Case No. 2023-1901

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIM ANNE FARRINGTON,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent

On petition for review from the Merit Systems Protection Board
in AT-1221-09-0543-B-2

CORRECTED OPENING BRIEF OF PETITIONER

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Case No. 23-1901

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIM ANNE FARRINGTON
v.
DEPARTMENT OF TRANSPORTATION

CERTIFICATE OF INTEREST

Counsel for Petitioner certifies the following:

1. The full names of the parties I represent are Kim Anne Farrington
2. The name of the real party in interest is the same.
3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party I represent are: N/A
4. The names of all law firms and the partners or associates that appeared before the MSPB for the party I represent are (A) The Government Accountability Project, Inc. and T.M. Guyer and Ayers & Friends, PC, Thad M. Guyer, Esq., Stephani L. Ayers, Esq. and Thomas M. Devine, Esq.; and (B) those law firms and lawyers have or are expected to enter appearances herein.
5. To the best of counsel's knowledge, there are no cases pending in this or any other court or agency that will directly affect or be affected by this Court's decision in this matter.
6. The information required by FRAP 26.1(b) and (c) is: N/A

Date: September 27, 2023 Respectfully submitted,

/s/ Thad M. Guyer

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STATEMENT OR RELATED CASES

There is no other appeal in or from the same civil action or proceeding in the originating tribunal that was previously before this or any other appellate court.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction under 5 USC 7703(a)(1) which provides: "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." The initial decision ("ID", Appx17) in this case was entered on June 1, 2016, and the final reviewable MSPB order was entered on March 15, 2023. (Appx1). Petitioner timely filed her petition review on Monday, May 15, 2023, within the 60 days allowed by statute, the 60th day having been a Sunday.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Did the Board err in applying the legislatively overruled *Huffman* holding denying full 5 U.S.C. Section 1221(e) contributing factor/clear and convincing evidence regime protections to disclosures made pursuant to Farrington's "ordinary duties" and "normal channels"?

(2) Did the Board err in applying the heightened burden of proof standard of "reprisal" prescribed by 5 U.S.C. Section 2302(f)(2) to Farrington's disclosures?

(3) Did the Board err in failing to protect the NTSB independent and external disclosure channel for Farrington and FAA employees who participate in air carrier accident investigations?

(4) Did the Board err in failing to protect the voluntary internal FAA Division level disclosure channel for Farrington and MCO employees who accepted occasional open-door invitations to discuss any subject?

(5) Did the Board err in affirming the AJ conclusion that Farrington could not have objectively reasonably believed the FAA and AirTrans violated regulatory and safety rules?

III. STATEMENT OF THE CASE

The Board's March 15, 2023, final order denied the petition for review, but modified the initial decision to find that 5 U.S.C. § 2302(f)(2) applies to this matter because the appellant's disclosures were made in the normal course of her duties through normal channels. The Board vacated the administrative judge's findings regarding laches and the agency's burden to prove by clear and convincing evidence that it would have taken the actions absent the appellant's whistleblowing disclosures. Except as expressly modified, the Board affirmed the initial decision.

A. The 2012 Remand and Hearing, and 2016 Initial Decision:

In its 2012 decision (Appx67), reported at *Farrington v. Department of Transportation*, 118 M.S.P.R. 331, MSPB Docket No. AT-1221-09-0543-W-1, ¶ 9

(July 16, 2012), the Board remanded for further adjudication the September 1, 2010 initial decision without hearing concluding that none of Farrington's disclosures could confer jurisdiction on the Board due to her failure to make non-frivolous allegations that they were made outside her normal work responsibilities and normal channels. On November 14, 2012, the administrative judge held a hearing. After the appellant testified, the agency moved to dismiss the appeal for lack of jurisdiction. After allowing the appellant to make a response, the administrative judge indicated that she was going to find in favor of the agency on the *Huffman* normal duties/normal channel jurisdictional disqualification. At that point, the administrative judge offered both parties the opportunity to go forward in order to make whatever record they might wish, and both parties indicated that they did not wish to do so.

Despite her finding of lack of jurisdiction, the administrative judge indicated she would allow the parties to submit closing arguments. However, before the administrative judge issued an initial decision, the Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law on November 27, 2012, significantly changing whistleblower law for federal employees. On December 14, 2012, the Board certified an interlocutory appeal as to retroactivity, and Farrington was allowed a voluntary dismissal without prejudice to await the retroactivity decision. (ID 2016, Appx17). On June 26, 2013, the Board issued its

decision holding that the WPEA was retroactive to pending cases. *Day v. Department of Homeland Security*, 119 M.S.P.R. 589 (2013). On July 23, 2013, Farrington refiled her appeal, which was then assigned to a new administrative judge as the administrative judge originally assigned to this appeal had retired.

B. The AJ's 2016 Normal Duties/Normal Channels Implicit Decision:

A full hearing was conducted, and despite the Board's 2012 remand order, the new AJ made no explicit conclusion as Farrington's normal duties and job channels. However, the Board's March 15, 2023, final decision concluded that the AJ had implicitly done so by the following finding that any protection Farrington had was limited to 5 U.S.C. § 2302(f)(2):

> In amending the WPA, however, the WPEA created an additional burden where investigating and reporting wrongdoing is an integral part of an employee's everyday job duties. Specifically, section 2303(f)(2) requires employees whose job consists of such responsibilities to demonstrate that a personnel action was taken "in reprisal for" a disclosure that was made during the normal course of duties and not just "because" of that disclosure. 5 U.S.C. § 2302(f)(2). In adding this additional burden, Congress was distinguishing between employees who have a general obligation to report wrongdoing and those employees whose very job involves investigating such as auditors and investigators. See, e.g., S. Rep. No. 112-155 at 5. I find that the appellant as an Aviation Safety Inspector responsible for ensuring compliance with the FARs falls under this provision.

(Appx14).

C. The 2016 AJ Alternative Conclusion of Lack of Reasonable Belief:

Alternatively, the AJ found that even without the § 2302(f)(2) jurisdictional disqualification, Farrington's May 2003 disclosures both to regional officials far

above her and the NTSB that AirTran was violating safety regulations and jeopardizing passenger safety connected to emergency exit training for flight crews were not objectively reasonable. Conflating her disclosures about regulatory violations, specific dangers to public safety, and inadequate funding to regulate the airline, the AJ dismissed them all as unprotected:

> While the appellant also argues that her May 2003 report discloses violations of the FAR, the report contains no specific citations to the FAR, does not explain how the appellant believes the FAR is being violated and briefly *states that regulatory requirements are not being met* without elaboration. A disclosure must be specific and detailed, not a broad-brush accusation that amounts only to a vague allegation of wrongdoing. *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 13 (2006); *Gryder v. Department of Transportation*, 100 M.S.P.R. 564, ¶ 13 (2005). At best, the appellant's May 2003 report amounts to a vague allegation of wrongdoing on the part of AirTran and I find that the May 2003 report is *not entitled to protection on the grounds that it disclosed a violation of law, rule or regulation*. The appellant also alleges that her May 2003 report *disclosed substantial and specific danger to public safety*.
>
> The inquiry into whether a disclosure is sufficiently "substantial and specific" to be protected under the WPA is determined by evaluating several factors, including (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences. *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010). General criticism by an employee that an agency is not doing enough is not protected. Id. at 1368-69. The appellant's *disclosure of inadequate funding for surveillance* does not rise to the level of creating a specific and substantial danger to public safety because *a reasonable person with the facts objectively known to the appellant could not have believed that she could not adequately perform her surveillance duties for AirTran*.

(Appx37, emphasis added).

D. The 2023 Board Affirms the 2016 AJ Conclusions on Normal Duties/Normal Channels and Lack of Reasonable Belief:

The March 15, 2023, final order attempted to cure the failure by the AJ to make explicit findings and conclusions as to which of Farrington's disclosures were made during the normal course of her duties and through normal channels:

> The administrative judge found that the appellant, as an Aviation Safety Inspector who was responsible for ensuring compliance with Federal Aviation Administration regulations and investigating and reporting wrongdoing, was covered by 5 U.S.C. § 2302(f)(2). The administrative judge, in analyzing the "extra proof requirement" regarding each personnel action, *appears to have implicitly found that each of the appellant's four disclosures were made during the normal course of her duties*. On review, the appellant contends that the case is governed by the Board's earlier [2012] decision, and its finding that "there was no duty speech." *We supplement the initial decision to explicitly find that the appellant made her disclosures in the normal course of her duties.*

(March 15, 2023, Appx4-5, internal case and record citations omitted) (emphasis added). The Board did not just make that "supplement", but used the internet to introduce whole cloth in the record that the NTSB does independent investigations and therefore any information that she provided to the NTSB in any form or through any channel was pursuant to her normal job duties, which included her witness interview and her May 2003 written disclosure:

> In its earlier decision, the Board relied on the appellant's position description and concluded that she failed to make a nonfrivolous allegation that her disclosures to the National Transportation Safety Board (NTSB) were not made within her normal job duties within the normal channels of reporting. The appellant's position description stated that, as part of her surveillance duties and responsibilities, she is expected to "conduct investigations of . . . aircraft incidents and

> accidents" and to "[p]articipate[] in cabin safety related incident/accident investigations of air carriers and air operators." *The NTSB is an independent Federal agency charged with "investigating every civil aviation accident in the United States," it determines the probable cause of accidents, and it issues safety recommendations aimed at preventing future accidents. National Transportation Safety Board, About the NTSB, https://www.ntsb.gov/about/pages/default.aspx (last visited Mar. 14, 2023).* The appellant provided the head of the NTSB Survival Factors Group with a copy of her May 2003 written report and she was interviewed by the NTSB Survival Factors Group *after the NTSB initiated its investigation into the March 26, 2003 AirTran incident*. Based on these facts, *we supplement the initial decision to find explicitly that the appellant's two disclosures to the NTSB were made within the normal course of her duties*.

(March 15, 2023, Appx5 ¶7, internal citations omitted). (Emphasis added).

Farrington had never before had any communications with the NTSB about anything. The NTSB is not mentioned in her job description or any performance appraisal.

E. <u>Failure to Prove Reprisal:</u>

The Board held that even assuming the appellant proved she disclosed a violation of law, rule, or regulation and/or a substantial and specific danger to public health and safety pursuant to 5 U.S.C. § 2302(b)(8)(A), the administrative judge correctly concluded she failed to prove "the agency took the personnel actions against her in reprisal for her disclosures". Because the Board affirmed the administrative judge's finding on reprisal, it held "we need not address the appellant's arguments on review concerning contributing factor or whether the

agency proved by clear and convincing evidence that it would have taken the action(s) at issue absent the disclosures." (Id. at Appx9 ¶12).

IV. STATEMENT OF RELEVANT FACTS

For purposes of this Petition for Review only, Farrington will not contest any fact finding on pure issues of fact has been made by the administrative judge or the Board without substantial evidence. Instead, she will contest only the application of the law to facts, and ultimate fact findings that are mixed issues of law and fact. For example, Farrington will not accept purported "findings of fact" that she engaged in no protected activity, or characterizing her "normal" duties and channels within the meaning of the WPEA, or her objectively reasonable belief in regulatory violations or safety standards, or whether she established Board jurisdiction under the WPEA.

