UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

PEDRO RIOS,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
SF-1221-21-0412-W-1

DATE: February 25, 2022

Thomas Dimitre, Esquire, Ashland, Oregon, for the appellant.

Julie Nelson, Golden, Colorado, for the agency.

Rachel Trafican, Esquire, Albuquerque, New Mexico, for the agency.

BEFORE
Michael S. Shachat
Administrative Judge

INITIAL DECISION

INTRODUCTION

On June 11, 2021, Pedro Rios (appellant) filed this Individual Right of Action (IRA) appeal claiming the U.S. Department of Agriculture, U.S. Forest Service (agency) refused to rehire him for the 2021 fire season in retaliation for whistleblowing activity. Initial Appeal File (IAF), Tab 1. On July 12, 2021, I found that the appellant had exhausted his administrative remedies and made non-frivolous allegations entitling him to a hearing on the merits. IAF, Tab 10. I conducted the requested hearing by web-based video conference on January 27 and 28, 2022. Hearing Record (HR), IAF, Tabs 48 and 50. Based on the

following analysis and findings, the appellant's request for corrective action is GRANTED.

ISSUES

As discussed in the Board's July 12, 2021, Order, the remaining issues I will decide in this appeal are:

1. Whether the appellant has proven by a preponderance of the evidence that his July 8, 2020, social media post was a disclosure protected by 5 U.S.C. § 2302(b)(8)(A)(ii);
2. Whether the appellant proved, by preponderant evidence, that the protected disclosure had a causal connection to the agency's decision not to hire him for the 2021 summer fire season;
3. If the appellant satisfies this burden, whether the agency produced clear and convincing evidence that it would not have rehired him for the 2021 summer fire season regardless of the appellant's July 8, 2021, social media post.

ANALYSIS AND FINDINGS

Findings of Fact[1]

The appellant was appointed to a Forestry Technician position, GS-0462-04 assigned to the agency's Klamath National Forest on May 24, 2020. IAF, Tab 9

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[1] My findings are based on preponderant evidence, which is the "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q). My findings also apply the credibility factors articulated in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), and the hearsay standards of *Borninkhof v. Department of Justice,* 5 M.S.P.R. 77, 87 (1981). There was no dispute about any of the material documents in this appeal, and I find they were authentic and reliable. *Id.*

The parties also submitted a list of stipulated facts. IAF, Tab 23 at 7-8. With non-substantive modifications for grammar and consistency, I have incorporated the stipulations into my findings.

at 65. The appellant's position was a temporary not-to-exceed (NTE) position limited to 1,039 hours under to 5 CFR 316.402(B)(7). In its simplest terms, the appellant's job duties were those of a wildlands firefighter, assigned to a crew that was part of the Klamath National Forest's Grass Lake Station, Goosenest Ranger District. HR (Appellant, Stroberg); IAF, Tab 9 at 49. His duties included conducting controlled burns, fire suppression, operating heavy equipment, patrolling the forest for new fires, and occasionally training new employees. HR (Appellant, Stroberg). Firefighting crews would typically travel for six or seven active wildfire incidents per season, possibly to other states. *Id.* During the 2020 fire season, the appellant reported to either Ed Willy or Ben Grotting as his crew chief or crew captain. HR (Stroberg, Appellant, Willy); IAF, Tab 9, at 59-60; Tab 46 at 8-9. During that same fire season, the appellant reported to Grotting while Willy was temporarily assigned to the position of assistant fire management officer. *Id.* Willy reported to Philip Bordeleon, Deputy Fire Officer, who reported to Dave Stroberg, District Ranger.

The Klamath National Forest has a "Forest Leadership Team" (FLT), consisting of its three district rangers, including Stroberg, the deputy officers, including Bordeleon, and the staff officers, including Mike Appling, the staff fire officer for the Goosenest District. HR (Stroberg). Appling has no supervisory relationship to the appellant, although he coordinated wildfire assignments. *Id.* The district's supervisory office is located in Yreka, CA, a small rural community in Siskiyou County, CA. *Id.* IAF, Tab 46 at 89.

On or about March 11, 2020, the World Health Organization (WHO) characterized the ongoing international outbreak of the novel coronavirus (COVID-19) as a pandemic.[2] The appellant is the parent of a young child with a

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[2] I take official notice of this fact. 5 C.F.R. §1201.64. *See* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#

chronic respiratory condition. HR (appellant, Stroberg). In May 2019, the appellant's child was hospitalized for fever and shortness of breath. HR (appellant); IAF, Tab 45 at 41-43. The local clinic determined the child was critically ill and transferred the child by air ambulance to U.C. Davis for intensive care. HR (appellant); IAF, Tab 45 at 41-43. While the appellant's child recovered from the May 2019 hospitalization, his chronic respiratory condition placed him in a high-risk category for becoming seriously ill from COVID-19. HR (appellant). As a result, the appellant and his family took precautions to isolate themselves and prevent exposure to the virus. *Id.* At the outset of the 2020 fire season, the appellant and his colleagues discussed their concerns about the pandemic with Willy and other managers and believed the agency would take precautions to prevent firefighters deployed to wildfire assignments from spreading the virus to family members or other community members upon their return from any firefighting assignments. HR (appellant, Willy).

At the beginning of July 2020, the agency deployed the crew to which the appellant was assigned to contain a wildfire in the Angeles National Forest (ANF) outside Los Angeles, CA. HR (Appellant, Willy). But by the time the crew arrived at the ANF fire position on July 7, 2020, the fire was already under control, and the appellant and his fellow crew members were directed to return to their regular duty station that same day. *Id.* While the appellant and other crew members raised concerns to their on-site managers that same day about potential exposure to COVID-19 and the possibility of spreading COVID-19 to family members or others upon their return home, they received no clear guidance on what precautions, if any, the agency intended to implement to prevent such potential exposure. HR (appellant, Willy). Willy testified about a phone call with Appling and others on July 7 where they proposed different options - that the team might be deployed to another fire, be asked to "camp," be kept in

Redding, CA, or be told to simply go home and report to their regular assignments – but said that no decision was made at that time. HR (Willy). The appellant testified that the night before they were preparing to leave Southern California, he understood from Willy that Appling planned to "stand his ground," and have the employees return to their homes without any quarantine or isolation procedures to protect their families. HR (appellant).

