UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

MARK BESANCENEY,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
PH-1221-19-0255-M-1

DATE: September 27, 2021

John T. Harrington, Esquire, Washington, D.C., for the appellant.

R. Scott Oswald, Esquire, Washington, D.C., for the appellant.

Sheila J. Callahan, Philadelphia, Pennsylvania, for the agency.

Stephanie C. Blum, Esquire, Romulus, Michigan, for the agency.

BEFORE
Kara Svendsen
Administrative Judge

INITIAL DECISION

On May 8, 2019, Mark Besanceney, the appellant, timely filed an individual right of action (IRA) appeal with the Merit Systems Protection Board (Board) under the Whistleblower Protection Act (WPA), as amended by the Whistleblower Protection Enhancement Act (WPEA), in which he alleged that the Department of Homeland Security, Transportation Security Administration (TSA or agency), retaliated against him for his alleged whistleblowing activities. Initial Appeal File (IAF), Tab 1. In an initial decision (ID) dated April 9, 2020, I

dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing. IAF, Tab 36.

On June 10, 2020, the appellant filed a petition for review with the U.S. Court of Appeals for the Federal Circuit. *See Besanceney v. Department of Homeland Security*, MSPB Docket No. PH-1221-19-0255-L-1, Litigation File (LF), Tab 1. Based on its decision in *Hessami v. Merit Systems Protection Board*, 979 F.3d 1362 (Fed. Cir. 2020), by Order dated January 22, 2021, the Court granted the Board's motion to vacate the ID and remanded the appeal for further adjudication. LF, Tabs 13, 14. Pursuant to the Court's Order, the Board docketed this remanded appeal on February 9, 2021. *See Besanceney v. Department of Homeland Security*, MSPB Docket No. PH-1221-19-0255-M-1, Remand File, (RF), Tab 2.

The requested hearing was held on April 27 and 28, 2021. For the reasons set forth below, the appellant's request for corrective action is DENIED.

Background

The appellant began his career with TSA in August 2003 as a Supervisory Criminal Investigator. IAF, Tab 7 at 151. At his request, in May 2015, the appellant was transferred to an assignment at the John F. Kennedy Airport (JFK) in New York City. *Id*., Tab 1 at 9. At JFK, he was a Special Agent assigned to TSA's Investigations Division (INV) in the Philadelphia Field Office. *Id*., Tab 6 at 7. His first-line supervisor was Jeffrey Vasey, Deputy Supervisory Agent in Charge (DSAC), and Thomas Williams, Supervisory Agent in Charge (SAC), was his second-line supervisor. *Id*.

Vasey began his federal service with the Secret Service in April 1976. In September 1998, he began working for the Department of Justice (DOJ) in their Office of Inspector General. Vasey entered on duty with TSA on October 10, 2010 as a DSAC for the Philadelphia Field Office. He retired from TSA on September 29, 2018. RF, Tab 12 (Hearing Testimony, Day 2; Vasey, track 1); IAF, Tab 32 at 54-55.

Williams worked for the federal government in various law enforcement positions from 1990 until 2005. He then went to work in the private sector as a computer forensics consultant. After returning to federal employment in 2012, Williams was hired by TSA as a SAC for the Northeast Region in May 2015, a position which continued to hold as of the date of his testimony. RF, Tab 11 (track 6).

In late July 2016, a JetBlue Airways corporate security investigator notified the appellant about the theft of personal property from checked baggage belonging to JetBlue passengers departing from LaGuardia Airport (LGA). IAF, Tab 1 at 10; Tab 28 at 62-63. As a result, at the appellant's request, TSA installed a camera in LGA Baggage Room 11. Over the next several weeks, at least seven instances of pilferage were recorded. *Id*., Tab 2 at 56-59. With the assistance of a TSA technician who was reviewing the recorded footage, the appellant was able to identify two LGA Transportation Security Officers (TSOs) as suspects. Per agency policy, the two suspects were suspended. *Id*., Tab 6 at 7; Tab 1 at 10. Thereafter, TSA opened an official investigation and assigned the appellant as the case agent.[1] *Id*., Tab 2 at 60.

The appellant claimed that in an effort to recover stolen property and facilitate the criminal prosecution of the identified TSO suspects, he developed a plan for a "consent searches" to be conducted on Monday, December 5, 2016. IAF, Tab 7 at 52-55. In the plan, the appellant related that surveillance footage revealed two LGA TSOs repeatedly rummaging through passengers' checked baggage and, on multiple occasions, one TSO removing personal effects from baggage and placing it in the other TSO's backpack. The appellant did not provide the dates of any of these occasions; nor did he provide a description of any of the personal effects purportedly taken. *Id*. Conversely, he did include the

[1] Although at his request the appellant was reassigned to Boston, he asked to complete the Room 11 theft investigation. RF, Tab 11 (Hearing Testimony, Day 1, tracks 1, 2).

details provided to him by the JetBlue security officer, 72 complaints involving theft of personal property consisting of sunglasses, clothing, bottles of liquor and perfume and jewelry, for the period of January 2016 through August 2016. *Id*.

According to the agency, the consent searches were not conducted because the appellant did not complete the necessary preliminary investigatory tasks in support of obtaining search warrants. In particular, he had not performed a thorough review of the surveillance footage in an effort to match thefts reported with footage reviewed. IAF, Tab 6 at 7-8; Tab 7 at 34-45. As such, Vasey and Williams determined that the case was not prosecution or warrant ready. *Id*., Tab 7 at 35. Specifically, if the suspects had declined to consent to the searches or speak with investigators, there was insufficient casework completed to obtain a warrant. *Id*.; Tab 2 at 63. Consequently, Vasey and Williams decided not to follow through with the appellant's proposed operations plan. Rather, the appellant was instructed to review the surveillance footage, a process he undertook beginning on December 7, 2016. *Id*., Tab 28 at 73-74.