Facts from Initial Decision: The following are findings of fact or mixed fact and law findings and conclusions made by the administrative judge in her June 1, 2016, initial decision (Appx17).

A. Background of Employment Relationship:

1. Kim Farrington was employed by the FAA as an Aviation Safety Inspector (Cabin Safety) from 1997 until 2004 insuring flight attendant training was adequate to protect the flying public. She was based in a small FAA outpost in Orlando, Florida called the "AirTran CMO", which is short for the "AirTran

Certificate Management Office". She was assigned only to flight attendant review of that single airline, AirTran Airways. The AirTran CMO was dedicated to the surveillance and regulation of AirTran Airways. (Appx18).

2. At the AirTran CMO, Farrington worked directly for the Principal Operations Inspector ("POI") Martin Polomski. The CMO Manager was Jack Moyers, and his Assistant Manager, Vickie Stahlberg. Polomski at the times relevant to this action was Farrington's first-line supervisor, and he was responsible for "anything related to the operation of the [AirTrans] airplanes" operating out of Orlando, from refueling to ticketing. The appellant spent significant time assisting AirTran with improving their flight attendant training program including traveling to Atlanta on two occasions to observe month long initial flight attendant training sessions. (Appx19-20).

B. Farrington's Regularly Assigned Duties and Communication Channels:

3. The AirTran CMO safety inspectors were divided into two branches: operations and maintenance. The appellant was employed by the agency with the title of "Aviation Safety Inspector (Cabin Safety)" from 1997 until 2004. She had no "normal responsibility" for any aspect of aviation accident investigations. (Appx21). Her normal communication channels were direct chain of command at the Orlando MCO. The AJ made no findings that Farrington had any regular, periodic or recurring reporting or communications channels outside of the MCO.

4. In ensuring AirTran flight attendants knew what they were doing, her normal and specific responsibilities were "to provide technical support to the general public, to observe airline activity for regulatory compliance, to observe the training of flight instructors, to monitor boarding of flights at gate to ensure oversized bags were not allowed, to review airline manuals and publications for compliance with FAA regulations and to observe initial and recurrent training of flight attendants to ensure that it was properly conducted." (Appx18-19).

C. Farrington was Recognized for Her Regulatory Knowledge and Safety Advocacy:

5. As a result of her efforts before her protected activity, Farrington received several awards from the FAA and a letter of praise from AirTran. She was repeatedly praised for her knowledge in advancing flight attendant training. On February 10, 2003, the appellant was presented with a "Superior Efforts Award" by Mr. Moyers in recognition of the improvement in flight attendant training at AirTran as a result of her efforts. (Appx20).

6. Moyers and an AirTran training officials had praised Farrington, and "characterized the training program as second to none as a result of her efforts." In his affidavit filed in support of the appellant in this appeal, the official, Mr. Clements, attested that Farrington was "instrumental in assisting AirTran with compliance and training" and "spent many hours reviewing policies and training

curriculum development resulting in marking improvement in the quality and standards of cabin attendant candidates." (Appx48).

D. <u>The AirTran Parallel FAA and NTSB Accident Investigations:</u>

7. On March 26, 2003, AirTran Flight 356 travelling from Atlanta's Hartsfield International Airport to New York's LaGuardia Airport made an emergency landing and evacuation at LaGuardia Airport due to smoke in the aircraft. During the evacuation, the flight attendants had some difficulty deploying the aircraft's tail cone emergency exit slide and several passengers were injured, including one seriously. The NTSB opened an investigation by a group known as the Survival Factors Group which had airline, union and FAA representatives. Farrington was never a member of that Group and other than a single interview, had no involvement with it until she sent the NTSB her May 2003 disclosure about the FAA's failure to regulate AirTran safety. (Appx22 and 30).

8. The NTSB investigation focused, in part, on AirTran flight attendant training and the appellant was interviewed due to her responsibilities for overseeing cabin safety and flight attendant issues. Other agency employees were also interviewed. Farrington was not contacted by the NTSB, but was instead notified by Moyers that the NTSB "wanted to talk to her about flight attendant issues" related to the accident at some point in April of 2003. Commercial aviation accidents by air carriers are exceedingly rare in the United States, so Farrington's

job duties could include participating in an accident investigation of air carriers if one ever occurred that involved flight attendant training. But AirTran Flight 356 was the only air carrier accident in her FAA career. (Appx21).

9. Independently of the NTSB, the agency had also begun conducting its own parallel investigation of the AirTran Flight 356 accident. On May 6, 2003, Farrington's POI Polomski informed AirTran that due to the problems with the manual operation of the tail cone exit slide during Flight 356's evacuation, the agency was conducting an investigation to discover the "active and latent organizational failures associated with this event." The appellant had no communication with, nor was she interviewed by, the NTSB until May 22, 2003. Thus, by the time of her first NTSB contact, Farrington had been pressing these "active and latent organizational failures". She was not vaguely speculating about them. As part of the agency review of AirTran's Flight Attendant Training Center, Farrington had concluded that "both flight attendant instructors and flight attendants did not know the applicable procedures for manual slide deployment in the event the automatic system fails." (Appx21).

E. Protected Disclosures to FAA and NTSB in May 2003:

10. In May 2003, Farrington wrote an 11-page report detailing complaints she had about the functioning of the agency in its AirTran oversight. The appellant sent a copy of her May 2003 disclosure to Fred Walker, Division Manager for

FSDO (her first protected disclosure). On May 21, 2003, "[r]egarding the safety issues raised by the appellant, [the FSDO] stated that the agency had empaneled a team of impartial specialists from outside of the appellant's work area to look into the issues she had raised." Concerned that Farrington was going to impugn the lax safety practices of the CMO, on May 16, 2003, Moyers sent an email to Walker titled "Heads Up Hostile Work Environment claim" minimizing her disclosure as simply being a matter of her being "upset at him." Thus, Walker himself, not just his staff, had received Farrington's "May 2003 Report sometime after May 16, 2003". (Appx22).

11. Less than 30 days later, on June 17, 2003, Walker "*visited* the AirTran CMO to meet with all employees". After the all-employee meeting, Farrington met alone with Moyers. "It was not unusual for Mr. Walker to meet with employees after his meeting" and he claimed that during these periodic *visits* to Orlando he "would routinely meet with Aviation Safety Inspectors to discuss safety issues". (Appx23 and 48). That is, he periodically "visited" the MCO, and during these periodic visits, he "routinely" talked to inspectors.

F. **Walker Gags Farrington from AirTran Regulatory Communications:**

12. It turned out that Moyer was not the only one concerned with Farrington's disclosure about poor AirTran oversight. In a stunning and unexplained coincidence of timing, on the day Walker arrived on June 17, 2003,

Klaus Goersch, Vice President of Flight Operations at AirTran, wrote to Mr. Walker complaining about the appellant and requesting that she be removed from oversight of AirTran." Goersch's letter accused the appellant "of attempting to force AirTran to change things to meet her personal preference without any regard for regulatory substance or support." Obviously not knowing the FAA had been giving her awards for her knowledge and dedication, the AirTrans executive lambasted "Farrington's lack of knowledge of the FARs" and for erecting "unnecessary obstacles " In the midst of the NTSB and FAA parallel investigation of the AirTran operational failure leading to a bungled and life threatening evacuation, Goersch's letter accused Farrington of "interrupt[ing] senior members of the [AirTran inhouse] training and standards organization" with guidance contrary "to AirTran policy and the proper content of the FAA accepted Flight Attendant Manual." (Appx23-24). According to Moyers, "he was not surprised to see the letter because POI Polomski had previously told him that AirTran was not happy with the appellant's performance and that they were considering writing a letter." (Appx24).

13. The FAA acted swiftly with the NTSB investigation still pending to honor AirTrans demands to rid itself of the whistleblower. On July 11, 2003, Walker's staff formally counselled Farrington about upsetting AirTran management. Jim Ellison, a high-level Labor Relations official from the Southern

Region in Atlanta, and Farrington was officially gagged and forbidden from carrying out her duties directly with AirTrans, ordering her to clear any communications with airline with her supervisors. Once stripped of her normal duties, on September 15, 2003, Walker said that although Farrington had proven herself to be “a knowledgeable inspector” she was being removed from direct communications with AirTrans so she could "learn to work in a more collaborative fashion.” (Appx24, n. 13). Moyers admitted that carrier could push back on being regulated and that "during the previous two years, AirTran had raised issues relating to the appellant’s conduct during training surveillance." (Id. at n. 14). The AJ made no findings as to why action was only being taken against Farrington within temporal proximity to her disclosures to high levels of the FAA and the NTSB.

14. Farrington testified that during the counselling, Ellison told her that “here’s the deal, you are being placed on an employee counseling moratorium that will last for 6 days, 6 weeks, 6 months, or 6 years, you are not to communicate with the carrier." The AJ found that "Mr. Ellison did not specifically deny telling the appellant she could be on the moratorium for 6 days or 6 weeks or 6 years but he denied telling her she would be removed." (Appx52 and n. 47).

G. FAA's Deliberate Infliction of Mental Distress on Farrington:

15. Within two weeks, Farrington was out on psychiatric leave. On July 24, 2003, the appellant stopped reporting for work due to a medical condition and never returned to the Orlando CMO. On January 20, 2004, Moyers received a follow-up letter from her psychiatrist, indicating that she could not return to duty until at least March 1, 2004. On February 4, 2004, the psychiatrist informed the agency that been Farrington was suffering from a work-related Adjustment Disorder with anxious and depressed mood., and indicated she could return to work in a duty station other than Orlando and recommended a transfer. On August 11, 2004, Moyers proposed the appellant's removal based on her continued unavailability for full-time duty. The appellant's removal was effective October 3, 2004. She did not file a direct appeal, instead on April 17, 2009, filing an IRA. (Appx25-26).

H. Farrington's Reasonable Belief in AirTran and FAA Regulatory and Safety Failures:

16. In concluding that Farrington could not have had a reasonable belief that AirTrans had put the flying public in danger and was not complying the FAR's for training flight attendants by not having an actual mock-up emergency exit in its training curriculum, the AJ cited after-the-fact NTSB and FAA investigation findings:

> During the emergency evacuation, the flight attendant tasked with opening the tail cone door was unable to get the emergency evacuation slide to fully inflate after opening the door. The appellant testified at the hearing that the flight attendant responsible for opening the tail cone door did not know how to operate it and could not get the tail cone door open. *This testimony is contrary to the findings in the NTSB report,* however, that found the flight attendant opened the tail cone door but had problems getting the slide to manually inflate after it did not do so automatically upon opening of the tail cone door.

(Appx22 and n. 33). (Emphasis added).

17. The AJ found that Farrington told the Survival Factors Group that the AirTran training program was ‘in compliance’ with the FARs but that "she thought that there might be occasions when the training was not conducted in compliance with the training program." The appellant "believed that the regulations required all flight attendants to operate all exits on all aircraft in all modes, and that the AirTran flight attendants would not be in compliance with the FAR unless they completed hands on training on a B-717 tail cone mockup." From this distinction over whether AirTran was directly violating an FAR or indirectly doing so by not being able to accomplish an error-free evacuation in accordance with AirTran's training manual, the AJ concluded she could not reasonably believe there were any FAR violations because her "statement to the NTSB that AirTran was in compliance with the FARs directly contradicts her hearing testimony, where she testified that AirTran had been deficient with respect to the FAR for 3 ½ years." (Appx39 and n. 34-35).