In the early morning hours of July 8, 2020, the appellant placed a post to a Facebook group of which he was a member, which he entitled "Siskiyou Coronavirus Community Response.[3] IAF, Tab 45 at 8-9. The post read as follows:

> My fire strike team stationed in (Siskiyou County) is out here in Southern California atm going between Cleveland National Forest and Angeles National Forest. Angeles NF is considered a "hot zone" for Covid19 and in fact several engines/stations are down staffed because of confirmed cases from USFS employees down here.
>
> Currently we are on day 4 but because of the "hot zone" we are in the Klamath National Forest Fire Staff Officer Mike Appling wants to bring us back early as soon as active fires are controlled supposedly due to the virus.
>
> Everyone on the strike team and even told that his constituents in KNF are perplexed and upset that he's trying to shorten our stay since we MAY or MAY NOT have been infected.
>
> Why bring us back early and expose the public and our own families when we can still be utilized down here with covering for potential future fires (we've been dispatched to 3 fires in 4 days) between CNF and ANF. We chose this job and know the dangers,

[3] The post was made under the pseudonym, "Titto Abel." The appellant explained that "Titto" is a diminutive of Pedro, and Abel is his middle name, and testified that he had no intention of masking his identity when he posted. HR (appellant).

> bringing us back to Siskiyou exposing an older public population and our own families is absolutely short sighted in our view.
>
> I have support from fellow crew members so I'd like to post Mike Appling's Public Service work number and public service gov email, so the public can voice their concerns to him as well…..

Id. The appellant concluded his post with the contact information for Appling from the agency's public website. *Id.*

Klamath management learned of the appellant's social media post that same morning. HR (Willy, Stroberg). IAF, Tab 45 at 82; Tab 46 at 10-14. When Willy and the appellant arrived at a hotel in Sacramento on the evening of July 8, 2020, Stroberg led a conference call with Willy, Bordelon and the appellant to discuss the post and the appellant's concerns. HR (Stroberg, Appellant, Willy). On the call, Stroberg told the appellant that he should have raised his concerns through his chain of command. *Id.* Stroberg told the appellant that he could have contacted Bordelon and himself directly if his immediate managers were unresponsive to his concerns. *Id.* Finally, Stroberg advised the appellant that he had contacted employee relations and that he might be disciplined for his post. HR (appellant, Stroberg).

The following day, Stroberg contacted agency employee relations and sought guidance as to whether he should impose some type of disciplinary action. IAF, Tab 46 at 12-13. L.P.,[4] the agency's employee relations specialist, advised Stroberg that the appellant's posting was likely a protected whistleblower disclosure and that he did not believe that any disciplinary action should be taken. *Id.* at 16. That same day, L.P. also sought advice from agency ethics advisors, and was advised that the appellant's post did not violate any agency ethics rules, advice that he shared with Stroberg on July 10, 2020. IAF, Tab 45 at 80-81.

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[4] In this initial decision, I use abbreviations for several individuals although their full names are in the record out of respect for their privacy.

On July 9, 2020, the strike team returned to Klamath and had a group meeting with Appling, who apologized for the confusion over quarantine protocols. HR (Appellant, Willy). The agency arranged to quarantine the team in a hotel for several days and offered COVID-19 testing. HR (Appellant, Willy).

On July 14, 2020, Stroberg emailed the appellant with the subject line "Follow Up and Expectations." IAF, Tab 9 at 34. In the email, Stroberg advised the appellant that using social media to address his concerns to management was "unprofessional and showed a lack of integrity." *Id.* HR (Stroberg). He further advised, in bold, underlined text: **my expectation is that you bring these concerns up through the chain of command**." *Id.* Stroberg included a bulleted list of items from the applicable code of conduct on using the chain of command and professionalism and warned the appellant that failure to meet his expectations may result in disciplinary action. *Id.*

On late July 2020, the appellant and his crew were assigned to fight a wildfire that had broken out in the Klamath National Forest. HR (appellant). On July 26, 2020, while driving an agency vehicle to check on reports of smoke in the surrounding areas, the appellant caused minor cosmetic damage to the vehicle when he backed into a tree while turning the vehicle around after going in the wrong direction. HR (appellant); IAF, Tab 45 at 20-25. The appellant took pictures of the site, and the damage, and attempted to send them to Willy by text, but the text did not immediately go through due to poor cellphone reception. HR (appellant, Willy). The appellant then drove to a location where his crew, commanded by Grotting, was engaged in wildfire suppression. HR (appellant). After the fire was under control, Grotting noticed the damage to the truck and told the appellant he should have immediately reported the damage to him. HR (appellant, Stroberg); Tab 46 at 36-40; Tab 17 at 12.

On July 28, 2020, Grotting asked the appellant to assist another crew, Crew 71, because they only had the crew chief, MA, to take 9 inexperienced fire fighters into the field to engage in fire suppression on a fire commonly referred to

as the "Little Soda Fire." HR (appellant, Willy); Tab 17 at 12; Tab 46 at 84. The appellant testified that this was the first active forest fire this particular crew had experienced, and that when he joined the crew they appeared fatigued and suffering from dehydration from their first day in the field. HR (appellant). On the third day, the appellant noticed one of the crew, TM, in severe distress, and took necessary steps to ensure he received medical attention. *Id.* TM was ultimately taken off the mountain and hospitalized for rhabdomyolysis, a condition that results from extreme dehydration and can lead to organ failure and death. HR (appellant, Stroberg). The appellant testified that he had been told by other crew members that TM had been throwing up in the truck on the way to fire, and that MA, the crew chief driving the truck, failed to recognize this and the other signs of dehydration, which would have averted the medical emergency. HR (appellant). The appellant discussed his concerns about the signs of dehydration during an "after-action" meeting led by the crew chief, MA. *Id.*; IAF, Tab 46 at 84-85. After the appellant discussed these concerns, MA reported to Grotting that the appellant had a negative attitude and had objected to "mopping up" MA's vehicle after the employee had thrown up in it. IAF, Tab 46 at 84-85; HR (Stroberg).

