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 Of The Merit Systems Protection Board In No. PH-1221-19-0255-M-1

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT, DEPARTMENT OF HOMELAND SECURITY

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

REGINALD T. BLADES, JR.
Assistant Director

JANA MOSES
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-2279
Email: jana.moses@usdoj.gov

Attorneys for Respondent

November 16, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel is aware that Mr. Besanceney had a previous appeal before this Court, *Besanceney v. M.S.P.B.*, No. 20-1869 (Fed. Cir.), in which he sought review of a Merit Systems Protection Board (MSPB) decision dismissing his whistleblower individual right of action appeal for lack of jurisdiction. In a January 22, 2021 order, this Court remanded the matter to the MSPB. ECF No. 23. We are unaware of any other case pending in this or any other court that will directly affect, or be directly affected by, this Court's decision in this appeal.

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 Of The Merit Systems Protection Board
In No. PH-1221-19-0255-M-1

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT, DEPARTMENT OF HOMELAND SECURITY

STATEMENT OF THE ISSUES

1. Whether the Merit Systems Protection Board's (MSPB or board) committed reversible error by stating that an employee who makes a disclosure to the agency's Office of Inspector General (OIG) must possess a reasonable belief of agency wrongdoing to establish protected whistleblowing under the Whistleblower Protection Act (WPA), notwithstanding that the outcome of the case would not have been different absent the judge's error, because no actionable personnel action exists.

2. Whether substantial evidence supports the board's conclusion that petitioner Mark Besanceney failed to establish a *prima facie* case of reprisal for whistleblowing because no reasonable person in his position would have believed that the alleged protected disclosures revealed agency wrongdoing, as contemplated by the WPA.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

Mr. Besanceney challenges the board's decision denying his individual right of action appeal against the Department of the Homeland Security, Transportation Security Administration (TSA or agency). *Besanceney v. Dep't of Homeland Security*, PH-1221-19-0255-M-1 (MSPB Sept. 27, 2021) (Initial Decision). Appx1-29.

II. Employment Background

A. Mr. Besanceney's Employment With TSA

Mr. Besanceney began his career with TSA in August 2003 as a Deputy Special Agent in Charge. Appx950-951. In 2008, he accepted a nonsupervisory criminal investigation position. Appx952. In May 2015, TSA assigned him to a New York office to serve as a Special Agent assigned to TSA's Investigations Division. Appx956. His first-line supervisor was Deputy Supervisory Agent in Charge Jeffrey Vasey, and his second-line supervisor was Supervisory Agent in

Charge Thomas Williams. Appx957.

In 2016, TSA assigned Mr. Besanceney to a case involving complaints about thefts of personal property from checked baggage belonging to airline passengers departing from LaGuardia Airport (LGA). Appx3; Appx386. TSA installed a surveillance camera in LGA Baggage Room 11, where TSA employees were inspecting checked baggage. *Id.* Footage from the surveillance camera revealed that two TSA employees were repeatedly rummaging through airline passengers' checked baggage. *Id.* One of the TSA employees was observed removing personal effects from the checked baggage and placing those items in a bag belonging to the other TSA employee. *Id.* Thereafter, TSA opened an official investigation and assigned Mr. Besanceney to serve as the case agent. *Id.* Relying upon the surveillance camera evidence, TSA suspended the two employees who the agency then identified as criminal suspects. *Id.*

Mr. Besanceney devised an operations plan to execute consent searches on December 5, 2016, to recover the stolen property and eventually pursue the criminal prosecution of the two suspects. Appx4; Appx205-207. At the December 5 pre-search briefing, Mr. Vasey and Mr. Williams learned that Mr. Besanceney had disregarded an assignment to review the surveillance footage and catalog his findings for an Assistant United States Attorney's (AUSA) or district attorney's review of whether the evidence could support a search warrant.

Appx1134, Appx1137-1138, 1141-1142. Consequently, Mr. Vasey and Mr. Williams abandoned the operations plan, concluding that the case was neither prosecution nor warrant ready. Appx4; Appx1142-1143. The rationale was that if the suspects had declined to consent to the searches or speak with investigators, there was insufficient casework completed to obtain a warrant. *Id.* Mr. Vasey and Mr. Williams again tasked Mr. Besanceney with reviewing the surveillance footage, which he did not complete until over a month later. Appx4; Appx414-418.

In a February 6, 2018, letter, Mr. Williams memorialized a remediation plan to address concerns with Mr. Besanceney's investigative judgment and deficient work performance. Appx23, Appx77-79. Among other requirements, the remediation plan included a directive to attend three training courses. Appx78.

On February 7, 2018, Mr. Williams issued a counseling letter to Mr. Besanceney to address his "inappropriate conduct towards . . . Vasey" that occurred after the February 6, 2018, meeting to discuss the remediation plan. Appx75. Mr. Williams explained that he had observed Mr. Besanceney "verbally berate[] [Mr. Vasey] in a mean spirited, unprofessional and malicious manner," demonstrating "a failure to exercise courtesy and tact in dealing with [his] supervisor." Appx75-76. The agency rescinded that letter on February 7, 2019 and issued a new counseling letter on the same day, containing substantively

identical language. Appx25, Appx63-65.

