UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

CHRISTIAN KREIPKE,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
CH-1221-15-0284-W-1

DATE: March 10, 2017

Shereef Akeel, Troy, Michigan, for the appellant.

Amy C. Slameka, Detroit, Michigan, for the agency.

Kristi Glavich, Detroit, Michigan, for the agency.

BEFORE
Dorothy L. Moran
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant, Dr. Christian Kreipke, filed this individual right of action (IRA) appeal on January 20, 2015, alleging the agency terminated him from his Health Science Specialist (HSS), GS-13, position effective October 11, 2013, in retaliation for his whistleblower activity. *See* Appeal File (AF) Tab 1.

The appellant claims he is a whistleblower against whom the agency retaliated by: (1) terminating and/or failing to renew his excepted service term appointment; (2) failing to compensate the appellant for monies owed under the approved grant, specifically "nearly $34,000 in salary and benefits" and blocking

another VA grant that would have expired in 2016; and (3) disbarring the appellant from employment for 10 years. In the alternative, the appellant states the normal disbarment period is 3 years, not 10.

None of the actions he identified are directly appealable to the Board as issued by the agency.[1] However, the actions could be construed as personnel actions covered by the Whistleblower Protection Act (WPA). *See* 5 U.S.C. § 1221(a). Because the appellant exhausted his administrative remedy before the Office of Special Counsel (OSC) and made non-frivolous allegations of fact establishing Board jurisdiction over his disclosure(s), a hearing was held on April 25-28, 2016, May 11, 2016, and June 8, 2016. The Board has jurisdiction to adjudicate the appellant's timely request for corrective action. *See* 5 U.S.C. § 1214(a)(3).

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

ANALYSIS AND FINDINGS

Background

In 2008 the appellant received an Assistant Professor appointment at Wayne State University (WSU). At WSU the appellant testified his specialty was behavioral neuropharmacology, for example, investigating a drug to see how it affects a final outcome, behavior, in an animal. He stated he published over 40 manuscripts and books, including three textbooks or reference books along with lecturing in 20 countries. The appellant testified there had not been a single retraction of any of his work to date.[2] Hearing Transcript (HT) 220 & 225.

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[1] There is no evidence in the record, nor did either party assert the agency took a suitability action against the appellant. *See* 5 C.F.R. § 731.401 *et .seq*.

[2] The agency submitted evidence after the record closed regarding a retraction initiated by WSU.

The appellant testified at WSU he shared the lab with Dr. Rafols who was the senior researcher in charge and that he also shared the computer that stored the research data with Dr. Rafols. *See* HT 228 & Appellant's Pre-hearing Submissions, Exh. Q.

On October 23, 2010, the appellant began working as a HSS (Scientist), GS-13, at the agency's John D. Dingell Medical Center in Detroit, Michigan (VAMC or Detroit VA). The agency appointed the appellant to an excepted service appointment, not to exceed (NTE), October 11, 2012. *See* 38 U.S.C. § 7405 (A)(1). Effective October 12, 2012, the agency extended the appellant's appointment to October 11, 2013. The appellant held a dual appointment as an Assistant Professor at WSU and a Scientist at the VA. AF, Tabs 1 & 8-11. With the dual appointment, the payment of his salary was split between WSU and the VA.

The appellant testified he also held a position for grant review with the American Institute of Biological Sciences for consortium grants proposed by multiple federal agencies which were often multi-million dollar grants. He explained he also reviewed grant proposals for the Department of Defense and for the VA directly. The appellant explained he reviewed grants related to traumatic brain injury (TBI) usually with 10 to 20 other investigators. He related the grant review process is important because government-sponsored research is massive and TBI is a major component. He stated he reviewed grants from universities in partnership with the government but not WSU because that would have been a conflict of interest. He testified as an investigator one looks at the grant budget to determine how it correlates to the actual science in pinpointing any irregularities in the budget. *See* HT 216-220.

On June 14, 2010, the appellant stated he refused to sign off on an "effort report" which over reported his effort (the percentage of time worked on a grant) to the National Institute of Health (NIH) that would have enabled WSU to receive more federal grant money. On August 17, 2010, he reported to WSU

management the fraudulent use of indirect costs and "disallowable costs" by WSU. In 2011, WSU appointed the appellant to an internal committee to investigate grant procedures. The appellant testified he presented his portion of the written report on June 29, 2011, to WSU Provost and other faculty asserting WSU was "likely" engaging in research/grant fraud. Thereafter allegations of research misconduct surfaced in lab results regarding a 2011 grant at WSU under the supervision of Dr. Rafols and the appellant. The appellant testified WSU commenced an investigation into research misconduct against him but not Dr. Rafols. *Id.* & (HT) Kreipke.

In February 2011, WSU notified Dr. Kaatz, Assistant Chief of Staff for Research & Development, VAMC, and Professor of Internal Medicine at WSU, of research misconduct allegations against the appellant at the VA. Dr. Kaatz, testified he also held the position designated Research Integrity Officer (RIO) at the Detroit VA. He explained as RIO the governing body over him at the VA was the Office of Research Oversight (ORO). He further explained at WSU the governing body is the Office of Research Integrity (ORI) and that VA ORO and WSU ORI collaborate on matters regarding research misconduct. *See* HT 114. He also testified there were monthly Research and Development committee meetings at the VA with WSU personnel including Dorothy Nelson, Associate Vice President for Research, WSU. *See* HT 115. Dr. Kaatz testified that WSU is the academic partner of the VA. He stated WSU medical and surgical residents perform rotations at the VA. He also explained most VA academic employees have a WSU appointment. *See* HT 192-93. The record shows WSU & the VA are inescapably intertwined.

Dr. Kaatz related at the request of Dr. Reeves, Medical Director, VAMC, and Professor at WSU, (dual employment) he investigated the research misconduct allegations against the appellant. He determined in March 2011, there was insufficient evidence of research misconduct and closed the inquiry without recommending an Administrative Investigation Board (AIB)

investigation. In April 2011, WSU again contacted the VA regarding allegations against the appellant. Dr. Kaatz testified at the request of Dr. Reeves, he investigated an allegation pertaining to salary fraud and determined there was insufficient evidence of salary fraud related to the appellant to initiate an AIB.

In December 2011, WSU completed its investigation and determined the appellant engaged in research misconduct. On January 6, 2012, the appellant attended a meeting with Dr. Kaatz, Dr. Pam Reeves, Scott Gruber, VA Chief of Staff and a Dean at WSU, and Roland Besset, VA counsel. He testified during this meeting he disclosed his findings of grant fraud and his belief that WSU actions against him were retaliation for his allegations of grant fraud by WSU. The record shows on February 29, 2012, WSU terminated the appellant's employment for research misconduct. *See* AF, Tabs 1 & 8-11.

The appellant maintained his part-time status at the VA. In March, 2012, the appellant's requests for full-time VA employment and health benefits were denied by Dr. Reeves. *Id*. However, in August 2012, the agency determined the appellant, by working a term appointment, actually was entitled to health benefits and retroactively restored the appellant's benefits.

In April 2012, WSU again contacted the VA regarding the appellant. On this occasion, Douglas Bannerman, ORO, contacted Dr. Reeves, regarding the same allegations of research misconduct that WSU investigated against the appellant and that were also previously investigated by Dr. Kaatz. On this occasion, Dr. Reeves did not delegate the matter to Dr. Kaatz, she appointed an acting research integrity officer, Dr. Anjaneyulu Kowluru, to inquire if an AIB should convene. He recommended an AIB. In May 2012, Dr. Reeves made the ultimate determination that an AIB should convene regarding allegations of research misconduct against the appellant. *See* Appellant's Prehearing Submissions, Exh. G.

In August 2012, the appellant informed Stuart Hoffman, Director TBI, VA in Washington, D.C., that both WSU and the VA were likely engaging in grant

fraud. The appellant testified he followed up his contact with Mr. Hoffman with an e-mail to ORO on August 30, 2012.

An AIB was convened in September 2012 to investigate allegations of research misconduct by the appellant. By written correspondence, Dr. Reeves informed the appellant the research misconduct pertained to VA research funded by the VA Merit Award No. B7157-R (application # RX000224). The record reflects Dr. Reeves correspondence convening the AIB was also forwarded to ORO and WSU, among other VA personnel. Thus, the record reflects the VA & WSU were inexplicably intertwined in their communications with respect to convening the AIB to investigate the appellant after numerous attempts to convene an AIB were unsuccessful.

