**2022-1271**

In The

# United States Court of Appeals

For The Federal Circuit

## MARK BESANCENEY,

***Petitioner***,

**v.**

## DEPARTMENT OF HOMELAND SECURITY,

***Respondent.***

**PETITION FOR REVIEW FROM THE MERIT SYSTEMS PROTECTION BOARD IN NO. PH-1221-19-0255-M-1**

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# BRIEF OF PETITIONER

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**John T. Harrington**
**R. Scott Oswald**
**THE EMPLOYMENT LAW GROUP, PC**
**1717 K Street NW, Suite 1110**
**Washington, DC 20006**
**(202) 261-2830**
**tharrington@employmentlawgroup.com**
**soswald@employmentlawgroup.com**

***Counsel for Petitioner***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

## CERTIFICATE OF INTEREST

**Case Number** 22-1271

**Short Case Caption** Besanceney v. DHS

**Filing Party/Entity** Mark Besanceney (petitioner)

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 12/20/2021

Signature: /s/ John T. Harrington

Name: John T. Harrington

| **1. Represented Entities.** Fed. Cir. R. 47.4(a)(1). | **2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2). | **3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). |
|---|---|---|
| Provide the full names of all entities represented by undersigned counsel in this case. | Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.<br><br>☑ None/Not Applicable | Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.<br><br>☑ None/Not Applicable |
| Mark Besanceney | | |
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☐ Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

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**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

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**6. Organizational Victims and Bankruptcy Cases**. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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## CASES

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## STATEMENT OF RELATED CASES

There is no other appeal or proceeding in any other court related to this same civil action. There are no known cases pending in this or any other court that will directly affect or be directly affected by this Court's decision in this pending petition.

## STATEMENT OF JURISDICTION

On May 8, 2019, Petitioner Mark Besanceney filed an individual right of action (IRA) appeal and hearing request with the Merit Systems Protection Board submitting his claim of reprisal for whistleblowing, pursuant to 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 2302(b)(9). Besanceney pled that the United States Department of Homeland Security (DHS), Transportation Security Administration (TSA) - Investigations (INV), formerly known as Office of Inspection, violated 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 2302(b)(9), when it retaliated against him for making protected disclosures.

MSPB Administrative Judge (AJ) Kara Svendsen issued an Initial Decision on April 9, 2020. Judge Svendsen granted TSA's motion to dismiss and dismissed Besanceney's appeal for lack of jurisdiction without the requested hearing. The AJ found that Besanceney failed to establish that he made a protected disclosure under the WPA. Besanceney timely filed a Petition for Review with this Court on May 29, 2020.

On December 8, 2020, Respondent The Merit Systems Protection Board moved, with Besanceney's consent, to remand this case for a new determination of whether Besanceney made a nonfrivolous allegation of a protected disclosure. On January 22, 2021, this Court granted the MSPB's motion and remanded the case for further adjudication.

Administrative Judge Svendsen conducted a hearing on April 27 and 28, 2021. On September 27, 2021, Judge Svendsen issued an Initial Decision in which she denied Besanceney's request for corrective action. Judge Svendsen found that none of the disclosures he raised before the Office of Special Counsel (OSC) are protected under the Whistleblower Protection Act (WPA) because none actually disclosed any alleged wrongdoing by TSA or its employees. Appx28. The Initial Decision issued by Judge Svendsen became final on November 1, 2021. Appx29.

Besanceney timely filed a Petition for Review with this Court on December 16, 2021. The appeal is from the Initial Decision issued by Judge Svendsen on September 27, 2021, that became final on November 1, 2021, which disposed of Besanceney's claims before the MSPB. Accordingly, this Court has jurisdiction to review this matter pursuant to 5 U.S.C. § 7703.

## STATEMENT OF THE ISSUES

1. Whether the Board erred in finding that Besanceney's December 2016 disclosure to his supervisors about the lack of probable cause for a search warrant was not protected, when that disclosure involved a violation of law, notably the Constitution, gross mismanagement, and a danger to public health or safety; and whether the Board particularly erred in not analyzing Besanceney's reasonableness in his belief of the same.

2. Whether the Board erred in finding that Besanceney's disclosure on April 12, 2017, was not protected, when he met with his supervisors and raised concerns about an investigation, which described violations of law and gross mismanagement.

3. Whether the Board erred in finding that Besanceney's disclosure on September 11, 2017, was not protected, when he emailed a complaint to Investigations Division Deputy Director Bobo and Acting Assistant Administrator John Busch describing the mishandling of an investigation.

4. Whether the Board erred in finding that Besanceney's disclosure on September 12, 2017, was not protected, when he forwarded his September 11, 2017, complaint to Investigations Division Business Management Office Director Susie Williams, again raising concerns of the mishandling of an investigation.

5. Whether the Board erred in finding that Besanceney's disclosure on November 16, 2017, was not protected, when he disclosed Williams's and Vasey's mishandling of an investigation in his response to the Notice of Proposed Removal.

6. Whether the Board erred in finding that Besanceney's disclosure on February 6, 2018, was not protected, when he alleged an assault, abuse, and potentially an illegal audio recording by his supervisor, Vasey, constituting a report of an abuse of authority.

7. Whether the Board erred in finding that Besanceney's disclosure on February 12, 2018, was not protected, when he disclosed DSAIC Vasey's alleged misconduct to INV's Special Investigations Unit (SIU).

8. Whether the Board erred in finding that Besanceney's disclosure on March 7, 2018, was not protected, when he disclosed DSAIC Vasey's alleged misconduct to the DHS Office of the Inspector General (OIG).

9. Whether the Board erred in not considering the prohibited personnel practices taken against Besanceney by TSA or the causal link between those actions and his protected disclosures.

10. Whether the Board erred in not considering or analyzing whether TSA met its heavy burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of Besanceney's disclosures.

## STATEMENT OF THE CASE

Besanceney worked for the U.S. Secret Service for 20 years prior to being employed by the TSA. Appx948-949. In 2003, Besanceney accepted the position of Deputy Special Agent in Charge (DSAIC) for the Detroit field office of the TSA. Appx950-951. Besanceney voluntarily stepped aside from his supervisory role in Detroit to be an investigator in Cincinnati. Appx951-952. Besanceney has been a Criminal Investigator for the TSA since 2008. Appx953. In 2015, Besanceney opted to transfer to the New York office to be closer to his wife, even

with the understanding that many individuals did not like the placement. Appx956-957.

In New York, Besanceney's first-line supervisor was Deputy Special Agent in Charge, Jeffrey Vasey, and his second-line supervisor was the Special Agent in Charge, Thomas Williams. Appx957. Besanceney transferred from New York to a satellite office in Boston in September 2016. Appx959. Besanceney continued to report to Vasey until Vasey retired in 2018. Appx958.

From 2016 to 2018, Besanceney made eight protected disclosures regarding Vasey and Williams that began with an investigation Besanceney led into baggage theft at the LaGuardia airport. Appx7.

### I. Besanceney is a seasoned investigator with 39 years of experience in law enforcement.

Besanceney holds a Bachelor's degree in marketing and a master's degree in criminal justice. Appx947-948. He has received specialized training from criminal investigator school and Secret Service school. Appx948. Besanceney began his Secret Service career in the Miami office, and participated in the criminal squad, counterfeit squad, and fraud squad. Appx949. While working for the Secret Service, Besanceney gained valuable experience obtaining criminal warrants. Appx949. He also had specific experience conducting consent searches in cases where there was not probable cause but merely reasonable suspicion. Appx950.