The appellant completed his review of the footage, and on January 10, 2017 provided Williams with a list of dates and times when items were taken and a description of what occurred and/or what was taken. IAF, Tab 28 at 75-77. Shortly thereafter, at the appellant's request, he was transferred to a satellite office in Boston effective late December 2016. *Id*., Tab 6 at 87, 7, 45; Tab 2 at 69. Subsequently, the LGA theft case was reassigned after a newly hired LGA agent. *Id*., Tab 6 at 87. The two suspects were prosecuted.

The appellant contended that he made several protected disclosures regarding the way the agency handled the LGA baggage room theft case. He also maintained that he made three disclosures regarding Vasey's purported abuse of authority regarding other matters. As a result, he claimed that he was subjected to numerous adverse personnel actions. Thus, on or about June 25, 2018, he filed a complaint with the Office of Special Counsel (OSC). IAF, Tab 2 at 3-29. By letter dated October 18, 2018, OSC advised him that it had made a preliminary

determination to end its investigation, but afforded him the opportunity to submit a written response. *Id*. at 30-31. The appellant submitted a written response to OSC dated October 31, 2018. *Id*. at 32-35. By letter dated March 4, 2019, OSC informed him that it had closed its investigation into his complaint. The closure letter also notified him of his Board appeal rights. *Id*. at 36-38; 39-40. This timely appeal followed.

Legal standard and burden of proof

The WPA, as amended, prohibits an agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Chambers v. Department of the Interior*, 602 F.3d 1370, 1375-76 (Fed. Cir. 2010) (citing 5 U.S.C. § 2302(b)(8)).

Where, as here, there is no independent right to appeal the personnel actions directly to the Board, an aggrieved employee must seek corrective action from OSC prior to seeking corrective action from the Board. 5 U.S.C. § 1214(a)(3); 5 U.S.C. § 1221(a); *Corthell v. Department of Homeland Security*, 123 M.S.P.R. 417, ¶ 7 (2016). Instantly, the appellant satisfied the OSC exhaustion requirement by informing OSC of the nature of his claims and providing OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992); *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 14 (2014). In a subsequent IRA appeal, the scope of the Board's jurisdiction is limited to those disclosures and those personnel actions raised before OSC. *Sazinski v. Department of Housing & Urban Development*, 73 M.S.P.R. 682, 685 (1997).

To prevail in an IRA appeal, an appellant must prove by preponderant evidence that: (1) he engaged in whistleblowing activity by making a protected disclosure, or engaged in other protected activity; and (2) the disclosure or

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).

The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8) 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 evidenced wrongdoing as defined by the WPA. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 17 (2011). An appellant's purely subjective opinion is insufficient, even if shared by other employees. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 11534 (2000).

An appellant also must prove the disclosure was a contributing factor to the personnel action. A "contributing factor" means the disclosure affected the agency's decision to threaten, propose, take, or not take the personnel action regarding the appellant. *See Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 10 (2013). An appellant can show that his disclosure was a contributing factor by satisfying the knowledge/timing test, meaning by presenting evidence that the official taking the personnel action was aware of the disclosure, and the official took the action within a short enough period after the disclosure for a reasonable person to conclude that the disclosure was a contributing factor to the personnel action. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 19 (2008).

Evidence and analysis

Regarding the six witnesses who testified at the hearing, I had the opportunity to observe each witness, and have carefully considered his/her

demeanor. *See Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 18 (2011). As discussed below, the various *Hillen* factors were considered in reaching credibility determinations.[2] *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987),

Alleged protected disclosures

As set forth in his OSC complaint, the appellant alleged his protected disclosures were as follows:

1. On December 5, 2016, he disclosed Williams's and Vasey's "mishandling of the LGA Baggage Room 11 Thefts during the investigation."
2. On April 2, 2017, he disclosed Williams's and Vasey's "mishandling of the LGA Baggage Room 11 Thefts during his quarterly review."
3. On July 25, 2017, he disclosed Williams's and Vasey's "mishandling of the LGA Baggage Room 11 Thefts during his mid-year review."
4. On September 11, 2017, he disclosed Williams's and Vasey's "mishandling of the LGA Baggage Room 11 Thefts via email to Darcy [sic] Bobo," Deputy Director, INV.
5. On November 16, 2017, he disclosed Williams's and Vasey's "mishandling of the LGA Baggage Room 11 Thefts in response to the Notice of Proposed Removal."
6. On February 6, 2018, he disclosed "Vasey's abuse of authority" to Williams and Vasey.
7. On February 12, 2018, he disclosed "Vasey's abuse of authority" to the agency's Special Investigations Unit (SIU).
8. On March 7, 2018, he disclosed "Vasey's abuse of authority" to the agency's Office of Inspector General (OIG).

IAF, Tab 2 at 22-23.

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[2] The factors are: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness' bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen*, 35 M.S.P.R. 453 at 458.

1. Mishandling of the LGA theft investigation

The appellant's first five purported disclosures all related to Vasey's and Williams's alleged mishandling of the LGA theft investigation. Again, the theft was brought to the appellant's attention by a JetBlue security office in July 2016. In an email sent to the appellant on November 7, 2016, the JetBlue security office identified one instance of theft of clothing from baggage. IAF, Tab 28 at 62-63. Two weeks later, the appellant received the following email, "Unfortunately pilferage is trending up again at LGA; a breakdown of the latest incidents is below. Please let me know when you think the camera footage can be reviewed." The email also included an itemized list of seven instances of baggage theft. *Id*. at 61-62. Two days later, by email dated November 23, 2016, the JetBlue security officer provided additional information regarding what had been stolen on each occasion. *Id*. at 60-61.

As he was obligated to do, the appellant notified TAS management of the thefts. He then met with Robert Duffy, Federal Security Director, regarding the thefts on November 23, 2016, the day before Thanksgiving. RF, Tab 11 (track 1). Per agency policy, the suspects were indefinitely suspended, which the appellant believed put the suspects on notice of the investigation. It was evident from the appellant's tone that although he was aware of this "zero tolerance" policy (*see* IAF, Tab 7 at 29), he did not agree with it. As explained by Williams, however, if the suspects were stealing from passengers, TSA could not allow them to continue working in the baggage room. RF, Tab 11 (track 6).