B. Alleged Protected Disclosures

On June 25, 2018, Mr. Besanceney filed a complaint with the Office of Special Counsel (OSC) alleging whistleblower retaliation and identifying eight alleged protected disclosures. Appx626-639; SAppx1-28[1]. He asserted that five of the disclosures concerned TSA's mishandling of the LGA theft investigation, and that the other three disclosures concerned Mr. Vasey's purported abuse of authority regarding other matters, as follows:

1. December 5, 2016, disclosed Messrs. Williams' and Vasey's "mishandling of the LGA Baggage Room 11 Thefts "during the investigation."

2. April 2, 2017, disclosed Messrs. Williams' and Vasey's "mishandling of the LGA Baggage Room 11 Thefts during his quarterly review."

3. July 25, 2017, disclosed Messrs. Williams' and Vasey's "mishandling of the LGA Baggage Room 11 Thefts during his mid-year review."

4. September 11, 2017, disclosed Messrs. Williams' and Vasey's "mishandling of the LGA Baggage Room 11 Thefts via email to [TSA Deputy Director] Darcy Bobo."

5. November 16, 2017, disclosed Messrs. Williams' and Vasey's "mishandling of the LGA Baggage Room 11 Thefts in response to the Notice of Proposed Removal."

[1] "SAppx_" refers to the pages in the supplemental appendix filed with this brief, pursuant to Fed. Cir. R. 30(e)(2). Despite our requests pursuant to Fed. Cir. R. 30(b), counsel for Mr. Besanceney failed to agree to add these supplemental pages to the designated material.

6. February 6, 2018, disclosed Mr. "Vasey's abuse of authority" to Messrs. Williams and Vasey.

7. February 12, 2018, disclosed Mr. "Vasey's abuse of authority" to the agency's Special Investigations Unit (SIU).

8. March 7, 2018, disclosed Mr. "Vasey's abuse of authority" to TSA's Office of Inspector General (OIG).

Id. He further claimed that he was subjected to numerous adverse personnel actions. *Id.*

By letter dated October 18, 2018, OSC advised Mr. Besanceney that it had made a preliminary determination to end its investigation, noting that the "investigation disagreement" underlying his first alleged protected activity does not constitute a protected disclosure, under 5 U.S.C. § 2302(a)(2)(D), because the event was merely a disagreement over a policy approach. Appx4-5; SAppx29-30. Finding no protected disclosures, OSC did not evaluate most of the personnel actions Mr. Besanceney had presented, reasonably so, because there can be no retaliation absent a protected disclosure. OSC did consider that Mr. Besanceney had received a counseling letter following his disclosure to the OIG, but found that the letter did not constitute a personnel action under 5 U.S.C. § 2302(a), and therefore, declined to take any action on his complaint. *Id.* In its final determination, after considering Mr. Besanceney's response letter, OSC reiterated its rationale for closing the matter. Appx5; SAppx31-34, SAppx35-37.

Mr. Besanceney's MSPB individual right of action (IRA) appeal followed.

C. Board And Court Proceedings

In an initial decision dated April 9, 2020, the board dismissed the IRA appeal for lack of jurisdiction, without holding the requested hearing. Appx882-943. On June 10, 2020, Mr. Besanceney filed a petition for review in this Court. *See Besanceney v. M.S.P.B.*, No. 20-1869 (Fed. Cir.). On January 22, 2021, this Court granted the board's motion to remand the case for a new determination of whether Mr. Besanceney made a nonfrivolous allegation of a protected disclosure based solely on his filings. *Id.*, ECF No. 23.

On remand, the board conducted a two-day hearing. Appx944, Appx1194. In a September 27, 2021, initial decision, the board denied Mr. Besanceney's IRA appeal. Appx1-36. The administrative judge found that "none of the disclosures [Mr. Besanceney raised before OSC] are protected under the Whistleblower Protection Act (WPA) because none actually disclosed any alleged wrongdoing by TSA or its employees." Appx28. The administrative judge also found that Mr. Besanceney's "alleged disclosures constituted mere disagreements with Messrs. Williams's and Vasey's choice of investigative strategy, and the recounting of unsubstantiated accusations against Mr. Vasey, without an accompanying showing that such matters constituted a report of wrongdoing of the type specified by the statute." *Id.* The administrative judge determined that Mr. Besanceney'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." Appx28-29. For those reasons, the administrative judge denied Mr. Besanceney's request for corrective action. Appx29. The initial decision became final on November 1, 2021. *Id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

The administrative judge correctly concluded that Mr. Besanceney failed to demonstrate that he made any protected disclosures. Substantial evidence supports the board's determination that the five disclosures regarding the LGA baggage theft investigation merely constituted disagreements with his supervisors' choice of investigative strategy. Ample record evidence also supports the board's finding that Mr. Besanceney's remaining three disclosures involved the recounting of admittedly unsubstantiated accusations against his supervisor. Accordingly, the board correctly concluded that none of Mr. Besanceney's disclosures met the standard set forth in the WPA. Indeed, as the board correctly found, no disinterested observer with knowledge of the essential facts known to and readily ascertainable by Mr. Besanceney would reasonably conclude that his disclosures revealed a violation of a law, rule, or regulation; gross mismanagement; a gross waste of funds; or an abuse of authority.