Besanceney served in a supervisory role with the Secret Service in the field, at headquarters, and on a protection assignment. Appx950. His last three to four assignments with the Secret Service were supervisory. Appx950.

As DSAIC for the TSA, Besanceney's primary role was to back up the Special Agent in Charge (SAIC). Appx951. This included reviewing applications, interviewing applicants, securing equipment, telephones, swearing people in, and assigning cases to one of six to eight investigators. Appx951. The responsibilities of a Criminal Investigator include being assigned to a case and creating an attack plan, which includes criminal and administrative tracks. Appx953-954. Investigators manage multiple cases at once. Appx953-954. Besanceney is at the top of the K band pay scale and has never been demoted. Appx1110.

## II. Besanceney led the investigation of baggage theft at LaGuardia airport and refused his supervisors' repeated attempts to pressure him to obtain search warrants when Besanceney reasonably believed that no probable cause for the search warrants existed.

Besanceney became aware of the LaGuardia baggage theft through an email from a JetBlue security liaison, Sean Joyce. Appx964, Appx971-972. Joyce reported that JetBlue had been experiencing thefts of passenger baggage. Appx1130-1131. Besanceney corresponded with Joyce throughout August 2016. Appx964-965. Joyce provided Besanceney with images of bags and items that were stolen. Appx964-965. Cameras were installed in the baggage screening room at LaGuardia in October 2016 for about thirty days to record the actions of the

baggage screeners, or to identify any other actors involved. Appx965, Appx1130-1131, Appx478.

On November 21, 2016, Besanceney emailed Vasey, Williams, and Karen Mogavero, an investigator counterpart at John F. Kennedy airport, informing them of the LaGuardia investigation. Appx964-965. The investigation included viewing videos of the screening room, identifying the 15 to 20 screeners, and seeing who was being honest. Appx966. Besanceney identified two suspects in a November 21, 2016, email to Vasey, Williams, and Mogavero. Appx966. When suspects are identified in a case, the investigator immediately notifies management; however, this limits the investigator's ability to do his job efficiently. Appx966-967.

Besanceney met with two managers at LaGuardia, the Federal Security Director for screening and the Assistant Federal Security Director, the day before Thanksgiving and showed them snippets of video surveillance of two suspects pilfering through luggage. Appx967. The two TSA employees identified as suspects were suspended shortly after it was discovered they were committing theft. Appx1131-1132. Once the suspects were suspended, they could no longer be surveilled in the baggage room. Appx1132.

The surveillance cameras operated for roughly another week after the suspects were suspended. Appx969. The TSA did not have the resources to review the surveillance footage in real time. Appx969-970. There was no surveillance of

the stolen items after the items left the LaGuardia baggage room. Appx976. The investigation into the baggage thefts was officially opened on December 2, 2016, and was assigned to Besanceney. Appx485, Appx1132.

On November 21 and 23, 2016, Joyce emailed Besanceney with the time and date of complaints and the items stolen. Appx971-972. Besanceney forwarded these emails to Gloria Markousis, an administrative assistant at LaGuardia, to help put the items in the record. Appx972-973. Vasey's response to the forwarded emails indicated that he wanted to get a search warrant; however, Besanceney knew that was not possible and it caused him to question Vasey's understanding of proper investigative protocol. Appx973.

Besanceney did not obtain the search warrants, as there was no way to ascertain where the stolen property went after it left the baggage room, a requirement to establish probable cause. Appx974. Vasey stated that review of the footage would not have tied stolen items to the suspects' residences and it would have needed someone to place the objects in the suspects' homes. Appx1211.

Besanceney understood that probable cause requires the affiant to present an affidavit for a search warrant with meticulous description of the items to be seized, how they were traced, and where they can be found. Appx975. But Besanceney and others involved in the investigation did not know where the stolen property went after the property left the baggage room. For that reason, Besanceney had

been communicating to Vasey and Williams about conducting consent searches. Appx970.

Besanceney spoke with Judy Phillips, Assistant US Attorney (AUSA) for the Eastern District of New York, to inform her that there was an ongoing investigation that did not rise to the level of a search warrant and that Vasey and Williams wrongly wanted one. Appx976-977. Besanceney contacted Phillips prior to December 5, 2016. Appx977. Phillips appreciated Besanceney's briefing and referred him to the Queens District Attorney's (DA) Office. Appx977-978.

Typically, the case agent would determine whether it was possible to obtain a search warrant. Appx1134. But Besanceney's supervisors consistently asserted their misguided opinions regarding probable cause. Even so, Besanceney repeatedly told Vasey and Williams that he planned to conduct consent searches. Appx1111.

Williams responded to Besanceney's December 3, 2016, operation plan by stating that they may need support when they go to New York for the consent searches *or the search warrants*. Appx983-984. Besanceney's email on December 4, 2016, contained the subject line "Operations Plan Consent Searches" and reviewed the plan and its objectives, focused only on consent searchers. Appx205, Appx1140-1141.

Besanceney believed he had a greater than 50% chance of retrieving information or stolen goods from the suspects, especially because of the video snippets. Appx986-987. Despite Vasey and Williams's awareness of Besanceney's plan, no searches were conducted on December 5, 2016, as Vasey and Williams abruptly shut down the operation that morning. Appx990. Vasey indicated to Williams that "the work [they] had expected to be done" was not completed, and there was no "work product to go to a district attorney's office" if the officers received pushback from the suspects. Appx1141-1142. Williams testified that he "could have made an articulation that there was probable cause" for search warrants in the baggage theft investigation but stopped short of asserting that there was probable cause. Appx1191.

John Busch, the Director of the Investigations Division and Besanceney's fourth-line supervisor at the time, said that if probable cause did not yet exist, then a search warrant should not be obtained; however, during the investigation planning conversation, other metrics need to be considered with regard to how to establish probable cause to get the warrant. Appx1298-1299.

Besanceney continued to work on the case, even after transferring to the Boston office, until the case was transferred to another investigator in May 2017. Appx994-995, Appx997. Until May 2017, Besanceney continued to review video

footage and visit pawn shops to locate property stolen from the baggage room. Appx1144.

### III. Besanceney made protected disclosures to Vasey and Williams on three separate occasions regarding violations connected to the lack of probable cause to secure a search warrant.

Besanceney's first protected disclosure occurred when Williams and Vasey took Besanceney aside on the morning of December 5, 2016, to tell him they were shutting down the operation because they believed there should be a search warrant. Besanceney knew that if they did not conduct consent searches, the investigation would be compromised. Appx990-991. Williams and Besanceney disagreed regarding the extent of permissible searches and whether *Garrity* applied to this scenario. Appx991-992. Besanceney told Williams and Vasey during this meeting that he did not believe probable cause existed for a search warrant. Appx992.

Besanceney's second disclosure regarding the violations related to the LaGuardia investigation occurred on April 12, 2017, during his quarterly performance review with Williams and Vasey. Appx7. Besanceney asked Williams and Vasey about the basis for their decision to shut down the December 5, 2016, operation as well as some additional investigation questions. Appx1011-1012. Besanceney's third disclosure of the same kind occurred on July 25, 2017, during his mid-year performance review with Williams and Vasey. Appx7.