In the interim, by email dated November 21, 2016, the appellant advised Williams and Vasey that he had identified two suspects. He further stated:

> We will aim to download video from the camera early next week to identify additional thefts based on video and theft complaints. I am working with JetBlue security to have PAX [passengers] provide photos of bags from which thefts occurred. (Management will need PAX statements before preparing termination paperwork if arrests cannot be made.)

IAF, Tab 28 at 57. The following week, on November 30, 2016, in an email copied to Vasey, the appellant noted he was working with JetBlue in an effort "to get more descriptions of property from incidents going back to the first of the year." *Id*. at 60. In response, by email, Vasey directed the appellant to obtain search warrants for the residences of the two suspects. *Id*. Vasey did not copy Williams on this email.

The appellant admittedly made no effort to obtain search warrants. Nor did he ever advise Vasey that he did not intend to do so. He testified that he did not seek search warrants because no one knew where the stolen items went. He asserted that TSA had to know where the stolen items had been taken after they were removed from Room 11 in order to obtain a search warrant. RF, Tab 11 (track 1). Thus, in his opinion, there was insufficient probable cause to obtain the warrants. *Id*. On cross-examination, the appellant begrudgingly admitted that he did not share this belief with Vasey, or Williams, until after December 5, 2016. *Id*. (track 3). He attempted to justify his actions by asserting, "They [Vasey and Williams] never explained to me why search warrants were warranted" (*id*.), as though his first- and second-line supervisors were required to justify the lawful directive they issued to him.[3] He admitted he ignored the emails about search warrants because he disagreed with Vasey and Williams and, "They never gave me the courtesy of using my knowledge, skills and abilities." *Id*.

By email dated December 2, 2016, Vasey formally assigned the LGA baggage theft case was to the appellant. IAF, Tab 28 at 64-66. The next day, a Saturday, ignoring Vasey's directive, the appellant sent an email to Williams indicating as follows: "Affirmative. Consent searches. Perhaps we can leverage

[3] The appellant admitted that neither Vasey nor Williams ever instructed him to break the law or lie to a prosecutor or judge in an effort to obtain the search warrants. He further admitted that it was lawful for Vasey and Williams to ask him, an investigator, to talk to a prosecutor about obtaining a search warrant. RF, Tab 11 (tracks 3, 4).

cooperation against staying out of jail and future employment." *Id*. at 69. It is not clear what the appellant was responding to in the affirmative or if there was more text as email appears to be cut off. *Id*.; *see also*, Tab 24 at 80. What is clear is the appellant's disregard for Vasey's instruction to seek search warrants.

Two minutes later, at 11:03 a.m., Williams emailed the appellant as follows, "We need to have an AUSA [Assistant United States Attorney] or ADA [Assistant District Attorney] on speed dial in case they pull a 'no one gets in to see the Wizard,'" meaning if the suspects did not consent to their residences being searched, TSA would contact a law enforcement official in an attempt to obtain search warrants. IAF, Tab 28 at 69; RF; Tab 11 (track 7). In his reply email, sent immediately thereafter, the appellant again failed to express his belief that there was insufficient probable cause necessary to obtain search warrants. Rather, he responded that he would connect with local ADA on Monday morning, the morning of the planned searches. *Id*., Tab 28 at 69. Williams responded, "Perfect! Thanks Mark." *Id*. at 68.

One minute before this response, at 11:05 a.m., Williams sent an email to area TSA agents, including Vasey and the appellant, alerting them that they were "likely to visit some suspects on Monday in NYC [New York]" and that "[i]t may involve consent searches or the execution of search warrants at 2 locations." *Id*. at 71. Williams further noted that the agents should have their body armor and other law enforcement items with them. *Id*.

Next, on Saturday, December 3, 2016 2:38:57 p.m., the appellant emailed Vasey and Williams a draft "Operations Plan: Consent Searches, December 5, 2016," regarding the suspects' residences.[4] IAF, Tab 7 at 52-55. The next morning, at 11:49 a.m., the appellant emailed the team thanking them in advance for agreeing to participate in consent searches, and stated, "Our goal is to

[4] The appellant emailed Williams and Vasey and amended plan on December 4, 2016. IAF, Tab 7 at 48-51.

convince the employees to surrender personal property stolen from the bags of passengers out of a bag room at LGA and take statements if they are willing." *Id*., Tab 28 at 72. Interestingly, despite his fixation on conducting consent searches rather than attempt to obtain search warrants, and his professed extensive planning and preparation, the appellant also noted, "I have all the forms necessary for the two teams except 'consent-to-search' [forms]. If anyone has them, please bring them." *Id*.; RF, Tab 11 (track 1). At the hearing, the appellant proffered no explanation for why he did not have the consent-to-search forms.

On Monday morning, the appellant was the last of the seven team members to arrive at the location he designated for the pre-search briefing. He blamed a three-hour drive in bumper to bumper traffic for his late arrival.[5] RF, Tab 11 (track 1). By the time he arrived, Vasey and Williams had decided that TSA would not attempt to conduct the consent searches.

Vasey recalled that he spoke with Williams before the other agents arrived. They believed the case was not at the stage to ask the suspects to consent to searches, but was at the stage to request search warrants. RF, Tab 12 (track 1). Williams testified that he did not believe the suspects would have consented, so the team needed to be ready to go to the prosecutor to obtain warrants. *Id*., Tab 11 (track 6). However, Vasey advised Williams that the appellant had not completed case work they expected would be done, specifically he had not reviewed all of the camera footage from Room 11 to ascertain when the thefts had occurred and what was taken, like the JetBlue security officer previously had done. Therefore, there would be nothing to show the prosecutor if the suspects did not consent to their residences being searched. *Id*. Such information would have supported TSA's request for search warrants. Consequently, Vasey and

[5] Several times during the hearing the appellant blamed traffic for his inability to complete tasks in a timely manner.

Williams decided not to follow through with the appellant's proposed operations plan. *Id*.