Several witnesses in addition to the appellant testified that MA did not prioritize the safety of his crew. HR (Appellant, JB, Willy). Another fire fighter on the crew, JB, testified that the appellant was a good leader, that he made things safer, and that he never had a bad attitude. HR (JB). JB testified that working with the appellant made his season better, and that the appellant "saved that guy's life" at the Little Soda Fire, referring to TM. HR (LB).

Regardless, when the appellant returned from the Little Soda Fire, Grotting reported to Stroberg that the appellant had a negative attitude and his belief that it was bringing down the morale of his entire crew. HR (Stroberg); IAF, Tab 17 at 12. Grotting also reported that the appellant said he was going to post complaints about the agency's hiring practices on social media. IAF, Tab 17 at 12. Stroberg

again sought guidance from LP, and at his recommendation, collected written statements from Grotting and MA. HR (Stroberg, Willy); IAF, Tab 17 at 12; Tab 46 at 35-40, 83-88.

At some point in late July after Stroberg collected Grotting and MA's statements, Willy and Grotting met with the appellant to discuss their concerns about his attitude. HR (Willy, appellant). They had a good discussion and the appellant resolved to correct his attitude. HR (Willy, appellant, Stroberg).

On October 23, 2020, the appellant received his 2020 performance appraisal with a rating of "Fully Successful." IAF, Tab 9 at 25-33. Willy noted in his comments to the appraisal that the appellant's performance in the area of teamwork needed to and did improve, but that the appellant still needed to work on teamwork with Marcus Applewhite, who was one of the other fire supervisors, and with Grotting. *Id.* at 27; HR (Willy, appellant).

On October 29, 2020, the agency extended the appellant's appointment to a maximum of 1,560 hours. IAF, Tab 9 at 14. The appellant's appointment ended on November 21, 2020, because the fire season ended. IAF, Tab 9 at 13.

As a result of his Fully Successful performance appraisal for 2020 and his years of service, the appellant was eligible for non-competitive rehire authority for the 2021 season. HR (LP, Stroberg, Willy); IAF, Tab 46 at 23, 25. Willy and Bordelon talked about whether the appellant would be reappointed the following season. HR (Willy). Bordelon recommended that Willy check with LP to ensure that "everything was good." *Id.* LP confirmed that the appellant would be rehired, and indeed, that absent some misconduct or a "minimally acceptable" performance evaluation, he was obligated to be rehired. HR (LP, Willy, Stroberg); IAF, Tab 46 at 23, 25. Willy and the appellant discussed his return and their plans for the following fire season. HR (Willy, appellant).

Earlier that summer, the appellant submitted a resume for permanent firefighting positions with the Forest Service. IAF, Tab 9 at 15-23. The appellant testified that he had been applying for permanent employment with the

agency for years but had not yet been selected. HR (appellant). He spoke with other agency employees who suggested that he include something on his resume to make him stand out and show his sense of humor. *Id.* In his resume, the appellant wrote that his objective was "to be as disgruntled as perm coworkers," that he had "Perseverance (Too dumb to apply for Cal Fire)," and that he had the "Ability to live off $15 since 2007." IAF, Tab 9 at 16. The appellant testified that he intended these comments to be light-hearted and to show his self-deprecating sense of humor. *Id.*

Stroberg was designated as the Klamath National Forest's recommending official for what the agency calls "Fire Hire," in which they review and select candidates for career positions. HR (Stroberg). In this capacity, on or about November 30, 2020, Stroberg saw and reviewed the appellant's resume and his comments. *Id.* Stroberg felt the comments were inappropriate and reached out to LP on or about December 1, 2020, asking if these comments would justify not rehiring him as a temporary employee for the 2021 fire season. HR (LP, Stroberg); Tab 46 at 5-6. Stroberg also discussed the question with Rachel Smith, his manager. HR (Stroberg, Smith). Stroberg did not discuss his concerns with Willy. HR (Stroberg, Willy). LP and Smith both advised Stroberg that agency was not required to rehire the appellant for the 2021 fire season, and that Stroberg could elect not to do so based on the appellant's prior behavioral issues and/or the comments he made on his resume. *Id.* HR (LP, Stroberg, Smith); IAF, Tab 45 at 102; Tab 46 at 5-6. Smith made the decision not to rehire the appellant, and instructed Stroberg to notify the appellant that, while he was not being non-competitively rehired, he could apply for a seasonal position if he wished and he would be considered along with other candidates. HR (Smith). Smith also instructed Stroberg not to include any details about the agency's decision making in his notification to the appellant. *Id.*

On December 1, 2020, Stroberg notified the appellant by voicemail that the Klamath National Forest would not be exercising non-competitive rehire

authority for the appellant for the 2021 season, but did not provide any explanation for his decision. HR (appellant, Stroberg); IAF, Tab 45 at 76. On or about December 2, 2020, the appellant brought an EEO complaint to an agency EEO counselor in response to the agency's decision not to rehire him. HR (appellant); IAF, Tab 6 at 5-6. Through the EEO investigatory process, the appellant first learned that the agency's explanation for not rehiring him was based on certain comments he made on his resume. HR (appellant). The appellant also contacted the Office of Special Counsel (OSC) on February 16, 2021, alleging that the agency did not rehire him for 2021 season because of his July 8, 2020, social media post. IAF, Tab 7 at 45-46.