Mr. Besanceney argues that the board ignored the reasonableness of his beliefs concerning agency wrongdoing. But the reality is that the administrative judge simply did not find that the evidence supported his view of the case. The administrative judge provided a thorough analysis of the evidence, including live witness testimony, and concluded that none of the disclosures concerning the LGA theft investigation revealed a reasonable belief of agency wrongdoing. In fact, the administrative judge relied on Mr. Besanceney's own testimony in reaching that conclusion. Mr. Besanceney simply disagrees with the board's weighing of the evidence. But he cannot substitute the board's judgment with his subjective opinion.

Finally, Mr. Besanceney cannot demonstrate reversible error in the board's application of the "reasonable belief" test (5 U.S.C. § 2302(b)(8)), rather than the appropriate section 2302(b)(9) standard, in deciding that his OIG disclosure failed to establish protected whistleblowing under the WPA. Notably, Mr. Besanceney does not allege any error in this regard on appeal. But even assuming the issue is preserved on appeal, the outcome of the case would not have been different absent the judge's error, because the undisputed record evidence failed to show an actionable personnel action. Moreover, Mr. Besanceney's OIG disclosure occurred after both alleged personnel actions, and, therefore, his disclosure could

not have influenced the agency's action. Any error in the board's statement of the law, therefore, is harmless.

In sum, Mr. Besanceney fails to demonstrate that the board made any harmful errors in deciding that he failed to establish a *prima facie* case of reprisal for whistleblowing, and because the board's findings are supported by substantial evidence, the Court should affirm the board's decision.

ARGUMENT

I. Judicial Review Of The MSPB Decision Is Limited

The scope of judicial review of MSPB decisions is narrowly defined and is strictly limited by statute. 5 U.S.C. § 7703(c); *see also O'Neill v. OPM*, 76 F.3d 363, 364 (Fed. Cir. 1996). This Court may reverse an MSPB decision only if it is: (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. 5 U.S.C. § 7703(c); *Frey v. Dep't of Labor*, 359 F.3d 1355, 1359 (Fed. Cir. 2004).

A petitioner bears the burden of establishing reversible error in the board's decision. *Fernandez v. Dep't of the Army*, 234 F.3d 553, 555 (Fed. Cir. 2000). "[T]he judicial function is exhausted when there is found to be a rational basis for the conclusions of the administrative body." *Carroll v. Dep't of Health & Human Servs.*, 703 F.2d 1388, 1390 (Fed. Cir. 1983) (citations omitted). Because the

board's credibility determinations are "virtually unreviewable," this Court has consistently declined to reweigh the evidence presented to the MSPB. *See, e.g.*, *Henry v. Dep't of the Navy*, 902 F.2d 949, 951, 953 (Fed. Cir. 1990); *Hambsch v. Dep't of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986).

When a petitioner challenges a board decision on the merits as unsupported by substantial evidence, the Court considers whether the record as a whole contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Frederick v. Dep't of Justice*, 73 F.3d 349, 352 (Fed. Cir. 1996) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

II. Statutory Framework Governing Whistleblower Protection Actions

The WPA, and as amended by the Whistleblower Protection Enhancement Act (WPEA), "prohibits any federal agency from taking, failing to take, or threatening to take or fail to take, any personnel action" against an employee for making a protected disclosure. *Fellhoelter v. Dep't of Agric.*, 568 F.3d 965, 970 (Fed. Cir. 2009) (citing 5 U.S.C. § 2302(b)(8)). To establish a *prima facie* case of reprisal for whistleblowing, an employee must show by preponderant evidence that they made a protected disclosure and that this disclosure contributed to the personnel action. 5 U.S.C. § 1221(e)(1).

An aggrieved employee may demonstrate that a protected disclosure was a contributing factor in a personnel decision by meeting the "knowledge/timing" test.

See 5 U.S.C. § 1221(e)(1). Pursuant to that test, an employee demonstrates that a disclosure was a contributing factor if he or she proves by a preponderance of the evidence that: (1) "the official taking the personnel action knew of the disclosure;" and (2) "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1).

The agency can rebut a *prima facie* case by proving, by clear and convincing evidence, that it would have taken the same personnel action even without any protected disclosures. 5 U.S.C. § 1221(e)(2); *accord Miller v. Dep't of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016).