Williams testified that TSA's goal was to a get search warrant or arrest warrant. He believed that based on the volume of thefts, there was sufficient justification for obtaining a warrant, noting that probable cause meant something was more likely to be true than not. RF, Tab 11 (track 6). However, information derived from a review of the Room 11 camera footage would have reinforced the request for a warrant. Accordingly, the appellant was instructed to review all footage and compile a list of stolen items. *Id*.

Initially, the appellant denied that Williams or Vasey ever asked him to review the footage and compile a list of stolen items before December 5, 2016. However, when confronted with his deposition testimony, he admitted that they had.[6] He attempted to justify his discrepant testimony by claiming Williams and Vasey only discussed the idea "in earnest in 2017." RF, Tab 11 (track 3). Not only was the appellant's testimony inconsistent, but it was contradicted by his own emails. In his November 21, 2016 email to Williams and Vasey, the appellant stated, "We will aim to download video from the camera early next week to identify additional thefts based on video and theft complaints." IAF, Tab 28 at 57. Yet, two weeks later, the appellant still had not reviewed camera footage. Similarly, in a November 30, 2016 email that he copied to Vasey, the appellant stated, "I'll try to get more descriptions of property from incidents going back to the first of the year." *Id*. at 60. Based on the foregoing, I find that the appellant was asked to review all Room 11 footage and summarize the thefts prior to December 5, 2016. *Hillen*, 35 M.S.P.R. at 458.

The appellant also argued that a review of all Room 11 recordings would have provided probable cause justifying a search warrant because he had no

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[6] On several occasions during his testimony, the appellant was impeached with testimony from his August 20, 2019 deposition. *See* IAF, Tab 27 at 25.

information regarding where the stolen items had been taken. Yet, he asserted that he could have used the few "snippets" of video he had been able to view on his cell phone to convince the suspects to consent to the searches. Nonetheless, he admitted that he only speculated that there was a 50 percent chance they would have consented. RF, Tab 11 (track 1).

The appellant also averred that he spoke to a Brooklyn AUSA and the Queens County DA's office regarding his operations plan. However, he admitted that he told them that TSA's investigation did not rise to the level of search warrants. RF, Tab 11 (track 1). The appellant is not a lawyer, but reached this legal conclusion, rather than allowing the AUSA or ADA to do so.

Williams later spoke to the Brooklyn AUSA. The AUSA confirmed that she had spoken with appellant. However, she advised him to talk to the Queens DA because the nature of the theft was below the AUSA's threshold for prosecution. The AUSA also confirmed that the appellant did not request search warrants. RF, Tab 11 (track 6).

The appellant finally began reviewing all Room 11 camera footage on December 7, 2016. He estimated, "It may take me several days to get through it all in order to identify incidents of observable thefts" and document the thefts by date and time. IAF, Tab 28 at 73-74. In actuality, it took him until January 10, 2017 to complete this task. *Id*. at 75-77. The appellant testified it was time-consuming, meticulous work for which he did not have time, but did not articulate what else he was working on during this time period that stretched his estimated "several days" into more than one month. He further asserted that he was not given any help to complete the review (RF, Tab 11, track 2), but conceded on cross-examination that on December 7, 2016, Williams offered him help, which he declined. *Id*. (track 3); IAF, Tab 28 at 73. He also admitted that had the suspects agreed to the consent searched, it would have saved him a significant amount of time and effort. RF, Tab 11 (track 3).

In his OSC complaint, the appellant claimed, "Ultimately, because Mr. Williams and Mr. Vasey botched the investigation, no arrests were made and no stolen items recovered." IAF, Tab 2 at 23. At the hearing, he testified that after his discussion with Williams and Vasey on December 5, 2016, he knew "the chance for an arrest and conviction were lost forever." . RF, Tab 11 (track 3). However, he already had admitted on cross-examination that the two TSOs ultimately were prosecuted. *Id*. Williams, Darci Bobo, the appellant's third-line supervisor, and John Busch, then the Director of the Investigations Division and the appellant's fourth-line supervisor, corroborated this testimony. *Id*. (track 6); Tab 12 (tracks 3, 4). The appellant reluctantly agreed that the agency mission had been accomplished with these prosecutions, but complained, "I got no credit." All my hard work was forgotten." *Id*., Tab 11 (track 3).

The appellant contended he first disclosed what he deemed to be Williams's and Vasey's mishandling of the theft investigation on December 5, 2016 "during the investigation." IAF, Tab 2 at 22. At the hearing, he elaborated that after arriving at the meeting point, Williams and Vasey summoned him into an office and asked, "Where's your head at." RF, Tab 11 (track 1). A discussion then ensued whether the investigation had progressed to the point that merited search warrants. Williams believed it had, but the appellant maintained it had not. *Id*. Williams and the appellant also debated the propriety of using a *Garrity* warning versus a *Kalkines* warning.[7] *Id*. (tracks 1, 6).

When asked on cross-examination whether the discussion was about different investigative strategies, the appellant quibbled and replied, "Well, legal

[7] A *Garrity* warning advises a federal employee that any statement he gives under the threat of discipline or discharge cannot be used against him in a subsequent criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493 (1967). Under *Kalkines*, an employee cannot be disciplined for remaining silent unless he is informed that his responses and their fruits cannot be used against him in a criminal matter. *Kalkines v. U.S.*, 473 F.2d 1391 (Ct. Cl. 1973).

concepts; let's call it that." RF, Tab 11 (track 3). When asked, "Didn't you use the word strategy at your deposition," the appellant responded, "Maybe." Then when asked, "Did you misspeak at your deposition," he replied, "Possibly." As demonstrated during this exchange, the appellant's demeanor on cross-examination often was confrontational and smug.

While disclosures made to the alleged wrongdoer are covered under the WPEA (*see Day v. Department of Homeland Security*, 119 M.S.P.R. 589 (2013)), I find that the appellant's December 5, 2016 discussion about investigative strategy with Williams and Vasey did not amount to a protected disclosure. Even under the expanded protections afforded by the WPEA, general philosophical or policy disagreements with agency decisions or actions are not protected unless they separately comprise a protected disclosure of one of the types of wrongdoing set forth in 5 U.S.C. § 2302(b)(8)(A). *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 8 (2015). Discussion among employees and supervisors regarding different possible courses of action is healthy and normal in any organization. *Reid v. Merit Systems Protection Board*, 508 F.3d 674, 678 (2007).