Applicable Law

Under the Whistleblower Protection Enhancement Act of 2012 (WPEA), the Board has jurisdiction over an IRA appeal if the appellant has exhausted the administrative remedies before OSC and makes nonfrivolous allegations that (1) they made protected disclosures pursuant to 5 U.S.C. § 2302(b)(8) or they engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D), and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Kerrigan v. Department of Labor*, 122 M.S.P.R. 545, ¶ 10 n.2 (2015) (citing 5 U.S.C. §§ 1214(a)(3), 1221(e)(1), *aff'd*, 833 F.3d 1349 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 2180 (2017); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001)). Once an appellant establishes jurisdiction over an IRA appeal, they must then prove the merits of the claim by preponderant evidence.[5] *Scoggins v. Department of the Army*, 123 M.S.P.R. 592 (2016); *Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661, ¶ 9 (2015).

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

If the appellant proves the merits of the claim by preponderant evidence, the agency must show by clear and convincing evidence that it would have taken the same personnel action in the absence of the appellant's protected disclosures or protected activity. *See Carr v. Social Security Administration, 185 F.3d 1318, 1323 (Fed. Cir. 1999); Ryan v. Department of the Air Force, 117 M.S.P.R. 362, 369 (2012); Azbill v. Department of Homeland Security, 105 M.S.P.R. 363 (2007).* Clear and convincing evidence '"is a high burden of proof for the Government to bear."' *Whitmore v. Department of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (quoting 135 Cong. Rec. H747-48 (daily ed. Mar. 21, 1989)). To determine if the agency met this burden, the Board will consider all of the relevant factors, including the following: (1) the strength of the agency's evidence in support of its action (for disciplinary actions) or whether the agency had legitimate reasons for the personnel action (for non-disciplinary actions); (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. *See Carr*, 185 F.3d at 1323. "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* at 1368.

As noted above in an Order dated July 12, 2021, I found that the appellant had exhausted the administrative remedies with OSC and made non-frivolous allegations that his July 8, 2020, social media post was a contributing factor in the agency's decision not to hire him for the 2021 summer fire season, and that the appellant was entitled to a hearing on his claim.

The appellant's burden

Protected Disclosures or other Protected Activity

A protected disclosure is a disclosure of information that the individual reasonably believes evidences a violation of law, rule, or regulation, gross

mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). The test to determine whether a putative whistleblower has a reasonable belief in the disclosure is an objective one: whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions of the agency evidenced one of these categories of wrongdoing. *Lachance v. White,* 174 F.3d 1378, 1381 (1999).

The appellant argued that his July 8, 2020, social media post disclosed a specific danger to public health or safety and constituted gross mismanagement.

Gross Mismanagement

Gross mismanagement is a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. *See Swanson v. General Services* Administration, 110 M.S.P.R. 278, ¶ 11 (2008). Differences of opinion between an employee and agency management as to the most appropriate course of action do not rise to the level of gross mismanagement. *See White v. Department of the Air Force*, 391 F.3d 1377, 1382-83 (Fed. Cir. 2004).

The mission of the Forest Service is the care of the agency's land and the communities surrounding that land. HR (Stroberg). Controlling forest fires is a critical part of that mission. *Id.* While the appellant's post questioned management's judgement in deploying its fire-fighting crews, "general philosophical or policy disagreements with agency decisions or actions are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A)." *Webb v. Department of Interior*, 122 M.S.P.R. 248, 252 (2015). The appellant did not articulate a clear conflict between the agency's mission and its actions to deploy crews to Southern California or returning them to Siskiyou County, or even the delay in developing

a COVID safety plan for those deployments. HR (appellant). I find that the appellant's disclosure did not evidence "gross mismanagement" because, while he questioned the agency's judgement in meeting the needs of its fire-fighting mission, he did not disclose a management action creating a substantial risk of an adverse impact to the agency's ability to accomplish that mission. *See Wood v. Department of Defense*, 100 M.S.P.R. 133 (2005); *Jensen v. Department of Agriculture*, 104 M.S.P.R. 379 (2007)). The appellant was an essential worker, and deploying fire crews to active forest fires, even in a pandemic, would be necessary to the accomplishment of the agency's mission.

Substantial and Specific Danger to Public Health and Safety

However, the appellant's post also explained that sending his crew to a location with a high rate of community spread of COVID-19, with multiple community restrictions in place,[6] and returning them without any isolation or other processes to prevent infection risked them spreading the virus to their families and to the public. The inquiry into whether a disclosed danger to public health and safety is sufficiently substantial and specific to warrant protection under the WPEA is guided by several factors, including the likelihood of harm resulting from the danger, when the harm may occur, the nature of the harm, and the potential consequences. *See Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 20 (2013).

I find the appellant reasonably believed he was being returned from Los Angeles to his home in Siskiyou County without any plans to screen or isolate him or his crew from potentially spreading COVID to the community. There was

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[6] I take official notice of the fact that at the time the appellant was deployed to Southern California, infection rates spiked in Southern California to the point where the Governor again imposed restrictions to prevent further spread of the disease. *See https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Closure-of-Sectors-in-Response-to-COVID-19.aspx.* I further take notice that at the time, testing was not generally available, and people were advised to isolate and wear masks if they were unable to stay home.