## IV. Besanceney escalated his disclosures up the chain of command after experiencing retaliation.

After Besanceney's protected disclosures on December 5, 2016, and April 12, 2017, Vasey and Williams began to consistently reject the Memorandums of Investigation (MOIs or investigative memos) Besanceney wrote on the case. Appx997. Their only purported reasons for rejecting the memos written by Besanceney were mere grammatical and formatting errors. Appx998.

Besanceney's memos had never been rejected for grammatical or formatting errors prior to the April 12, 2017, meeting. Appx999. There were no case management issues documented in Besanceney's 2016 review. Appx1004. Vasey rated Besanceney as achieving or exceeding expectations in the three performance goals in his 2015 evaluation, but found he was somehow unacceptable in the competencies. Appx461, Appx1127. Williams testified that it "was unusual" for someone to be found unacceptable in one or more competencies and yet meet all of their performance goals; he said, "I haven't had any other situation like this." Appx461, Appx1127.

Besanceney's 2016 performance review indicated he was closing cases and submitting reports in a timely manner. Appx464, Appx1128-1129. Besanceney's performance in 2016 was rated as exceeding expectations in two of three performance goals and rated as achieving expectations on the third. Additionally, he exceeded expectations in four of the six competencies and achieved

expectations on the other two, demonstrating his ability to handle multiple cases and adhere to time constraints. He was awarded for this positive performance review. Appx464, Appx1129-1130.

Williams issued a memo of counseling to Besanceney on June 4, 2017, authored by Vasey and reviewed and edited by Williams. Appx499, Appx1147. Williams consulted with Vasey regarding the issuance of this memo of counseling, and the memo was based on information provided to him by Vasey. Appx499, Appx1148. Williams relied on Vasey's opinion regarding the edits purportedly required on Besanceney's MOIs when issuing Besanceney's counseling memo. Appx1148-1149.

After issuing Besanceney a counseling memo on June 4, 2017, Williams placed him on an Improvement Period Notice (IPN). Appx1151. Williams and Vasey presented Besanceney with the IPN on July 25, 2017, after Williams checked with Darci Bobo, Deputy Director of the Investigations Division and Besanceney's third-line supervisor, and Busch. Appx1151-1152. Williams did not recall whether he took notes during the July 25, 2017, meeting but stated that the memo of the meeting he later produced was an amalgamation of both his and Vasey's after-meeting notes. Appx190, Appx1152-1154. Vasey said that during his tenure as DSAIC, only Besanceney was issued an IPN. Appx1202. The discussion of the IPN included the LaGuardia theft case. Appx1006.

In Besanceney's counseling memo, Williams and Vasey directed Besanceney to complete additional MOIs and allotted him a week to do so. Appx1171-1174. Besanceney requested additional time (five weeks), though he assured Williams it likely would not take that long. Williams testified that this was a reasonable request. Appx1171-1174. In Besanceney's experience, no one had ever previously imposed a timeline on when MOIs need to be completed. Appx955. Prior to 2016, no one had ever told Besanceney that his MOIs were untimely. Appx956. Prior to 2016, none of Besanceney's MOIs were ever rejected (though some would consult with Besanceney about the contents of a report). Appx956.

Vasey and Williams's requirement that Besanceney submit all memos within three to five days after any investigatory activity was a rule of which Besanceney had never heard (and, to his knowledge, no one else had ever heard of). Appx999. Prior to April 2017, Besanceney never had any discussions with Vasey or Williams about turning in MOIs within three to five days. Appx999. The next step after issuing the memo was a formal notification to try and improve an employee's performance. Appx1176.

Besanceney expressed in emails to Vasey and Williams his belief that they were deliberately digging him into a hole at work. Appx1004-1005. Besanceney believed that the hole that Vasey and Williams had dug for him was putting him

behind in his work—by an estimated 12 to 15 weeks. Appx1005. This was all caused by Vasey and Williams's consistent rejections of Besanceney's work for pretextual reasons. Appx1005.

Williams testified that Besanceney's performance did not improve following his June 4, 2017, memo of counseling. Appx1188. However, Williams placed him on an improvement plan only six weeks after that memo and then proposed his removal almost immediately after the 60-day IPN period. Appx1188.

On September 11, 2017, Besanceney made is fourth protected disclosure when he submitted a formal complaint of retaliation to Bobo. Appx1009. Neither Bobo nor anyone else contacted Besanceney about his complaint. Appx1013.

### V. Besanceney experienced additional retaliation with the issuance of his proposed removal; he engaged in additional protected activity in his response to the proposed removal and disclosed Vasey's abuse of authority.

Williams testified he was aware of Besanceney's complaint to Bobo reporting retaliation and mismanagement but did not recall exactly when he was made aware. Appx1155. Williams proposed Besanceney's removal following his report of retaliation and mismanagement; and Williams discussed Besanceney's complaint of retaliation and mismanagement against him with the deciding official—Bobo. Appx1155-1156. Williams based Besanceney's notice of proposed removal on Besanceney's alleged failure to meet the requirements of the IPN.

Appx96, Appx1157. Besanceney was the only employee Williams ever put on an improvement plan or recommended for removal. Appx1157.

According to Bobo, Besanceney's proposed removal was based on Williams's claim that Besanceney did not meet the requirements of his IPN. Appx1268. Bobo reviewed Besanceney's response to the proposed removal and it essentially discussed the same matters discussed in Besanceney's complaint. Appx1268. Bobo said that, to some degree, there may have been discussion in Besanceney's response to the proposed removal about him being set up for failure following the disputes with his superiors involving the LaGuardia investigation. Appx1268.

Bobo concluded that while there were deficiencies in Besanceney's performance, they did not warrant removal—and for that reason, she did not address Besanceney's complaint of retaliation in her January 25, 2018, decision on removal. Appx1269.

**a. Besanceney reasonably believed Vasey assaulted his ex-wife, stalked his ex-girlfriend, and illegally audio recorded a meeting with Besanceney.**

Besanceney received information from two reliable sources that Vasey had assaulted his ex-wife. Appx1098. Besanceney received an unsigned affidavit in the mail that was very detailed and deeply troubling. Appx1100. Besanceney received an unsigned copy of Vasey's divorce proceeding, articulating allegations of

assault. Appx1097-1098. It is Besanceney's duty to report off-duty misconduct, particularly misconduct committed by managers. Appx1103.

Besanceney's sixth protected disclosure occurred during a February 6, 2018, meeting with Vasey and Williams, in which Besanceney asked Vasey whether he had hit his wife. Appx1093. Besanceney felt it was his duty as a TSA investigator to report Vasey's alleged behavior. Appx1095. Williams reported the allegations made by Besanceney against Vasey. Appx1185.

Besanceney's seventh disclosure occurred on February 12, 2018, when he reported Vasey's abuse of authority to TSA's Special Investigations Unit (SIU). Appx7. The SIU opened an investigation into Vasey but did not interview his ex-wife about the allegations of assault. Appx1099. Williams was interviewed by the investigators looking into Besanceney's allegations against Vasey. Appx1185. Besanceney's eighth and final disclosure was on March 7, 2018, when he disclosed Vasey's abuse of authority to TSA's Office of Inspector General (OIG). Appx7.

