 458-462. I further find relevant that McGuire consulted with HR regarding these instructions and that they were issued pursuant to the guidance he received from these workforce

professionals. RAF, Tab 41 (HCD Vol. 1). Though the appellant clearly disagreed with McGuire's instructions, he failed to present credible evidence rebutting McGuire's reasonable explanations supporting them. Accordingly, I find strong the agency's evidence supporting McGuire's decision to send the March 2019 emails.

Reassignment to CS

I find the agency presented strong evidence supporting the appellant's reassignment to CS and Headquarters. Cherundolo credibly testified that McGuire and DellaCorte briefed him on the issues McGuire saw with the CATS program and their suggestion that the appellant should no longer lead the program. RAF, Tab 43 (HCD Vol. 2). McGuire testified in corroboration that he believed the appellant was not suited for the role. RAF, Tab 42 (HCD Vol. 1). As discussed above, I find this determination squarely grounded in McGuire's assessment of the program, which substantially occurred prior to his knowledge of the appellant's whistleblowing. I find McGuire's recommendation consistent with his actions during that time period, such as his disagreement with the appellant's hardware recommendation for the CATS devices, his removal of Task Monitor duties from the appellant, and his concern regarding the space the program occupied on Ft. Bragg. I therefore find the agency presented strong evidence supporting Cherundolo's decision to reassign the appellant.

Regarding the particular position to which the appellant was assigned, Cherundolo credibly testified that he selected the CS position because it was vacant at the time and it was at the appellant's

grade level. RAF, Tab 43 (HCD Vol. 2). DellaCorte further corroborated that CS was an important function within OM and that Cherundolo wanted to keep the unit fully staffed. RAF, Tab 45 (HCD Vol. 3); *see also Hillen*, 35 M.S.P.R. at 458-462. It is also consistent with the CS Acting Chief's July 15, 2019 email to the appellant welcoming him to CS and stating "Things are pretty busy here, so we could use some assistance." RAF, Tab 31 at 41. The appellant presented no evidence rebutting this testimony or otherwise indicating a more favorable reassignment position was available at that time. Accordingly, I find strong the agency's evidence supporting Cherundolo's decision to reassign the appellant to the CS position.

I further find the agency presented strong evidence to support physically reassigning the appellant from Fort Bragg back to Headquarters. First and foremost, the CS position was situated at Headquarters. The appellant alleged, however, that the agency was required to continue his previously-granted reasonable accommodation to be stationed near Duke University. I find the appellant's contention unreasonable in light of his June 2019 medical documentation clearing him for full duty and the agency's determination that the appellant failed to provide medical documentation supporting the request. At the outset, I note that McGuire actively sought out and relied on Orr and Lary in determining whether the appellant was to be provided with any accommodations in the Spring/Summer 2019. RAF, Tab 43 (HCD Vol. 2); see, e.g., RAF, Tab 31 at 39-40; RAF, Tab 24 at 100-103, 129; RAF, Tab 25 at 17-19. I find his reliance on the

agency's subject matter experts particularly relevant given, as discussed below, Orr and Lary had no reason to retaliate against the appellant.

I further find based on Orr's credible testimony that he addressed the appellant's reasonable accommodations without any undue influence from other agency officials.[4] RAF, Tab 53 (HCD Vol. 4). Throughout Orr's testimony, I found him to be consistent, direct, and earnest as he explained his actions. *Id.; see also Hillen*, 35 M.S.P.R. at 458-462. I find the agency presented strong evidence that his determinations regarding the appellant's accommodations were reasonable and based on the medical documentation of record alone. The appellant's original medical documentation indicated he needed to be stationed near Duke University for monitoring of his recovery from the September 2017 radiation treatments. RAF, Tab 20 at 22-25. Dr. Chang further stated that the appellant's symptoms could be exacerbated due to those treatments for 6-18 months and may linger for up to one year. RAF, Tab 28 at 27-28. I find this well supports the agency's request for updated medical

[4] The appellant alleged McGuire was heavily involved in the accommodation process, suggesting he exerted some influence over Orr. However, the appellant failed to support that allegation with any credible evidence. Rather, the emails of record indicate McGuire consulted with Orr as the reasonable accommodation coordinator and appropriately checked in with him to determine what, if any, actions needed to be taken on the requests. *See, e.g.,* RAF, Tab 24 at 100-103, 129; RAF, Tab 25 at 17-19. I find nothing improper about his contacts with Orr based on these emails, nor was there any testimony suggesting McGuire influenced Orr in any way during the process. *See generally*, RAF, Tabs 43 and 53 (HCD Vols. 2 and 4).