Next, the appellant contended that during his April 12, 2017 mid-year review with Williams and Vasey, he again discussed the LGA Baggage Room 11 theft investigation. IAF, Tab 23 at 12, ¶¶ 12-13; RF, Tab 11 (track 2). Although he cited to no document to support his assertion, the appellant testified that when the subject of the LGA theft investigation arose, the mid-year review meeting "got heated." He expounded he knew that Williams and Vasey "didn't know what they were doing" and that their investigative backgrounds were "very scant." *Id*. (track 3). When confronted with his deposition testimony, however, the appellant admitted that he did not know about either of their investigative backgrounds. *Id*. Despite such admission, during his testimony, the appellant frequently maligned the investigatory skills of Vasey and Williams, claiming they lacked the knowledge and experience to conduct criminal investigations.

The appellant asserted that he again raised the issue regarding Williams's and Vasey's purported mishandling of the theft investigation for a third time during his quarterly review conducted on the July 25, 2017. As they had for his mid-year review, Williams and Vasey traveled to the appellant's Boston office for the quarterly review. RF, Tab 11 (track 2). In addition to receiving his review, the appellant was issued an improvement period notice (IPN), which gave him 60 days to demonstrate acceptable performance. *Id*.; Tab 7 at 38-41. During his testimony, the appellant offered little evidence concerning what was discussed about regarding the LGA baggage theft investigation. Instead, the focus of his testimony was his belief that the IPN "was absolutely not justified," was "manufactured" by Williams and Vasey, and that the "goals were absolutely not attainable" because by Williams and Vasey rejected everything he submitted. RF, Tab 11 (track 2).

A memorandum to file prepared by Williams shortly after the July 25, 2017 review reflects that the LGA baggage theft case was discussed. IAF, Tab 7 at 34-37; RF, Tab 11 (track 6). Williams memorialized that the appellant accused both Williams and Vasey of causing him to "lose" the LGA Baggage Room 11 thefts case on December 5, 2016 when because they did not agree with his plan to conduct consent searches before the appellant had completed a thorough review of the Room 11 surveillance video. Williams further related that the appellant questioned Williams and Vasey about their investigative experiences and experience with conducting searches and obtaining search warrants. Williams noted that he and Vasey had extensive experience in writing, obtaining and executing federal and state search and arrest warrants, with a combined number in the hundreds. *Id*. at 35. Thus, this memorandum confirms that the appellant did raise his issues with the handling of the baggage theft investigation during his July 25, 2017 quarterly review.

Consistent with what Williams memorialized, it was evident from the substance of his testimony, and the manner in which he testified, that the

appellant believed he possessed superior investigatory skills compared to Williams and Vasey. The appellant has a Master's in Criminal Justice. He attended Basic Criminal Investigator School at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. He also received training at the Secret Service School in Beltsville, Maryland, before serving as a Secret Service agent for 20 years, including 16 years as a supervisor. RF, Tab 11 (track 1).

Vasey, too, worked as a Secret Service agent. He served for over 22 years, from April 1976 to September 1998. The then worked as a law enforcement officer for the Department of Justice, Office of Inspector General from September 1998 to October 2010, when he entered on duty with the TSA's Office of Inspection, where he remained until his retirement. RF, Tab 12 (track 1); IAF, Tb 32 at 54-56 (Q9, A9). Williams has a Bachelor of Science degree in Criminal Justice. He possessed 15 years of federal law enforcement experience before entering on duty with TSA as the SAC for the Northeast Region in May 2015. RF, Tab 11 (track6). Williams also attended Basic Criminal Investigator School at FLETC. As such, the appellant's estimation of his own skills notwithstanding, he adduced no evidence that Williams and Vasey were not qualified for their positions or otherwise incompetent.

The appellant claimed his fourth disclosure was contained in a September 11, 2017 email he sent to Bobo. IAF, Tab 2 at 23; Tab 7 at 28-33. The email opened with, "Please accept this notification as an official complaint of mismanagement and retaliation lodged against SAIC Tom Williams and DSAIC Jeff Vasey by me, and take whatever action you deem appropriate." *Id*. at 28. The appellant asserted, "The mismanagement was amplified on December 5, 2016. On that date, a dispute between them and me [sic] arose over investigative

strategy[8] in the midst of an on-going investigation," referring to the LGA baggage theft case. *Id*. He elaborated,

> The mismanagement was amplified on December 5, 2016. On that date, a dispute between them and me arose over investigative strategy in the midst of an on-going investigation. During the midyear review not long after, they refused to take ownership of actions they took in a theft investigation that crippled my case. Their decisions and actions denied me the satisfaction of two arrests and two convictions by the close of 2016. My sin was holding them to account for their decisions and actions.

Id. at 28. He claimed that as a result of this discussion, Vasey and Williams buried him with work. *Id*.

The appellant explained to Bobo that as part of his investigation, he had a surveillance camera installed in the baggage room for approximately 30 days and it recorded a total of 23 thefts attributable to two employees. He expressed his belief that, "Once management placed the employees on suspension, opportunities to observe them in REAL TIME pilfering checked baggage was lost." IAF, Tab 7 at 29. He contended,

> Nevertheless, there was plenty of 'reasonable suspicion' that stolen property could be recovered from each residence. However, Williams and Vasey mistakenly and foolishly believed that the mere 'suspicion' rose to the level meriting federal search warrants.

Id. The appellant contended, "I knew better based upon experience and knowledge of case law – federal search warrants require "probable cause." He related that after speaking with the AUSA duty assistant, who referred him to the Queens District Attorney's Office (QDAO), "I prepared for the next best thing – 'consent searches.'" *Id*. He then prepared the operations plan for the consent searches. *Id*.