**b. Besanceney reasonably believed Vasey or Williams recorded their July 2017 meeting without his knowledge or consent.**

Besanceney reasonably believed Vasey and Williams had recorded their July 2017 meeting when he realized the memo he received following the meeting was much too detailed to have been based on recollection or notes made after the meeting. Appx1104. Besanceney reported his reasonable belief of an illegal audio

recording to Bobo—after first discussing it with Vasey and Williams. Appx1105-1106.

Besanceney made a detailed statement to the Special Investigations Unit, detailing his reasonable belief that a secret audio recording had been made, but investigators nonetheless failed to find evidence of the recording. Appx1106. Despite the seriousness of an allegation of secretly recording an employee, Vasey and Williams were not disciplined or terminated. Appx1107.

Williams said he only "sometimes" takes notes during meetings or performance reviews. Appx502, Appx1145. Vasey is unaware of any email in which he shared any handwritten notes related to this meeting with Williams. Appx1250. Vasey did not recall taking notes at the meeting. Appx1216-1217. It is against state law and TSA policy for Vasey and Williams to have recorded their conversation with Besanceney without his consent. Appx1009.

### VI. The adverse actions taken by the TSA have caused Besanceney to experience emotional distress and have damaged his professional reputation, his prospects for promotion at TSA, and his prospects for employment outside of TSA.

TSA's adverse actions have been "extremely stressful" for Besanceney; he has been "humiliated, demoralized, and harassed." Appx1321-1322. He has lost weight and (pre-COVID) stopped socializing with friends due to the stress caused by TSA; and that stress has adversely affected his marriage. Appx1321-1322.

Despite his "stellar reputation" prior to his protected disclosures, his opportunities for promotion within TSA "have been crushed" and his employment prospects, if he leaves TSA, have been harmed. Appx1322-1323.

## SUMMARY OF THE ARGUMENT

The Board erred in finding that five disclosures made by Besanceney in relation to the LGA baggage theft investigation were not protected disclosures under the WPEA. Besanceney had a good faith belief that Williams and Vasey were violating rules, regulations, and the law when they pressured him to obtain federal search warrants, based on probable cause, when no probable cause existed.

Besanceney reported his protected concerns five times: 1) during a December 5, 2016, discussion with Williams and Vasey regarding the lack of probable cause; 2) during Besanceney's April 2, 2017, quarterly review when he again reported Williams and Vasey's mishandling of the LGA theft investigation (including the attempts to pressure him to obtain search warrants); 3) during Besanceney's July 25, 2017, mid-year review when he again disclosed Williams and Vasey's mishandling of the LGA theft investigation (including the attempts to pressure him to obtain search warrants); 4) in his September 11, 2017, email to Bobo; and 5) in his November 16, 2017, response to the Notice of Proposed Removal.

Besanceney, as the objectively reasonable officer placed in charge of the investigation, did not believe the available evidence created probable cause sufficient to obtain a search warrant. Rather, he believed the evidence never rose above the standard of reasonable suspicion because there was no evidence as to where the stolen items were taken after they were stolen. Moreover, requiring Besanceney to sign an affidavit falsely attesting to his "belief" of probable cause could subject him to both civil and criminal penalties. Besanceney had a reasonable belief that 1) signing a dishonest affidavit to obtain a search warrant was illegal and improper; and 2) even if he were to obtain such a search warrant without an affidavit, executing it could result in constitutional infringements and suppressed evidence. While determining whether there is sufficient probable cause for a search warrant in a particular instance may be "debatable," it involves a legal standard created by the Constitution of the United States and further defined by the Supreme Court. A dispute regarding the appropriate level of evidence necessary to establish probable cause is not a disagreement about a policy or a strategic decision.

Besanceney also reasonably believed Vasey had engaged in off-duty misconduct (constituting an abuse of authority) that Besanceney was required to report—and which he did report. Besanceney received information from two reliable sources regarding this alleged off-duty misconduct. And Besanceney

reasonably believed Vasey or Williams recorded a July 2017 meeting without his knowledge or consent; the memo he received following the meeting was much too detailed to have been based on recollection or notes made after the meeting. Besanceney reported his reasonable belief of an illegal audio recording to Bobo—after first discussing it with Vasey and Williams.

Besanceney's sixth protected disclosure occurred during a February 6, 2018, meeting with Vasey and Williams, when he reported the misconduct allegations and the illegal recording; and his seventh disclosure occurred on February 12, 2018, when he reported Vasey's abuse of authority to TSA's Special Investigations Unit (SIU). Besanceney's eighth and final disclosure was on March 7, 2018, when he disclosed Vasey's abuse of authority to TSA's Office of Inspector General (OIG).

The Board did not address Besanceney's reasonable belief or even why he believed he was being recorded; there is nothing in the Board's decision to indicate the Board considered or even acknowledged the unusually detailed July 2017 memo, nor considered whether a disinterested observer would find this a report of wrongdoing. As the Board failed to address certain facts altogether, as well as failed to apply the appropriate test to Besanceney's beliefs, it erred in finding that this disclosure was unprotected.

The Board further erred in not considering the prohibited personnel practices taken against Besanceney by TSA or the causal link between those actions and his protected disclosures. Besanceney's protected activities contributed to the adverse personnel actions that escalated over the course of his employment with TSA. The time between each of Besanceney's protected activities and the corresponding personnel action is substantially less than six months, which is "sufficiently proximate" to satisfy the timing prong of the knowledge-timing test. Though unacknowledged by the Board, Besanceney established that his protected activities were a contributing factor in the personnel actions taken against him.

Finally, the Board erred in not considering or analyzing whether TSA met its heavy burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of Besanceney's disclosures.

## ARGUMENT

### Standard of Review

This Court must set aside the MSPB's decision if it finds that it was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c); *Kewley v. Dep't of Health & Human Serv.*, 153 F.3d 1357, 1361 (Fed. Cir. 1998). Questions of law are reviewed *de novo. See LaChance v. White*, 174

F.3d 1378, 1380 (Fed. Cir. 1999) (citing *Frederick v. Dep't of Justice*, 73 F.3d 349, 351-52 (Fed. Cir. 1996)).