documentation when it assessed the appellant's status some 20 months later. At the time of his reassignment in July 2019, the appellant's most recent medical documentation failed to specify necessary medical treatment that required he remain stationed near Duke University. Based on the medical documentation of record and the appellant's testimony thereof, the appellant received radiation treatments at Stanford (California) in September 2017 to treat his tumor. RAF, Tab 42 (HCD Vol. 1). As the appellant testified, should those treatments fail to contain the tumor's growth, at some point in the future the appellant could need surgery, which would be performed by Dr. Cunningham at Duke University. *Id.* This is consistent with the appellant's own statements to the agency in November 2018 that his relocation to North Carolina was due to his diagnosis "and subsequent observation" following his radiation treatment. RAF, Tab 31 at 29. The appellant made this statement in response to a notification that he was eligible to rotate back to a field position and a request that he submit his "8 point bio" for an open enforcement position in the agency's St. Louis Division. *Id.* The appellant stated at that time that the agency has "prohibited me from enforcement while I undergo this process." *Id.*

It is evident from the medical documentation of record that Drs. Chang and Gertner were evaluating and coordinating the appellant's care from California (Stanford). The documentation further indicates that the appellant was to follow up with Dr. Chang in the event he experienced symptoms between these annual checkups. RAF, Tab

28 at 24. While both Drs. Gertner and Chang recommended the appellant have access to Duke University, neither doctor provided responses to the agency's specific questions regarding the care the appellant was recommended to receive there, or whether the appellant's annual scans could be performed anywhere and interpreted by practitioners at Duke University when necessary. I find credible Lary's unrebutted testimony that Health Unit's physician reached out to Dr. Gertner following his August 2019 letter and left messages but did not receive any response, despite his offer to discuss the matter further with an agency physician. RAF, Tab 43 (HCD Vol. 2). Nor did the appellant provide the agency with any medical documentation from Dr. Cunningham or other practitioners at Duke University addressing those questions, despite his testimony that he consulted with Cunningham about the issue. RAF, Tab 42 (HCD Vol. 1). The documentation therefore indicates only that the appellant required yearly monitoring scans so as to determine if and when future surgical intervention may be necessary. *Id.* The appellant himself did not testify to the medical care he receives at Duke University. RAF, Tab 42 (HCD Vol. 1). Rather, his testimony indicated the need to reside near Duke University was important in the event that surgery may be required at some point in the future. He testified that not living in the Raleigh area would be unworkable in the event he was required to have surgery, referencing a months-long recovery process that would be impossible to do if he and his family were living in Virginia. *Id.* Accordingly, I find strong evidence supporting the Orr's determination that the

appellant failed to provide medical documentation sufficient to support his request to remain in the Raleigh area as a reasonable accommodation following his clearance for full duty. Therefore, I find the agency presented strong evidence supporting the CS reassignment and relocation going into effect despite the appellant's request to remain stationed near Duke University.

Likewise, I find strong evidence supporting removal of the appellant's telework accommodation and directive to report to both the Raleigh office and ultimately Headquarters in the CS position. The appellant acknowledged that the CS position dealt with classified information and could not be performed remotely. RAF, Tab 42 (HCD Vol. 2). Furthermore, I find the agency presented strong evidence supporting its determination that the appellant's medical documentation did not support his request for ongoing telework. In their letters to the agency, both Drs. Gertner and Chang noted the typical symptoms associated with the appellant's condition and recovery from the radiation treatment he received at Stanford. However, neither provided information indicating the appellant was experiencing any of those symptoms at that time. As Lary aptly noted, though the appellant had a chronic condition, his medical documentation did not establish the current need for an accommodation, as his doctors cleared him for enforcement duties and did not indicate any current symptoms. RAF, Tab 31 at 39. I find her determination credible, as it was based on the available medical documentation, and inherently reasonable, and therefore find the

agency's reliance on that determination reasonable as well. *See Hillen*, 35 M.S.P.R. at 458-462.