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[8] This document confirms that the appellant believed his disagreement with Williams and Vasey concerned investigative strategy.

As related in his email, it seemed as if the appellant had spoken to the DA's office prior to arriving at his decision to conduct consent searches. However, as noted in his Saturday, December 3, 2016 email to Williams, the ADA had not yet returned his call so he intended to "connect" with her on Monday morning, the morning when the searches were to be conducted. IAF, Tab 28 at 69. Moreover, the appellant did not explain to Bobo that he told the ADA there was no probable cause (RF, Tab 11, track 3), rather than allow her, the legal expert, to make a determination. The appellant also failed to mention that Williams had considered conducting consent searches, as evidenced by his December 3, 2016 email to the appellant in which he mentioned a contingency plan in case "no one gets in to see the Wizard." *Id*. Once Williams learned that the appellant had only reviewed limited portions of the Room 11 camera footage, however, he concluded that the suspects likely would not consent. RF, Tab 11 (track 6).

In his email, the appellant also set forth three items about which, in his opinion, Williams and Vasey were mistaken: that the case merited federal search warrants; the meaning of a *Garrity* warning; and how to secure an arrest warrant. The appellant wrote, "They thought they knew better, but they didn't. They didn't think I knew better, but I did." IAF, Tab 7 at 30. He then complained about having to spend the last three weeks of December 2016 "meticulously viewing and documenting 30 days of video footage, often in slow motion, day-by-day, hour-by-hour, minute-by-minute, and second-by-second." *Id*.

The appellant also recounted that at his July 25, 2017 quarterly review, "I reminded them [Williams and Vasey] of what is written above," referencing the earlier portion of his email criticizing his supervisors and the investigative strategy they pursued in connection with the baggage theft case. IAF, Tab 7 at 32.

Bobo responded to the appellant's email on September 14, 2017. IAF, Tab 7 at 23. Bobo testified that she considered the appellant's email to be a

performance issue, not a protected disclosure. RF, Tab 12 (track 3). In fact, a significant portion of the appellant's five-page, single-spaced email dealt with his workload and Williams's and Vasey's assessment of his performance. IAF, Tab 7 at 28-33. Bobo also testified that after receiving the appellant's email, she instructed Williams to have a discussion with the appellant regarding the proper way to handle searches and take direction. Additionally, she told Williams to instruct the appellant to follow supervisory directions even if he disagreed. Bobo's instruction was consistent with *Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 11 (2006), which holds that an employee should conform to a lawful instruction and challenge it later if he thought the instruction was wrong. While this is essentially what the appellant did, at the hearing he admitted that neither Vasey nor Williams ever instructed him to violated the law. RF, Tab 11 (track 3).

In addition to the appellant's email substantiating that his disagreement with Williams and Vasey was about investigative strategy, it also demonstrates his utter lack of respect for Williams and Vasey. The appellant's disdain was evident from his demeanor, tone and choice of words, repeatedly referring to Williams and Vasey as foolish and ignorant, as well as lacking in knowledge and experience. On several occasions, rather than answer the question posed, the appellant attempted to interject negative information about Vasey. In fact, throughout his testimony, the appellant tended to over-explain his actions and digress by offering extraneous information unrelated to the alleged disclosures and adverse personnel actions. Even when asked straightforward questions, his responses were rambling. On cross-examination, he became even more evasive and bombastic in his answers. All of these factors detracted significantly from his credibility. *Hillen*, 35 M.SP.R. at 462.

Lastly, the appellant contended that his November 21, 2017[9] response to an October 26, 2017 notice of proposed removal[10] constituted his fifth disclosure about Williams's and Vasey's supposed mishandling of the baggage theft investigation. IAF, Tab 2 at 23; Tab 6 at 41-50; 54-59. In his response, the appellant admitted that he questioned Williams and Vasey "about their knowledge of criminal law, procedures, and the use of a *Garrity* warning (non-custodial rights)." *Id*. at 44. The appellant reiterated his belief that, "Mr. Williams and Mr. Vasey had little understanding of the probable cause required to obtain search warrants, the use of warnings, and the indictment process." *Id*. He asserted that by repeatedly questioning and opposing Williams's and Vasey's "erroneous insistence that search warrants were needed," he engaged in activity protected under the WPA. *Id*.

In his OSC complaint, the appellant again disparaged Williams' and Vasey's investigative knowledge and acumen. During the investigation, he told Williams and Vasey that "their failure to recognize basic criminal procedure would jeopardize the investigation." IAF, Tab 2 at 23. He then claimed that "because Mr. Williams and Mr. Vasey botched the investigation, no arrests were made and no stolen items recovered." *Id*. But, the TSOs were arrested and prosecuted. As such, his assertion that the "failure to secure these arrests further supports [his] reasonable belief that proper and correct investigative decisions were not adequately taken into consideration in line with TSA rules, regulations, and procedures" is unfounded. *Id*. at 24. 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. The

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[9] In his OSC complaint, the appellant asserted that his response was dated November 16, 2017. IAF, Tab 2 at 23.

[10] The proposal notice was issued based on the results of the appellant's performance during his 60-day IPN period. IAF, Tab 6 at 54-59.

appellant's purely subjective belief that he "knew better" than Williams and Vasey does not constitute a reasonable belief. *Giove v. Department of Transportation*, 230 F.3d 1333, 1338 (Fed. Cir. 2000). The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct. *Lachance*, 174 F.3d at 1380-81.

Even acknowledging that proceeding with the consent searches was a valid investigative strategy, Williams's and Vasey's decision not to proceed in that manner did not rise to the level of gross mismanagement. Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 16 (2007). A disclosure questioning management decisions that are merely debatable or mere negligence, with no element of blatancy, is not protected as a disclosure of gross mismanagement. *Sazinski*, 73 M.S.P.R. at 686-87 (citation omitted).