To prevail under a claim of violation of the Whistleblower Protection Act (WPA), as amended by the Whistleblower Protection Enhancement Act (WPEA), an employee must prove by a preponderance of the evidence that: (1) he engaged in whistleblowing activity by making a protected disclosure, or engaged in other protected activity; and (2) the disclosure activity was a contributing factor in the agency's decision to take or fail to take one of the personnel actions listed at 5 U.S.C. § 2302(a). Preponderant evidence is that degree of relevant evidence a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

Under the WPA, a protected disclosure is a "formal or informal communication or transmission" that an employee reasonably believes evidences "(i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(a)(2)(D). An employee may establish his reasonable belief by showing that the disclosure he made concerned a matter which a reasonable person in his position would have believed constituted a protected disclosure under the WPA. *See Fisher v. Env't Prot. Agency*, 108 M.S.P.R. 296, ¶ 7 (2008). The test of whether an appellant possessed a reasonable belief that he

made protected disclosures under the WPA is "whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA." *Id*. at ¶ 7 (citing *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

### A. Violations of law, rule, or regulation need not be specifically identified.

For an appellant to make a non-frivolous allegation that there was a "violation of law, rule, or regulation," the appellant need not specifically allege a particular kind of fraud, waste, or abuse as defined by the WPA. *See Schneider v. Dep't of Homeland Sec.*, 98 M.S.P.R. 377, ¶ 13 (2005). Instead, under the Board's precedent, "the inquiry into whether a disclosure is protected ends upon a determination that the appellant disclosed a violation of law, rule, or regulation." *Id*. No *de minimis* standard or threshold is required for a disclosure of a "violation of law, rule or regulation." *Id*. An appellant need not identify any specific part of the law, such as the title or number of the statute or regulation, when his statements "clearly implicate an identifiable law, rule, or regulation." *Schneider*, 98 M.S.P.R. 377, at ¶ 13.

An employee is not required to identify a statutory or regulatory provision by title or number when the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable

violation of law, rule, or regulation. *See Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). An appellant only needs a reasonable belief that the conduct violates some law, rule, or regulation. *Sinko v. Dep't of Agr*., 102 M.S.P.R. 116, ¶ 10 (2006). Even in the absence of a specific citation, it is well settled that a disclosure may be protected to the extent that it clearly implicates an identifiable regulation. *See Salinas v. Dep't of the Army*, 94 M.S.P.R. 54, ¶ 8 (2003) (*citing Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001).

Although the WPA does not define "rule," the Board has held that it **includes established or authoritative standards for conduct or behavior**. *See Rusin v. Dep't of the Treasury*, 92 M.S.P.R. 298 at ¶¶ 15-20 (2002) (emphasis added) (holding a Department of the Treasury Procurement Instruction Memorandum and the Bureau of Alcohol, Tobacco, and Firearm's Government Commercial Credit Card Program qualify as "rules"); *see also Chavez v. Dep't of Veterans Affairs*, 120 M.S.P.R. 285, 297 (2013); *Drake v. Agency for Int'l Dev*., 543 F.3d 1377, 1382 (Fed. Cir. 2008); *LaChance*, 174 F.3d at 1381.

### B. Gross mismanagement is a management action or inaction that may significantly impact an agency's ability to accomplish its mission; and abuse of authority is a fact-driven inquiry.

The Board defines "gross mismanagement" as "a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." *Fisher*, 108 M.S.P.R. 296, at ¶ 9 (citing *Shriver*

*v. Dep't of Veterans Affairs*, 89 M.S.P.R. 239, ¶ 7 (2001)). Such actions are "more than *de minimis* wrongdoing or negligence." *Id*. Disclosures of "gross mismanagement" must have an "element of blatancy." *Id*.

Likewise, the Board defines an "abuse of authority" as "an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in a personal gain or advantage to himself or to preferred other persons." *Id*. at ¶ 9 (citing *Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001)).

The Board does not recognize a *de minimis* standard or threshold for what constitutes an "abuse of authority." *Wheeler*, 88 M.S.P.R. 236, ¶ 13. A determination as to whether an appellant has properly pled a non-frivolous allegation of "abuse of authority" is a fact-driven inquiry which examines whether a disinterested person with access to the facts known by the appellant could reasonably conclude that there was an abuse of authority. *Id*.

### C. Three factors are considered in determining whether a disclosure involves a substantial and specific danger to public health or safety.

When determining whether a disclosure involves harm to public safety or health, the following factors are considered: "(1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences." *Chambers v. Dep't of the Interior*, 602

F.3d 1370, 1376 (Fed. Cir. 2010) (finding that a U.S. Park Police chief informing a newspaper reporter that traffic incidents had increased on a parkway resulting from a diversion of officers was a disclosure evidencing substantial and specific danger to public safety under the WPA). But an employee can also satisfy his burden by showing past harm. *See id.*

### D. The Board erred in finding Besanceney did not make any protected disclosures under the WPA.

The Board erred in determining that none of Besanceney's disclosures regarding the mishandling of the LGA baggage theft investigation and Vasey's abuse of authority are protected disclosures under the WPA.

### E. The Board erred when it determined that Besanceney's reports of the mishandled LGA theft investigation are not protected disclosures under the WPEA.

The Board erred in finding that the five disclosures made by Besanceney in relation to the LGA baggage theft investigation were not protected disclosures under the WPEA. The evidence demonstrates Besanceney had a good faith belief that Williams and Vasey were violating rules, regulations, and the law when they pressured him to obtain federal search warrants, based on probable cause, when no probable cause existed; and that Williams and Vasey subsequently risked public safety and abused their authority. Besanceney reported his protected concerns five times: 1) during the December 5, 2016, discussion with Williams and Vasey

regarding the lack of probable cause;[1] 2) during Besanceney's April 2, 2017, quarterly review when he again reported Williams and Vasey's mishandling of the LGA theft investigation; 3) during Besanceney's July 25, 2017, mid-year review when he again disclosed Williams and Vasey's mishandling of the LGA theft investigation; 4) in his September 11, 2017, email to Bobo; and 5) in his November 16, 2017, response to the Notice of Proposed Removal.

The Board determined that Besanceney's December 5, 2016, disclosures to William and Vasey regarding their failure to recognize and apply the proper standard for probable cause and their attempts to pressure him to falsely claim probable cause existed, and the associated failure to conduct consent searches of the suspects' homes, did not constitute a protected disclosure. The Board justified this determination by characterizing the conversations between Besanceney and his managers as a "general philosophical or policy disagreement with agency decisions" and merely a "discussion among employees or supervisors regarding different possible courses of action." Appx15. In determining that the December 5, 2016, discussion was a philosophical or policy disagreement, the Board cited *Webb v. Dep't of Interior*, No. DA-1221-14-0006-W-1, 2015 WL 150466 (M.S.P.B. Jan. 13, 2015). In *Webb*, the Board held that an employee's authoring of a position

[1] Disclosures made to the alleged wrongdoer are covered under the WPEA. *Day v. Department of Homeland Security*, 119 M.S.P.R. 589 (2013).

paper disputing the restructuring of his department was not protected activity. *Id.* at 252. The Board determined that the policy paper contained no allegations that the restructuring would result in personal gain to any person involved in the expenditure of federal funds and constituted only "his disagreements with debatable management decisions." *Id.* at 252 no. 3.

While determining whether there is sufficient probable cause for a search warrant may be "debatable," it is not merely philosophic, nor is it a question of workplace policy. It is a legal standard created by the Constitution of the United States and further defined by the Supreme Court. *See* U.S. CONST. amend. IV. The Supreme Court has articulated that to determine whether probable cause exists, the Court should "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). A dispute regarding the appropriate level of evidence necessary to satisfy this burden does not fall under the umbrella of disagreement with Vasey and Williams regarding policy decisions of the department.

Besanceney, as the objectively reasonable officer placed in charge of the investigation, did not believe the available evidence created probable cause sufficient to obtain a search warrant. Appx975. Rather, he believed the evidence never rose above the standard of reasonable suspicion because there was no

evidence as to where the stolen items were taken after they were stolen. Appx978. There was no surveillance of the stolen items after the items left the LaGuardia baggage room. Appx976.