The appellant failed to rebut this credible evidence by indicating that he was experiencing symptoms that prevented his commuting or otherwise required him to telework during this time period. The appellant testified only that he had been experiencing symptoms earlier in December 2018 and January 2019 that prevented him from looking at a computer for long periods of time (thus preventing him completing the task monitor training more quickly). RAF, Tab 42 (HCD Vol. 1). The appellant did not testify that he was unable to commute to the Raleigh office from July 2019 through his retirement in March 2020, nor is there otherwise any such evidence in the record. *Id.* I therefore find the agency presented strong evidence supporting the appellant's assignment to the Raleigh office pending his physical transfer back to Headquarters, and ultimately the agency's approval of that physical transfer in December 2019.

Carr Factor 2

The personnel actions at issue were taken by McGuire (March 2019 emails), Cherundolo (CS reassignment) and the Career Board (Headquarters relocation approval). With respect to all of the personnel actions at issue, the appellant alleges McGuire and DellaCorte either directly retaliated against him for his protected disclosures/activities, or indirectly caused the personnel actions under the "cat's paw" theory. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411. I therefore address both of their motives to retaliate with respect to all of the personnel actions at issue. I also address

Cherundolo's motive to retaliate, as he was aware of the appellant's whistleblowing at the time he reassigned the appellant.

Regarding McGuire, I find he had little motive to retaliate against the appellant for his allegations regarding the CATS contract award. As discussed above, at the time of the March 2019 emails at issue, McGuire had only recently received the appellant's March 5, 2019 email containing protected disclosures regarding the CATS contract, and that this was his first awareness of the appellant's allegations. McGuire was not implicated in any way by these disclosures, as he was not an OM employee at that time and had no involvement in the CATS contract award. Nor has the appellant established McGuire had any such personal stake in any outcome of the appellant's allegations or was otherwise personally affected by those allegations. The Federal Circuit has held that management officials may develop a motive to retaliate against a whistleblower despite being uninvolved or implicated in the protected disclosures at issue. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012). However, I find no such evidence indicating the appellant's allegations regarding the CATS contract affected McGuire in any way, particularly given the agency's evidence of McGuire's consistent actions towards the appellant regarding his CATS role both before and after the appellant's March 5, 2019 email.

Some of the appellant's later protected disclosures and activities, however, do implicate McGuire to an extent, in that they allege McGuire retaliated against him for his whistleblowing. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. As these

claims had potential to bring increased scrutiny to McGuire's actions, I find McGuire had some motive to retaliate against the appellant for those disclosures with respect to later personnel actions. However, I find that motive to be relatively weak, particularly given that the personnel actions at issue had been set in motion well before these allegations, as discussed in detail above. Nor is there any evidence that McGuire has been negatively affected by those allegations. Rather, McGuire testified that he remains in his position with the agency and continues to oversee the CATS contract. RAF, Tab 43 (HCD Vol. 2). I further find McGuire's testimony credible that he was not motivated by the appellant's protected disclosures or activities, as he testified in a straightforward and calm manner that he believes in the "process" related to the appellant's allegations, including the Board's hearing proceedings. *Id.; see also Hillen,* 35 M.S.P.R. at 458-462.

I find DellaCorte's motive to retaliate is stronger than that of McGuire, as DellaCorte was directly involved in the CATS contract award and therefore directly implicated in the appellant's earliest disclosures. DellaCorte was also implicated in the appellant's later protected disclosures and activities in that he accused DellaCorte of whistleblower retaliation. I find, however, the agency presented evidence indicating DellaCorte's motive to retaliate was not very strong. I credit DellaCorte's testimony as to the lack of merit to the appellant's allegations. DellaCorte testified at length, consistently and repeatedly, and through extensive cross examination, that the agency's Contracts Office administered the CATS contract award process and

ensured the agency adhered to all appropriate contracting principles. RAF, Tab 45 (HCD Vol. 3); *see also Hillen,* 35 M.S.P.R. at 458-462. He credibly testified that he followed their guidance throughout the contract process. *Id.* Despite the appellant's extensive cross examination of the agency's witnesses on this issue, he ultimately failed to establish credible evidence indicating the award was improperly issued or that DellaCorte would have been negatively impacted by his allegations following the OPR or OIG investigations. *Id.* DellaCorte repeatedly explained that Cloud Lake was an approved DEA contractor and that it was already providing OM with contract services at the time it was awarded the CATS contract as well. *Id.* He further explained the contract was a direct award to Cloud Lake rather than an open bid, and was pursued so as to consolidate OM's needs under a single contract. *Id.* The appellant corroborated this testimony, as he testified that Large had provided him the same explanation at the time of the award. RAF, Tab 42 (HCD Vol. 1).