no dispute that the agency's managers never conveyed a plan to the deployed crews prior to the date of their scheduled return home and indeed were still in the process of discussing and developing those plans as the crews were enroute back to their home station. HR (appellant, Willy, Stroberg). At the time, COVID information and disinformation was rampant; there was little consensus on risk factors or how it was spread, many thousands had died from it, no vaccine or effective treatment was available, and the appellant lived in a small rural community with limited medical services. *Id.* The appellant and Willy testified that while in Southern California, the crew was housed in facilities where other recent occupants had contracted COVID-19. *Id.* A reasonable, disinterested person with knowledge of this situation would share the appellant's stated concern that the firefighters could be infected with COVID-19 and if they returned to their homes and communities without precautions, they would spread it to others, some of whom might become seriously ill or die. This was especially true for the appellant, whose own child suffered from a chronic respiratory illness that was known to place such individuals at higher risk of serious illness and even death after contracting the virus. HR (appellant); IAF, Tab 45 at 41-45. The agency's own response demonstrates a recognition that the appellant's concerns were legitimate, as it ultimately elected to implement isolation protocols for the crew and offering them COVID tests. HR (appellant. Willy, Stroberg). The appellant's social media post about the situation – the agency's apparent failure to implement a COVID safety plan for the agency's returning firefighters – described a substantial and specific danger to public health and safety in the form of spreading the virus to the community. The appellant has proved that he made a protected disclosure when he did so.

Personnel Action

The parties stipulated that the appellant was eligible for non-competitive rehire authority for the 2021 fire season, that the agency did not exercise its non-competitive rehire authority, and the appellant was not rehired for the 2021 fire

season. A "personnel action" under the WPEA includes an action related to an "appointment." *See* 5 U.S.C. § 2302(a)(2)(A)(i). This includes a non-selection, or any other affirmative decision not to hire. *See Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1326-27 (2006). The appellant has carried his burden to show that he was subjected to a personnel action.

Contributing factor

The appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, including, but not limited to, evidence that the official taking the personnel action knew of a disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Easterbrook v. Department of Justice*, 85 M.S.P.R. 60, ¶ 7 (2000).

Here, the appellant's disclosure occurred on July 8, 2020. Stroberg was involved in the response to the appellant's disclosure. HR (Stroberg); IAF, Tab 46 at 12. Stroberg was also the official that discovered the comments on the appellant's resume, found them to cross a "red line" for him, and sought guidance from LP about whether those comments would be sufficient to justify not rehiring the appellant, and after confirming with LP, directed the appellant be removed from the rehire list. HR (Stroberg; LP); IAF, Tab 45, at 103-105; Tab 46 at 5-7.

Stroberg's supervisor, Rachel Smith, testified that it was her decision not to rehire the appellant, and that she was not aware of the appellant's protected disclosure at the time she made her decision. HR (Smith). Even if I were to credit Smith's testimony that she alone was responsible for the rehire decision, I also find that she had or should have had knowledge of the appellant's protected disclosures. IAF, Tab 46 at 19. Stroberg sent her an email with unidentified "background," about the appellant's employment. *Id.* Smith had telephone conversations with both Stroberg and LP, who were concerned about not rehiring the appellant specifically *because* they believed he was entitled to the protections

of a whistleblower. HR (Stroberg, LP). While Smith claimed not to have seen the background email and not to have been aware of the appellant's social media post, I find it implausible that they would not have explained the basis for their concerns to Smith when asking for her opinion about rehiring. *See Hillen*, 35 M.S.P.R. 453, 458 (1987). I find that the appellant has proved that it is more likely than not Smith was aware of his protected disclosures.

Even assuming without finding that Smith lacked any knowledge about the appellant's protected disclosure when she made her decision, it was Stroberg who initiated the action after reviewing the appellant's resume. HR (Stroberg). His direct and substantial involvement in the decision is sufficient for the appellant to meet the knowledge prong of the knowledge/timing test under what is commonly referred to as a "cat's paw" theory of liability. *See*  *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S. Ct. 1186, 1190, 1193–94, 179 L.Ed.2d 144 (2011) (adopting the term "cat's paw" to describe a case in which a particular management official, acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action); *See Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 11 (2012) (an appellant may establish an official's constructive knowledge of a protected disclosure by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action).

The decision not to rehire the appellant in December 2020 was made approximately 5 months after his social medial post in July 2020, which satisfies the timing portion of the knowledge-timing test. *See Ingram v. Department of the Army*, 116 M.S.P.R. 525 (2011) (holding test is satisfied when the disclosure and personnel action are 1-2 years apart). The appellant has therefore established by preponderant evidence that his protected disclosure to management was a contributing factor to the personnel action through the knowledge and timing test. To the extent that the appellant produced additional evidence that his social

media post was a contributing factor in the agency's decision to not rehire him, I weigh that evidence below.

The agency's burden

Because the appellant carried his burden to prove by preponderant evidence that he made a protected disclosure that was a contributing factor in the agency's decision to not rehire him for the 2021 fire season, I will now analyze whether the agency has shown by clear and convincing evidence that it would have taken the same action absent any whistleblowing. 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). It is a higher standard than preponderant evidence. *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594 (2011); 5 C.F.R. § 1209.4(d). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider all of the relevant factors, including the following: (1) the strength of the agency's evidence in support of its action (for disciplinary actions) or whether the agency had legitimate reasons for the personnel action (for non-disciplinary actions); (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 v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, 369 (2012); *Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363 (2007).

In *Whitmore v. Department of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012), the Court held that all of the pertinent evidence must be considered in evaluating whether the agency has met its burden. *Whitmore*, 680 F.3d at 1368. 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. "To be clear, *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"; rather, the "factors are merely appropriate and pertinent considerations for determining whether the agency carries its burden of proving by clear and convincing evidence that the same action would have been taken absent the whistleblowing." *Id*. at 1374.