The AIB was chaired by Dr. Timothy Hadden, who also held a dual appointment with WSU and the VA as a HHS for approximately 30 years. The record reflects the members of the AIB, with the exception of one member, were also affiliated with WSU. The appellant stated he testified before the AIB on January 29, 2013. He testified he explained his allegations of retaliation for whistleblowing to the AIB. On March 18, 2013, the appellant provided written comments to the AIB.

After its investigation, the AIB issued a 62 page undated report with many exhibits finding that the appellant engaged in research misconduct and recommended corrective action against the appellant. The AIB recommended the following corrective action:

> 1. Termination of the Respondent's active Merit Review Award entitled "Poly-trauma following brain injury; towards a combinatorial therapy,"
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> 2. Prohibition from receiving VA research funds for a period of ten years, and
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> 3. Retraction of the following articles:
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> a. The Neurol Res 2011 article….
>
> b. The Neurol Res 2010 article….

Appellant's Prehearing Submissions, Exh. I.

The report was signed by the AIB members on March 28, 2013 and on April 4, 2013, by written memorandum Dr. Reeves notified the Acting Network Director, VISN 11, Mr. McDivitt, she agreed with the findings of the AIB and the recommended corrective action. *Id* and Tab 42. Mr. McDivitt testified the memo informed him Dr. Reeves concurred with the AIB report and decided to discharge the appellant from employment, once his "review was complete." HT 65, *See* Agency's Motion for Reconsideration, Exh. 5 at 85.

Mr. McDivitt stated he concurred in the termination of the appellant's active merit review award, prohibiting the appellant from receiving VA research funds for 10 years, as well as "retraction of the cited articles." HT 71. He explained he directed Dr. Reeves not to terminate the appellant until there had been a review of his decision by the Undersecretary of Health, in case there was an appeal. He testified he learned later Dr. Petzel, Deputy Under Secretary of Health, affirmed his decision. *See* HT 72-75. By written correspondence dated August 22 and September 27, 2013, the VA notified the appellant his VA appointment would expire on October 11, 2013.

On July 23, 2014, the appellant filed a complaint with OSC. According to the OSC correspondence, the appellant reported to VA management and WSU management, WSU was engaging in fraudulent practices by inflating costs of research projects, using indirect costs and disallowable costs to procure additional grant money from the federal government. With his OSC complaint, the appellant attached a timeline of his alleged protected disclosures, grievance activity, and the agency's actions. The appellant filed a timely appeal with the Board on February 20, 2015.[3] *See* AF, Tab 1.

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[3] Although the parties engaged in the Board's Mediation and Appeals Program, the appeal was not resolved.

Issues and burdens of proof

It is the appellant's burden to establish the Board's jurisdiction over his appeal and the merits of his claim by preponderant evidence.[4] It is the appellant's burden to establish:

(1) the date of his protected disclosure,

(2) the person to whom the disclosure was made,

(3) the substance of the disclosure,

(4) the type of disclosure: a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; a substantial danger to public health or safety. The appellant must establish that the matter was one that a reasonable person in his position would believe evidenced a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The test for determining whether his belief was reasonable is this: Could a neutral, objective person with knowledge of the essential facts that he knew, or could have readily found out, reasonably have concluded that the actions of the government show one of the five types of disclosures? The disclosure need not be true. The disclosure must match that presented to the Office of Special Counsel,

(5) that the agency retaliated against him for making that disclosure. "Retaliated against" means that the agency took or failed to take, or threatened to take or fail to take, a personnel action as defined by 5 U.S.C. § 2302(a)(2), such as a removal, suspension, or reassignment. A complete list of these personnel actions is set forth in the Board's regulations at 5 C.F.R. § 1209.4(a),

(6) that the proposing official or deciding official for the specific personnel action knew of the appellant's disclosure, and

(7) that his disclosure contributed to the agency's decision to impose the personnel action at issue.

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[4] Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.R.R. § 1201.4(q).

The appellant's complaint to the Office of Special Counsel (OSC) sets the boundaries for the Board's inquiry in this appeal. The Board's inquiry is limited to the alleged protected disclosures and the characterization of the disclosures the appellant brought before the OSC.

If the appellant meets his burden of proof to show his protected disclosures were a contributing factor in the agency's personnel actions, then for the agency to prevail it must show by clear and convincing evidence that it would have taken the same personnel actions even if the appellant had not made a disclosure. It is a higher standard than preponderance of the evidence. *See Schnell v. Department of the Army*, 114 M.S.P.R. 83 (2010); *Whitmore v. Department of Labor* 680 F.3d 1353 (Fed. Cir. 2012); *see also* 5 C.F.R. § 1209.4(e). An appellant can show that a protected disclosure was a contributing factor in a personnel action by proving that the official taking the action or failing to take the action had either actual or constructive knowledge of the protected disclosure. *See Weed v. Social Security Administration,* 113 M.S.P.R. 221 ¶ 11 (2010).

In order to determine whether the agency met its clear and convincing evidence burden, the Board looks at the strength of the evidence the agency used in support of the personnel action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision(s), and any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are in other ways similar to the appellant. *See Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999).

In his OSC Request for Corrective Action, the appellant identified an alleged protected disclosure. *See* AF, Tab 1. The appellant states he had a reasonable belief he was disclosing a violation of law, rule, or regulation in grant fraud by WSU to VA officials and to WSU. The appellant alleges VA officials "wore two hats, where they are faculty at Wayne State and also worked at the VA." AF Tab 1. *See Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371 (Fed. Cir. 2001). The following disclosure is listed in the OSC

correspondence to the appellant and in the appellant's pre-hearing submissions as follows below.

Disclosure :

On June 14, 2010, the appellant refused to sign off on an effort reporting document for WSU in order for WSU to receive additional compensation from the federal government to cover his salary because the appellant believed his signature on the document would constitute grant fraud. In August 2010, the appellant alleges he protested further grant fraud by WSU personnel. The appellant describes his disclosure as follows. On January 6, 2012, Dr. Kaatz (who was previously contacted by WSU regarding allegations against the appellant) "called a meeting." "Present at the meeting was [sic] Pam Reeves, Scott Gruber (Chief of Staff at JDDVAMC and Dean at WSU), Kaatz, Roland Besset (Counsel to VA)(via phone), and myself. Dr. Kaatz expressed his concerns about WSU's treatment of me and my research. I then had the opportunity to disclose that I felt that WSU's actions were retaliation for my findings of alleged grant fraud at WSU." AF Tabs 1, 8-11. The appellant alleges the grant funds were dispersed from the federal government, some of which included VA funds from Washington, D.C.

The agency disputes a protected disclosure was made and disputes any VA funds were utilized. *See* AF Tab 72.

Other claims of protected activity

The appellant alleges violations of 5 U.S.C. § 2302(b)(9)(A) because he filed grievances regarding the merits of his whistleblowing activity. According to the OSC correspondence, the appellant filed grievances on January 26, 2013, March 6, 2013, March 30, 2013, and May 16, 2016. *See* AF, Tab 1. The appellant alleges he filed grievances "to protest the actions taken against me which included retaliation, creation of a hostile work environment, withholding

pay (a colleague had received a VA grant which was to pay an additional nearly [sic] $34,000 in salary and benefits for me and this was withheld), disregard for workplace violence, gross disregard for VA policy, and breach of confidentiality." *Id.*

The agency disputed that the grievances were connected to any whistleblowing activity and argued one of the appellant's grievances regarded a parking space. *See* AF Tabs 36 & 72.

Also, the appellant alleges a violation of 2302(b)(12) because Pam Reeves, Medical Center Director mishandled his grievances under VA policy and terminated him without a hearing. *See* AF Tabs 1 & 8-11.

The agency disputes that the grievances were mishandled and disputes the appellant was entitled to a hearing under VA policy. *See* AF Tabs 36 & 72.

OSC Complaint

The appellant states in his OSC complaint, "The ultimate price I have paid for reporting misconduct and grant fraud at both WSU and VA is humiliation, termination, loss of income, mental distress, loss of reputation, loss of future earnings, etc." AF Tab 10 at 63-64. The appellant further describes in seven single spaced pages to OSC his whistleblowing activities at WSU and the VA and the alleged retaliation by WSU and the VA. The appellant testified on January 6, 2012, he disclosed to Dr. Katz, Dr. Reeves, Scott Gruber (Chief of Staff VA & Dean at WSU), and Ronald Besset, VA Counsel that WSU was engaging in grant fraud which also included VA funds. The appellant testified the grant fraud involved "disallowable costs" that WSU improperly and falsely secured. He testified WSU policies were in violation of federal policy. He explained because of his dual appointment the VA received funds under the grant for his work. AF, Tabs 1, 8-10 & Kreipke HT.