The appellant presented evidence that DellaCorte disagreed with the appellant's disclosures regarding the contract award. DellaCorte admitted in his testimony that he cast aspersions on the appellant's claims when he forwarded those claims to OPR for investigation following the appellant's March 5, 2019 email. RAF, Tab 45 (HCD Vol. 3). DellaCorte explained that he doubted the appellant's claims simply because he worked with the Contracts Office throughout the process and believed the Contracts Office followed the proper procedures for awarding the CATS contract. *Id.* The appellant failed

to present testimony or other evidence rebutting the credible and consistent testimony that all contract procedures were properly adhered to. Accordingly, despite much accusation and innuendo of wrongdoing, I find more reasonable and credible DellaCorte's testimony that he did not lend credence to the appellant's claims.

DellaCorte further credibly testified in rebuttal to the appellant's allegations that DellaCorte personally had or allowed the agency to have a conflict of interest regarding Cloud Lake or Compass, and that he was truthful in certifying as much to the Contracts office. RAF, Tab 45 (HCD Vol. 3). During DellaCorte's hearing testimony, the appellant continually referred to DellaCorte's signed "Certification Concerning Nondisclosure, Conflicts of Interest, and Rules of Conduct for Personnel Participating in Evaluation" and alleged that DellaCorte had a conflict of interest with respect to the contract award. *Id.*, RAF, Tab 26 at 20. I find little merit in the appellant's argument. DellaCorte testified that he was aware that Cloud Lake and Compass principles previously worked at the DEA. RAF, Tab 45 (HCD Vol. 3). However, the appellant failed to present evidence suggesting that his awareness of or even association with any of these individuals created a conflict of interest for the purposes of DellaCorte's required certification. The referenced certification involves any potential financial interest DellaCorte might have or obtain in relation to a potential contractor and other rules of behavior, such as not accepting gifts or disclosing unauthorized information. RAF, Tab 26 at 20. I find credible DellaCorte's consistent testimony that he

did not have any personal conflicts of interest and that his actions with respect to the award were wholly directed by the agency's Contracts Office. RAF, Tab 45 (HCD Vol. 3). The appellant presented no evidence rebutting this credible testimony.

During witness examination, the appellant repeatedly referred to the "Grubbs memorandum" as the basis for his claims of contract impropriety. The memorandum reiterates a Federal Acquisition Regulation (FAR) that prohibits all DEA officials from "directing or otherwise intimating that contractors hire specific individual(s) to work under DEA contracts." RAF, Tab 26 at 29-30. The memorandum further references an existing policy requiring current DEA officials or those who had been DEA officials within two years of working on a DEA contract to receive clearance from the Office of Chief Counsel prior to performing any such work. *Id.* The memorandum extends that clearance process to any person who had been a DEA official within five years of working on a DEA contract. *Id.* The memorandum is not a blanket prohibition on former DEA officials working on DEA contracts. *Id.*

I find this memorandum does not make it more likely that DellaCorte would be found to have engaged in any wrongdoing or otherwise increase is motive to retaliate against the appellant for his allegations. First, the memorandum was issued in February 2018, well after the Cloud Lake contract was awarded. RAF, Tab 45 (HCD Vol. 3). Regardless, I find the agency has established that none of the protected disclosures or activities at issue in this 60 appeal involve DellaCorte or any other relevant party directing a contractor to hire current or former

DEA officials. *See generally,* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. To the extent the appellant alleges Wezain's placement on the contract was a violation of the Grubbs memorandum, I find the agency presented strong evidence to the contrary. DellaCorte credibly and consistently testified that Cloud Lake presented Wezain's resume to him as one of several qualified applicants for hiring and that he ultimately selected Wezain as a result of that proffer. RAF, Tab 45 (HCD Vol. 3). He further testified that he did not know Wezain prior to hiring him and still has never met him. *Id.* The appellant failed to present evidence rebutting this sequence of events or otherwise suggesting that DellaCorte pressured either Cloud Lake or Compass to hire Wezain. The appellant only alleges Wezain's hire was a waste of money because he did not have the requisite skills to help Guerra with data analytics.[5] RAF, Tab 42 (HCD Vol. 1).