18. Unlike the AJ, POI Polomski did not find Farrington's positions to be unreasonable. He testified that:

> "[T]he NTSB investigation discovered that the tail cone cover that protected the emergency slide pack used to AirTran's mockup did not correctly replicate what was actually on the airplane. *He and the appellant disagreed about what training needed to be done to fix this.* The appellant believed all of the flight attendants needed to be taken off-line and given hands on training immediately between the two slide pack covers, which would have AirTran informing them that they needed to modify their tail cone mockup to replicate the B-717 aircraft. *** *While Mr. Polomski agreed that additional training was needed, he disagreed with the appellant over how it should be done.*

(Appx41-42). (Emphasis added).

<u>Facts from 2023 Final Order</u>: The following are fact findings or mixed findings of fact and law set forth in the Board's March 15, 2023, Final Order of Dismissal.

1. The appellant's position description stated that, as part of her surveillance duties and responsibilities, she is expected to "conduct investigations of . . . aircraft incidents and accidents" and to "participate in cabin safety related incident/accident investigations of air carriers and air operators." (Appx5).

2. The NTSB is an independent Federal agency charged with "investigating every civil aviation accident in the United States," it determines the probable cause of accidents, and it issues safety recommendations aimed at preventing future accidents. (Id.)

3. The appellant's position description stated that she would have "frequent contact" with, among other groups, "field and regional office management" and that the "purpose of these contacts is to . . . provide feedback, communicate findings, or resolve issues and problems." The Division Manager was the appellant's fourth- or fifth-level supervisor. (Appx6 at ¶9).

4. The information Appellant disclosed in her May 2003 written report and subsequent meeting with the Division Manager was information that she learned during the normal course of her duties. (Id.)

5. The Division Manager had an "open door policy," but Farrington was never told that she had a duty to provide the Division Manager with the written report or speak to him. She never spoke to the Division Manager prior to sending him the May 2003 report and she had never gone to him on a work-related issue. (Id.)

6. When there was a disagreement at the local level about an issue, the issue was elevated, and it was common for Aviation Safety Inspectors to work through local managers or to raise directly issues to the regional level. (Appx7).

7. Concerning the May 2003 written report, Farrington had attempted to pursue her disclosures therein through her normal supervisory channels. (Id. at ¶10).

8. Appellant provided her May 2023 report to someone in her chain of command. (Id.)

9. Concerning the June 17, 2003, meeting, the Division Manager's handwritten notes from this meeting included references to, among other things, "no crew members trained hands on" with an arrow and the citation "121.417." (Appx7-8 at ¶11). The regulation at 14 C.F.R. § 121.417 discusses crewmember emergency training. (Appx8 at n. 4).

10. The appellant's conversation with the Division Manager occurred in the workplace. The content of their conversation focused on work-related issues. Her position description contemplates such communications with field and regional office managers. (Appx8).

11. The appellant reported to the Division Manager that her findings and recommendations were not being addressed, that flight attendants had not been trained on the proper tail cone exit, and that passengers were at risk.

12. All of Farrington's concerns were based on information that she "learned" as an Aviation Safety Inspector. (Appx6-8).

V. SUMMARY OF THE ARGUMENT

Farrington, a former FAA employee, disclosed information related to aviation safety to the National Transportation Safety Board (NTSB) and her FAA division manager. These disclosures are protected under the WPEA. The Board

erred in failing to apply the broad protections provided by the WPEA, which shields federal employees from retaliation for disclosing information they reasonably believe evidence violations of law, gross mismanagement, waste of funds, abuse of authority, or a substantial danger to public health or safety. Instead, the Board applied the most restrictive interpretations of the statute.

Ten years after the WPEA legislatively overruled the restrictive "ordinary job duties" and "normal channels" of disclosure, the Board clings to the old rules. It failed to apprehend that the WPEA does not limit protection based on the disclosure channel used by the whistleblower. Instead, Sections § 2302(f)(1)(A), (D), and (E) protect disclosures made through any channel, including direct communication to a supervisor, oral channels, and off-duty disclosures through unofficial channels. Section 2302(f)(2) does not directly reference channels but is focused on two characteristics: the job duties of the disclosing employee and the substantive content of the disclosure. Albeit under a heightened proof standard, that section protects whistleblowers who regularly investigate and disclose wrongdoing, regardless of the communication channel used. The Board erred in holding that Ms. Farrington's disclosures were all restricted to the lesser Section 2302(f)(2) protections.

There are no exceptions or reduced protections for external channel disclosures under the WPEA. The WPEA specifically mandates the creation of

official channels for certain types of disclosures. The congressional intent behind the WPEA emphasizes that the statute is designed to ensure that employees would not face retaliation for disclosing misconduct or abuses of authority regardless of their regular job responsibilities and normal reporting channels. Ms. Farrington's NTSB disclosures were transmitted through an independent and external channel and therefore were not subject to diminished protections. The NTSB is an independent federal agency.

Finally, Farrington's belief in FAA and AirTrans regulatory and safety violations were objectively reasonable. Her job did not entail regularly investigating and disclosing to the Atlanta Regional Office "wrongdoing" by FAA employees at Orlando MCO. The Board erred in finding otherwise.

ARGUMENT

VI. STANDARD OF REVIEW

Congress established the standards for review at 5 U.S.C. § 7703(c) as follows:

> [T]he court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
>
> (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[.]

The Federal Circuit reviews the Board’s determinations of law for correctness without deference to the Board’s decision. *McEntee v. MSPB*, 404 F.3d 1320, 1325 (Fed. Cir. 2005).

(3) The standard of review in this Court is de novo from the Board’s orders based on applications of law. In particular, this Court reviews determinations of the MSPB's jurisdiction de novo as to questions of law, and underlying factual findings for substantial evidence. *Parrott v. Merit Sys. Prot. Bd*., 519 F.3d 1328, 1334 (Fed.Cir. 2008). There are no disputed facts in this case, only application of the law to record and jurisdictional facts. Jurisdictional facts are reviewed *de novo* as well. *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932) (requiring de novo judicial review of agency determinations of jurisdictional fact).

VII. SUMMARY OF THE BOARD'S ORDER FINDING FARRINGTON UNPROTECTED UNDER THE WPEA

The Board's order finding that Farrington is unprotected by the WPEA is based on the following findings and conclusions under 5 U.S.C. § 2302(f)(2) of the Whistleblower Protection Enhancement Act of 2012 (WPEA):

(1) Farrington's disclosures were made in the normal course of her duties as an Aviation Safety Inspector. 5 U.S.C. § 2302(f)(2) provides:

> *If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing* (referred to in this paragraph as the “disclosing employee”), the disclosure shall not be excluded from

> subsection (b)(8) *if the disclosing employee demonstrates* that an employee who has the authority to take*** any personnel action *** took *** a personnel action *** *in reprisal for the disclosure* made by the disclosing employee.

(Emphasis added).

(2) 5 U.S.C. § 2302(f)(2) therefore applies to deny her the protections afforded by 5 U.S.C. § 1221(e)(1) ("contributing factor") and § 1221(e)(2) "clear and convincing evidence" with that undemanding burden of proof framework.

(3) Under the heightened framework § 2302(f)(2), Farrington failed to prove the agency took personnel actions against her "in reprisal for the disclosure[s] made by" her.

The Board does not cite any Federal Circuit cases for the proper application of 5 U.S.C. § 2302(f)(2), given that even as of September 2023, there are no such cases, but only a single passing reference in *Heath v. Dep't of the Army*, 640 F. App'x 989, 990 (Fed. Cir. 2016) ("Whistleblower Protection Enhancement Act clarified that disclosures made in the normal course of one's duties may qualify as protected disclosures. *See* 5 U.S.C. § 2302(f)(2)".) The review of Farrington's case by the Federal Circuit will be on a largely blank slate of § 2302(f)(2) jurisprudence.

Although there is no Federal Circuit application of § 2302(f)(2), other courts have applied it. Under 5 U.S.C § 2302(f)(2), "disclosures made during the normal course of duties was contingent on whether an employee could prove that the

officials responsible for the personnel action at issue acted with an improper 'retaliatory motive'—that is, a heightened burden that is not required when a whistleblower makes a disclosure *outside* the normal course of his duties. *Acha v. Dep't of Agric.*, 841 F.3d 878, 882 (10th Cir. 2016) (original emphasis). "The 2012 WPA amendment clarified that an employee is not excluded from whistleblower protection simply because her 'disclosure is made during the normal course of duties.' 5 U.S.C. § 2302(f)(2). With the 2012 amendment to the WPA, 'Congress made crystal clear its intent that *any* whistleblower who reports misconduct via one of the enumerated channels be protected'." *Leshinsky v.* Telvent GIT, S.A., 942 F. Supp. 2d 432, 449 (S.D.N.Y. 2013) (emphasis in original). *Taft v. Agric. Bank of China Ltd.*, 156 F. Supp. 3d 407, 414-15 (S.D.N.Y. 2016). "The WPEA amended the WPA to include 5 U.S.C. § 2302(f)(2), which states that when 'a disclosure is made during the normal course of duties of an employee', as here, any adverse personnel action must, to qualify as retaliatory, be 'in reprisal' for the disclosure—not just because of it. *** Because the Court finds that [the employee] fails to 'establish the lesser standard of proving contribution to the decision to remove her, she by definition, fails to prove the greater standard of retaliatory motive'." *Iglesias v. United States Agency for Int'l Dev.*, Civil Action No. 17-285 (JDB), 2018 U.S. Dist. LEXIS 175806, at *27 n.14 (D.D.C. Oct. 12, 2018).

VIII. THE BOARD ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY APPLY THE WPEA 2012 AMENDMENTS LEGISLATIVELY OVERRULING THE COURT'S DUTY SPEECH RESTRICTIONS

Petitioner challenges the Board's decision and the interpretation of 5 U.S.C. § 2302(f)(2) based on the following arguments.

A. Distinguishing Constitutional from Statutory Claims:

The "duty speech" doctrine, as exemplified in *Garcetti v. Ceballos* (2006), should be distinguished from statutory whistleblower claims. Public employees have First Amendment rights when speaking as citizens about matters of public concern. When a civil servant discloses wrongdoing, she is not compelled to disclose as part of her normal job duties or outside of her normal reporting channels, then her speech enjoys the same protection as made by a citizen. The crucial factor is not the location or subject matter of the disclosure but whether it was made strictly pursuant to an employee's professional duties. The *Garcetti* majority specifically invoked the Whistleblower Protection Act pf 1989 and state whistleblower protections laws in its discussion:

> Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." The *dictates of sound judgment are reinforced by the powerful network of legislative enactments*--such as whistle-blower protection laws and labor codes--available to those who seek to expose wrongdoing. See, e.g., 5 U.S.C. § 2302(b)(8) ***.

Garcetti v. Ceballos, at 425. (Emphasis added, internal citations omitted.) "Sound judgment" counsels the court to afford Farrington at least as much protection as the *Garcetti* and its progeny provide, and 5 U.S.C. § 2302(f)(2) should be construed in light of that First Amendment jurisprudence.