Under the WPA, a Federal employee may seek corrective action from the board for any personnel action that the employee reasonably believes was taken in retaliation for any act of whistleblowing, as defined in section 2302(b)(8) of Title 5, or for any act set forth in Title 5, section 2302(b)(9)(A)(i), (B), (C), or (D). *Young v. M.S.P.B.*, 961 F.3d 1323, 1328 (Fed. Cir. 2020) (citing 5 U.S.C. § 1221). An objective test is used to determine whether an individual has such a reasonable belief: "whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act." *Id.* (citing *Giove v. Dep't of Transp.*, 230 F.3d

1333, 1338 (Fed. Cir. 2000)).

Not all disclosures are protected. Protected whistleblowing occurs when an employee makes a disclosure that he or she reasonably believes establishes: "[1] a violation of law, rule, or regulation; [2] gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety[.]" *Fields v. Dep't of Justice*, 452 F.3d 1297, 1302 (Fed. Cir. 2006) (citing 5 U.S.C. § 1221(a) (2000)) (quoting 5 U.S.C. § 2302(b)(8)).

A protected whistleblowing disclosure also includes information disclosed to the Inspector General of an agency. 5 U.S.C. § 2302(b)(9)(C).[2] For disclosures to an Inspector General, the WPA does not require proof of a reasonable belief of wrongdoing. 5 U.S.C. § 1221(a); *compare* § 2302(b)(8) to (b)(9)(C).

---

[2] Section 2302(b)(9)(C) states that Government officials with authority to take a personnel action shall not:

> (9) [T]ake or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> . . .
>
> (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law . . . .

5 U.S.C. § 2302(b)(9)(C).

III. Mr. Besanceney Has Waived The Issue That The Board Erred In Failing To Recognize His OIG Complaint As A Protected Disclosure, And He Cannot Otherwise Show That The Board's Error Prejudiced Him

In its amicus curiae brief, OSC raises an issue that Mr. Besanceney has failed to raise in his opening brief. OSC argues that the board incorrectly applied the "reasonable belief" test (5 U.S.C. § 2302(b)(8)), rather than the section 2302(b)(9) standard, in deciding that Mr. Besanceney's OIG disclosure failed to meet the standards for protected whistleblowing under the WPA. Amicus Curiae Br. at 4-6; Appx28. Although we do not challenge this argument, OSC, an amicus curiae, cannot raise an issue that Mr. Besanceney has not presented to this Court. *E.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001) ("Although an amicus brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues into an appeal, at least in cases where the parties are competently represented by counsel."); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986) (An amicus curiae "cannot raise issues not raised by the parties."). As well, Mr. Besanceney has waived this issue. *See Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("an issue not raised by an appellant in its opening brief . . . is waived"); *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999) (same).

However, should the Court decide to consider this issue, even though it is not properly before this Court, the board's error was harmless. Mr. Besanceney cannot show that the outcome of his IRA appeal would have been different had the board recognized his OIG complaint as a protected disclosure under section 2302(b)(9). Indeed, his claim would have failed for lack of an actionable personnel action in any event.

As we previously established, an employee seeking protection under the WPA must demonstrate by a preponderance of the evidence that they made a protected disclosure and that the disclosure was a "contributing factor" in the agency's decision to take a personnel action. 5 U.S.C. § 1221(e)(1); *see* 5 C.F.R. §§ 1209.4, 1209.7. A protected disclosure includes the disclosure of information to or cooperation with an agency's Inspector General. 5 U.S.C. § 2302(b)(9)(C). Whereas section 2302(b)(8) requires an employee to reasonably believe that his or her disclosure evidence agency wrongdoing, section 2302(b)(9) does not have that requirement.

Mr. Besanceney alleged that two personnel actions resulted from his March 7, 2018, filing of an OIG complaint: (1) a letter of counseling,[3] and (2) a requirement to attend training courses as part of a 2018 remediation plan. Appx75, Appx77-79; Sappx25, SAppx29-30. Neither of those agency actions meets the definition of "personnel action" under section 2302.

First, the counseling letter was not a personnel action because it did not propose or threaten any disciplinary actions. Appx75-76; *see also* 5 U.S.C. § 2302(a)(2)(A)(iii) (a "personnel action" includes "other disciplinary or corrective action"). The letter merely advised Mr. Besanceney that "any future incidents of misconduct may result in disciplinary action." Appx76; *see Mohammed v. Dep't of the Army*, 780 F. App'x 870, 876 (Fed. Cir. 2019) (unpublished table decision) ("The informal memorandum of counseling issued to Ms. Mohammed informed her about the negative feedback and reminded her about workplace expectations. It did not propose any disciplinary measures . . . .").