The test for whether a disclosure is protected is not whether an actual violation occurred but whether the appellant had a reasonable belief he was

making a disclosure that evidences a violation of law, rule, or regulation. *See Drake* v. *Agency for International Development,* 543 F.3d 1377, 1382 (Fed. Cir. 2008).

The appellant further stated he informed Scott Hoffman, Director of Research, TBI, VA that both the VA and WSU were "likely engaging in grant fraud." AF Tab 8 at 18 of 162. The appellant also stated he contacted the VA-OIG hotline on September 23, 2012, and communicated multiple allegations of fraud at the agency including grant fraud regarding his specific grant because monies were not being appropriated properly.

I find the appellant's belief that grant fraud was being committed by WSU that also included VA funds violated a law, rule, or regulation, as discussed above, satisfies the test for a protected disclosure. *See Mithen v. Department of Veterans Affairs,* 122 M.S.P.R. 489, 500-01 (2015). I find the appellant showed by preponderant evidence that he made a protected disclosure.

The appellant reported to the OSC he filed grievances on January 26, 2013, March 6, 2013, March 30, and May 16, 2013, alleging the agency created a hostile working environment, withheld his salary, engaged in gross disregard of VA policy, disregard for potential workplace violence, and retaliation. The WPEA expanded the scope of 5 U.S.C. § 2302(b)(9), to include:

> (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation--
>
> (i) with regard to remedying a violation of paragraph (8); or
>
> (ii) other than with regard to remedying a violation of paragraph (8).

The WPEA extended the Board's IRA jurisdiction to claims arising under 5 U.S.C. § 2302(b)(9)(A)(i), but not to those arising under (b)(9)(A)(ii). WPEA § 101(b)(1)(A). *Mudd v. Department of Veteran's Affairs*, 120 M.S.P.R. 365, 369 (2013).

A reading of the appellant's March 6, 2013, grievance and the agency's February 4, 2013, response clearly shows the substance of the appellant's grievance did concern remedying an alleged violation of subparagraph (b)(8). See AF Tabs 8 & 74, Exh. 10. The appellant specifically alleges that as part of the AIB investigation his computer and his lab were confiscated resulting in his inability to work on his grant. In response to his complaints, the appellant stated he was told by Kathy Osinski, manager, that during the AIB investigation he should come to work and "twiddle my thumbs". The appellant also alleged in the grievance that he was suspended by the agency from working on VA grant #RX000375 that he received with Dr. Kuhn.

As stated previously, the appellant testified he filed grievances "to protest the actions taken against me which included retaliation, creation of a hostile work environment, withholding pay (a colleague had received a VA grant which was to pay an additional nearly $34,000 in salary and benefits for me and this was withheld), disregard for workplace violence, gross disregard for VA policy, and breach of confidentiality." *See* AF Tabs 1 & 8-11. Thus, I find the appellant met his burden to show that the content of the grievance activity was to remedy an alleged violation of (b)(8).

Also, the appellant alleges a violation of 2302(b)(12) because Dr. Reeves, Medical Center Director, mishandled his grievances under VA policy and terminated him without a hearing. He claims his due process rights were violated.

It is a prohibited personnel practice (PPP) to take a personnel action if the taking of such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles listed in § 2301 of Title 5. 5 U.S.C. § 2302(b)(12). To establish that the agency committed a violation of this section, the appellant must establish an agency employee took or failed to take a personnel action that violated any law, rule, or regulation implementing, or

directly concerning, the merit system principles contained in 5 U.S.C. § 2301. *Villamarzo v. Environmental Protection Agency*, 92 M.S.P.R. 159, ¶ 9 (2002). Section 2301, in turn, defines merit systems principles to include the principle that "[a]ll employees should receive fair and equitable treatment in all aspects of personnel management ... with proper regard for their privacy and constitutional rights." 5 U.S.C. § 2301(b)(2). Thus in order to state a claim of a PPP under 5 U.S.C. § 2302(b)(12), the appellant must identify a law, rule or regulation implementing or directly concerning 5 U.S.C. § 2301(b)(2). *See Pollard v. Office of Personnel Management*, 52 M.S.P.R. 566, 570 (1992). The merit system principles in 2301 are not self-executing. *Cole v. Office of Personnel Management*, 71 M.S.P.R. 70, 72 (1996).

The appellant failed to identify a law, rule or regulation implementing or directly concerning 5 U.S.C. § 2301(b)(2). The appellant did not submit any evidence to support his claim he was entitled to a hearing before the VA Medical Director prior to her terminating his term appointment. The appellant did not show at the time of his removal he qualified as an employee with a due process right to a hearing. 5 U.S.C. § 7511. Nor did the appellant provide any evidence to show the agency mishandled his grievances to invoke a 2301(b)(2) violation. Therefore, I find the appellant failed to satisfy his burden for a 2302(b)(12).

Personnel Actions:

The appellant alleges as a result of these disclosures the agency retaliated against him in the following alleged personnel actions:

1. The agency terminated /failed to renew his excepted service appointment, HSS, GS-13, effective October 11, 2013;

2. The agency failed to compensate the appellant for monies owed under the grant, specifically "nearly $34,000 in salary and benefits" and his failure to receive another VA grant that would have expired in 2016;

3. The agency disbarred the appellant from employment for 10 years. The appellant states he should not have been disbarred and that the normal disbarment period is 3 years, not 10, and;

4. The agency changed the appellant's working conditions during the AIB investigation by confiscating his computer, erasing his data, and "firing his staff, all of which significantly impeded the appellant's ability to work on his grant", creating a hostile work environment. AF, Tab 78.

Personnel actions under the WPA and the WPEA are generally are defined as taking, failing or threatening to take an action to include an appointment; a promotion; a disciplinary action; a detail, transfer, or reassignment; a performance evaluation; a decision concerning pay, benefits, or awards; a decision to order psychiatric testing or examination; any other significant change in duties, responsibilities, or working conditions, and implementation or enforcement of any non-disclosure policy. *See* 5 U.S.C. §§ 2302(a)(2)(A), 2302(b)(8). Although the appellant's original disclosures took place in 2010 and January 2012, the appellant alleges that he suffered whistleblowing retaliation for his grievance activities in 2013 and thus the WEPA may apply to portions of this appeal.

The agency disputes the above alleged personnel actions are covered personnel actions under the statue.

I find the appellant's alleged personnel actions, described above, loss of appointment, loss of pay, disbarment from employment (a decision regarding employment) and a change in working conditions, are specifically included within the language of the WPA as personnel actions. *See* 5 U.S.C. § 2302(a)(2)(A).

Contributing Factor

I find the record is clear the agency officials taking the personnel actions were aware of the appellant's whistleblowing activity prior to taking the personnel actions because the appellant told the officials of his whistleblowing.

The agency claimed the officials taking the personnel actions did not consider the appellant's statements to be whistleblowing activity or consider him to be a whistleblower. The agency did not dispute the appellant's statements informing agency officials of grant fraud before the AIB. Although Dr. Katz testified he did not recall the appellant mentioning grant fraud at the January 6, 2012 meeting, he did not deny the appellant made the disclosure in the meeting with Dr. Reeves.

Dr. Hadden, Chair of the AIB, testified the appellant's e-mails and statements of alleged grant fraud were accepted into the investigation record. He testified that the AIB reviewed the appellant's documents. He further explained the AIB decided that they did not know the appellant was a whistleblower, "couldn't make no [sic] conclusion about it whatsoever. And it never occurred to us that this represented any kind of whistleblowing." HT 1037; *see* AF, Tab 42.

Dr. Reeves did not testify at the hearing but the record is clear she was aware of the appellant's whistleblowing activities because he informed her of his allegations. The record also shows Dr. Reeves made the decision to terminate the appellant's term appointment and the next levels within the VA reviewed the AIB findings checking to ensure VA guidelines and regulations were followed in the process. *See* Appellant's Prehearing Submissions. The record is also clear that the appellant notified Mr. McDivitt of his whistleblowing activities and the entanglements of VA personnel holding "dual hats" at WSU.