B. Congress's Intention to Restrict Agency "Duty Speech" Defense:

In enacting 5 U.S.C. § 2302(f)(2) of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Congress sought to severely limit the effect of court decisions that narrowed the scope of protected disclosures, citing *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (no protection under 5 U.S.C. §§ 1221(e)(1) and 2302(b)(8) (1994) if employee "did no more than carry out his required everyday job responsibilities"), citing *Horton v. Department of Transp.*, 66 F.3d 279, 282 (Fed. Cir. 1995), and distinguishing *Marano v. Department of Justice*, 2 F.3d 1137, 1139 (Fed. Cir. 1993). Section 2302(f)(2) of the WPEA aimed to reverse such restrictive decisions, not to simply water them down. Congress's intent was to provide protection to a broader range of disclosures, contrary to the "duty speech" defense.

C. Importance of Employee Duties Actually Performed:

An employee's protection under 5 U.S.C. § 2302(f)(2) should not be determined solely by their position description but by evidence of the duties they actually perform on a regular basis. The standard of review of a written job

description should be narrowly construed, not broadly cast since § 2302(f)(2) was enacted to restrict not broaden the potential harms of the duty speech defense. The agency writes the job description and they should be strictly construed against the agency. Judicial experience teaches that normal job descriptions often do not reflect an employee's true job duties, and the content of an employee's speech, and hence the benefit to the public and airline passengers, should not be limited by these descriptions. The Board's application of § 2302(f)(2) to the Farrington case should carefully scrutinized *de novo* in view of the Congressional purpose of protecting whistleblowers to ensure they can report wrongdoing without fear of retaliation, and hence aligning § 2302(f)(2) with statutory principles of transparency and accountability within government agencies.

IX. THE BOARD ERRED AS A MATTER OF LAW IN FAILING TO PROTECT FARRINGTON'S USE OF WPEA DISCLOSURE CHANNELS

A. <u>The WPEA Protects all Disclosure Channels:</u>

Under the WPEA, a "disclosure" is a "*communication or transmission*" of information. 5 U.S.C.S. § 2302(a)(2)(D). All communications and transmissions of disclosures are made through "channels" between those who send and those who receive the disclosures by oral or written means whether in person, by electronic message transmission or telecommunications. All disclosures put into these channels are protected based solely on their *substantive content* as to "any violation

of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety". All communications or transmissions of such substantive content sent through the channel are fully protected so long as the whistleblower "reasonably believed" that content.

Meriam-Webster Dictionary (online) defines "transmit" as to send or convey from one person or place to another, and "transmission" as something that is transmitted (e.g., message). That dictionary defines "communication" as a process by which information is exchanged between individuals, such as a verbal or written message (e.g., captain received an important *communication*). It defines "channel" as a means of communication or expression, such as a fixed or official course of communication (e.g., went through established military *channels* with his grievances). Finally, "wrongdoing" is defined as an evil or improper behavior or action (e.g., cleared of any *wrongdoing), or* an instance of doing wrong.

In enacting the WPEA in 2012, 5 U.S.C. § 2302(f)(1) and (2), Congress foreclosed the Board from denying full protection based upon the disclosure channel selected by a whistleblower. § 2302(f)(1) and (2) do not directly reference disclosure "channels", but § 2302(f)(1)(A), (D) and (E) do so indirectly within the prohibition that utilization of particular channel cannot be used as grounds to exclude covered disclosure from the blanket § 2302(b)(8) protection--, i.e., "any

disclosure". § 2302(f)(1)(A) protects disclosures made through any direct channel to a supervisor; § 2302(f)(1)(D) protects disclosures made through any oral channels whether by means of face-to-face, by phone or voice mail transmission; and § 2302(f)(1)(E) protects off-duty disclosures through unofficial channels such as transmissions made from home.

B. <u>Protection under Section 2302(f)(2) is not Channel Dependent:</u>

By contrast, § 2302(f)(2) makes no direct or indirect reference to channels, but is concerned exclusively with two characteristics of the disclosure: (1) the job duties of the "disclosing employee", and (2) the substantive content sent through the channel. § 2302(f)(2)'s transmitter protection is for a "disclosing employee" "during the normal course of [her] duties" must both "regularly investigate *and* disclose" information; and § 2302(f)(2)'s substantive protection is that the disclosure must directly transmit information about "wrongdoing". § 2302(f)(2) contains the only usage of the term "wrongdoing" in the WPEA. Whistleblowers whose job is *not* to "regularly investigate and disclose*** wrongdoing" are fully protected even if they communicate or transmit information they obtain during their normal duties and through normal channels. The WPEA explicitly overruled case precedent to the contrary.

An employee who only irregularly or occasionally investigates and discloses information about wrongdoing is fully protected; as is the employee who regularly

investigates, but only occasionally discloses; or the employee who only occasionally investigates but regularly discloses. And an employee is fully protected who regularly investigates and discloses an agency's law violations or wasteful or dangerous or incompetent practices *not attributed to a wrongdoer* but instead to the state of operations of the agency, or its history of failure to reform or correct its deficiencies, no matter how well known and complained about those deficiencies may be. § 2302(f)(1)(B) and (G) respectively protect the employee even when the "disclosure revealed information that had been previously disclosed", and no matter how stale the disclosure is based on the "amount of time which has passed" since the agency's deficiencies manifested. Still, where an agency has the authority to create a special disclosure channel for certain kinds of communications or transmissions, an employee can "be disciplined for failing to adhere to applicable agency regulations requiring them to report misconduct through agency procedures *in addition to* their whistleblower disclosures through other channels." *Losada v. DOD*, 601 F. App'x 940, 943 (Fed. Cir. 2015) (discipline proper where whistleblower failed to "disclose the suspected child abuse via the proper channels, rather than [only] the email to OSC").

C. There Are No Exceptions or Reduced Protections for External Channel Disclosures:

Unlike European whistleblower protection laws that require the creation, maintenance, auditing and protection of internal, external and public (media and

NGOs) channels, American whistleblower law does not mandate creation and maintenance of particular internal or public channels, so long as a workable communication and transmission channel exists within each agency. But the law is different for external channels which are specifically mandated by statute and regulation, and which therefore must be protected by the agency administering the channel. Almost all federal whistleblower statutes mandate agencies, bureaus and commissions to create official channels to receive disclosures. Under the WPEA, the Office of Special Counsel is mandated to create channels to receive and process disclosures from whistleblowers about fraud, gross waste or mismanagement, abuse of authority, imminent safety danger and violation of law. And under the myriad of federal statutes protecting aviation, nuclear, transportation, health insurance, pipeline, product safety, food adulteration, securities and financial sector whistleblowers, the Department of Labor, Department of Energy, Consumer Financial Protection Bureau, Commodities Future Trading Commission and SEC are required to operate reporting channels, in addition to the OIGs of every federal agency. All governmental external channels are mandated to operate in accordance with published rules and regulations.

Congressional committees in 1994 criticized the Board for continuing to take a narrow view of what constitutes a protected disclosure. *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1348 (Fed. Cir. 2001). The House report for the 1994

amendment stated that "the most troubling precedents involve the Board's inability to understand that 'any' means 'any' [except] *** for classified information or material the release of which is specifically prohibited by statute." *Id*, quoting S. Rep. No. 103-358, at 11 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3559. Despite the committee criticism, *Huffman* held that "reports made as part of an employee's assigned *normal job responsibilities* are not covered by the [Whistleblower Protection Act] when made *through normal channels*." *Id.* at 1344. (Emphasis added, quoted in *Layton v. MSPB*, 392 F. App'x 875, 877-78 (Fed. Cir. 2010). *Kahn v. DOJ*, 618 F.3d 1306, 1313 (Fed. Cir. 2010) summarized Huffman as holding "an employee must communicate the information either outside the scope of his normal duties or outside of normal channels to qualify as a protected disclosure." The Board and this Circuit were unequivocal that disclosures made as part of normal duties using normal channels" enjoyed no protection whatsoever because they do not meet the threshold definition of "any disclosure". See also, *Fields v. Dep't of Justice*, 452 F.3d 1297, 1305 (Fed. Cir. 2006).

Congress' criticism did not fall on deaf ears, but were denied any judicial weight because "post-enactment statements made in the legislative history of the 1994 amendment have no bearing on our determination of the legislative intent of the drafters of the 1978 and 1989 legislation." *Huffman v. Office of Pers. Mgmt.*, at 1354. Thus, the court declined to agree that a "*protected disclosure may be made*

as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive, or context." *Id*. citing 140 Cong. Rec. H29353 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey) (emphasis added). However, after *Kahn* was decided, Congress adopted the WPEA, and added § 2302(f)(1) and (2), legislatively overruling *Huffman* and its progeny, abrogating entirely the "normal channels" disqualification, and confining the "normal job responsibilities" only to employees who "regularly investigate and disclose*** wrongdoing". Even then, employees in that narrowed class are still protected, but have a heightened burden of proof to demonstrate reprisal. The WPEA also overruled *Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310, 1314 (Fed. Cir. 2002) (no protection for employee "report of information that was already publicly known").

X. INSTEAD OF PROTECTING DISCLOSURE CHANNELS, THE BOARD AND THE AGENCY WEAKENED THEM

A. <u>The Board Applied Channel Analysis Rejected by Congress:</u>

Conspicuously missing from 5 U.S.C. § 2302(b)(8), § 2302(f)(2) and § 1221(e) is any reference to "normal job responsibilities" or "normal channels" for disclosures. These terms of the old and legislatively overruled *Huffman* approach had appropriate place in Farrington II. It is contrary to the WPEA to deny whistleblower protection to an employee based on the channels she used to report

safety. Nor does the WPEA withhold protections for disclosures of violations to supervisors in her chain of command. Farrington's job was *not* to "regularly investigate and disclose*** wrongdoing". Aviation accidents are exceedingly rare, as are NTSB investigations. That Farrington worked on a single investigation during her career cannot establish her regular participation in an NTSB investigation, much less that she herself had a duty to "regularly investigate" aviation accidents. Furthermore, NTSB investigates accidents by airlines, and only incidentally enquires about FAA performance. Her job position in critiquing common carrier performance does not involve any duty to "regularly investigate and disclose*** wrongdoing" by agency officials.

The Board took a narrow interpretation of "any disclosure" under 5 U.S.C. § 2302(b)(8) by limiting its protection to disclosures not made through "normal channels" and "ordinary job duties." That interpretation restricts protection to disclosures made within "normal channels" or "ordinary job duties", a *Huffman* era restriction the WPEA overruled. This will have a chilling effect on whistleblowing and defeat the statutory purpose, for employees who are most likely to acquire knowledge of unacceptable agency practices and official behaviors during their normal job responsibilities and communicating and transmitting that knowledge through the normal channels, will decline to transmit that knowledge.

B. The Board Undermined the NTSB as a Protected External Disclosure Channel:

The Board failed to determine whether Farrington engaged in any protected activity, but merely assumed it for purposes of its channel analysis. Thus, paying no attention to the substantive content of her disclosures, but only to type labelling them, the Board failed to apprehend the fundamental channel analysis it needed to undertake to fulfill the WPEA Congressional purpose. Most prominently, the Board failed to determine whether the NTSB was an internal or external channel. The Board acknowledged then ignored that the NTSB is an independent federal agency charged by Congress with investigating every civil aviation accident. The NTSB has five Board Members, each nominated by the President and confirmed by the Senate to serve 5-year terms. The NTSB is a classic external reporting channel, and is bound by the information gathering procedures of 49 U.S.C. Part 831, including information provided by witnesses. As such, the Board was obligated to ensure that FAA employees had full access to the NTSB as an external disclosure channel. Instead, the Board did just the opposite, and denied primary whistleblower protection to Farrington in using that external channel.