Besanceney has almost forty years of experience in law enforcement. Appx948-951. He worked for the U.S. Secret Service for twenty years prior to joining the TSA in 2003 and has extensive experience obtaining criminal warrants and conducting consent searches. Appx948-951.

The Board erred when considering the reasonableness of Besanceney's determination that there was not probable cause. Specifically, the Board stated "the appellant is not a lawyer, but reached this legal conclusion, rather than allowing the AUSA or ADA to do so." Appx13. But the Supreme Court has held that when "dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; **they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act**." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (internal citations omitted) (emphasis added). Besanceney had not only a good faith belief, but an objectively reasonable belief, that no probable cause existed to support a search warrant without evidence as to where the stolen objects were taken.

To obtain a warrant to search private property, an officer must typically sign an affidavit attesting to his personal knowledge of the facts and represent that he

believes there is sufficient probable cause to search private property. *United States v. Harris*, 403 U.S. 573 (1971). The Supreme Court has held that suppression of evidence in a criminal trial is appropriate if "the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Leon*, 468 U.S. 897, 926 (1984).

Moreover, requiring Besanceney to sign an affidavit falsely attesting to his "belief" of probable cause could subject him to both civil and criminal penalties. *S.H. v. D.C.*, 270 F. Supp. 3d 260, 284 (D.D.C. 2017) (holding that an officer who signed an affidavit seeking a warrant without probable cause was not entitled to qualified immunity against suit, but fellow officers who only executed the warrant were immune). Even Williams and Vasey do not argue there was an "objectively reasonable belief in the existence of probable cause." Williams testified *only* that he "could have made an articulation that there was probable cause" for search warrants, but expressly stopped short of making the assertion that there *was* probable cause. Appx1191.

The rules or regulations being violated by Williams and Vasey include, but are certainly not limited to, both the Fourth Amendment and 18 U.S.C. § 1621 ("Whoever . . . in any declaration, certificate, verification, or statement under penalty of perjury [. . .] willfully subscribes as true any material matter which he

does not believe to be true [. . .] is **guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both**.") (emphasis added). Asking Besanceney to defy these laws is a clear violation of established or authoritative standards for conduct or behavior for TSA officers and supervisors.

Besanceney had a clearly reasonable belief that 1) signing a dishonest affidavit to obtain a search warrant was illegal and improper; and 2) even if he were to obtain such a search warrant without an affidavit, executing it could result in constitutional infringements and suppressed evidence. The Board, when determining that Besanceney's December 5, 2016, conversation with Williams and Vasey was not a protected disclosure, analyzed only whether "strategies" were discussed during this meeting to validate some type of policy or investigative debate. Appx14-15. But the analysis properly turns on Besanceney's reasonable belief that executing his supervisors' plan would result in overt violations of the law and forcing him to do so (or face retaliatory consequences) is, in fact, a violation of TSA policy and rules.

The Board's conclusion that Besanceney's disclosures did not address violations of regulations, rules, and laws does not reflect the full record as to the consequences of Vasey and Williams's actions. Rather, the Board accepted without further inquiry or consideration that Besanceney was obligated to sign such an

affidavit or generally obtain a warrant, without any mention of the Fourth Amendment or rights afforded to Besanceney.

And the Board erred when it explicitly pointed to the fact that Besanceney did not cite a specific rule or regulation. Appx21 ("Not only is his assertion of no arrest inaccurate, the appellant did not cite to any specific 'proper and correct investigative decision,' rule, regulation or procedure that was not followed."). This consideration is improper as a matter of law; an appellant need not identify any specific part of the law, such as the title or number of the statute or regulation, when his statements "clearly implicate an identifiable law, rule, or regulation." *Schneider*, 98 M.S.P.R. 377, at ¶ 13. The Board plainly erred in ruling Besanceney's disclosures were not protected, as this consideration was not in accordance with the law. Moreover, when considering the four disclosures made outside of the December 5, 2016, meeting, the Board entirely fails to address the reasonableness of Besanceney's beliefs, and entirely fails to analyze the viewpoint of a "disinterested observer," thus ultimately failing to engage in the proper analysis set out under the WPA. Appx15-23.

Gross mismanagement is also evident based on the facts set out above. When holding that the December 5, 2016, disclosure to Williams and Vasey did not qualify as a protected disclosure of "gross mismanagement," the Board determined that Williams and Vasey's decision to cancel consent searches was not

gross mismanagement. Appx22. As a matter of law, the Board's analysis turned on the incorrect issue; the proper consideration is whether their decision to pursue search warrants at that point in the investigation with insufficient probable cause constitutes gross mismanagement, not their rejection of consent searches.

Any evidence obtained from searches based on faulty warrants could have been fruit of the poisonous tree. *United States v. Calandra*, 414 U.S. 338, 354 (1974). To rise to the level of gross mismanagement, the management's action or inaction must create a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Johnson v. Dep't of Justice*, 104 M.S.P.R. 624, ¶ 16 (2007). The TSA's mission is to "[p]rotect the nation's transportation systems to ensure freedom of movement for people and commerce." TRANSPORTATION SECURITY AGENCY, https://www.tsa.gov/about/tsa-mission (last visited Oct. 31, 2018). Properly obtaining evidence and successfully prosecuting suspects is critical to the success of this mission; here, those efforts were brought to an abrupt halt when investigators circumvented proper legal procedure. *See, e.g.*, *Illinois*, 462 U.S. at 231; *Leon*, 468 U.S. at 926.

Further, Vasey and Williams went on to ignore Besanceney's urgings to follow proper procedure. Should the Court find that the December 5, 2016, disclosure to Williams and Vasey did not implicate "blatant" mismanagement, it is plain that Besanceney's disclosures following this conversation did address the

blatancy and willfulness of Vasey and Williams's failures. A disinterested observer, especially one with federal law enforcement experience, should understand the importance of probable cause and legitimate search warrants as a matter of public trust and constitutional rights. By impressing upon Vasey and Williams that there was no probable cause, and thus no justifiable search, Besanceney disclosed his supervisors' gross mismanagement five separate times, all of which were protected under the WPA.

Asking Besanceney to obtain such a warrant also created substantial danger to health or safety. By executing a faulty warrant without probable cause, Vasey and Williams could have endangered both TSA personnel and the individuals unknowingly subject to search. Consideration of TSA staff and law enforcement safety is a hallmark of criminal law, and is to be studiously protected. *Riley v. California*, 573 U.S. 373 (2014) (discussing Fourth Amendment exemptions for law enforcement officers resulting from imminent safety concerns). However, the individuals inside the home are also at risk during the execution of a warrant, and even more so if there is no probable cause of criminal action (demonstrating a higher uncertainty of actual culpability). Permitting law enforcement agencies to coerce investigators to sign affidavits, or even simply obtain warrants, without proper basis, results in a number of people being put in unnecessary danger.

Finally, Vasey and Williams abused their authority when repeatedly pushing for federal search warrants to their own benefit. Rather than seek a search warrant themselves (notably, thus incurring liability by signing an affidavit attesting to probable cause), they instead pressured a subordinate to do so by threatening punitive action—and then subjected him to retaliatory actions by substantially increasing his workload, refusing to approve numerous reports for vague or contradictory administrative reasons, and requiring Besanceney to revise and resubmit the same reports multiple times. This culminated in a Memorandum of Counseling, an Improvement Period Notice, and a Proposed Removal.