Mr. Williams issued the letter to Mr. Besanceney to counsel him for his "inappropriate conduct" towards Mr. Vasey during the February 6, 2018, meeting, the focus of which was to discuss how Mr. Besanceney could successfully

[3] As we previously explained, on February 7, 2018, Mr. Williams issued the counseling letter to Mr. Besanceney. Appx75-76. The agency rescinded that letter on February 7, 2019, and issued a new counseling letter on the same day, containing substantively identical language. Appx25, Appx63-65.

complete his remediation plan. Appx75-76. In the letter, Mr. Williams explains that, during the February 6 meeting, Mr. Besanceney "verbally berated and accused" Mr. Vasey of "serious misconduct that was alleged to have occurred decades ago, with no proof or substance[,] in a mean spirited, unprofessional and malicious manner." Appx75. Mr. Williams further states that he expects Mr. Besanceney, as a senior special agent, to conduct himself in a "restrained, respectful and professional manner at all times." *Id.* The letter reminded Mr. Besanceney that he was responsible for exercising courtesy and tact in dealing with co-workers and supervisors. *Id.* The letter also states that it "is not a disciplinary action" and would not be placed in Mr. Besanceney's personnel file. Appx76. Essentially, the letter indicates that disciplinary action is not warranted at that time but nonetheless serves the legitimate purpose of clarifying the agency's expectation of professional conduct. Accordingly, as the administrative judge correctly concluded, the counseling letter was not a disciplinary action as contemplated by 5 U.S.C. § 2302(a)(2)(A)(iii). Appx25. And Mr. Besanceney does not challenge that factual finding on appeal.

More fundamentally, because Mr. Besanceney's OIG complaint *postdated* the counseling letter, the OIG complaint could not have influenced Mr. Williams' decision to issue the counseling letter. So, even assuming that the counseling letter was a personnel action, Mr. Besanceney still cannot demonstrate that his OIG

disclosure was a "contributing factor" in a "personnel action." 5 U.S.C. § 1221(e)(1).

As the administrative judge explained, a "contributing factor" means that the disclosure affected the agency's decision to threaten, propose, take, or not take the personnel action regarding the employee. Appx6 (citing *Mudd v. Dep't of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 10 (2013)). An employee "can show that his or her 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." *Id.* (citing *Gonzalez v. Dep't of Transp.*, 109 M.S.P.R. 250, ¶ 19 (2008)). Mr. Besanceney cannot make that showing.

Second, Mr. Besanceney cannot demonstrate that his OIG disclosure was a contributing factor to the training requirement that was included in his remediation plan. Indeed, as he stated in his OSC complaint, the training requirement was ordered in February 2018. *See* Appx23, Appx77-79, Appx626-639; SAppx1-28, SAppx25. The OIG disclosure did not occur until March 2018. So, here, too, the protected disclosure *postdated* the purported personnel action.

In sum, even if the board had concluded that Mr. Besanceney's OIG complaint constituted a protected disclosure under section 2302(b)(9), the outcome of his IRA appeal would not have changed. Based on the undisputed record evidence, Mr. Besanceney cannot establish a *prima facie* case of reprisal for whistleblowing, because the counseling letter is not a disciplinary action and the supervisory decisions concerning the required training and the counseling letter occurred before he filed his OIG complaint, thus failing to meet the knowledge/timing test. *Kewley v. Dep't of Health & Hum. Servs.*, 153 F.3d 1357, 1361-62 (Fed. Cir. 1998). Accordingly, no grounds for a remand or reversal exists.

However, should the Court decide that the board's error prejudiced Mr. Besanceney, a contention he has declined to press on appeal, any remand should be limited to the board correcting only that error and making a corresponding redetermination of the case. A redetermination of the entire case is unwarranted, because, as we discuss in section IV, substantial evidence supports the board's decision that Mr. Besanceney's remaining seven disclosures failed to meet the standards set forth in 5 U.S.C. § 2302(b)(8).

IV. The Board Correctly Determined That Mr. Besanceney Failed To Make Any Protected Disclosures Because His Disclosures Merely Evidenced His Disagreement With The Agency's Investigative Strategy Or Unsubstantiated Accusations Against His Supervisor

Before the board, Mr. Besanceney identified eight communications that he alleged were protected disclosures. The first five communications concern the alleged mishandling of the LGA baggage theft investigation, and the other three communications involve Mr. Vasey's alleged abuse of supervisory authority regarding other matters. As we demonstrate below, the board correctly concluded that none of these communications constitutes a protected disclosure pursuant to the WPA, because no disinterested observer familiar with the facts of this case could reasonably find evidence of agency wrongdoing when, even as Mr. Besanceney has stated, the alleged mismanagement is a "dispute . . . over investigative strategy." Appx734; Appx1062; *see also Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (the relevant, objective inquiry for the board's consideration is whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence" gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation); 5 U.S.C. § 2302(a)(2)(D), (b)(8).