The appellant further insinuates without evidence that the former DEA officials involved with Cloud Lake and Compass are in violation of the Grubbs memorandum. Again, DellaCorte credibly testified without rebuttal that Cloud Lake was already approved by the Contracts Office and performing services for OM at the time of the CATS contract award. RAF, Tab 45 (HCD Vol. 3); *see also*

---

[5] DellaCorte testified that he selected Wezain for his operational expertise and expected him to be useful in working with entities overseas to install the CATS devices in the GOVs there. RAF, Tab 45 (HCD Vol. 3). There appears to be a disconnect between DellaCorte ' s reasons for hiring Wezain and the appellant ' s assigning Wezain to assist Guerra with analytics instead. RAF, Tabs 42 and 45 (HCD Vols. 1 and 3).

Hillen, 35 M.S.P.R. at 458-462. Regardless, the Grubbs memorandum indicates that the restrictions and responsibilities therein fall to the former DEA officials seeking to work on DEA contracts. RAF, Tab 26 at 29-30. There is nothing in the memorandum placing the onus on current DEA officials such as DellaCorte to police these provisions. *Id.* Nor is there otherwise any indication in the record that DellaCorte would be responsible or negatively affected if any former DEA official failed to comply with the agency's clearance policy. Such a conclusion would be both unreasonable and unlikely, and the appellant presents no evidence suggesting otherwise. *See Hillen,* 35 M.S.P.R. at 458-462. Likewise, the appellant failed to present evidence supporting his suggestion that DellaCorte's mere knowledge that any Cloud Lake or Compass principles used to work for the DEA would violate either the Grubbs memorandum or other contract principles. Given the evidence of record, I therefore find no reasonable inference in the record that DellaCorte stood to be negatively affected by the appellant's allegations, despite the allegations accusing him of wrongdoing.

Nevertheless, even if DellaCorte had a stronger motive to retaliate against the appellant, I find he had little role or influence in the events leading to the personnel actions at issue in this appeal. As discussed above, I find credible McGuire's testimony that, upon his entry into the Deputy Chief position, DellaCorte gave him a general directive to review the Command Center programs and provide recommendations for any changes he felt beneficial. RAF, Tab 43 (HCD Vol. 2); *see also Hillen*, 35 M.S.P.R. at 458-462. McGuire testified that

DellaCorte did not give specific instructions as to how his assessment would be done or any expected or suggested outcome thereof. *Id.* Regarding the personnel actions themselves, McGuire credibly testified that he sent the March 15, 2019 and March 21, 2019 emails in consultation with HR and that DellaCorte was not involved. *Id.* DellaCorte likewise testified that he did not direct McGuire to send the emails or otherwise issue the instructions therein. RAF, Tab 45 (HCD Vol. 3). Rather, he credibly testified that he instructed McGuire to ensure he coordinated with HR in addressing the appellant's personnel matters. *Id.* This testimony is corroborated by emails of record evidencing McGuire's consistent consultation with those parties throughout the personnel actions at issue. *See Hillen*, 35 M.S.P.R. at 458-462. The appellant did not present any evidence rebutting this credible, consistent testimony.

I note that both DellaCorte and McGuire were aware of and interviewed by the agency's OPR and OIG in connection with the appellant's allegations. RAF, Tabs 43 and 45 (HCD Vols. 2 and 3). I find this evidence indicates both DellaCorte and McGuire had at least some motive to retaliate against the appellant. However, neither DellaCorte or McGuire testified that they were notified or otherwise believed they were the subject of the investigation. RAF, Tabs 43 and 45 (HCD Vols, 2 and 3). I find this testimony credible and uncontradicted by any other evidence of record. *See Hillen,* 35 M.S.P.R. at 458-462. Accordingly, while being interviewed by OPR and OIG may have given McGuire and/or DellaCorte a motive to retaliate against the appellant, I find the

evidence suggests that motive was not particularly strong for the reasons discussed above.