The WPEA expanded the definition of protected disclosures and intended to ensure that employees wouldn't face retaliation for bringing misconduct or abuses of authority to light. 5 U.S.C. § 2302(f)(1) and (2) are critical specially enacted amendments to the civil service good government and whistleblower protection

regime. All disclosures with protected content are covered by the WPEA all of the time, irrespective of time and place. The only exception is a narrow one, which places a heightened burden of proof on whistleblowers in a limited class mandated to regularly investigate and report "wrongdoing", such as auditors, law enforcement officers, and common carrier aviation accident investigators, such as those employed by the NTSB. FAA employees who infrequently coordinate with the NTSB are not in that limited class. Farrington's primary job was confined to quality control over flight attendant training, and the only accidents for which she would have a role were those where flight attendant performance was a factor under review.

C. Farrington's Job Was Not to Regularly Investigate and Disclose Agency Wrongdoing to FAA Division Level Officials:

In addition to protection of her external disclosures to the NTSB, Farrington's internal disclosures to the FAA Division Manager in Atlanta did not derive from any regular investigative duties to ferret out and disclose wrongdoing by agency employees at the Orlando MCO. The Board's steadfast determination that full WPEA protection was lost by Orlando employees who voluntarily accepted of the Division Manager's occasional open forum invitations distorts not just Section 2302(f)(1) and (2), but the unambiguous Congressional intent of the WPEA. As *Huffman* quoted the Congressional record, the Congress was adamant that a "protected disclosure may be made as part of an employee's job duties, may

concern *policy or individual misconduct*, and may be oral or written and *to any audience* inside or outside the agency, *without restriction to time, place*, motive, or context." (Emphasis added).

D. The Board Erroneously Failed to View Reasonable Belief from Farrington's Perspective:

The Board erred as a matter of law in failing to view objectively reasonable belief from Farrington's perspective. No witness testified that her beliefs in FAA and AirTran violations were implausible. Her POI specifically testified it was a difference of opinion. As this Court held in *Horton v. Dep't of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995):

> The statute requires only that the whistleblower had a reasonable belief that, for example, a rule or regulation had been violated, in order for the disclosure of such violations to be protected. Indeed, the Board's finding that the reported violations were "trivial" supports a reasonable belief on the part of Mr. Horton that violations in fact occurred. We take note that the evidence was mixed concerning the substance of the matters disclosed. For example, the library staff member admitted to the personal phone call that was the subject of the May 16 incident. *The Board did not review this evidence from the viewpoint of Mr. Horton's "reasonable belief,"* but instead found that this single incident could not reasonably be viewed as wrongdoing. *** Whether or not the reported violations were trivial, in the Board's view, does not deprive the discloser of the benefit of having made a protected disclosure.

(Emphasis added). Indeed, neither the administrative judge nor the Board explained how, as a matter of law, Farrington's beliefs were not objectively reasonable. As this Court recently reiterated in *Ferrell v. HUD*, No. 2022-1487, 2023 U.S. App. LEXIS 3146, at *7-8 (Fed. Cir. Feb. 9, 2023):

> A protected disclosure under the WPA and WPEA is a disclosure of information that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 C.F.R. § 1209.4(b). *The test to determine whether a putative whistleblower has a reasonable belief is an objective one:* could 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 one of the categories of wrongdoing protected by the WPA and WPEA. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). *The reasonableness of the disclosure is based upon what the employee knew at the time of the disclosure, not whether later information may have established the reasonableness of an earlier disclosure*. *Reardon v. Dep't of Homeland Sec.*, 384 F. App'x 992, 994 (Fed. Cir. 2010).

Thus, subsequent findings by the NTSB can play no role, as the Board erroneously accorded the issue.

XI. IN ITS NEW "REPRISAL" JURISPRUDENCE, THE BOARD ATTEMPTS TO ABROGATE THE BURDEN OF PROOF REGIME LONG SINCE ESTABLISHED BY CONGRESS.

Section 2302(f)(2) provides that investigators must prove retaliation rather than a mere causal link. That only affects the ultimate conclusion whether the law has been violated, however. There is not a scintilla of statutory language, legislative history or prior precedent that paragraph (f)(2) amended the methodology or order of the parties' burdens of proof to reach the "reprisal" conclusion. The Board's decision erroneously requires whistleblowers to disprove what Congress has prescribed as the agency's burden to establish by clear and

convincing evidence. The Board has no authority to rewrite the Act's order, methodology and structure for presenting and adjudicating burdens of proof.

When it enacted the WPA, Congress codified long-standing principles to assess retaliation that were controlling even before 1989 when it modified the laxity and severity of parties' respective burdens of proof under section 2302(b)(8). Since passage of the Civil Service Reform Act, an employee has only needed to establish a retaliatory inference for a *prima facie* case. This can be proven by demonstrating protected activity and its nexus to a subsequently prohibited personnel action. The ultimate conclusion on retaliation, however, requires careful scrutiny of the agency's purported independent basis for the action. *See, e.g., Warren v.* Dept. *Army,* 804 F.2d 654-57 (Fed. Circ. 1986). Nothing in statutory language or legislative history of WPEA Subjection (f) modified this.

In 1989 Congress relaxed the employee's nexus burden to only require a showing of "contributing factor" for the nexus, which it defined as: "*Any* factor, alone or in combination with other factors, that tends to affect the out in any way." See, 134 *Cong. Rec*. 19,981 (1988) and 135 *Cong. Rec.* 4509 (1989). See also *id.* at 4518 (statement of Sen. Grassley); at 4522 (statement of Sen. Pryor); at 5033 (explanatory statement of Senate Bill 20); and at 4522 (statement of Rep. Schroeder). Retaliation is one way to prove nexus, but not a stated statutory prerequisite. This is firmly shown by the 1994 Congress' codification of the

knowledge-timing test, which the Board has held as it must is satisfied if an action occurs within two years of lawful whistleblowing. *Boyd v. Dep't of Homeland Sec.*, 2015 MSPB LEXIS 5631, p. 10 (June 25, 2015); *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, p. 27 (2013); *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, p. 20 (2008); *Schnell v. Dep't Army*, 114 M.S.P.R. 83 (2010), 2010 MSPB LEXUS 67, p. 21; *Carey v. DVA*, 93 M.S.P.R. 676 (2003); *Redschlag v. Department of the Army,* 89 M.S.P.R. 589, p. 87 (2001). Thus, temporal proximity alone is enough, and is extremely close in Farrington's case.

In 2012 and 2017 Congress established and then narrowed a "duty speech" exception that requires the employee to demonstrate retaliation. 5 U.S.C. 2302 section (f)(2). Yet the amendments contained no modifying language of the core whistleblower protection of the contributing factor standard. Nothing in Subsection (f) abrogates that upon the employee showing contributing factor, if only by temporal proximity, the burden then shifts to the agency to prove by clear and convincing evidence an independent basis for which it would have acted. 5 U.S.C. section 1221(e). The procedure and substance of *Carr. v. Social Security Administration,* 185 F.3d 1318 1323 (Fed. Circ. 1999) amply makes the point. There this Court established the three factor criteria for measuring whether an agency has met its affirmative defense burden: (1) strength of the evidence of the asserted independent non-discriminatory reason for action; (2) strength of the

evidence of lack of the deciding officials' motives to retaliate; and (3) evidence of discriminatory treatment compared to similarly situated employees who had not made protected disclosures. In every case where contributing factor is established no matter how tenuously, *Carr* factor (2) "motive to retaliate" or motive for reprisal must be measured through the normal burden of proof process.

Since passage of the WPEA this structure has continued to be controlling for all whistleblower appeals interpreting retaliation or reprisal: the employee has a relatively modest nexus burden for the prima facie case, and whether there has been reprisal is only decided after the agency's attempt to prove non-retaliatory reasons and motives by clear and convincing evidence. *Rutter v. DOJ* , 2018 MSPB LEXIS 500, *16-17 (M.S.P.B. February 6, 2018); Coppola v. Dep't of Veterans Affairs, 770 F. App'x 573, 576 (Fed. Cir. 2019). Under Subsection (f)(2), if the professional investigator or accountant establishes contributing factor even by temporal proximity alone as Farrington clearly does, if the agency cannot prove by clear and convincing evidence that it would have taken the same action for legitimate reasons, the employee necessarily has met her burden of showing reprisal. The Board in this case did the exact opposite of what the statute commands. It held with no citation or explanation of any kind as to the burden of proof process or standards for measuring reprisal, that administrative judges by merely concluding in a freewheeling process that there was no reprisal, can

completely dispense with the statutorily prescribed contributing factor and clear and convincing affirmative defense analysis.

Under the WPEA Subsection (f)(2) language, the corrected holding is that in order for an administrative judge to make a conclusion whether reprisal has been shown, it is the agency's burden to specifically prove non-retaliatory motives by clear and convincing evidence. The Board erroneously ignored the statutory shifting burdens of proof, and required Farrington to prove the ultimate conclusion of retaliation without considering whether she had met the modest standards for an inference either before or after Congress enacted the contributing factor test. To allow the Farrington Board holding to stand, will functionally erase the core of the statutory scheme that mandates the agency to convincingly defend its asserted innocent motives. No authority exists that when Congress enacted section 2302(f)(2) it was cancelling the reverse burden of proof in section 1221. Section 2302(f)(2) only affects the ultimate conclusion for a WPA violation, not the infrastructure of the parties' burdens to reach it.

XII. FARRINGTON HAS MET HER BURDEN TO PROVE REPRISAL

Even if the burden to prove reprisal rested solely with appellant in a statutory vacuum, she has met it. The Board failed to define what is required to constitute reprisal before ruling that Farrington had not proved it. The difference between a causal link and reprisal is that the latter requires the element of

punishment, the former does not. See, *Spruill v. MSPB,* 978 F.2d 679, 681 (Fed. Circ. 1992). As Spruill explained at note 2:

> A note on terminology. What is at issue here is an official action, presumably adverse, taken against an employee, intended to be punishment for some protected act of the employee, such as whistleblowing. This official action is sometimes called 'reprisal,' and sometimes called 'retaliation.' The dictionary meaning of reprisal suggests actions taken to procure redress of grievances, or something given or paid in restitution. Retaliation, on the other hand, connotes repayment in kind, to transgress against a transgressor. Neither term quite describes what is going on. We use reprisal since that is the term used, though not defined, in the Findings and Purpose section of the WPA, see 103 Stat. 16 § 2 (codified at 5 U.S.C. § 1201, note (Supp. II 1990)), and it has fewer letters.