A. The Five Communications Concerning The Alleged Mishandling Of The Baggage Theft Investigation Were Evidence Of Disagreements Over An Investigative Strategy Rather Than Protected Disclosures

The board correctly concluded that none of Mr. Besanceney's five disclosures concerning the agency's alleged mishandling of the baggage theft investigation demonstrated agency wrongdoing as required by 5 U.S.C. § 2302(b)(8). Indeed, as the administrative judge found, Mr. Besanceney could not satisfy the necessary reasonable belief test, because, by his own admissions, his disclosures merely reflected his disagreements with his supervisors' investigative strategy, thus, failing to merit whistleblower protections. Substantial evidence supports the board's conclusion.

Mr. Besanceney argues that he satisfied the reasonable belief test because he had a "good faith belief that Messrs. 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." Pet'r Br. at 27-33. That argument is baseless for several reasons.

Even by Mr. Besanceney's own admission, his disclosures did not concern potential violations of law. His hearing testimony reflects that neither Mr. Vasey nor Mr. Williams ever instructed him to violate the law, including misrepresenting facts in an affidavit or to a judge in pursuit of a search warrant. Appx9-10, Appx1048-1049. Notably, he agreed that Messrs. Vasey and Williams "lawful[ly]

instruct[ed]" him to obtain an AUSA's legal opinion about whether there was sufficient probable cause to support a warrant. Appx1050-1051. He also agreed that it is the AUSA's decision—not his—whether to apply for a search warrant, and that a judge ultimately decides whether sufficient probable cause exists. Appx1051-1052. His own testimony undermines his theory that Messrs. Vasey and Williams required him to disregard the law to obtain a search warrant.

Ignoring his own failure to properly obtain a legal opinion on the sufficiency of probable cause,[4] Mr. Besanceney invents a scenario of him "signing a dishonest affidavit" to obtain a search warrant that ultimately results in an illegal search of the suspects' homes. Pet'r Br. at 31-32. But his hypothetical fails to reflect the factual circumstances of this case, even according to his own testimony, as recited above.

Mr. Besanceney appears to invite the Court to reweigh the evidence and reach its own conclusion on whether probable cause was sufficient. In doing so, he misapplies the standard of review, which does not question whether this Court

[4] The administrative judge discussed Mr. Besanceney's testimony that he had spoken to a Brooklyn AUSA and the Queen's County DA's office regarding his operations plan, and that he told them that TSA's investigation did not rise to the level of search warrants. Appx9-10, Appx13, Appx976-977 ("I spoke to both the AUSA duty attorney, Eastern District of New York in Brooklyn, and I spoke to an ADA in the Queens County District Attorney's office, but it was never about search warrants. I described to the AUSA duty agent what I had. And I described to her that I have an investigation here that does not rise to the level of search warrants.").

could reach a different conclusion than the board, but instead is limited to determining whether the board's decision was supported by substantial evidence. *See* 5 U.S.C. § 7703(c). His analysis of the Fourth Amendment to the United States Constitution fares no better, demonstrating that he also misapprehends the relevance of whether probable cause existed. Pet'r Br. at 29-36. Despite his insistence, the dispositive issues in this appeal do not concern the sufficiency of probable cause or his professed superior legal knowledge.

Substantial evidence also supports the board's finding that Mr. Besanceney's disclosures merely reflected his disagreements about investigative strategy. During the hearing, he testified that the December 2016 disclosure involved him questioning Messrs. Vasey and Williams about "legal issues," and a "discussion ensued" concerning whether the investigation "merited search warrants." Appx14; Appx990-992, Appx1059-1061. Mr. Besanceney also testified that Messrs. Vasey and Williams believed that "there was probable cause for search warrants," but he disagreed with their rationale. Appx14; Appx991-992. They also debated the propriety of which advisement of legal rights should be recited to the suspects. *Id.*

Relatedly, as the administrative judge observed, Mr. Besanceney repeatedly maligned Messrs. Vasey's and William's investigative skills, claiming that they lacked the knowledge and expertise to conduct criminal investigations. Appx15; *see, e.g.*, SAppx22; Appx970, Appx982-983, Appx1010-1011, Appx1042-1043,

Appx1076. In contrast, Mr. Besanceney has repeatedly declared that he possesses superior investigative and legal knowledge, to which his supervisors should have deferred. *See id.*; *see also* Pet'r Br. at 28-33. He persists that his supervisors' failure to defer to his proposed course of action somehow resulted in agency misconduct. However, as the administrative judge correctly determined, Mr. Besanceney's "purely subjective belief that he 'knew better' than Williams and Vasey" falls far short of demonstrating a reasonable belief of agency wrongdoing. Appx21-22. "The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct." Appx22 (citing *Lachance*, 174 F.3d at 1380-81); *see also O'Donnell v. M.S.P.B.*, 561 F. App'x 926, 929 (Fed. Cir. 2014) ("Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility." (citing *Lachance*)).

As the administrative judge aptly observed, not all disagreements between supervisors and their employees constitute protected disclosures. Appx15. Indeed, "[d]iscussion among employees and supervisors regarding different possible courses of action is healthy and normal in any organization." *Id.* (citing *Reid v. M.S.P.B.*, 508 F.3d 674, 678 (2007)); *see also Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) ("Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely

ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision.")