The personnel actions occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel actions. The disclosure and grievance activity took place between 2011-2013 and the personnel actions took place in 2011 through October of 2013, the same period of time. Thus, I find based on the knowledge/timing test the appellant satisfied his burden to show his disclosure was a contributing factor in the personnel actions at issue in this appeal. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 20 (2008).

Clear and Convincing Evidence

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 than preponderant evidence. 5 C.F.R. § 1209.4(e). In determining whether an agency has met this burden, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its 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. *Carr,* 185 F.3d at 1323; *Jenkins,* 118 M.S.P.R. 161, ¶ 16. The Federal Circuit has held that evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record and despite the evidence that fairly detracts from that conclusion. *Whitmore,* 680 F.3d at 1368 (Fed.Cir.2012). The Court noted:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment action against a whistleblower carries its statutory burden to prove – by clear and convincing evidence – that the same adverse action would have been taken absent the whistleblowing.

Whitmore¸ 680 F.3d at 1377. Therefore, in order to determine whether the agency has met its burden, all of the pertinent evidence must be considered. *Id*. at 1368.

The agency did not show by clear and convincing evidence it would have taken the above described personnel actions absent his whistleblowing activity.

Carr factors

(1) The strength of the agency's evidence in support of its action(s).

The agency maintained it provided extensive evidence of the appellant's research misconduct. The AIB investigated and concluded that the appellant engaged in medical research falsification follows:

> Allegations a and b — the respondent falsified research in a publication (also found in a NIH grant application and poster presentations) using the same image of hippocampus and/or sensorimotor cortex to describe different experimental conditions.
>
> Allegation c — the respondent falsified research in article (also found in VA NIH proposal and poster presentations) using the same image of a graph of systolic blood pressure data to describe different experimental conditions.
>
> Allegation dl —the respondent falsified research in a VA RR&D Merit award application (also found in a publication and the respondents and another researcher's NIH proposal) using the same image of sensorimotor cortex to describe different experimental conditions.
>
> Allegation d2 — the respondent falsified research in a VA RR&D proposal and a publication using the same image of a western blot to describe different experimental conditions.
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> Allegation d3 — the respondent falsified research in a VA RR&D proposal and a publication using the same image of immunofluorescence in endothelium to describe different experimental conditions.
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> Allegation d4 —the respondent falsified research in VA RR&D Merit award application (also found in two NIH proposals and a publication) using the same image of angiogenesis to describe different experimental conditions.
>
> Allegation d5 — the respondent falsified research reported in VA RR&D merit award application (also found in two NIH grant proposals and a publication) using the same image of a graph to describe different experimental conditions.
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> Allegation d6 — the respondent falsified research in a VA RR&D Merit review application (also found in respondents NIH proposal, two NIH proposals from other researchers) using the same image of a western blot of a protein to describe different experimental conditions.

> Allegation d7 —the respondent falsified data in a VA RR&D Merit award (also found in the respondents NIH proposal, two NIH proposals from other researchers) using the same image of a western blot to describe different experimental conditions.
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> Allegation e — the respondent falsified research in a VA RR&D Merit award application (also found in the respondents NIH application and a NIH application of another researcher) using the same image of a western blot to describe different experimental conditions.

Appellant's prehearing submissions, Exh. H

Dr. Reeves, who did not testify at the hearing, forwarded these AIB findings and her concurrence to the Acting Network Director, VSN 11, stating, "I have decided to separate the respondent from VA service once your review of the [sic] this case is complete."[5] *Id.*

Robert McDivitt, Acting Network Director, VISN 10, testified VISN 10 oversees VA health care operations in the lower peninsula of Michigan, Ohio, and Indiana. In May 2013 he was detailed twice to be Acting Network Director of VISN 11, overseeing VA operations in the lower peninsula of Michigan, Northwest Ohio, Indiana, and Central Illinois. Mr. McDivitt testified he was the adjudicating official for the AIB recommendations and did not have an affiliation with WSU. Mr. McDivitt explained he received memorandums from Dr. Reeves dated April 4, 2013, and April 19, 2013, (correcting a typographical error) that included a summary of the "multiple allegations of falsification of research materials" by the appellant. HT 64. Mr. McDivitt testified the memo stated Dr. Reeves concurred with the AIB report and decided to discharge the appellant

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[5] No explanation was provided for why Dr. Reeves did not testify at the hearing. I granted the agency's hearing request (not mentioned at the prehearing), without objection to enter her deposition into evidence. A cursory reading of the deposition shows she suffered from a lack of memory and/or had no knowledge on relevant matters, for example, whether the allegations against the appellant involved VA funds. *See* AF, Tab 99 ay 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 23, 26, 33, 34, 36, 37, 38, 41, 49, 50, & 52 (the deposition was ended after approximately 50 minutes by Dr. Reeves who stated "sorry, I have to go". *Id.* at 52.

from employment, once his "review was complete." HT 65; *See* Agency's Motion for Reconsideration, Exh. 5 at 85.

He testified he requested additional information regarding one of the AIB member's potential conflict of interest, Dr. Levy. He explained additional information was forwarded to him and he concurred with Dr. Reeves' opinion there was no conflict of interest by Dr. Levy. He testified he reviewed the procedures followed by the AIB and talked to unidentified outside experts. He testified by video at the Board hearing by reading from VA Handbook 1058.02 and the memorandum dated May 8, 2013, regarding his actions. He explained he reviewed the full investigative report and attachments that were provided by the appellant, including the appellant's correspondence, (which contained his whistleblower allegations). In addition he testified he consulted with Dr. John Callahan, a noted VA research leader, consulted with the chief medical officer for the VISN, Dr. Mellow, a psychiatrist and "the research integrity officer, board members from Detroit, Dr. Hadden and the team, and had [sic] I consulted with VA general counsel, attorneys who were expert in research and research misconduct, specifically Ruth Dowling, who was a member of general counsel at the time." HT 69.

He further explained he found the appellant committed the research misconduct by falsifying his research materials and he concurred with the proposed disciplinary and corrective actions. He stated he concurred in the termination of the appellant's active merit review award, prohibiting the appellant from receiving VA research funds for 10 years, as well as "retraction of the cited articles." HT 71. He explained he directed Dr. Reeves not to terminate the appellant until there had been a review of his decision by the Undersecretary of Health, in case there was an appeal. He explained he later learned Dr. Petzel, Deputy Undersecretary of Health, affirmed his decision. *See* HT 72-75.

Mr. McDivitt acknowledged that the Office of Research Oversight oversees issues of research compliance and research misconduct in the VA. Mr. McDivitt

testified on cross-examination that he was not aware of the appellant's whistleblowing "charges if it wasn't included in the package here." HT 78. Mr. McDivitt also acknowledged while he reviewed the appellant's materials, he "focused on the VA portion of it, which is [sic] was asked to adjudicate." HT 79. He testified he did not remember any of the allegations made by the appellant regarding grant fraud. He testified he did receive the appellant's packet in May 2013, but he did not make any inquiry regarding the appellants whistleblower retaliation claims. He further testified he did not know what the term "effort reporting" meant and that he did not discuss with Dr. Reeves the allegations of grant fraud by the appellant at WSU. *See* HT 80-83. On cross-examination Mr. McDivitt stated he did not discuss the appellant with Dr. Hadden. *See* HT 84. He also did not recall that the AIB members with the exception of one had affiliations with WSU. He also acknowledged he was not aware that the one VA grant the appellant was working on was investigated by Dr. Katz who found there was not enough evidence to proceed with an AIB investigation.

Mr. McDivitt acknowledged that the 2005 VA Handbook 1058.02 definition of medical research was identical to the 2012 VA Handbook 1058.02 definition but in the VA Handbook 1058.02 effective November 2012 the definition of what constitutes "medical research" changed. *See* Appellant's Prehearing Exhs III & JJJ. Mr. McDivitt was not aware of the date when the AIB assembled or the date change in the definition of medical research. Mr. McDivitt acknowledged if the AIB convened in September 2012 then the 2005 version (and 2012 version prior to November 2012) would be in effect for the AIB. The applicable handbook defined medical research as "funded" in whole or in part by the VA, when it was conducted by VA employees within their scope of their VA employment, and using VA facilities, equipment, personnel or patients. *See* HT 85-94 & Agency Exh. 6. These handbook provisions were not considered by Mr. McDivitt. Importantly, the record reflects the changes to the definition of "medical research" to include "unfunded" VA grants, where an application for a

VA grant was filed, occurred after the AIB convened but before it issued its recommendations. *See* HT 95-97 & Appellant's Prehearing Exhs III & JJJ. (Appellant's III at 6 is dated May 2005, & JJJ, Appellant's Exh. JJJ VA Handbook 1058.02, at 5 dated November 2012 and VA Handbook 1058.02 dated February 2014 is Agency's Exh. 6.)