Regarding the appellant's reassignment to CS and associated transfers, I find Cherundolo was responsible for making those decisions, though he was influenced by both McGuire and DellaCorte in doing so. Independently, I find Cherundolo had a relatively weak motive to retaliate against the appellant. He testified that he was aware of the appellant's allegations regarding the CATS contract because DellaCorte brought them to his attention. RAF, Tab 43 (HCD Vol. 2). He credibly testified, however, that he was unconcerned by the appellant's claims. *Id.* He testified that he had seen allegations of this nature before and it was simply something that had to be investigated, as any other would be. *Id.* I find Cherundolo's demeanor during this portion of his testimony was calm and earnest, and indicated that he was truly not troubled by the allegations. *See Hillen,* 35 M.S.P.R. at 458-462. His assessment is also consistent with the abundant evidence of record indicating the agency had not violated any contracting principles during the contract process, as discussed above. I further note that Cherundolo served in the Chief of Operations position for a matter of approximately 6 to 7 months prior to his retirement from the agency in July 2019. RAF, Tab 43 (HCD Vol,. 2). Therefore, he came to that position well after the contract award occurred and there is no evidence he otherwise had any involvement in it. *Id.* While management officials may be assigned some motive to retaliate simply because they are managers in an organization accused of wrongdoing, *see, e.g., Whitmore*, 680 F.3d at 1370, I find no other

indicia of motive on Cherundolo's part and that his overall motive to retaliate against the appellant was relatively weak.

Cherundolo credibly testified that he made the decision to transfer the appellant from the CATS program and therefore back to Headquarters based on McGuire and DellaCorte's briefing to him after McGuire's Fort Bragg site visit. RAF, Tab 43 (HCD Vol. 2). He testified that McGuire reported back after the visit his concerns about the program and that the appellant may not be in the right role. *Id.* He further testified to having had prior meetings with McGuire and DellaCorte to discuss their concerns about the productivity of the program. *Id.* Accordingly, I find any animus McGuire and DellaCorte may have had at the time of those conversation can be imputed to Cherundolo. *See Aquino*, 121 M.S.P.R. 35 at ¶19, citing *Staub*, 562 U.S. 411.

Finally, I find the agency presented strong evidence Hunter had no motive to retaliate against the appellant for his whistleblowing.[6] The appellant testified that he did not talk with Hunter about his concerns with the contract award to Cloud Lake or alleged cronyism. RAF, Tab 42 (HCD Vol. 1). Rather, he emailed Hunter about his concern that Wezain was not qualified to work on the contract. *Id.; see also* RAF, Tab 23 at 11-13. The parties stipulated

---

[6] The appellant appears to focus on McGuire and DellaCorte's retaliatory motive as the basis for his claims. However, because the appellant alleges he made a protected disclosure directly to Hunter regarding Wezain's placement on the contract, I address herein any motive she may have had to retaliate against the appellant. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1.

that the appellant had a reasonable belief that he was making a protected disclosure when he emailed Hunter regarding this issue. *See* RAF, Tab 33 at 4 and Tab 17 at 4, n. 1. However, I find no indication from the appellant's emails that he was accusing Hunter of any wrongdoing at that time. RAF, Tab 23 at 11-13. Rather, both the appellant and DellaCorte testified that it was DellaCorte's decision to hire Wezain. RAF, Tabs 42 and 45 (HCD Vols. 1 and 3). It is evident from his emails that the appellant contacted Hunter about this issue because she was his liaison with Cloud Lake and had to go through her to obtain what he believed to be necessary training for Wezain. RAF, Tab 23 at 11-13. Accordingly, I find no evidence suggesting Hunter had any motive to retaliate against the appellant for these emails. Nor do I find evidence suggesting Hunter had a motive to retaliate against the appellant for his allegations regarding the CATS contract. I find credible Hunter's testimony that she was not involved in the contract award, and it is undisputed that she did not become the COR for that contract until sometime after the award process was complete. RAF, Tab 42 (HCD Vol. 1); *see also Hillen*, 35 M.S.P.R. at 458-462. The appellant's allegations simply do not implicate Hunter in any way and I find no reasonable evidence of record indicating she would have experienced any negative effects as a result of the those allegations.

Similarly, the appellant indicated that he referred to his whistleblowing allegations during his exchanges with Orr regarding his accommodation requests. RAF, Tab 53 (HCD Vol. 4). However, I find no evidence that, even if Orr was aware of the

appellant's whistleblowing, that he had motive to retaliate against the appellant for it. Like Hunter, Orr had no involvement in or connection with the CATS contract award process or otherwise had reason to be affected in any way by the appellant's allegations. *Id.* The appellant himself alleges that Orr was simply a "tool" used by McGuire and DellaCorte to effect their retaliatory actions. *Id.* Accordingly, I find Orr had no motive to retaliate against the appellant for his whistleblowing.