In addition, Besanceney's rights are not the only rights adversely affected by Williams and Vasey's supervisory decisions; by maintaining that search warrants (without probable cause) were the correct way to proceed, Vasey and Williams ignored the Fourth Amendment rights of the accused. More succinctly, Vasey and Williams arbitrarily exercised their power as federal officials in a way that adversely affected both Besanceney and private citizens. Besanceney's disclosures regarding their mishandling of legal and investigatory procedures are therefore also protected as disclosures addressing their abuses of authority. The Board erred when not acknowledging any of the facts surrounding Vasey and Williams's abuse of authority, and erred by failing to acknowledge the rights of any individuals outside of the TSA.

### F. The Board erred when it determined Besanceney's reports of Vasey's abuse of authority are not protected disclosures under the WPEA.

Besanceney made three protected disclosures regarding Vasey's abuse of authority as a federal law enforcement officer: (1) Besanceney's February 6, 2018, disclosure of Vasey's abuse of authority to both Williams and Vasey; Besanceney's February 12, 2018, disclosure of Vasey's abuse of authority to the Special Investigations Unit; and Besanceney's March 7, 2018, disclosure of Vasey's abuse of authority to the Office of Inspector General.

When concluding that Besanceney's reports of Vasey's abuse of authority are not protected disclosures, the Board held that

> He testified he did not ask his unnamed sources how they acquired their information about Vasey. Moreover, even though his sources gave him the names of potential witnesses, the appellant did [sic] contact these individuals in an effort to obtain additional information. As such, I find the appellant did not possess a reasonable belief that Vasey had engaged in the domestic abuse and stalking incidents the appellant ostensibly disclosed. Rather, these disclosures were based on mere rumors, which are [sic] the type of disclosure the WPA protects.

Appx27.

This analysis is reversible in several ways. First, the Board wrongly expects Besanceney to perform his own investigation as to the full veracity of these claims, rather than apply the proper standard of having a reasonable belief that this is an abuse of authority by a federal officer. It is Besanceney's duty to report off-duty

misconduct, particularly misconduct committed by managers, but it is not his duty to investigate these allegations. Appx1103.

Further, the Board fails to analyze the evidence contributing to Besanceney's reasonable belief of abuse of authority beyond "limited information he obtained from unnamed sources." Appx27. Supporting the contention that rumors are unprotected by the WPA, the Board cites to *Johnson v. Dep't of Justice*, No. DC-1221-06-0388-W-1, 2007 WL 447155 (M.S.P.B. Feb. 6, 2007). In *Johnson*, the plaintiff reported a "fight" at the holiday party, with no specific source (even an unnamed source); he simply asserted the fight was "known by everyone." *Id.* at 633. The plaintiff did not even know who was involved in this fight. *Id.*

Besanceney had two separate credible sources for his allegations, and even later received an unsigned copy of Vasey's divorce proceedings evidencing Vasey's alleged assault on his ex-wife. Appx1097-1098. Typically, in the investigative process, law enforcement officials are given heightened credibility. For example, a magistrate judge may rely on a law enforcement officer's knowledge of someone's reputation when issuing a warrant. *Harris*, 403 U.S. 573, 583 (1971). Besanceney has been in law enforcement for forty years. When someone with his experience confirms that he has two separate, credible sources from which his information is derived, it is likely that these allegations are more than "rumors."

A disinterested observer, upon review of two credible sources of information provided by someone with forty years of law enforcement experience, would reasonably conclude that this amounts to a report of wrongdoing (thus constituting protected activity under the WPA). Instead, the Board determines there are no facts "known to and readily ascertainable to Besanceney," improperly dismissing both his sources and credibility as an officer. Appx27.

Besanceney's final protected disclosure addressed his belief that Williams and Vasey had surreptitiously and unlawfully audio recorded personnel meetings between Williams, Vasey, and Besanceney. Appx582, Appx621. Given Williams and Vasey's observed failure to take notes during their personnel meetings with him, and the unusual level of detail captured in the memo prepared by his supervisors regarding Besanceney's July 2017 meeting with them, Besanceney had a reasonable belief that either Williams or Vasey had surreptitiously recorded the personnel meetings. Whereas notes from the April 2017 meeting consisted of less than half a page of general information in bullet point, notes from Besanceney's July 2017 meeting consisted of four pages of notes with bullets, sub-bullets, and direct quotes. Besanceney knew that covertly recording personnel meetings was prohibited by TSA policy, as well as Massachusetts and Pennsylvania law.

The Board ruled that Besanceney could not have had a reasonable belief that this disclosure revealed misconduct because "he had no proof of being audio

recorded." Appx27. However, "[n]owhere in the WPA did Congress place a burden of proof on an appellant in an IRA appeal to provide 'irrefragable' proof to rebut a presumption that, in the matter at issue, agency officials performed their duties correctly, fairly, in good faith, and in accordance with law." *White v. Dep't of Air Force*, No. DE-1221-92-0491-M-4, 2003 WL 22175176 (M.S.P.B. Sept. 11, 2003), *aff'd*, 391 F.3d 1377 (Fed. Cir. 2004). Moreover, "both the statutory language and the legislative history of the WPA indicate that the reasonable belief test is the only relevant inquiry in determining whether a particular disclosure is protected." *Id.* (internal citations omitted).

Again, the Board does not address Besanceney's reasonable belief or even why he believed he was being recorded; there is no evidence that the Board considered or even acknowledged the abnormally detailed July 2017 memo, nor considered whether a disinterested observer would consider this a report of wrongdoing. As the Board failed to address certain facts altogether, as well as failed to apply the appropriate test to Besanceney's beliefs, it erred in finding that this disclosure was unprotected.

### G. The Board further erred in not considering the prohibited personnel practices taken against Besanceney by TSA or the causal link between those actions and his protected disclosures.

As discussed above, the Board erred in finding Besanceney made no protected disclosures related to Williams and Vasey's gross mismanagement, abuse of authority, danger to public health or safety, and violation of rules, laws, and regulations. After incorrectly reaching this conclusion, the Board failed to analyze the prohibited personnel actions to which TSA subjected Besanceney—namely, the Memorandum of Counseling, the Improvement Period Notice, and the Proposed Removal; and failed to analyze the causal link between his disclosures and those actions.

In the burden shifting scheme for whistleblower cases, an employee must prove by a preponderance of the evidence that he made a protected disclosure that was a contributing factor to an adverse action. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). The burden of persuasion then shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. *Id.; see also Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1322 (Fed. Cir. 1999).

A "contributing factor" is "**any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision**." *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (emphasis in

original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)). "This substantial reduction of the whistleblower's burden" means that "**any weight**" given to a protected disclosure can satisfy the "contributing factor" test. *See id.* (emphasis added).

An employee may demonstrate that a disclosure was a contributing factor in the covered personnel action through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. *Benton-Flores v. Dep't of Def.*, No. DC-1221-13-0522-W-1, 2014 WL 3748419 (M.S.P.B. July 31, 2014). Thus, an appellant's submission of evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, is evidence sufficient to meet the knowledge-timing test, and satisfies the contributing factor standard. *Id*.