Mr. McDivitt also acknowledged he did not look at the computer files, or compare the raw data and that he relied upon experts. Mr. McDivitt also testified this was his first involvement in any charges of medical research misconduct. *See* HT 98-99. He also acknowledged he discussed the findings with Dr. Bannerman in the Office of Research Oversight.[6]

The record is clear from the agency documents that the AIB was convened and investigated the allegations against the appellant under VA Handbook 1058.2. *See* AF Tab 8, P.88, Appellant's Exhs. PPP. Dr. Hadden also acknowledged the investigation was conducted in accordance with VA Handbooks 1058.2 & 0700. *See* HT 925. Handbook 1058.2 solely applies to VA-funded research, or research associated with a VA-funded grant.[7]

The record is also clear that the appellant received one VA grant entitled, "*Poly-Trauma Following Brain Injury: Towards a Combinatorial Therapy*," identified as RX000224-01A1. Dr. Hadden acknowledged that the AIB made no findings as to the only VA funded grant received by the appellant. (emphasis

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[6] I note that the appellant's comments to the final investigation report were not forwarded by the VA to Mr. McDivitt. *See* Exh. K, Appellant's Prehearing Submissions, April 9, 2013, correspondence from appellant's attorney & VA Handbook 1958.2.

[7] During the pendency of the investigation VA Handbook 1058.2 was updated to VA Handbook 1058.02, the definition of research misconduct was changed to include requests for funding (applications for VA Merit Award). The definition of VA research was also modified to include research conducted by VA employees while on VA time, using VA resources (equipment) or on VA property funded by VA, by other sponsors, or unfunded. Appellant's Prehearing Submissions, Exh. III.

supplied) *See* HT 931-932. Thus, the AIB findings of research falsification involved projects involving Dr. Rafos, who was in charge of the WSU lab, and research by interns, not solely the appellant.

Dr. Rafos declined to appear before the AIB. Dr. Hadden testified he had no authority to compel Dr. Rafos to testify. Although I understand the AIB determined research misconduct occurred involving "falsification" of medical research, the strength of the agency's evidence does not clearly and convincingly support its finding that it was the appellant's actions that resulted in "falsifying" medical research. There is strong evidence the AIB did not have authority to investigate the appellant's involvement because the research it investigated did not meet the definition of medical research under the applicable VA Handbook definitions previously discussed.

The charges of falsifying medical research and falsifying medical presentations of research are tantamount to a falsification charge. To sustain a falsification charge, the agency must prove: (1) the information submitted included a false statement; (2) the false statement was material; (3) the employee acted with the requisite intent. *O'Lague v. Department of Veterans Affairs,* 123 M.S.P.R. 340, ¶ 6 (2016) citing *Naekel v. Department of Transportation,* 782 F.2d 975, 977 (Fed. Cir. 1986; *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1300 (Fed. Cir. 2008).

The intent element of a falsification charge requires two distinct showings: (1) that the employee intended to deceive or mislead the agency; and (2) that he intended to defraud the agency for his own private material gain. *Parker v. Department of Veterans Affairs,* 122 M.S.P.R. 353, ¶ 10 (2015) *citing Leatherbury,* 524 F.3d at 1300. Whether intent has been proven must be established by considering the totality of the circumstances, including the appellant's plausible explanation. *Parker*, 122 M.S.P.R. 353, ¶ 10. While intent may be inferred, an employee's good faith explanation can negate an inference of intent to deceive the agency. *Leatherbury*, 524 F.3d at 1300-01; *Boo v.*

Department of Homeland Security, 122 M.S.P.R. 100, ¶ 10 (2014). A finding that the appellant provided incorrect information alone cannot control the question of intent for purposes of adjudicating a falsification charge. *Leatherbury*, 524 F.3d at 1300-01, *see also Boo*, 122 M.S.P.R. 100, ¶ 15 (falsification charge could not be sustained where the record was devoid of any evidence that the appellant intended to defraud, deceive or mislead the agency for her own private material gain). The definition of "own private material gain" is quite broad and not limited to monetary gains arising from a falsification. *Boo*, 122 M.S.P.R. 100, ¶ 13.

Dr. Hadden testified the AIB conducted a fair and laborious investigation. Dr. Hadden testified he did not consider the appellant's documents pertaining to whistleblowing activities had anything to do with the VA. He testified the ORO provided guidance, VA Handbooks 1058.2, 1058.02, 0700, and training throughout the investigation, including "federal policy on research misconduct." HT 851. Dr. Hadden further explained:

> We were supposed to dig deep into whatever documents published papers, computer files, printed materials, anything that we could discover that would have pertinence to the investigation and the allegations. We were to seek out interviews with anyone who we thought could give relevant testimony. And we were to also look deep enough to see if there were potential instances of misconduct that were not included in the original allegations.
>
> So, we were supposed to kind of be thorough and global as opposed to the inquiry being more focused on the explicit original allegations.

Id.

Dr. Hadden testified their investigation was separate from that of WSU. Dr. Hadden testified regarding the investigation's scope:

> First of all, we limited our scope to only those documents, published papers, grant applications and so forth that had the VA connection except in that we used other documents that have VA connections as corollaries. So, for example, if we only have one instance in VA documents of some data and that was all we could

> use, we wouldn't know what it really meant. But if we used other non-VA materials that have the same image, then we could compare how were these data used in this image versus this image versus this image.
>
> So, we were focused only on VA. We only made findings on VA-related materials.

HT 890.

The record evidence shows the AIB determined some data and/or graphs utilizing the data obtained generally from staining and/or the Floura Jade process were "falsified". This same "falsified" data and/or graphs were copied from one article, poster, and grant application to another. Dr. Hadden stated the AIB considered the appellant's oral responses and written reports in concluding as follows:

> We concluded that there were many examples of research misconduct by the respondent in the case that extended over a long period of time, that were extensive in number, that were costly to the VA and to the scientific community at large.

HT 892. The agency argued the data misuse was intentional and pervasive.[8] The AIB found that the same figures were used to represent different experiments and/different experimental conditions. *See* Tab 46, pp.104-105, Exh. 1, pp.49-50 (the AIB in using the same exhibit found some figures for certain allegations to be falsified research misconduct and some were not.)

To the extent that creditability determinations are necessary, I credit the testimony of both the agency witnesses and the appellant and his witnesses. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). The strength of the agency's evidence in support of its action in this appeal is one of legal interpretation, not credibility. Agency witnesses testified they did not consider

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[8] Interestingly, the agency argued that no VA funds were involved so therefore the appellant's disclosure could not have been whistleblowing and in turn argues VA funds were involved to establish its right to investigate and order corrective action against the appellant. In addition, the data misuse, which was not the charge against the appellant, occurred at the facilities of WSU.

the appellant to be a whistleblower. In analyzing the strength of the agency's action, one of the issues is whether the evidence meets the Board's standard of "falsification", the research misconduct charged against the appellant by the agency which led to the personnel actions. Thus, the issues pertain to legal interpretations, not credibility.

In an effort to discredit the appellant, the agency points out events that occurred after the agency charged the appellant with medical research "falsification". The appellant testified that other than the WSU and VA investigations there had never been a finding of misconduct against him or a retraction of a published article. The agency argued a retraction notice was made as of July 13, 2016, (after the hearing in this appeal) for the 2006 article, "Calponin and Caldesmon cellular domains in traction micro vessels following traumatic brain injury" authored by the appellant and Dr. Rafos. The retraction notice reads as follows, "The article was retracted following an investigation by Wayne State University into the research activities of the first author. The investigation identified a discrepancy between the data reported in the article and the original collected data." *See* Exh. A to Agency's Closing Argument.

This retraction is consistent with the appellant's testimony and evidence of the steps he took once the discrepancy in data was reported to him by the lab student. Importantly, Dr. Rafos, was not investigated by WSU or the VA, although the record shows Dr. Rafos held a dual appointment with the VA and WSU.[9]

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[9] On February 10, 2016, the appellant was notified by the ORI in the U.S. Department of Health and Human Services (HHS) that it was making findings of research misconduct based upon the evidence and findings of an investigation report by WSU and "additional information obtained by ORI during its oversight review of the WSU investigation report." AF, Tab 89. HHS also recommended disbarment for 10 years. The recommended decision was appealed. *See* AF Tab, 106.