Carr Factor 3

I find the appellant's circumstances were fairly unique in that he was a remote employee and his position was relocated from the area in which he lived and worked. I find little evidence of similarly situated employees to whom comparisons could be made. For example, regarding McGuire's March 2019 emails, he credibly testified that remote work was very uncommon in the agency during this time period and that he had not had occasion to send similar instructions to employees before. RAF, Tab 43 (HCD Vol. 2). Regarding the appellant's reassignment to CS and relocation back to Headquarters, Cherundolo testified that he could not recall if he had transferred any other employees during his tenure. RAF, Tab 45 (HCD Vol. 3). However, I do not find this unusual because Cherundolo only served as the Chief of OM, in either an acting or official capacity, for less than one year. *Id.* I therefore find it credible that he did not have occasion to reassign other employees against their wishes during that short period of time. *Id.*; *see also Hillen,* 35 M.S.P.R. at 458-462.

The Federal Circuit has explained that "*Carr* does not impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three *Carr* factors to weigh them each individually in the agency's favor." *Whitmore*, 680 F.3d at 1374. The Board has further held that the third *Carr* factor may be insignificant where there is no evidence that the agency had taken similar actions against non-whistleblowers. *See Runstrom v. Department of Veterans Affairs,* 123 M.S.P.R. 169, ¶ 18 (2016)(finding the third *Carr* factor insignificant due to the lack of evidence that there were any similarly situated employees to the appellant); *McCarthy v. International Boundary and Water Commmission: U.S. & Mexico*, 116 M.S.P.R. 594, 626 (2011), *Sutton v. Department of Justice*, 94 M.S.P.R. 4, 13-14 (2003); *c.f. Whitmore*, 680 F.3d at 1374-75 (agencies are required to present evidence pertinent to *Carr* factor 3 where it exists). Given the uniqueness of the appellant's circumstances and the agency's credible evidence that no similarly situated circumstances have occurred, I find this factor to be neutral in my assessment of the agency's overall burden of proof.[7]

---

[7] The agency attempted to present evidence that that McGuire behaved consistently with respect to his assessment of the Command Center and its effect on both the appellant and non-whistleblower employees. McGuire and DellaCorte both credibly testified that McGuire recommended and implemented several substantial changes to other programs within the Command Center as a result of his assessment thereof. RAF, Tabs 43 and 45 (HCD Vols. 2 and 3). For example, regarding the duty agent program, McGuire testified that he changed how critical incidents were written up and reported to the field offices. RAF, Tab 43 (HCD Vol. 2). He testified that he had

Weighing together all of the evidence pertaining to the three *Carr* factors, I find the agency has established clear and convincing evidence that it would have taken the personnel actions at issue regardless of the appellant's whistleblowing. While the appellant established that McGuire and DellaCorte had some motive to retaliate against him, I find the agency presented strong evidence supporting its actions and that this outweighs their motives to retaliate. I find the agency's failure to present similarly situated circumstances in which it has treated nonwhistleblowers better than the appellant does not tip the scales in the appellant's favor, as the agency presented credible evidence that the appellant's circumstances were quite unique. *Runstrom*, 123 M.S.P.R. 169 at ¶ 18. Accordingly, considering all of the relevant evidence of record, I find the agency has met its burden of proof by clear and convincing evidence.

---

different employees write up the incident reports in preparation for phasing out the duty agent program entirely. *Id.* He credibly explained that this was a significant change in how the program had been operating. *Id.* DellaCorte corroborated this testimony as well. RAF, Tab 45 (HCD Vol. 3). McGuire also testified that he reviewed all staff position descriptions and presented employees with new expectations to reconcile discrepancies in the duties they were performing, such as the agency's Lead Information Management Specialist, John Jackson. RAF, Tab 43 (HCD Vol. 2). McGuire testified that he is not aware of any whistleblowing activity on the part of Jackson. *Id.* While these facts may not involve "similarly situated" circumstances, they indicate the consistency of the impact of McGuire's assessment on all employees regardless of any whistleblower status. The appellant did not present evidence rebutting McGuire and DellaCorte's credible testimony on these matters. *See Hillen*, 35 M.S.P.R. at 458-462

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/
Monique Binswanger
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **December 20, 2021**, 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).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until

at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

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://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.

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