Besanceney's protected activities contributed to the adverse personnel actions that escalated over the course of his employment with TSA. The time between each of Besanceney's protected activities and the corresponding personnel action is substantially less than six months, which is "sufficiently proximate" to satisfy the timing prong of the knowledge- timing test. *See Benton-Flores*, 121

M.S.P.R. 428, ¶ 13 (citing *Rubendall v. Dep't of Health & Human Servs.*, 101 M.S.P.R. 599, ¶ 13 (2006)).

Though unacknowledged by the Board, Besanceney established that his protected activities were a contributing factor in the personnel actions taken against him.

TSA took numerous actions against Besanceney because of his protected disclosures and protected activities; as evidenced by the close temporal proximity of the adverse actions to the protected activity, and the pretextual nature of TSA's justifications for its actions, Besanceney's protected activity was a contributing factor.

After Besanceney first objected to Williams and Vasey's orders and management of the LGA Baggage Room 11 Thefts investigation, TSA substantially increased his workload, refused to approve numerous reports for vague or contradictory administrative reasons, and required Besanceney to revise and resubmit the same reports multiple times. First, TSA, through Williams, issued Besanceney a Memorandum of Counselling over case deadlines and reporting. As Williams and Vasey continued to move the goalposts on Besanceney's deliverables, they ultimately issued Besanceney a retaliatory Improvement Period Notice. After his supervisors falsely determined Besanceney had not met the requirements of the IPN, Williams proposed Besanceney's removal from Federal

service. Ultimately, Deputy Director Bobo overruled the proposed removal, but kept Besanceney in Williams and Vasey's chain of command.

### H. The Board erred in not considering or analyzing whether TSA met its heavy burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of Besanceney's disclosures.

TSA did not meet its heavy burden under the WPA to demonstrate it would have subjected Besanceney to punitive action in the absence of his protected whistleblowing—and the Board, as already discussed, erred in not finding any of Besanceney's disclosures protected, as well as failed to address them as a contributing factor for TSA's prohibited personnel actions.

When 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, this Court will consider the following factors: (1) the strength of the agency's evidence in support of its personnel 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.

"Clear and convincing" evidence is evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is "highly probable." *Miller v. Dep't of Justice*, 842 F.3d 1252, 1257-58 (Fed. Cir.

2016). The clear and convincing burden of proof imposes a heavier burden upon an agency than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt. *Id.* This Court reviews the Board's finding of independent causation for substantial evidence. Appx1258.

"Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Jacobs v. Dep't of Justice*, 35 F.3d 1543, 1546 (Fed. Cir. 1994). "Any determination by an AJ that is based on findings made in the abstract and independent of the evidence which fairly detracts from his or her conclusions is unreasonable and, as such, is not supported by substantial evidence." *Whitmore*, 680 F.3d at 1376. The Board must provide an in-depth review and full discussion of the facts to explain its reasoning, including consideration of countervailing evidence presented by the employee. *Agoranos v. Dep't of Justice*, 602 Fed. Appx. 795, 801 (Fed. Cir. 2015) (emphasis added).

The record demonstrates that TSA did not meet its burden to show by clear and convincing evidence that it would have taken the same personnel actions in the

absence of Besanceney's disclosures; and the Board erred in not considering or analyzing whether TSA met this heavy burden.

## CONCLUSION

Besanceney had a good faith belief that Williams and Vasey were violating rules, regulations, and the law when they pressured him to obtain federal search warrants, based on probable cause, when no probable cause existed; and Besanceney reported his protected concerns five times (on December 5, 2016, April 2, 2017, July 25, 2017, September 11, 2017, and November 16, 2017).

Besanceney did not believe the available evidence created probable cause sufficient to obtain a search warrant; and signing an affidavit falsely attesting to his "belief" of probable cause could have subjected him to both civil and criminal penalties. Besanceney had a reasonable belief that 1) signing a dishonest affidavit to obtain a search warrant was illegal and improper; and 2) even if he were to obtain such a search warrant without an affidavit, executing it could result in constitutional infringements and suppressed evidence.

Besanceney also reasonably believed Vasey had engaged in off-duty misconduct (constituting an abuse of authority) that Besanceney was required to report—and which he did report. And Besanceney reasonably believed Vasey or Williams recorded a July 2017 meeting without his knowledge or consent; the

memo he received following the meeting was much too detailed to have been based on recollection or notes made after the meeting. Besanceney reported his reasonable belief of an illegal audio recording to Bobo and later to TSA's Special Investigations Unit and Office of Inspector General—after first discussing it with Vasey and Williams. He thus made additional protected disclosures on February 6, 2018, February 12, 2018, and March 7, 2018.

The Board did not address Besanceney's reasonable belief or even why he believed he was being recorded; there is nothing in the Board's decision to indicate the Board considered or even acknowledged the unusually detailed July 2017 memo, nor considered whether a disinterested observer would find this a report of wrongdoing. As the Board failed to address certain facts altogether, as well as failed to apply the appropriate test to Besanceney's beliefs, it erred in finding that these disclosures were unprotected.

The Board further erred in not considering the adverse actions taken against Besanceney by TSA or the causal link between those actions and his protected disclosures. Besanceney's protected activities contributed to the adverse personnel actions that escalated over the course of his employment with TSA. The time between each of Besanceney's protected activities and the corresponding personnel action is substantially less than six months, which is "sufficiently proximate" to satisfy the timing prong of the knowledge-timing test. Though unacknowledged by

the Board, Besanceney established that his protected activities were a contributing factor in the personnel actions taken against him.

Finally, the Board erred in not considering or analyzing whether TSA met its heavy burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of Besanceney's disclosures.

Besanceney respectfully requests this Court reverse and vacate the Board's Final Order and find Besanceney engaged in one or more protected disclosures; find that he established one or more of his protected disclosures were a contributing factor in the adverse actions taken against him by TSA; find TSA failed to prove by clear and convincing evidence it would have taken the same actions in the absence of Besanceney's protected whistleblowing; and remand this matter to the Board for judgment in Besanceney's favor and all appropriate remedies, including compensatory damages for the emotional distress and reputational harm caused by TSA.

Besanceney respectfully requests this Court reverse and vacate the Board's Final Order and find Besanceney engaged in one or more protected disclosures; find that he established one or more of his protected disclosures were a contributing factor in the adverse actions taken against him by TSA; find TSA failed to prove by clear and convincing evidence it would have taken the same actions in the absence of Besanceney's protected whistleblowing; and remand this

matter to the Board for judgment in Besanceney's favor and all appropriate remedies, including compensatory damages for the emotional distress and reputational harm caused by TSA, and his attorney's fees. In the alternative, Besanceney respectfully requests that the Court vacate the Board's Final Order and remand for reconsideration with an instruction that Besanceney engaged in protected activity.

Respectfully submitted,

/s/ John T. Harrington
R. Scott Oswald
John T. Harrington
THE EMPLOYMENT LAW GROUP, P.C.
1717 K Street NW, Suite 1110
Washington, D.C. 20006
(202) 261-2830
(202) 261-2835 (facsimile)
soswald@employmentlawgroup.com
tharrington@employmentlawgroup.com

*Counsel for Petitioner Mark Besanceney*