Long before the WPEA's passage, the circumstantial evidence allowances to prove retaliation had long since been established. As the Board explained in *Valerino v. HHS*, 7 MSPR 487, 489-90 (1981):

> Whether a causal connection exists between the alleged protected activity and appellant's removal requires consideration of various factors including: (1) the employer's reaction to the protected activity, *Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979); (2) the closeness of the adverse action to the protected activity, compare [*490] *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980); *NLRB v. Automotive Controls Corp.*, 406 F.2d 221 (10th Cir. 1969) with *Williams v. Boorstin*, 23 FEP Cases 1669 (D.C. Cir. 1980), *cert. denied*, 68 L.Ed.2d 842, 25 FEP Cases 1192 (1981); *NLRB v. Walton Mfg. Co.*, 286 F.2d 26 (5th Cir. 1961); *Rogers v. McCall*, 488 F. Supp. 689 (D.D.C. 1980); (3) the extent of the charges and disclosures forming the basis of the protected activity, *Frazier*, supra, 189; (4) the seriousness of them *Id*.; and (5) the time during which the matters raised by them were left unresolved. *Id.*

See also Powers v. Dep't of Navy, 69 MSPB 150, 156 (1995); *Fellhoelter v. Dep't Agriculture*, 568 F. 3d 965, 971 (Fed. Circ. 2009); *Sheehan v. Dep't Navy,* 230 F.3d 1009, 1014 (2001); and *Webster v. Dep't of the Army,* 911 F.2d 689, 690 (Fed. Cir. 1990). In *Warren v. Dep't of Army*, 804 F.2d 654, 656 (Fed. Cir. 1986), this Court held:

> The board and counsel for petitioner agree that one adjudicating an adverse action in which a claim of illegal retaliation is made, must apply four tests which, as stated in *Hagmeyer v. United States*, 757 F.2d 1281, 1284 (Fed. Cir. 1985), are as follows:
>
> > In order for petitioner to prevail on his contention, [of illegal retaliation] he has the burden of showing that (1) a protected disclosure was made, (2) the accused official knew of the disclosure, (3) retaliation resulted, and (4) there was a genuine nexus between the retaliation and petitioner's removal.

Subsection (f) using the term "reprisal" did not change this longstanding formula. In case after case having nothing to do with that subsection, this Court has used the term "reprisal" as a fundamental element of every whistleblower's claims.

In *Rickel v. Dep't of the Navy*, 31 F.4th 1358, 1364 (Fed. Cir. 2022), the Court explained:

> 5 U.S.C. § 2302(b)(8) prohibits an agency from penalizing its employees for whistleblowing. "An employee who believes he has been subjected to illegal retaliation must prove by a preponderance of the evidence that he made a protected disclosure that contributed to the agency's action against him." *Smith v. GSA*, 930 F.3d 1359, 1365 (Fed. Cir. 2019). "If the employee establishes this *prima facie case of reprisal* for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken 'the same personnel action in the absence of such disclosure,'

> which we sometimes refer to as a showing of 'independent causation.'" *Miller v. DOJ*, 842 F.3d 1252, 1257 (Fed. Cir. 2016) (citations omitted). In determining whether the agency has carried its burden, the Board considers the three nonexclusive *Carr* factors. *See Carr*, 185 F.3d at 1323.

See also, *Coppola v. Dep't of Veterans Affairs*, 770 F. App'x 573, 576 (Fed. Cir. 2019) ("while the term 'reprisal' is commonly used in the whistle-blower context, it also relates to retaliatory action against an employee for filing an EEO complaint alleging discrimination"); *Brock v. DOT*, No. 2023-1133, 2023 U.S. App. LEXIS 24745, at *15-16 (Fed. Cir. Sep. 19, 2023) ("If the employee establishes this *prima facie case of reprisal* for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken 'the same personnel action in the absence of such disclosure", quoting *Whitmore v. Dep't of Lab.*, 680 F.3d 1353, 1364 (Fed. Cir. 2012)); and *Anoruo v. VA*, No. 2023-1114, 2023 U.S. App. LEXIS 21460, at *6-7 (Fed. Cir. Aug. 16, 2023) ("If the employee establishes this *prima facie case of reprisal* for whistleblowing, the burden of persuasion shifts to the agency", quoting *Smith v. Gen. Servs. Admin.*, 930 F.3d 1359, 1365 (Fed. Cir. 2019).)

This "reprisal" test existed before and after section 2302(f)(2) was enacted. Appellant has presented voluminous evidence in the record for each of these factors, none which the Board challenged as it ignored them all. Even with the

Board's erroneous legal standards, appellant has more than met her burden to prove an inference of retaliation.

XIII. SECTIONS 2302(F)(1) AND (2) SHOULD BE VIEWED IN A FIRST AMENDMENT DUTY SPEECH CONTEXT

The Board's holding that the Agency sustained its duty speech defense under § 2302(f)(2) is not consistent with Supreme Court decisions in *Garcetti v. Ceballos*, 547 U.S. 410 (2006)*, Lane v. Franks*, 573 U.S. 228 (2014) and *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). While the final order contends that Farrington's disclosures were within her ordinary job duties, *Garcetti, Franks* and *Kennedy* provide a whistleblower duty speech framework that the Board did not.

A. **Disclosures and Speech Related to Employment Duties, but not Compelled by Them are Protected Under the First Amendment and the WPEA:**

The majority opinion in *Garcetti* holds that speech made by a public employee "pursuant to their official duties" is not protected by the First Amendment. However, *Garcetti* emphasized that this determination must be made by evaluating the nature of the employee's actual job duties, not just written job descriptions. Speech made pursuant to an employee's official responsibilities is not protected, but speech on matters of public concern, even if made in the workplace, retains protection if the employee spoke as a citizen. The analog of § 2302(f)(2) to *Garcetti* is that when a federal civil servant without her job mandating it discloses wrongdoing, even about her own Agency with information she learned during her

job, she essentially speaks as a citizen. An employee blowing the whistle on wrongdoing outside of her job duties does not speak as an "employee" but as a "citizen".

B. The Board Conflated Farrington's Work Related Knowledge with Work Mandates:

The Board did not distinguish whether Farrington's speech was made on matters of public concern or simply a matter of public administration. Nor did the Board distinguish whether the subject matter of her speech was learned at work, or whether that speech was compelled by work. The latter is not protected, but the former is, whether under *Garcetti* or § 2302(f)(2). *Lane v. Franks* clarified the distinction:

> But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of the prosecutor's employment," because "the First Amendment protects some expressions related to the speaker's job." In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti*i s *whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties*.
>
> It bears emphasis that our precedents dating back to *Pickering* have recognized that *speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment*. In *Pickering*, for example, the Court observed that "teachers are . . . the members of a community most likely to have

> informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." Most recently, in *San Diego* v. *Roe*, 543 U. S. 77, 80 (2004), the Court again observed that public employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large."

Lane v. Franks, 573 U.S. 228, 239-40, emphasis added, internal quotations and brackets omitted.

C. <u>The Board Did not Engage in the Required Rigorous Scrutiny of Asserted Job Duty Assertions by the Agency:</u>

Farrington's disclosures raised concerns about aviation safety, passenger safety, and compliance with regulations, all of which address matters of enormous public concern about which she learned on the job. Most recently, the Court in *Kennedy v. Bremerton Sch. Dist.*, reconciled *Garcetti* and *Lane* to strongly emphasize that rigorous scrutiny must be applied to all claims by government that it is denying protection to speech because it has effectively paid for it through wages:

> In *Garcetti*, the Court concluded that a prosecutor's internal memorandum to a supervisor was made "pursuant to his official duties," and *** the prosecutor's speech "fulfilled a responsibility to advise his supervisor about how best to proceed with a pending case." In other words, *** *it was speech the government "itself had commissioned or created" and speech the employee was expected to deliver* in the course of carrying out his job.
>
> By contrast, in *Lane* a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his government employment. The Court held that the employee's speech was protected by the First Amendment. In doing so, the Court held that *the fact the speech touched on matters related to public*

> *employment was not enough to render it government speech*. *** It is an inquiry this Court has said should be undertaken "practically," rather than with a blinkered focus on the terms of some formal and capacious written job description. To proceed otherwise would be to *allow public employers to use "excessively broad job descriptions" to subvert* the Constitution's protections.
>
> *** When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. *** Simply put: Mr. Kennedy's prayers did not "owe their existence" to Mr. Kennedy's responsibilities as a public employee.

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022), emphasis added, internal citations and brackets omitted. Whether under the First Amendment or § 2302(f)(2), the Board overly emphasized the fact that Farrington's disclosures were of a subject matter closely related to her job functions, but gave only general conclusions that her regular job duties compelled those disclosures. The burden for any defense is on the party asserting it, and in a WPEA case, the Agency bears the burden of showing officially articulated duties compelled the disclosures.

XIV. CONCLUSION

The WPEA, imbued with bipartisan Congressional wisdom, offers expansive protections to federal employees who courageously disclose information they reasonably believe exposes violations of law, gross mismanagement, waste of funds, abuse of authority, or threats to public health and safety. The statutory amendments require the Board and courts to refrain from imposing restrictions on the channels through which disclosures are made. Sections 2302(f)(1)(A), (D), and

(E) unequivocally extend protection to disclosures made through diverse channels, including direct communication to supervisors, oral discussions, and off-duty disclosures through unofficial means. Section 2302(f)(2) goes beyond channel considerations to give primary focus to the substantive content of the disclosures, subject to the very narrow restriction on full protection for whistleblowers who regularly investigate and disclose wrongdoing.

Petitioner respectfully urges this Court to reverse the Board's decision, declare that Section 2302(f)(2) does not apply to her case, and remand this matter for further proceedings that adhere to the true spirit and intent of the Whistleblower Protection Enhancement Act.

Respectfully Submitted by:

/s/ Thad M. Guyer

____

Thad M. Guyer

Counsel for Petitioner

ADDENDUM

A. Relevant Statutes

5 U.S.C. § 1221(e):

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B)the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 2302(b)(8) and (f):

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— ***

(8) take 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—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; ***

***

(f)

(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the "disclosing employee"), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take,

> recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

B. Final Order of the Merit System Protection Board Subject to Review

Attached hereto is the sole agency action and decision appealed from which is the Final Order of the Merit System Protection Board dated March 15, 2023:

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KIM ANNE FARRINGTON,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
AT-1221-09-0543-B-2

DATE: March 15, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Stephanie L. Ayers, Esquire, and Thad M. Guyer, Esquire, Medford, Oregon, for the appellant.

Elizabeth J. Head, Washington, D.C., for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which denied corrective action in this individual right of action appeal. On petition for review, the appellant makes the following arguments: (1) the statute at 5 U.S.C. § 2302(f)(2) does not apply to her because her disclosures were not made in the

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

normal course of her duties; (2) she proved that her disclosures were a contributing factor in the agency's decision to take various personnel actions against her; (3) the agency abandoned its laches defense and the administrative judge erred in her analysis of this issue; and (4) she was prejudiced by the administrative judge's delay in issuing the initial decision and her credibility determinations were erroneous. *Farrington v. Department of Transportation*, MSPB Docket No. AT-1221-09-0543-B-2, Petition for Review (PFR) File, Tab 27. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; 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 administrative 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; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

¶2 After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. We MODIFY the initial decision to find that 5 U.S.C. § 2302(f)(2) applies to this matter because the appellant's disclosures were made in the normal course of her duties. We VACATE the administrative judge's findings regarding laches and the agency's burden to prove by clear and convincing evidence that it would have taken the actions absent the appellant's whistleblowing disclosures. Except as expressly modified herein, we AFFIRM the initial decision.[2]

[2] The Association of Flight Attendants-Communications Workers of America requested leave to file an amicus curiae brief in support of the appellant. PFR File, Tab 16. The Board, in its discretion, may grant such a request if the organization has a legitimate

The statute at 5 U.S.C. § 2302(f)(2) applies to this appeal because the appellant made her disclosures in the normal course of her duties, and we agree with the administrative judge that the appellant did not prove that the agency took the personnel actions against her in reprisal for her disclosures.