Strength of the agency's evidence

Turning to the first *Carr* factor, Stroberg and Smith testified that they did not re-hire the appellant for the 2021 fire season because of the appellant's unprofessional comments on a resume he submitted seeking a permanent position. HR (Stroberg, Smith, LR). Stroberg specifically testified that appellant's resume objective, "…seeking full time position to be as disgruntled as perm co-workers" crossed "a red line for him." IAF, Tab 9 at 16; HR (Stroberg). Stroberg felt those comments went against the agency and the department's core values, priorities, and who they were trying to be as an agency. *Id.* He testified that the agency's fire crews constantly put their safety at risk when they are out on the fire line, and they need teamwork and a respectful, positive work environment. *Id*. He testified that he would not be able to sleep at night if he hired someone who was going to come in as a disgruntled employee, as it would put the health and safety of the entire crew at risk. *Id*.

I found Stroberg's testimony about his reaction to the appellant's comments sincere and unequivocal. *See Peloquin v. U.S. Postal Service*, 51

M.S.P.R. 435, 438 (1991). While I find it more likely than not that the appellant intended his comments to convey lighthearted sarcasm, which he believed would be welcome on a fire crew, I find it reasonable for managers to expect more professionalism on a written resume, even considering the type and level of employment sought. In addition, management witnesses testified that the agency's policies provide that it "may" rehire long term seasonal employees, not that it must do so, and they credibly testified that they had elected not to rehire otherwise eligible employees for seasonal fire seasons as a result of misconduct or performance issues. HR (Stroberg, Smith). Notably, Stroberg credibly testified that he planned to rehire the appellant for the 2021 fire season, notwithstanding the concerns it had regarding his attitude during the 2020 fire season and its knowledge of his protected disclosure. HR (appellant, Willy, Stroberg). This evidence favors the agency's position that it was the appellant's resume comments that led to the decision not to rehire him, not his Facebook post.

However, there is much evidence that undermines the agency's articulated reason for its ultimate action not to rehire the appellant. First, the appellant's resume was submitted with an application for an entirely different, permanent position and had nothing to do with the appellant's eligibility for the 2021 seasonal rehire. HR (appellant, Stroberg). I find that the record reflects that the agency's policy was to automatically rehire long term seasonal employees unless they are rated as "marginally successful," or there is some evidence of misconduct or performance issues directly related to their conduct or performance while in the position for which they are to be rehired. HR (LP, Willy, Stroberg, Smith); IAF Tab 46 at 25. Here, while the appellant's poorly chosen comments on his resume would have certainly been a basis for not selecting him for the permanent position he applied for, the agency has failed to offer any credible evidence that its own rehiring policy for seasonal employees would permit it to not rehire the appellant for these comments. Thus, the agency appears to have

made a one-time, fairly unique decision not to follow its own rehiring practices with respect to its decision not to rehire the appellant for the 2021 fire season.

In addition, the record evidence strongly suggests that, while Stroberg intended to rehire the appellant for the 2021 fire season after he was rated fully successful for the 2020 fire season, he did so reluctantly, and only after being advised by LP that he had no choice but to do so. Indeed, taken as a whole, the record evidence demonstrates that Stroberg spent a noticeable amount of effort to document performance and conduct issues with the appellant, and the fact that these efforts began only weeks of the appellant's Facebook post strongly suggests that they were not a standard management response to concerning conduct and performance issues exhibited by the appellant, but instead reflected a more proactive effort to build the type of case that LP had advised Stroberg from the beginning would be needed should the agency elect to take disciplinary action against a known whistleblower. *See* IAF, Tab 46 at 16. Additionally, the level of scrutiny and effort expended by Stroberg in addressing the appellant's performance and conduct issues appears to be noticeably out of proportion to the both nature of the appellant's position as a temporary, NTE GS-4 employee and Stroberg's role as the appellant's third-line supervisor with approximately 85 employees under his authority during fire season. HR (Stroberg).

Thus, viewing the record as a whole, I find the agency's evidence in support of its action to be fairly weak.

Motive to Retaliate

The next *Carr* factor to be considered is motive to retaliate. I conclude that the evidence reflects a strong motive to retaliate against the appellant.

First, Stroberg's testimony that the appellant's resume was the only reason he was not rehired is inconsistent with other statements Stroberg gave prior to the hearing. In written correspondence, LP and Stroberg both discussed their perception that the appellant had interpersonal issues throughout the 2021 fire season, and that the appellant's "disgruntled" comment reflected that he would

continue to be a "problem employee," that should not be rehired. IAF, Tab 46, at 5-7. Stroberg began a sworn statement saying that the appellant was not rehired because management wanted to see if there was a better applicant for the position. IAF, Tab 46 at 50. In the same statement, Stroberg referenced his perception that the appellant's negative attitude and work performance had been a problem during the 2021 fire season, such that his supervisors and managers did *not* want him rehired either. *Id.* Thus, while I do not doubt the sincerity of Stroberg's distaste for the appellant's "disgruntled" comment, I also do not credit his testimony that the comment was the *only* reason he did not want to rehire the appellant. *See Hillen*, 35 M.S.P.R. at 458 (1987). Stroberg's statements were written closer in time to the events at issue, and with respect to the affidavit, with time to review and reflect before signing it. I find those statements more probative of Stroberg's decision-making than his testimony at hearing and more consistent with the record. *See Hillen*, 35 M.S.P.R. at 458 (1987). I further find Stroberg's shifting reasons for the agency's action evidence that the agency proffered reason – the appellant's resume – was a pretextual reason. *See, e.g. Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R. 579 (2012)(discussing shifting reasons as evidence of pretext in the context of disability discrimination claim).

Second, to the extent that it could be argued that a bad attitude and poor performance would support the agency's decision, the record does not support that the appellant actually demonstrated either deficiency. The appellant had worked as a temporary seasonal firefighter since 2017, but Stroberg only became concerned with the appellant's attitude and interpersonal skills after the appellant's July 8, 2021, social media post. The appellant admitted to being frustrated with the agency's response to COVID-19 and to his social media post, and to his long-standing inability to obtain permanent employment, and that appears to have adversely impacted his attitude at work for a period of time during the 2020 fire season. HR (appellant). However, the appellant, Willy, and

Bordelon met to discuss the appellant's attitude at the end of July, immediately after the three incidents logged by Grotting, and by all first-hand accounts, the appellant's "negative attitude" was not a further concern for the remaining four months of the fire season, and he was ultimately rated as Fully Successful on his 2020 performance evaluation. HR (appellant, Willy). Willy certainly wanted the appellant to return for the 2021 fire season. HR (Willy); IAF, Tab 46 at 41-47.