I credit the appellant's testimony because I observed the appellant's demeanor and he testified for days in a clear, straight-forward manner on direct and cross-examination; his testimony was supported by lab student and doctorial candidate, Justin Graves', testimony and is supported by the record evidence that follows.

Importantly, there was no agency testimony or evidence that any "falsification" occurred on the one VA grant received by the appellant. *See* HT 242-280-, AF Tabs, 51-59, appellant's prehearing Exhs. GG-QQ. There was no evidence that any of the "falsified" data/graphs were prepared at the VA. The experiments leading to the "falsified" data were conducted at the WSU lab. Also, as the agency argued it was not the mission of the AIB to determine whether conclusions made with the misused data would have been different if the correct data were used. Thus, it is unclear what harm the agency suffered or gain to the appellant occurred in analyzing the agency's determination of "falsification."

It is undisputed that some incorrect data used in "figures" were essentially copied and pasted into a 2009 VA Poster, a 2010 VA Poster, the 2010 and 2011 neurological articles, and in VA Merit Award application(s). The appellant acknowledged the inaccuracies involved staining, western blots, and Fluoro-Jade. The appellant stated he moved quickly to correct the inaccuracies when he learned of the issues. The figures were corrected in the October 2011 edition of the journal as errata with the notation, "were made inadvertently by the laboratory staff." The record shows misrepresentations of data were made. However, the appellant credibly stressed Dr. Rafols, whose name appeared as well on the articles, was mainly responsible for the lab and shared in lab oversight experiment responsibilities.

Justin Graves testified he began working at WSU in August 2010 in the lab operated by Dr. Rafols and the appellant. He explained Dr. Rafols was the most senior, who had the "final say" on whether or not he was hired. *See* HT 15. He testified all the students working in the lab had access to the computer that he set

up as the main repository for the lab data. He testified when he worked in the lab there were four students in total working with Dr. Rafols and the appellant. *See* HT 15-17.

Mr. Graves testified Michael Fronczak was involved in the Fluro-Jade process at the lab. After Mr. Fronczak left the lab in November or December 2010, this work was done by Wei Zhang. He testified he never observed the appellant perform Fluro-Jade work or do any staining. Mr. Graves defined Fluoro-jade as a fancy term for an Immunostain that basically looks for damaged neurons using fluorescence. *See* HT at 20-21.

Importantly, Mr. Graves testified Christian Reynolds, another doctoral student (the informant against the appellant), was not following lab protocol because he failed to enter data into the main computer. He also explained Mr. Reynolds made threats to WSU against the appellant and himself. He testified Mr. Reynolds would appear and disappear from the lab and once when he had to look for information at Mr. Reynold's desk he found a gun manual within his documents. Mr. Graves explained he reported his concerns to a department chair at WSU and was told by the chair, whose name he could not remember, that Anthony Kropinski (another lab employee) was aware of the threats by Mr. Reynolds against the appellant.

He further explained Mr. Reynolds[10] informed WSU of research misconduct allegations against the appellant. *See* HT 25-28. He explained WSU took the lab computer in January 2011 during its investigation into Mr. Reynolds allegations but did not take Dr. Rafols' computers. He explained if there is a suspicion of wrongdoing it would make sense that you would investigate all involved parties, not just the appellant. *See* HT 30.

Mr. Graves explained he testified before the committee investigating the appellant in February or March of 2011 and WSU terminated his employment that

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[10] Mr. Reynolds did not testify at the hearing.

summer. Mr. Graves testified approximately three to four months after he was discharged by WSU the VA hired him as a worker without compensation to assist the appellant in his lab at the VA. His understanding was the VA paid his salary to WSU in order for him to be in a WSU Ph.D. program. Mr. Graves testified he was questioned by the VA AIB in November 2012. He explained Dr. Hadden asked him questions regarding Fluro-Jade, staining, and figures. He testified during the VA's investigation the computers used at the VA lab were also confiscated. *See* HT 35-39, 52-56.

The appellant denied he intentionally falsified any medical research data and denied all the allegations against him. The appellant testified it was not his role to do histology, looking at the brain cells; he did not have an interest in it because the literature supported "that a lot of times you'll have brain injury, but you'll have no behavioral deficits. Or you'll have behavioral deficits but you can't detect any brain injury." HT 221. He testified he did not perform Fluoro-Jade in the lab and did not learn the technique.

He further explained he differed with conventional scientific method that first you would come up with a theory, state what you think would happen, and design an experiment to test your theory. Instead he stated he employs a reverse philosophy that he teaches his students to let the data speak for itself and then formulate the findings. He stated using that method there are no successes or failures the data speaks for itself. *See* HT 220-223. He also explained that his goal was to have an end point, contrary to the advice he was given by other scientists who explained in grant funding the goal was to receive more grants so his grants should show there are more questions than answers, to keep the grants funded. The appellant testified he disagreed with this approach. *See* HT 224.

In sum, although the agency found the appellant's falsification was willful and intentional, the record shows that the appellant had been lax in his oversight of the lab and that the inaccuracies could have been inadvertent. It is important to note that the appellant moved quickly to correct the inaccuracies. After

informed of the data inaccuracies by a lab student the appellant informed Dr. Rafols who in turn e-mailed the publisher of the articles on March 3, 2011, as follows:

> ….I wanted to be transparent immediately about an issue that [sic] arisen in my lab. A student informed me of a couple of minor errors in two manuscripts that were recently published and that I authored/edited. Essentially two figures were erroneously inserted, however the correct images look almost indistinguishable. I have carefully reviewed the mistakes and it is apparent that the correct figures do not change the interpretation of the findings. I will send you the corrected images or will have my associate, Dr. Kreipke, send them to you….(emphasis supplied)

Appellant's pre-hearing submissions, Exh. N.

Dr. Rafols' above e-mail corroborates that mistakes were made in the lab, the "falsified" figures were minor and look virtually identical to each other, and the findings based on the figures did not change. Dr. Hadden also confirmed that the AIB made no findings as to the interpretation of the data in the "falsified" research. I also note that because Dr. Rafols sent the e-mail and not the appellant, Dr. Rafols was the senior researcher responsible for the lab and ultimately responsible for ensuring the figures were correct.

Therefore, based on the above, I find the agency failed to show the appellant intended to deceive or mislead the agency; and (2) failed to show the appellant intended to defraud the agency for his own private material gain. *Parker,* 122 M.S.P.R. at ¶ 10 . Thus, the agency's evidence in support of its findings and recommendations against the appellant, i.e. long standing falsification and "small" likelihood of rehabilitation were not strong or clear and did not meet the Boards definition of falsification as described above. The AIB's findings led to the agency's actions of terminating the appellant's VA Merit Review Award, prohibiting the appellant from receiving VA research funds for 10 years thereby effectively preventing his reappointment to a term appointment

with the VA, and the retraction of the 2010 & 2011 "*Neurol Res*" articles. As a result, the evidence supporting these actions was not very strong.

Likewise, the agency's record evidence is not strong in support of its decision to change the appellant's working conditions during the AIB investigation by confiscating his computer, interfering /dismantling his lab, and taking away his staff. Taking these actions as a whole, changing the appellant's working conditions, confiscating his computer, interfering /dismantling his lab, taking away his staff, all of which significantly impeded the appellant's ability to work on his grant, along with the agency's decision to investigate him three times, erroneously deciding he was not entitled to health care benefits (later corrected), and erroneously questioning his employment contract, taken as a whole operate to show whistleblowing retaliation. *See* AF Tab 78.

(2) The existence and motive to retaliate against the appellant was shown.

In *Whitmore*, the U.S. Court of Appeals for the Federal Circuit also stated the following:

> Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate.

Whitmore, 680 F.3rd at 1371.

As previously mentioned, Dr. Kaatz testified that in February 2011, Dr. Reeves, asked him to investigate possible involvement of VA resources in a neurological publication that involved the work of Dr. Rafols and the appellant. He explained that Dr. Reeves asked him to do this based upon his role as the RIO. She explained to Dr. Kaatz she received "information" from Dr. Dorothy Nelson, WSU. What information was received from Dr. Kaatz was not identified. Dr. Kaatz explained when he was asked to look into the "matter" he was unaware the

appellant was appointed as an auditor to look into possible grant fraud at WSU. *See* HT 116.