¶3 Under the Whistleblower Protection Enhancement Act of 2012 (WPEA), an appellant may establish a prima facie case of retaliation for whistleblowing disclosures and/or protected activity by proving by preponderant evidence that (1) she made a disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D),[3] and (2) the whistleblowing disclosure or protected activity was a contributing factor in the agency's decision to take, fail to take, or threaten to take or fail to take, a personnel action against her. 5 U.S.C. § 1221(e)(1); *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015). If the appellant makes out a prima facie case, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the whistleblowing disclosure(s). 5 U.S.C. § 1221(e)(2); *Webb*, 122 M.S.P.R. 248, ¶ 6.

¶4 Prior to the WPEA's enactment, disclosures made in the normal course of an employee's duties were not protected. *Salazar v. Department of Veterans Affairs*, 2022 MSPB 42, ¶¶ 10-12. However, under a provision of the WPEA codified as 5 U.S.C. § 2302(f)(2), such disclosures are protected if the appellant shows that the agency took a personnel action "in reprisal for" the disclosures.

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interest in the proceedings, and such participation will not unduly delay the outcome and may contribute materially to the proper disposition thereof. 5 C.F.R. § 1201.34(e)(3). We find that an amicus curiae brief from the Association of Flight Attendants will not materially contribute to the proper disposition of this matter, and we deny its request.

On December 30, 2022, the appellant filed a motion for leave to file a new pleading, which appears to be a request to expedite processing of this matter. PFR File, Tab 44. Because this order is a final decision in this matter, we deny the appellant's motion.

[3] This appeal does not involve protected activity as set forth in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D).

Id., ¶ 10 (citing 5 U.S.C. § 2302(f)(2)). This provision imposed an "extra proof requirement" for these types of disclosures such that an appellant to whom 5 U.S.C. § 2302(f)(2) applies must prove by preponderant evidence that the agency took a personnel action because of the disclosure and did so with an improper, retaliatory motive. *Id.*, ¶ 11 (discussing S. Rep. No. 112-155, at 5-6 (2012)).

¶5 The National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA), signed into law on December 12, 2017, amended 5 U.S.C. § 2302(f)(2) to provide that disclosures "made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing," are protected if the employee demonstrates that the agency "took, failed to take, or threatened to take or fail to take a personnel action" with respect to that employee in reprisal for the disclosure. *Salazar*, 2022 MSPB 42, ¶¶ 13-14; Pub. L. No. 115-91, § 1097(c)(1)(B)(ii), 131 Stat. 1283, 1618 (2017). As we held in *Salazar*, 2022 MSPB 42, ¶¶ 15-21, the 2018 NDAA's amendment to 5 U.S.C. § 2302(f)(2), which clarified the prior version of that statute enacted in the WPEA, applies retroactively to appeals pending at the time the statute was enacted.

¶6 The administrative judge found that the appellant, as an Aviation Safety Inspector who was responsible for ensuring compliance with Federal Aviation Administration regulations and investigating and reporting wrongdoing, was covered by 5 U.S.C. § 2302(f)(2). *Farrington v. Department of Transportation*, MSPB Docket No. AT-1221-09-0543-B-2, Remand File, Tab 38, Initial Decision (ID) at 13-14, 17. The administrative judge, in analyzing the "extra proof requirement" regarding each personnel action, appears to have implicitly found that each of the appellant's four disclosures were made during the normal course of her duties. ID at 29-40. On review, the appellant contends that the case is governed by the Board's earlier decision in *Farrington v. Department of Transportation*, 118 M.S.P.R. 331 (2012), and its finding that "there was no duty

speech." PFR File, Tab 27 at 26. We supplement the initial decision to explicitly find that the appellant made her disclosures in the normal course of her duties.

¶7 In its earlier decision, the Board relied on the appellant's position description and concluded that she failed to make a nonfrivolous allegation that her disclosures to the National Transportation Safety Board (NTSB) were not made within her normal job duties within the normal channels of reporting. *Farrington*, 118 M.S.P.R. 331, ¶ 9. The appellant's position description stated that, as part of her surveillance duties and responsibilities, she is expected to "conduct investigations of . . . aircraft incidents and accidents" and to "[p]articipate[] in cabin safety related incident/accident investigations of air carriers and air operators." *Farrington v. Department of Transportation*, MSPB Docket No. AT-1221-09-0543-W-1, Initial Appeal File (IAF), Tab 19, Subtab B at 1-2. The NTSB is an independent Federal agency charged with "investigating every civil aviation accident in the United States," it determines the probable cause of accidents, and it issues safety recommendations aimed at preventing future accidents. National Transportation Safety Board, *About the NTSB*, https://www.ntsb.gov/about/pages/default.aspx (last visited Mar. 14, 2023). The appellant provided the head of the NTSB Survival Factors Group with a copy of her May 2003 written report and she was interviewed by the NTSB Survival Factors Group after the NTSB initiated its investigation into the March 26, 2003 AirTran incident. Based on these facts, we supplement the initial decision to find explicitly that the appellant's two disclosures to the NTSB were made within the normal course of her duties.

¶8 We now turn to the two disclosures that the appellant made to the Division Manager, including (1) the May 2003 written report, which discussed, among other things, lack of management support and funding approval, complaints about training at AirTran facilities, and inability to perform surveillance activities, and (2) her meeting with the Division Manager following an "All Hands" meeting on June 17, 2003 (for which the Division Manager took some handwritten notes). ID

at 18-20; IAF, Tab 19, Subtabs F, H. In its Opinion and Order, the Board noted that there was a material dispute of fact concerning whether the appellant's communications to the Division Manager followed typical customs and practices in the workplace for reporting regulatory and safety issues to higher-level management. *Farrington*, 118 M.S.P.R. 331, ¶ 8. The Board defined "normal channels" as when an "employee conveyed duty-related information to a recipient, who in the course of his or her duties, customarily receives the same type of information from the employee and from other employees at the same or similar level in the organization as the employee." *Id.*, ¶ 6. The Board identified some of the factors that were relevant to the determination, including whether the communication complies with the formal and informal customs and practices in the employee's workplace for conveying such information up the chain of command, whether the organization enforces a strict hierarchical chain of command requiring that communications must go through lower-level supervisors before being elevated to higher management, and whether the information was conveyed to the recipient in the organization's commonly accepted manner or method for presenting such information for management consideration. *Id.*

¶9 The appellant's position description stated that she would have "frequent contact" with, among other groups, "field and regional office management" and that the "purpose of these contacts is to . . . provide feedback, communicate findings, or resolve issues and problems." IAF, Tab 19, Subtab B at 2. It is undisputed that the Division Manager was the appellant's fourth- or fifth-level supervisor, *Farrington*, 118 M.S.P.R. 331, ¶ 8, and the information that she disclosed in the written report and subsequent meeting with the Division Manager was information that she learned during the normal course of her duties. On review, the appellant cites to the Division Manager's testimony that he had an "open door policy," but she was never told that she had a duty to provide the Division Manager with the written report or speak to him after the June 17, 2003 meeting. PFR File, Tab 27 at 12, 15. In her deposition, the appellant testified

that she never spoke to the Division Manager prior to sending him the May 2003 report and she had never gone to him on a work-related issue. IAF, Deposition, Subtab 10 at 276 (testimony of the appellant). However, she acknowledged that, when there was a disagreement at the local level about an issue, the issue was elevated, and she does not appear to dispute the testimony of the Division Manager and the Assistant Division Manager that it was common for Aviation Safety Inspectors to work through local managers or to raise directly issues to the regional level. IAF, Deposition, Subtab 1 at 12 (testimony of the Division Manager), Subtab 7 at 3 (testimony of the Assistant Division Manager), Subtab 10 at 277 (testimony of the appellant).

¶10 Concerning the May 2003 written report, the appellant acknowledged in her deposition that she raised issues that she had attempted to pursue through her normal supervisory channels. IAF, Deposition, Subtab 10 at 276 (testimony of the appellant). The Assistant Division Manager responded in writing to the appellant's May 2003 report to the Division Manager, she acknowledged the safety issues that the appellant raised involving AirTran and her concerns about her own work environment, and she described the steps that the agency was taking to investigate these concerns. IAF, Tab 19, Subtab G. Given that the content of the May 2003 report was information that she learned during the course of her duties as an Aviation Safety Inspector, she provided the report to someone in her chain of command, it was a common practice for aviation safety inspectors to elevate disagreements on such issues to a higher level, and the agency's formal response to her concerns, we find that the appellant's May 2003 written report to the Division Manager was made in the course of her normal duties through normal reporting channels.

¶11 Concerning the June 17, 2003 meeting, the Division Manager's handwritten notes from this meeting included references to, among other things, "no crew

members trained hands on" with an arrow and the citation "121.417."[4] IAF, Tab 19, Subtab H. The appellant on review cites her testimony that she reported to the Division Manager that her findings and recommendations were not being addressed, that flight attendants had not been trained on the proper tail cone exit, and that passengers were at risk. PFR File, Tab 27 at 12. Thus, the appellant discussed with the Division Manager during this meeting her concerns based on information that she learned as an Aviation Safety Inspector. Neither party disputes that the Division Manager held regular "All Hands" meetings in the field offices, and he would often invite Aviation Safety Inspectors to speak with him afterwards, he had an "open-door policy," and Aviation Safety Inspectors "[r]outinely" took advantage of his open-door policy to speak to him about various issues. IAF, Deposition, Subtab 1 at 10-12, 17-18 (testimony of the Division Manager). Given that the appellant's conversation with the Division Manager occurred in the workplace, after a meeting in which the Division Manager invited Aviation Safety Inspectors to speak with him privately afterwards, the content of their conversation focused on work-related issues, and her position description contemplates such communications with field and regional office managers, we find that any disclosures made to him during this meeting were made during the normal course of her duties through normal reporting channels. Because we have found that all of the appellant's disclosures were made in the normal course of her duties as an Aviation Safety Inspector, the statute at 5 U.S.C. § 2302(f)(2) applies to this matter.

¶12 Even if we assume for the purposes of our analysis that the appellant proved that she disclosed a violation of law, rule, or regulation and/or a substantial and specific danger to public health and safety pursuant to 5 U.S.C. § 2302(b)(8)(A), we agree with the administrative judge that the appellant failed to prove that the agency took the personnel actions against her in reprisal for her disclosures. ID

[4] The regulation at 14 C.F.R. § 121.417 discusses crewmember emergency training.

at 29-40. Because we affirm the administrative judge's finding in this regard, we need not address the appellant's arguments on review concerning contributing factor or whether the agency proved by clear and convincing evidence that it would have taken the action(s) at issue absent the disclosures. PFR File, Tab 27 at 28; *see Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 28 (2016) (finding that it was inappropriate for the administrative judge to determine whether the agency proved by clear and convincing evidence that it would have denied the appellant's access to restricted areas and classified documents in the absence of his whistleblowing when she found that he failed to prove his prima facie case). To the extent that the administrative judge made findings about laches that relieved the agency of its obligation to prove by clear and convincing evidence that it would have taken the same actions absent the appellant's disclosures, ID at 41-45, we vacate the administrative judge's findings in this regard.