As noted above, the appellant speculated that there was only a 50 percent chance the suspects would have agreed to the consent searches. RF, Tab 11, track 1. Nonetheless, he disagreed with the decision of Williams and Vasey not to conduct consent searches. At most, his disagreement over the investigative strategy employed by Williams and Vasey constituted a general philosophical disagreement, not a protected disclosure. *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 7 (2016). Despite his disagreement over strategy, the agency's mission was accomplished with the prosecution of the two TSOs, which the appellant begrudgingly acknowledged. RF, Tab 11 (track 3). Furthermore, it was evident throughout his testimony that the appellant's actual complaint was the length of time it took him to review the camera footage and the fact that he did not get any credit for the prosecution of the TSOs.

Based on the foregoing, I find that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant would not have reasonably concluded that the actions of Williams and Vasey evidenced

wrongdoing as defined by the WPA. Consequently, none of the appellant's ostensible disclosures concerning Williams's and Vasey's handling of the LGA baggage theft investigation constitute protected whistleblowing.

2. Vasey's abuse of authority

The appellant's remaining three alleged disclosures (six through eight; IAF, Tab 2 at 23) related to Vasey's supposed abuse of authority.[11] The sixth purported disclosure was made on February 6, 2018 after Bobo issued a January 25, 2018 notice of a decision regarding the appellant's October 26, 2017 notice of proposed removal. After reviewing documents related to the IPN, the proposal notice, and the appellant's response, Bobo determined that although the appellant's performance deficiencies outlined in the proposed removal were significant, she believed the mitigating factors outweigh any aggravating factors. Therefore, she decided removal was not warranted and issued no disciplinary action. . IAF, Tab 6 at 38-40. *Id*. Nevertheless, Bobo testified she was concerned with the appellant's investigative judgment and performance, but believed he could improve with training. RF, Tab 12 (track 3).

Because, as Bobo noted, the appellant's performance was deficient with respect to one of his performance goals (IAF, Tab 6 at 66, 80-83, 54-59, 38-40), Williams and Vasey met with him on February 6, 2018 to discuss a remediation plan pursuant to which he was given an additional opportunity to improve his performance during the 2018 performance year. The plan included sending the appellant to three training courses and providing him with mentoring for 30 days. *Id*. at 36-38. At some point in the meeting, the appellant asked Williams and Vasey if they were audio-recording the meeting. Williams and Vasey denied

[11] An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results personal gain or advantage to himself or to preferred other persons. *Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 11 (2011).

recording the meeting. RF, Tab 11 (track 2). The appellant admitted that he had no proof that Vasey and Williams had secretly recorded him. *Id*. (track 4).

During the remediation plan meeting, a TSA Human Resources representative participated via telephone. RF, Tab 11 (tracks 4, 6). She explained the plan to the appellant. *Id*. (track 4). Once she hung up, the appellant accused Vasey of supposed misconduct involving his ex-wife and an ex-girlfriend. Specifically, he asked if Vasey had hit his ex-wife with open hand, closed fist, beer or whiskey bottle. When asked, "Did you make that up; Vasey does not even drink," the appellant responded, "Meh. I just asked him. He could have answered." *Id*. (track 4).

The appellant further contended that Vasey had stalked his ex-girlfriend, an AUSA. RF, Tab 11 (track 2). According to the appellant, Vasey misused his authority and credentials to get information about the woman from a hotel clerk, may have crossed state lines, and may have taken photographs that were anonymously sent to the Department of Justice's Inspector General.[12] *Id*.; Tab 32 at 16.

When asked if the allegations were from more than 20 years ago, the appellant admitted they were "stale, old allegations; yes, correct." RF, Tab 11 (track 4). The appellant further admitted that he had learned about the allegations in 2015. The appellant offered no proof in support of his allegations. He merely indicated he learned about the accusations from two different unnamed sources. *Id*. (tracks 2, 4). At his deposition, when asked what proof he had to support these accusations, he admitted, "I didn't have any evidence. I had none. I had zero." IAF, Tab 21 at 15 (page 261, lines 7-9).

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[12] That same day, Vasey reported the appellant's "harassing behavior and inappropriate conduct" and "unequivocally denied" the allegation to the agency's Office of Inspection. IAF, Tab 32 at 64-65.

As a result of leveling these allegations against Vasey, on February 7, 2018 Williams issued the appellant a letter of counseling. IAF, Tab 6 at 33-34. The appellant signed the letter on February 14, 2018. *Id*. at 34. However, this letter of counseling had been rescinded by letter dated February 7, 2019. *Id*. at 21. As indicated in the rescission letter, a new letter of counseling was issued. *Id*. The new letter, also dated February 7, 2019, was substantively the same as the prior letter. *Id*., *cf*., at 22-23; 33-34. The letter reminded the appellant that he was responsible for exercising courtesy and tact in dealing with fellow workers and supervisors, as well as for "[s]upporting and assisting in creating a productive and hospitable model work environment." *Id*. at 33. It was not a disciplinary action and was not placed in the appellant's official personnel folder.

On February 7, 2018, the day after the remediation plan meeting, the appellant sent an email to Bobo in which he related the accusations he had directed to Vasey during the meeting. IAF, Tab 32 at 8-9. In the response she sent the next morning, Bobo indicated that the agency would review the appellant's allegations and proceed accordingly, but asked the appellant for details, including, "when these events occurred, where did they occur, any witnesses to the events and any additional info regarding these allegations, etc." *Id*. The appellant provided no details.

The agency considered the appellant's allegations against Vasey to be serious and, on February 8, 2018, assigned Special Agents Christopher Leeman and Keith Edwards, Office of Inspection, to investigate. IAF, Tab 32 at 7-16. From February 8 to April 2, 2018, Leeman and Edwards conducted formal interviews and attempted to obtain official law enforcement and personnel records regarding all three allegations raised by the appellant. These allegations included not only the claims about Vasey's ex-wife and ex-girlfriend, but also the claim that "Vasey unlawfully and inappropriately audio recorded one or more discussion(s) with Besanceney, without his knowledge or permission." *Id*. at 4, 7.