Dr. Kaatz further explained he was tasked with the inquiry phase to determine if there was sufficient evidence to convene an AIB investigation. Dr. Kaatz testified in February 2011 he reviewed the publication in question, the lab, the computer, animal purchase records, and sequestered data that he received from WSU. He explained at that time he determined VA funds could not have been used and he advised Dr. Nelson, WSU, and Dr. Reeves he was closing the inquiry into the appellant's conduct. (emphasis supplied) *See* HT 116-120. The second inquiry he was directed to conduct in April 2011 by the VA included allegations of VA grant fund irregularities and data fabrication. He testified he interviewed personnel including Dr. Kuhn, who was on the PhD committee for Christian Reynolds (the informant), and she explained to Dr. Kaatz that the allegations against the appellant were "ridiculous". Dr. Kaatz further testified he reviewed the data, examined the figures, reviewed the grant, gathered information from the lab, the computer, and reviewed sequestered data that he received from Dr. Nelson at WSU. He also testified he was in e-mail communication with Dr. Rafols. He testified he interviewed Christian Reynolds, Dr. Anthony Kropinski who also worked at the lab during the relevant period, and Dr. Petrov, who was in charge of the lab prior to Dr. Rafols. He explained he was "shocked" when Dr. Kropinski informed him that Christian Reynolds said he wanted to put the appellant's "hands in liquid nitrogen so his hands would freeze and shatter so he would not be able to play the piano." HT 146. He also related that Dr. Kropinski told him Mr. Reynolds spent the "night in the lab with no specific purpose" having access to all the computers. *Id.* Thus, malice by the informant against the appellant was shown.

Importantly, Dr. Kaatz testified he re-created the "curves" after "crunching" the numbers and although his shapes of the curves were not identical (to the merit grant application) it was close and thus he concluded that there was

not enough information to proceed with a research misconduct AIB investigation against the appellant. Dr. Katz related he spend in excess of 100 hours conducting his inquiry and conducted a thorough inquiry. He discussed his findings with Dr. Reeves. He issued a written report regarding his findings. *See* HT 120-126, 132-33 & Appellant's Exh. AAAA. He further explained in his opinion Dr. Reeves must sign his report. *See* AF Tab 82 (July 28, 2011 report authored by Dr. Kaatz and signed by Dr. Reeves). He further explained he discussed his findings with ORO and the OIG. He testified he gave the benefit of doubt to the appellant:

> Insufficient evidence exists to open a formal investigation…there was reasonable and plausible explanations proved by the Respondent and supportive testimony was provided by Dr. Kuhn, Dr. Rafols vouched for the authenticity of the data included in the grant application, the inability of the Respondent to produce the raw data used to construct the figures was troublesome…but more likely than not it represents a deficiency in data managed practices and not fabrication of falsification.

Appellant's Exh. AAAA.

Dr. Kaatz related he was "cold contacted" by WSU for information and discussed with ORO what information could be released. He testified the matter was finished in August 2011 when he completed his report and his findings were forwarded to Patricia Fox, VA Administrative Officer, who in turn met with the WSU Investigating Committee. *See* HT 135-36.139. Importantly, Dr. Kaatz testified his inquiry was on the identical issue the AIB was ultimately charged to investigate. *See* HT 144-45. He further related he notified the VISN Director, Mr. McDivitt, of his findings that there was insufficient evidence to convene an AIB. *See* HT 146-149. He explained he believed the matter to be closed when this issue of medical research fraud by the appellant was raised a third time. He testified Dr. Reeves and ORO made the decision that he would not be involved in the allegations the third time. Dr. Kaatz stated he was never consulted by the AIB regarding his findings.

Dr. Kaatz testified regarding the findings, Allegation a, stated in the AIB report as follows:

> Q It says the Respondent falsified research reported in figure 3 in an article titled Clazosentan A Novel Endothelin A Antagonist improves cerebral blood flow and behavior after traumatic brain injury which was published in 2011 in Neurological Research. Do you see that:
>
> A I do.
>
> Q Of this whole thing, I just want to ask you about that specific thing. Do you agree with me that in the 2011 inquiry, February 2011 inquiry, you looked into that same thing regarding whether or not VA funds were used with respect to the Neurological Research 2011 publication?
>
> A Correct.
>
> Q And you concluded, at that time…that you're going to close the inquiry as we discussed already earlier because it was impossible that VA funds would have been used because Dr. Kreipke didn't have the money at that time, correct?
>
> A His grants started in late 2011. So that was my conclusion.

HT 151-152.

Dr. Kaatz also testified regarding the findings, Allegations b, c, and d, as it related to the same article published in 2011, as stated in the AIB report, that he concluded no VA funds could have been used in the research. Dr. Kaatz made clear that the appellant's VA merit grant (RX00224-01A1) was approved for funding in 2009, "but for a variety of reasons, …the funding didn't arrive on station until 2010, October 2010"…. HT 167 & 191. He testified he did not research or have knowledge regarding VA 2009 poster or VA 2010 poster referenced in the AIB findings of medical research falsification. *See* HT 150-54. Dr. Katz also acknowledged he was not aware of anyone at the VA who was found to have engaged in falsified research and/or receiving a 10-year ban from employment. *Id.*

Dr. Kaatz acknowledged that the agency confiscated the appellant's computer during the AIB investigation. He related he could not confirm the

appellant's allegations that when the computer was returned data was missing. Dr. Kaatz confirmed that "someone" whose name he could not recall asked him about the appellant's employment at the VA and whether it was legal. Dr. Kaatz testified he discussed the inquiry with the appellant who reminded him of his memorandum of understanding with the VA. Dr. Kaatz further testified he, "pulled it out, verified its authenticity, and apologized to him [the appellant] for even bringing this up…But it was a mistake, this MOU did exist and he was functioning under the guidelines of that MOU." HT 156.

Dr. Kaatz disputed the appellant's allegations contained in his grievances that no work was being done on the grant because the computers were taken away and there was missing data. Dr. Kaatz acknowledged that the appellant's lab personnel, Justin Graves and Dr. Kopinski were terminated from VA employment with two weeks' notice on March 13, 2013. Dr. Kaatz explained Justin Graves and Dr. Kopinski were terminated because no work was being done on the grant. *See* HT 164.

He further explained that he later learned, the appellant was placed on paid administrative leave from March 13, 2013 until the expiration of his grant in October 2013. Dr. Kaatz stressed the decision was an administrative decision and not one made by him. He explained after WSU let the appellant go, the appellant came to the VA, was given an office and he had a lab, so Dr. Kaatz believed the appellant was working on the grant. He testified he learned later the appellant needed tissue samples from WSU and thus he offered to recover those from WSU but the appellant did not take him up on the offer. *See* HT 174. Dr. Kaatz explained when the appellant's grant began in 2010, he did some work at the VA "mostly histopathologic". He explained the appellant did have some animals at the VA but he was "unhappy" with the care the animals received so he moved them back to WSU and continued to do histopathological work, tissue specimens at the VA. *See* HT 165. He stated he did not know whether or not the Fluror-Jade staining was done at WSU or the VA.

Dr. Kaatz acknowledged that he later learned the appellant was provided some salary from the VA thru an Interagency Personnel Agreement (IPA) prior to 2010 and that he had a without compensation (WOC) appointment from January 1, 2008 through October 23, 2010. *See* HT 170. Dr. Kaatz testified the appellant was a 5/8th employee which means part-time with the VA. He also explained the funds left over from the appellant's grant, approximately $115,000, were returned to the VA Office of Research and Development. *See* Agency's Motion for Reconsideration, Exh.10.

Dr. Kaatz acknowledged his findings of no VA funding would not be the same today as his early findings because he was not aware of the appellant's WOC status or the IPA status, or the VA research day posters. *See* HT 181. Dr. Katz explained he offered to change the appellant's working area from the 4th floor (where the appellant stated he was uncomfortable working), to the basement where most of the research facilities are located and he declined. Dr. Katz testified he did not observe any hostilities against the appellant. HT 181.

However, Dr. Kaatz did not testify regarding the merits of the AIB's medical falsification charges. The July 29, 2011, report by Dr. Kaatz states in relevant part as it relates to Dr. Rafols:

> A face-to-face meeting was not possible as he was teaching in Mexico. He stated that behavioral analyses were done by the Respondent and others and that he as well as other laboratory members scrutinized all such data. He indicated that experimental repetitions were carried out with consistent results. He was completely satisfied with these data and was confident of their authenticity.