Moreover, I find the evidence Stroberg cited in support of his belief that the appellant had attitude and performance problems contrived and unreliable. According to Stroberg, less than 20 days after the appellant's social media post, Grotting reported the deficiencies and then prepared and revised the post-hoc "log" of incidents at Stroberg's direction, citing to incidents of bad attitude on three consecutive dates in July. IAF, Tab 46 at 36-40; Tab 17 at 12. However, Grotting did not testify and the record does not otherwise support Grotting's characterization of the appellant's conduct. Regarding the first cited deficiency, as discussed above, the appellant attempted to notify Willy of his vehicle accident immediately, and he timely completed an accident report. HR (Appellant, Willy); IAF, Tab 45 at 19-25. I find Stroberg's testimony that the appellant erred by not informing Grotting before he noticed it, contrived and implausible. HR Stroberg. I found the appellant's rationale for waiting to tell Grotting about the accident because Grotting was the incident commander attempting to get a fire under control reasonable, particularly considering the high priority the agency professed to place on employee health and safety. HR (appellant, Stroberg). While this may reflect some sort of communication breakdown between the appellant and Grotting, characterizing it as a conduct issue demonstrating an intentional failure to report a motor vehicle accident, as Stroberg does, is an exaggeration at best.

The third item on Grotting's log involved the appellant's assignment to Crew 71 as a lead firefighter for the Little Soda Fire. HR (appellant, Willy, JB). Based on a review of all the evidence and testimony in the record, I find that the appellant resisted the assignment because he did not like MA's leadership style

and did not trust him or believe he was sufficiently attentive to the health and safety of his crew. HR (appellant, Willy, JB). According to Stroberg, this type of trust and teamwork is a paramount importance to the agency, yet it was discounted here in the case of MA. Indeed, the record evidence demonstrates that it was MA's own neglect of his crew the led the appellant to have to take potentially life-saving action when one of MA's crew developed a severe illness from dehydration, but Stroberg appears to have given more attention and concern to the appellant's comments during the 'after action' meeting with MA than to the potentially fatal oversight on MA's part to the severe dehydration symptoms exhibited by one of his own crew. I find Grotting and MA's written statements self-serving and unreliable evidence of the severity of the appellant's attitude issue, and the agency has offered no explanation for why it elected not to have either MA or Grotting testify at hearing. *See Borninkhof*, 5 M.S.P.R. at 87 (1981). There is no reliable evidence that the appellant engaged in any type of serious misconduct during the 2020 fire season. To the contrary, he appears to have potentially saved someone's life and voiced legitimate concerns to MA about circumstances that required he do so. Willy, the appellant's first-line supervisor for several fire seasons, and JB, the appellant's former co-worker during at least a portion of the 2020 fire season – individuals who would presumably be in the best position to gauge the appellant's skills and worth to the agency – both offered credible testimony in which they spoke highly of the appellant's skills, teamwork, and work ethic. HR (JB, Willy).[7] Willy during his testimony unequivocally stated that he wanted the appellant to return for the 2021

[7] I note that the agency sought to undermine JB's credibility through his admission at hearing that he had been terminated by the agency during the 2020 fire season. HR (JB). But I found JB's demeanor in testifying about his observations of the appellant to be calm and direct and unhesitant, and found nothing in his testimony to suggest that his own work issues biased his testimony against the agency in any way. Indeed, JB testified that he had been rehired by the agency for the 2021 fire season at a different location, and performed successfully. *Id.*

fire season, and fully expected the appellant to be returning until he was informed otherwise. HR (Willy). In sum, I find the timing and intensity of the scrutiny of, and response to, what appears to have been a few relatively minor disputes and disagreements between the appellant, a temporary seasonal employee, and his supervisors strongly suggestive of retaliatory animus.

Third, I find further evidence of animus in the fact that Stroberg took no steps to verify the negative information he relied upon in determining that the appellant was a problem. HR (Stroberg). He relied on Grotting's negative reports of appellant's attitude but appears to have ignored evidence that the appellant corrected those deficiencies after they were brought to his attention. *Id.* Despite Stroberg's professed commitment to the health and safety of its employees, he admitted during his testimony that no one investigated TM's nearly fatal dehydration while under MA's command at the Little Soda Fire. HR (Stroberg). It is difficult to reconcile this lack of response on management's part to a life-threatening work issue with its claim that its decision not to rehire the appellant for the 2021 fire season was being primarily driven by health and safety concerns for crew members who might have to work with the appellant, given that those concerns had arisen solely out of written comments on a resume. In addition, while Stroberg spoke with employee relations and his own supervisor about the appellant's comments, he elected not to speak to Willy or to anyone else that worked closely with the appellant about whether the comments raised any concerns for them that the appellant would undermine morale among his fellow crew members and thereby potentially risk their health and safety, as Stroberg claimed during his testimony would very possibly be the case. Notably, Willy testified that in 20 years as a supervisor, this was the only time he could recall where management decided not to rehire one of his seasonal employees without first consulting him first. HR (Willy).