Concerning disclosures two through five, Mr. Besanceney generally argues that the administrative judge failed to apply the proper analysis under the WPA, including an assessment of the reasonableness of his beliefs and the "viewpoint of a 'disinterested observer.'" Pet'r Br. at 33. He incorrectly states that the board "entirely fail[ed] to address the reasonableness of [his] beliefs." *Id.* But the reality is that the board simply did not find that the evidence supported his view of the case. The administrative judge provided a thorough analysis of the evidence and witness testimony (especially Mr. Besanceney's) and concluded that none of the disclosures concerning the LGA theft investigation revealed a reasonable belief of agency wrongdoing. Mr. Besanceney has failed to demonstrate a lack of substantial evidence underpinning the board's findings which, as we relate above, are ample. And because all his remaining arguments are contingent upon his unsubstantiated premise of insufficient probable cause, those arguments must also fail. *See* Pet'r Br. at 33-36.

Likewise, Mr. Besanceney fails to demonstrate evidence of gross mismanagement, which requires proof that a management action or inaction created a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. Appx22 (citing *Johnson v. Dep't of Justice*, 104 M.S.P.R.

624, ¶ 16 (2007)). According to Mr. Besanceney, the "proper consideration" for the board was whether his supervisors' "decision to pursue search warrants at that point in the investigation with insufficient probable cause constitutes gross mismanagement, not their rejection of consent searches." Pet'r Br. at 34. Again, Mr. Besanceney relies on the faulty premise of insufficient probable cause. The administrative judge concluded that "[e]ven 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." Appx22 (citing *Sazinski v. Dep't of Housing & Urban Dev.*, 73 M.S.P.R. 682, 686-87 (1997)). Indeed, as the administrative judge correctly noted, "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." *Id.*; *see also Standley v. M.S.P.B.*, 715 F. App'x 998, 1001-03 (Fed. Cir. 2017) (affirming a dismissal of IRA appeal where multiple disclosures consisted of a fairly debatable policy dispute).

Mr. Besanceney could not have reasonably believed that Messrs. Williams and Vasey's decision to obtain search warrants (rather than attempt consent searches) would have had a substantial adverse impact on TSA's ability to accomplish its mission, particularly because, as the administrative judge found, Mr. Besanceney speculated that there was only about a 50 percent chance the

suspects would have agreed to the consent searches. Appx22; Appx986. Nonetheless, he disagreed with the decision not to conduct consent searches. *Id.* The administrative judge correctly concluded that, "[a]t most, his disagreement over the investigative strategy employed by Messrs. Williams and Vasey constituted a general philosophical disagreement, not a protected disclosure." *Id.* (citing *Salerno v. Dep't of the Interior*, 123 M.S.P.R. 230, ¶ 7 (2016)). Notably, notwithstanding Mr. Besanceney's disagreement over strategy, "the agency's mission was accomplished with the prosecution of the two TSOs, which the appellant begrudgingly acknowledged" subsequently occurred without consent searches. Appx22; Appx1058-1059 ("It was accomplished, but I got no credit.").

In sum, Mr. Besanceney merely disagrees with the board's weighing of the evidence. But his "purely subjective opinion is insufficient" to demonstrate error in the board's analysis. Appx6 (citing *LaChance*, 174 F.3d at 1381). The Court should reject his attempt to substitute his own judgment for that of the board. *See Williams v. Rice*, 983 F.2d 177, 180 (10th Cir. 1993).

B. None Of The Three Communications Involving Mr. Vasey's Alleged Abuse Of Supervisory Authority Constituted A Protected Disclosure Because Mr. Besanceney Admittedly Possessed No Proof Of Those Allegations

The Court should also affirm the board's conclusion that Mr. Besanceney's remaining three disclosures, concerning Mr. Vasey's purported abuse of authority, were not protected. Appx23-27. Without any evidence, as Mr. Besanceney has conceded, he accused Mr. Vasey of assaulting his (Mr. Vasey's) ex-wife decades ago, stalking an ex-girlfriend many years ago, and joining Mr. Williams to secretly audio record him during one of their meetings. Appx24, Appx67, Appx1092-1102. As the board correctly concluded, none of those unsubstantiated allegations evidenced abuse of authority.

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 in personal gain or advantage to himself or to preferred other persons. Appx23 (citing *Herman v. Dep't of Justice*, 115 M.S.P.R. 386, ¶ 11 (2011)); *see also Hansen v. M.S.P.B.*, 746 F. App'x 976, 980 (Fed. Cir. 2018) (same).