AF, Tab 82 at 3.

A reading of this report, in addition to Dr. Kaatz's and Justin Graves' testimony, raises serious questions regarding the credibility and motivation of the "informant" against the appellant. *Id.*

The appellant pointed out ORO oversees the VA grant process. He explained all grants he worked on at WSU were associated with National Institute

of Health (NIH) & ORI oversees NIH. *See* HT 239. The appellant clarified that exhibits in the AIB investigation were sent directly from WSU to ORI and then forwarded to the VA AIB.

Based upon the above it is not clear what repercussions would befall agency officials, however, the agency did not sufficiently explain the reasons Dr. Reeves relieved Dr. Kaatz of the initial responsibility to investigate the appellant (after he twice found insufficient evidence to convene an AIB) as RIO, even appointing an Acting RIO to continue to investigate the appellant for the same reasons until an AIB was appointed. The agency did not sufficiently explain Dr. Reeves' written instructions to the Acting VISN Director that she intended to implement the AIB recommended actions once his review was complete; thereby indicating her view that the higher level review was more of a rubber stamp. The record shows the strong academic relationship between the VA & WSU and the interplay among the VA, ORO, ORI, and WSU. An inference can clearly be made that Dr. Reeves was attempting to appease WSU and protect their relationship by acquiescing in WSU's continued interference with the VA's employment of the appellant. *See* HT 114-115; Appellant's Prehearing Submissions. I find the existence and motive to retaliate stemmed from the improper influence of WSU over the VA to take action against the appellant.

(3) The agency did not provide evidence that action was taken against similarly situated non-whistleblowers.

The agency is not required to produce evidence for each and every one of the *Carr* factors. *Whitmore*, 680 F.3d at 1374. The agency did not produce any evidence that it takes similar actions against employees who are not whistleblowers. As previously stressed Dr. Reeves from the Detroit VA did not testify nor did the Undersecretary of Health for the VA in Washington, Dr. Pretzel, (who affirmed Mr. McDivitt's approval of the AIB findings and

corrective action) testify. Mr. McDivitt who was a VISN Director and Acting VISN Director, in effect over 4 states, testified the appellant's appeal was the first he had ever seen regarding medical research falsification and disbarment.

The Board's reviewing court has cautioned the agency ignores this factor at its own peril. "*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," and that "the absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis," it also has recently observed that "the Government's failure to produce evidence on this factor 'may be at the agency's peril,' considering the Government's advantage in accessing this type of evidence." *Miller v. Department of Justice,* 842 F.3d 1252, 1262 (2016)(quoting *Whitmore,* 680 F.3d at 1374).

In the instant case, due to the stated review at the national level, the agency had access to any and all evidence of similar actions taken nation-wide within the VA, yet produced no evidence or testimony that similar actions were taken against non-whistleblowers. The appellant produced evidence that no action was taken by the VA regarding his non-whistleblower co-authors on the relevant articles. It is undisputed that no action was taken regarding Dr. Rafols. Dr. Rafols held a dual appointment with the VA and WSU. The VA maintained it had no control over Dr. Rafols, however the 2010 & 2011 *"Neuro Res"* articles were co-authored by Dr. Rafols. The record shows Dr. Rafols was involved in every grant or document where the AIB found research misconduct. Yet Dr. Rafols was not barred from receiving future VA funds and/or VA Merit Awards. In addition, the AIB specifically cleared Dr. Rossi of any wrong doing. Thus, I find this factor also operates against the agency's burden to show causation by clear and convincing evidence.

In sum considering the record evidence as a whole, I find the agency failed to meet its steep burden to show independent causation. *Miller,* 842 F.3d at 1263.

(reversing Board's determination that agency met clear and convincing evidence on the basis of management's testimony).

Hostile Work Environment

As stated previously, the appellant reported to the OSC he filed grievances on January 26, 2013, March 6, 2013, and May 16, 2013, alleging the agency created a hostile working environment, withheld his salary, engaged in gross disregard for VA policy, disregard to potential workplace violence, and retaliation. I find the appellant engaged in whistleblowing activity under the WEPA by disclosing to the OSC his grievance activity the agency created a hostile work environment. *See Savage*, 122 M.S.P.R. at 612; *Whitmore*, 680 F.3d at 1376. This activity was directed towards Dr. Reeves who the grievance were either filed against or heard and decided the grievances.

I find the agency created a hostile work environment in retaliation for the appellant's whistleblowing activity, as previously discussed, because he proved by preponderant evidence that he was subjected to a material alteration in the terms and conditions of his employments. 5 U.S.C. § 2302(a)(2)(A)(xii); *Id.* (explaining that the agency's creation of a hostile work environment is a personnel action under section 2301(a)(2) (A)(xii) because, if proven, it would constitute a significant changed in working condition). The Board generally defines a hostile work environment as a pattern of ongoing and persistent harassment that is severe and pervasive enough to alter the condition of employment. *See Kitlinski v. Department of Justice,*123 M.S.P.S. 41 ¶ 18 (2015); *Gregory v. Department of the Army,* 114 M.S.P.R. 607 ¶ 31 (2010). Determining whether a work environment is hostile and abusive must be made by examining all of the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonable interfered with an employee's work performance. *See Gregory*, 114 M.S.P.R. 607 at ¶ 31.

It is undisputed and I find the agency confiscated the appellant's computers (whether data was missing was disputed), discharged his staff, interfered with his research animals, interfered with his ability to work on another grant with Dr. Kuhn which was partially funded beyond the expiration of this term appointment, denied him health benefits for months, and incorrectly disputed his employment contract, all of which created a convincing mosaic of a hostile work environment. *See* AF Tabs 78, 105, & Kriepke HT. The agency's actions were not isolated. I further find these actions were prolonged, humiliating, and interfered with the appellant's work performance, as the record clearly reflects. The pattern of harassment was sufficiently severe to alter the appellant's working conditions. *Id.* As previously stated the appellant showed he participated in protected activity, agency officials involved were aware of the grievance activity and the appellant showed nexus, as described above.

Accordingly, the appellant's claims that he is still owed money under grant(s) and was subjected to a hostile work environment are not fully developed as to the appropriate relief and are issues for supplemental proceedings for consequential and compensatory damages. Likewise, the issue of available grant funds for extending the term appointment is an issue for supplemental proceedings because the appellant presented evidence he received a VA grant with funds available through 2016. As stated previously, the record clearly shows the agency did not reappoint the appellant to another term appointment because of the 10-year disbarment. *See Usharauli v. Department of Health and Human Services,* 116 M.S.P.R. 383, 388 (2011)(WPA covers the failure to make an appointment or extend an appointment in the federal service when that action is because of a protected disclosure.); *see also Ruggieri v. Merit Systems Protection Board,* 454 F.3d 1323, 1325 (Fed. Cir. 2006).

DECISION

The appellant's request for corrective action is GRANTED.

ORDER

The agency is ordered within 30 days of the date of the decision to rescind its decisions to: (1) terminate the appellant's active Merit Review Award entitled "Poly-trauma following brain injury: towards a combinatorial therapy"; (2) to rescind its decision to terminate the appellant's term appointment and to pay him any monies owed under the VA Merit award /VA grants as a result of the termination of his term appointment for VA research; and (3) rescind its decision to debar the appellant from receiving VA funds for a period of 10 years.

The appellant may be entitled to consequential damages regarding the personnel actions and compensatory damages for the agency's creation of a hostile work environment. The appellant is entitled to attorney fees. *See* 5 U.S.C. § § 1221(g)(1)(A);

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The interim relief will order the agency to rescind its decisions to: (1) terminate the appellant's active Merit Review Award entitled "Poly-trauma following brain injury: towards a combinatorial therapy"; and (2) to rescind its decision to terminate the appellant's term appointment for VA research; and (3) to rescind its decisions to debar the appellant from receiving VA funds for a period of 10 years.

The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the

interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: _____/S/_____
Dorothy L. Moran
Administrative Judge

ENFORCEMENT

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

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

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at 42 U.S.C. § 1981a. The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.204. If you believe you meet these requirements, you must file a motion for compensatory damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **April 14, 2017**, 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 the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and

may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

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

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

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

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with

the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States 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 after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States 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, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

DECISION CASE CITES LISTING

Christian Kreipke v. Department of Veterans Affairs

Docket No. CH-1221-15-0284-W-1

THIS CITE CHECK CONDUCTED BY _____ ON March 08, 2017.