Finally, I find it improbable that the appellant's social media post was not a factor in the calculus that caused Stroberg to conclude that the appellant was a

"problem employee" who should not be rehired. Stroberg testified that Appling and others on the FLT felt the appellant's post reflected badly on the agency. HR (Stroberg). Stroberg testified that when the appellant's social media post came to the attention of the district, agency leadership was frustrated and he himself felt blindsided by it. HR (Stroberg). He felt that if the appellant had their contact information, he should have called directly to express his concerns before posting it with their contact information. HR (Stroberg). Stroberg's tone and demeanor at hearing reflected his genuine frustration with the idea that the appellant did not contact him directly before going to social media with his concerns. *Id.* Even after Stroberg consulted with employee relations and LP counseled that no action should be taken, Stroberg testified that Appling and unnamed others felt they should take action, despite the guidance that it was protected activity and should be left alone. *Id.* While Stroberg testified that he accepted LP's guidance, he still told the appellant that while he hadn't broken any rules with this post, he could be disciplined if he again made public comments without first going through the chain of command. *Id.* IAF, Tab 9 at 34-35. Notably, Grotting's log specifically mentions the appellants' social media comments, and a threat to make more social media posts. IAF, Tab 17 at 12.

The agency attempts to characterize Stroberg's response to the appellant as a concern with the appellant's choice of forum rather than the message, but this situation is distinguishable from situations where the appellant attempts to shield disruptive conduct with a protected disclosure. *See Kalil v. Department of Agriculture.* 479 F.3d 821, 825 (Fed. Cir. 2007). As discussed above, the appellant's post broke no rules and raised legitimate concerns through the only forum he felt he had available to him to do so. HR (appellant). All agency employees have a right to raise legitimate workplace concerns without fear of reprisal, as the agency itself has readily admitted. 5 U.S.C. § 2302(b)(8); HR (LP, Stroberg). Stroberg's dismay at the appellant's post appears to have largely stemmed from a mistaken belief that the appellant had not first attempted to use

the chain of command to address his concerns before making his Facebook post. HR (Stroberg). But the record reflects that the appellant did in fact attempt to use the chain of command to voice his concerns, and only chose to post his concerns after getting vague and unsatisfactory responses regarding the agency's plans to quarantine the crews when they returned home, which Stroberg could easily have learned had he elected to develop the facts further, which he did not. HR (appellant, Willy, Stroberg). Ultimately, Stroberg offers nothing but his own concept of professionalism and mistaken belief that a long-term seasonal employee would know to simply call and speak directly to District leadership about his concerns. HR (Stroberg). I find that Stroberg's frustration with the appellant's alleged unprofessional choice to raise his concerns on social media and his comments to the appellant in setting "expectations" for future conduct is itself evidence of a motive to retaliate.

Considering the record as a whole, I find that there is strong evidence of a retaliatory motive on the agency's part, particularly with respect to Stroberg.

Treatment of similarly situated employees

I now turn to the third *Carr* factor, treatment of similarly situated employees. The names of three other seasonal firefighters that were not to be rehired are in the record, but the reason they were not to be rehired is not listed. IAF, Tab 45 at 105. The appellant testified that he was aware of some other employees who were not rehired, but that they had misconduct issues. HR (appellant). One of the individuals who testified, JB, was fired mid-season and not rehired due to unspecified misconduct. *Id.* None of the agency witnesses offered an example of another long-term seasonal firefighter not automatically rehired for making unprofessional comments on a resume, or for anything other than serious misconduct or significant performance issues. HR (Stroberg, Willy, Smith, LR). The record evidence demonstrates that the appellant was the only seasonal fire fighter who was not rehired and who was not involved in or allegedly involved in some type of misconduct or troubling performance issues.

HR (Stroberg). The evidence that the agency treats non-whistleblowers the same way that it treated the appellant is therefore very weak. *See Smith v. General Services Administration*, 930 F.3d 1359, 1367 (Fed. Cir. 2019).

To summarize, the agency's evidence in support of its personnel actions is weak, there is strong evidence of retaliatory animus toward the appellant for using social media to bring attention to his concerns, and there is no evidence that the agency treated employees who are not whistleblowers similarly to the appellant. Considering all three *Carr* factors together, and considering the entire record, the agency has failed to carry its burden to prove by clear and convincing evidence that it would not have rehired the appellant even in the absence of his protected activity.

DECISION

The appellant's request for corrective action is GRANTED.

ORDER

I **ORDER** the agency to place the appellant in the same position he would have been had he been rehired for the 2021 fire season, to include any extension that was afforded similar employees, any service credit afforded similar employees, and restoration of any rehire eligibility for future employment. The appellant shall be deemed to have met his performance expectations for that period of employment.

I **ORDER** the agency to remove the appellant from any "DO NOT REHIRE" lists.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits

due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

FOR THE BOARD: /S/
Michael S. Shachat
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 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 1, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

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

Criteria for Granting a Petition or Cross Petition for Review

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

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

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A

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

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

service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

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 OF APPEAL RIGHTS

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

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

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

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

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation

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

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

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

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL AND/OR COMPENSATORY 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.

In addition, the Whistleblower Protection Enhancement Act of 2012 authorized the award of compensatory damages including interest, reasonable expert witness fees, and costs, 5 U.S.C. §§ 1214(g)(2), 1221(g)(1)(A)(ii), which you may be entitled to receive.

If you believe you are entitled to these damages, you must file a motion for consequential damages and/or compensatory damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

NOTICE TO THE PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a

prohibited personnel practice" under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D). 5 U.S.C. § 1221(f)(3).

DEFENSE FINANCE AND ACCOUNTING SERVICE
Civilian Pay Operations

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx.**

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.

☐ 3) Signed and completed "Employee Statement Relative to Back Pay".

☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under 5 U.S.C. § 5551 for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:

    a. Employee name and social security number.
    b. Detailed explanation of request.
    c. Valid agency accounting.
    d. Authorized signature (Table 63).
    e. If interest is to be included.
    f. Check mailing address.
    g. Indicate if case is prior to conversion. Computations must be attached.
    h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected (if applicable).

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement (if applicable).
2. Copies of SF-50s (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

    a. Must provide same data as in 2, a-g above.
    b. Prior to conversion computation must be provided.
    c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.