As part of their fact finding, Leeman and Edwards interviewed the appellant on February 12, 2018, the date of his alleged seventh protected disclosure. IAF, Tab 2 at 23; Tab 32 at 18-19. During his interview, the appellant admitted he did not have direct knowledge or possess direct evidence of to support his allegations regarding Vasey's ex-wife and former girlfriend. *Id*. at 19. Rather, he was relying on "sources" he refused to reveal. *Id*.

On February 6, 2018, the appellant also provided a sworn statement. IAF, Tab 32 at 20-25. When asked what he intended on February 6, 2018 by asking Vasey in front of Williams if Vasey, had hit his ex-wife with an open hand, a closed fist, a beer bottle, or a whiskey bottle, wife," he admitted, "My intention was to challenge Vasey, and Williams, to face facts, rather than only [allow them to] mischaracterize my integrity, work ethic, and work product. *Id*. at 22. In an email he sent to Leeman and Edwards on February 14, 2018, the appellant admitted that the "domestic [incident] and stalking allegations are stale and dated." *Id*. at 50. In fact, he averred they were from "circa 1997." *Id*. at 18, 21.

Leeman interviewed an assistant in the police department in the state where the appellant claimed Vasey had lived at the time of the incident involving his ex-wife. The assistant also conducted a search of the department's automated records system, which uncovered no criminal records regarding Vasey or the alleged incident. IAF, Tab 34 at 39-40. The assistant noted, however, that calls for police service were only maintained for three months. *Id*.

Similarly, Leeman contacted the DOJ OIG and requested that they check available databases to determine whether any responsive record(s) supported the stalking allegation. IAF, Tab 34 at 42. The DOJ OIG related it had no records relevant to or supporting, in whole or in part, an allegation that "Vasey misused his official position as a Federal Law Enforcement Officer with the DOJ-OIG to investigate or 'stalk' DOJ Attorney [] without official cause or predication." *Id*. at 43-46. Ultimately, the investigation was closed on April 4, 2018 after Leeman

and Edwards were unable to substantiate any of the appellant's allegations against Vasey.[13] *Id*. at 4-5.

On March 7, 2018, the appellant filed a complaint with the agency's OIG in which he reiterated his claims about Vasey's alleged domestic abuse and stalking incidents as well as his claim that Vasey and Williams had improperly recorded him without his consent. IAF, Tab 30 at 70-74. Again, at the hearing, the appellant admitted he had no evidence of a "covert" recording. RF, Tab 11 (track 4). When asked at his deposition about his contention that Vasey and Williams had audio-recorded meetings, the appellant conceded that he had not seen or heard any recording devices. IAF, Tab 21 at 20 (page 236, lines 1-15). Based on his own admissions that he had no proof of being audio-recorded by Vasey or Williams, I find he did not possess the reasonable belief necessary that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8).

Similarly, regarding Vasey's alleged abuse of authority, the appellant admitted he had no evidence except for the limited information he obtained from unnamed sources. 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 contact these individuals in an effort to obtain additional information. RF, Tab 11 (track 4). 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. There were no essential facts known to and readily ascertainable by the appellant regarding these accusations. Thus, no disinterested observer could have reasonably concluded the unsubstantiated accusations again Vasey constituted protected disclosures. Rather, these disclosures were based on mere rumors, which are the type of disclosure the WPA protects. *See Johnson*, 104 M.S.P.R. at ¶ 15.

[13] The entire investigation is found at IAF, Tab 32 at 4 through Tab 34 at 46.

In his OSC complaint, the appellant asserted that OSC did not consider whether his OIG disclosure was protected under 5 U.S.C. § 2302(b)(9), contending that such a claim was easier to prove than an allegation under § 2302(b)(8) because the former did not limit protected disclosures to those that met the "reasonable belief" test as required by § 2302(b)(8). He argued that all disclosures to the OIG were protected regardless of whether they were reasonable. IAF, Tab 2 at 37 n.1. Although § 2302(b)(9)(C) makes it a prohibited personnel practice for an agency to take a personnel action because an employee made a disclosure to the agency's OIG, the mere act of speaking or filing a complaint with OIG is insufficient. The information provided to the OIG must rise to the level of whistleblowing. *See Schlosser v. Department of the Interior*, 75 M.S.P.R. 15, 21 (1997). The appellant's unsupported allegations about Vasey do not rise to the level of protected whistleblowing disclosures. *See Huffman v. Office of Personnel Management*, 92 M.S.P.R. 429, ¶ 10 (2002) (reporting unsubstantiated rumors does not satisfy the reasonable belief requirement).

Findings

As detailed above, I find that none of the disclosures the appellant raised before OSC are protected under the WPA because none actually disclosed any alleged wrongdoing by TSA or its employees. Fundamental to the nature of a protected disclosure is that it "blows the whistle" by reporting the commission of one of the types of wrongdoing enumerated in 5 U.S.C. § 2302(b)(8)(A). Here, the appellant's alleged disclosures constituted mere disagreements with Williams's and Vasey's choice of investigative strategy, and the recounting of unsubstantiated accusations against Vasey, without an accompanying showing that such matters constituted a report of wrongdoing of the type specified by the statute. The appellant's complaints did not disclose a violation of a law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority;

or a substantial and specific danger to public health or safety. Consequently, his request for corrective action is denied.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /s/
Kara Svendsen
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **November 1, 2021**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

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

NOTICE OF LACK OF QUORUM

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

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

Criteria for Granting a Petition or Cross Petition for Review

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

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

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be

received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

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

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

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

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

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

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

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

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

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U.S. MERIT SYSTEMS PROTECTION BOARD

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2022-1271

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of Mark Besanceney *v.* Department of Homeland Security, MSPB Docket No. PH-1221-19-0255-M-1, and that the administrative record is under my official custody and control on this date

on file in this Board

January 13, 2022
Date

Lisa L. White for
Jennifer Everling
Acting Clerk of the Board

CERTIFICATE OF SERVICE

I hereby certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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Respondent

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U.S. Department of Justice
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thee.matthews@usdoj.gov

January 13, 2022
(Date)

Lisa L. White for
Jennifer Everling
Acting Clerk of the Board