The alleged sixth protected disclosure occurred during a February 6, 2018, meeting with Messrs. Williams and Vasey, the purpose of which was to discuss a remediation plan to address concerns with Mr. Besanceney's investigative judgment and deficient work performance. Appx23, Appx77-79, Appx80-81,

Appx1269. As referenced in section III, during the February 6 meeting, Mr. Besanceney purportedly disclosed evidence of Mr. Vasey's abuse of authority by accusing Mr. Vasey of physically abusing his ex-wife and stalking an ex-girlfriend. Appx24, Appx719-720, Appx780, Appx1092-1093. The alleged seventh protected disclosure occurred on February 12, 2018, when he reported Mr. Vasey's alleged misconduct to TSA's Special Investigations Unit, who were investigating Mr. Besanceney's allegations of abuse, stalking, and inappropriate audio recording. Appx25; Appx66-67.

Mr. Besanceney argues that the board committed reversible error by "wrongly expect[ing]" him to "perform his own investigation as to the full veracity of [his] claims [against Mr. Vasey], rather than apply the proper standard of having a reasonable belief that this is an abuse of authority by a federal officer." Pet'r Br. at 37. That argument is unavailing, especially because Mr. Besanceney admittedly possessed no proof to support his accusations against Mr. Vasey, except undisclosed information he claimed to have obtained from unnamed sources. Appx24; Appx1092-1102. Indeed, he refused to identify the "reliable" or "credible sources" that he claimed possess knowledge of Mr. Vasey's alleged misconduct. *Id.*; Appx67; Pet'r Br. at 38-39. And the unsigned transcript of Mr. Vasey's divorce proceeding, upon which he later relied as evidence of misconduct, was not

in his possession until after SIU interviewed him about his allegations against Mr. Vasey. Pet'r Br. at 38; Appx1098-1099.

In addition, as the administrative judge found, Mr. Besanceney admitted that the allegations were "stale old allegations," as long as 20 years ago, that he used to "set the stage for a third criminal allegation about the secret tape recording." Appx1024, Appx1097, Appx1103. The administrative judge also considered Mr. Besanceney's deposition and hearing testimony that, "when asked what proof he had to support these accusations, he admitted, 'I didn't have any evidence. I had none. I had zero.'" Appx24; Appx1106.

Substantial evidence supports the administrative judge's finding that "there were no essential facts known to and readily ascertainable by the appellant regarding these accusations." Appx27. Therefore, as the administrative judge correctly determined, Mr. Besanceney cannot convincingly argue that a disinterested observer could have reasonably concluded that the unsubstantiated accusations against Mr. Vasey constituted protected disclosures. Appx24 (citing *Johnson*, 104 M.S.P.R. at ¶ 15).

Equally unavailing is Mr. Besanceney's argument concerning his eighth disclosure. Pet'r Br. at 39-40. In his OIG complaint, he reiterated his claims about Mr. Vasey's alleged domestic abuse and stalking incidents as well as his claim that Messrs. Vasey and Williams had covertly recorded him. Appx27; Appx621-625.

The administrative judge again relied on Mr. Besanceney's hearing testimony that he possessed no evidence of a "covert" recording. Appx27; Appx1108-1109. The administrative judge also considered his testimony that he had not seen or heard any recording devices. *Id.* "Based on his own admissions that he had no proof of being audio-recorded by Vasey or Williams," the administrative judge found that Mr. Besanceney "did not possess the reasonable belief necessary that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8)." Appx27.

Mr. Besanceney faults the board for not crediting his statement that the "unusual level of detail captured in the memo prepared by his supervisors regarding [his] July 2017 meeting" supported his reasonable belief that Messrs. Vasey and Williams had secretly recorded the meeting. Pet'r Br. at 39. But the judge's credibility decisions are "virtually unreviewable[,]" and Mr. Besanceney offers no legal ground on which to undo them. *See Frey v. Dep't of Labor*, 359 F.3d 1355, 1361 (Fed. Cir. 2004).

Contrary to Mr. Besanceney's position, the board reached its decision by correctly applying the relevant WPA standard to the facts. And, Mr. Besanceney's failure to establish a *prima facie* case of reprisal for whistleblowing alleviated the board's duty to determine whether the agency would have taken the same personnel actions absent any protected disclosures. 5 U.S.C. § 1221(e)(2). Mr. Besanceney's disagreement with the board's weighing of evidence fails to

establish any error, and runs counter to the limited standard of review, under which this Court must affirm so long as the board's decision was supported by substantial evidence. *See* 5 U.S.C. § 7703(c); *see Jones v. Dep't of Health & Human Servs.*, 834 F.3d 1361, 1369 (Fed. Cir. 2016). The board's analysis was consistent with the record evidence and the law, and Mr. Besanceney has not demonstrated otherwise.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the board's decision.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

/s/ Tara K. Hogan for Reginald T. Blades, Jr.
REGINALD T. BLADES, JR.
Assistant Director

/s/ Jana Moses
JANA MOSES
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-2279
Email: jana.moses@usdoj.gov
Attorneys for Respondent

November 16, 2022

CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the Rules of this Court in that it contains 6,676 words including text, footnotes, and headings. This is within the limit of 14,000 words set by Federal Rule of Appellate Procedure (FRAP) Rule 32(a)(7)(B)(i).

2. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/ Jana Moses