<u>The appellant's arguments regarding the quality of the hearing recording, the administrative judge's credibility determinations, and her delay in issuing the initial decision do not warrant a different outcome.</u>

¶13 The appellant contends on review that the administrative judge's "extreme" delay in issuing the initial decision "severely prejudiced" her and violated her due process rights, Board procedures, and statutory mandates. PFR File, Tab 3 at 6, Tab 27 at 5. In pertinent part, she asserts that she was prejudiced because the audio recording from the 2-day hearing in 2013 was inaudible and that due to the delay in issuing the initial decision, the original court reporter passed away, the original court reporting company dissolved, and there was no usable audio recording of the hearing. PFR File, Tab 27 at 5-6. The submissions on review describe the parties' efforts to jointly contract with another court reporter to generate a transcript of the hearing under these circumstances. *E.g.*, PFR File, Tabs 1, 3, 5, 7, 9, 11. The Office of the Clerk of the Board subsequently granted the appellant's motion to file transcripts of the hearing proceedings. PFR File,

Tabs 20, 22. However, instead of filing the transcripts in their entirety, the appellant reprinted excerpted portions of the 2013 hearing transcript in her supplemental petition for review. PFR File, Tab 27 at 12-26.

¶14 We acknowledge that the audio recording of the 2013 two-day hearing is virtually inaudible. The appellant's arguments on review do not persuade us that she was prejudiced by the delay between the close of the record and the date that the initial decision was issued. For instance, she asserts on review that the initial decision should be disregarded because it "barely contains any purported quotes of testimony," and "has few if any references to some witnesses," and she requests that the Board review the administrative judge's "harsh" credibility findings. *Id.* at 7. However, the administrative judge who issued the initial decision is the same administrative judge who was present during the 2-day hearing in 2013. The administrative judge's credibility determinations are implicitly based on witness demeanor, *Little v. Department of Transportation*, 112 M.S.P.R. 224, ¶ 4 (2009), and the appellant's disagreement with the administrative judge's findings, without more, is insufficient to overcome the deference to which such determinations are entitled. *See, e.g.*, *Purifoy v. Department of Veterans Affairs*, 838 F.3d 1367, 1373 (Fed. Cir. 2016) (explaining that the Board must give "special deference" to an administrative judge's demeanor-based credibility determinations, "[e]ven if demeanor is not explicitly discussed"); *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (stating that the Board must 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; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so). Importantly, the appellant does not contend that the administrative judge was incapacitated or otherwise unable to take notes during the hearing or observe the testimony of witnesses, which might call her credibility determinations into question, nor does the appellant provide any authority to

support her assertion that the administrative judge erred by failing to include any quoted testimony.

¶15 We have reviewed the excerpts of the 2013 hearing transcript, which largely involve testimony concerning the appellant's disclosures, various agency officials' knowledge of the disclosures, circumstances surrounding some of the personnel actions, and the clear-and-convincing factors. *E.g.*, PFR File, Tab 27 at 12-26. However, the excerpted testimony does not change our analysis of whether any of the appellant's disclosures were made in the normal course of her duties through normal channels or whether she proved that the agency took the personnel actions in reprisal for her disclosures.

¶16 Finally, to the extent that the appellant may be arguing that her rights were harmed by the virtual inaudibility of the hearing tapes, we disagree. In *Harp v. Department of the Army*, 791 F.2d 161, 163 (Fed. Cir. 1986), the U.S. Court of Appeals for the Federal Circuit rejected a petitioner's claim that the unavailability of a hearing transcript constituted harmful error per se, requiring reversal of the Board's decision. The court found that "such loss is not fatal" to the court's ability to review a Board appeal. The court analyzed several factors to determine whether a fatal flaw occurred, such as whether the appellant established that he was prejudiced by the loss of the hearing transcript, whether the appellant showed that the administrative judge failed to consider or misused any particular testimony from the hearing, and whether other evidence existed in the record that would support the administrative judge's findings. *Id.*; *see also Kemp v. Department of Veterans Affairs*, 154 F. App'x 912, 914 (Fed. Cir. 2005)[5]; *Henderson v. Office of Personnel Management*, 109 M.S.P.R. 529, ¶ 5 n.1 (2008). Here, we find that the appellant did not show that she was prejudiced by the virtual inaudibility of the hearing tapes and she did not demonstrate that the

[5] The Board may follow a nonprecedential decision of the Federal Circuit when, as here, it finds its reasoning persuasive. *Morris v. Department of the Navy*, 123 M.S.P.R. 662, ¶ 13 n.9 (2016).

administrative judge failed to consider or misused any particular testimony of the witnesses that might have caused a different result in this case. Furthermore, although some or all of the hearing tapes may have been virtually inaudible, the record in this case was sufficiently developed to provide a meaningful review of the issues raised by the appellant.[6]

NOTICE OF APPEAL RIGHTS[7]

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You may obtain review of this final decision. 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 final decision, 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.

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[6] We have reviewed the relevant legislation enacted during the pendency of this appeal and have concluded that it does not affect the outcome of the appeal.

[7] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

(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 of issuance of this decision. 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 you

receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. 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 you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

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 either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[8] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 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

[8] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

KIM ANNE FARRINGTON, Appellant,	DOCKET NUMBER AT-1221-09-0543-B-2
v.	
DEPARTMENT OF TRANSPORTATION, Agency.	DATE: June 1, 2016

Stephanie L. Ayers, Esquire, and Thad M. Guyer, Esquire, Medford, Oregon, for the appellant.

Parisa Naraghi-Arani, Esquire, Washington, D.C., and Russell B. Christensen, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE
Sharon J. Pomeranz
Administrative Judge

INITIAL DECISION

The appellant filed an individual right of action (IRA) appeal with the Merit Systems Protection Board (Board) and alleged the Federal Aviation Administration, Department of Transportation (FAA or agency), took certain personnel actions against her in reprisal for her protected whistleblower activity. A hearing was held on December 18-19, 2013, in Orlando, Florida. For the reasons explained below, the appellant's request for corrective action is DENIED.

BACKGROUND

Factual Background

The appellant was employed by the agency as an Aviation Safety Inspector (Cabin Safety) from 1997 until 2004.[1] As an Aviation Safety Inspector, it was the appellant's job to investigate violations of, and enforce, the Federal Aviation Regulations (FAR).[2] Initial Appeal File (IAF), Tab 19, Subtab B (Position Description for Aviation Safety Inspector-Cabin Safety). For the time period relevant to the issues in this appeal, the appellant was assigned to the AirTran Certificate Management Office (AirTran CMO) in Orlando, Florida. HCD (Farrington Testimony). The appellant's specific responsibilities were to provide technical support to the general public, to observe airline activity for regulatory compliance, to observe the training of flight instructors, to monitor boarding of flights at gate to ensure oversized bags were not allowed, to review airline manuals and publications for compliance with FAA regulations and to observe initial and recurrent training of flight attendants to ensure that it was properly conducted. IAF, Tab 19, Subtab B; HCD (Farrington Testimony).

The AirTran CMO[3] was dedicated to the surveillance and regulation of AirTran Airways. The AirTran CMO safety inspectors were divided into two branches: operations and maintenance.[4] For FAR enforcement and compliance purposes each branch was overseen by either a principle operations inspector (POI) or a principal maintenance inspector (PMI). The appellant worked directly

[1] The appellant began working for the agency on July 20, 1997. IAF, Tab 4, Subtab 4a (Agency File); Hearing Compact Disc (HCD) (Farrington Testimony).

[2] The FAR are codified at 14 C.F.R. § 1 et. seq.

[3] The AirTran CMO was part of the agency's Southern Region Flight Standards District Office (FSDO). A CMO is a field office dedicated to the surveillance and regulation of a single air carrier. IAF, Tab 19, Subtab C at 4-5.

[4] The operations branch was responsible for overseeing and regulating AirTran flight crews, including flight attendants and was where the appellant worked.

with the POI, Martin Polomski.[5] The CMO Manager was Jack Moyers, who from 2001 until late 2002 was the appellant's first-line supervisor. In late 2002, Mr. Moyers hired an Assistant Manager, Vickie Stahlberg, to help him run the office, and Ms. Stahlberg became the appellant's first-line supervisor. HCD (Moyers Testimony). Ms. Stahlberg left the AirTran CMO in late 2003, and, in March 2004, Mr. Polomski became the appellant's first-line supervisor.[6] *Id.*; HCD (Polomski Testimony).

As the POI, Mr. Polomski was responsible for ensuring the safety and regulatory compliance of AirTran Airways for the operations side of the house which included pilots, dispatchers, flight attendants, ticket agents, and anything related to the operation of the airplane. HCD (Polomski Testimony). In addition, as the POI, changes to manuals were ultimately Mr. Polomski's decision. *Id.*

In the Summer of 2002, Steve Clements, Manager of Ground Operations Training for AirTran, requested the appellant's assistance with the AirTran Flight Attendant Training Program. The appellant spent significant time assisting AirTran with improving their flight attendant training program including traveling to Atlanta on two occasions to observe month long initial flight attendant training sessions. HCD (Farrington Testimony); Refiled Remand Appeal File RAF-2, Tab 26, Ex. JJJ at 79-80 of 126 (Affidavit of Steven Clements).

As a result of her efforts on the AirTran Flight Attendant Training Program, the appellant received several awards from the FAA and a letter of praise from AirTran. For example, on October 7, 2002, the appellant received a

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[5] Mr. Polomski worked on the AirTran certificate in various capacities from 1998 until 2012. HCD (Polomski Testimony). At the time of the hearing, Mr. Polomski was still employed by the agency. *Id.*

[6] Ms. Stahlberg left the AirTran CMO to return to Houston for personal reasons. HCD (Moyers Testimony). At that point, her position was abolished and the POI position was made into a supervisory position. *Id.*

"Well Done Award" from Mr. Moyers for conducting special emphasis surveillance of AirTran's flight attendant training program. RAF, Tab 11, Ex. L at 29 f 36. And, on October 28, 2002, Mr. Clements wrote to Mr. Polomski thanking him for "the instrumental role [his] office has played in helping AirTran Airways enhance our Flight Attendant training program." Remand Appeal File (RAF), Tab 11, Ex. M. Mr. Clements specifically noted the appellant's efforts, including spending almost two months working with AirTran to make their "Flight Attendant training program second to none." *Id*. On January 23, 2003, the appellant was nominated for "Flight Inspector of the Year" by one of her co-workers largely for her work helping AirTran with its flight attendant training program. HCD (Farrington Testimony); RAF, Tab 11, Ex. N, at 31-32 of 35. On February 10, 2003, the appellant was presented with a "Superior Efforts Award" by Mr. Moyers in recognition of the improvement in flight attendant training at AirTran as a result of her efforts at an awards luncheon. HCD (Farrington Testimony); RAF, Tab 11, Ex. O.

On March 26, 2003, AirTran Flight 356 travelling from Atlanta's Hartsfield International Airport to New York's LaGuardia Airport made an emergency landing and evacuation at LaGuardia Airport due to smoke in the aircraft. RAF, Tab 11, Ex. P at 34-35. The pilot declared an emergency and ordered the evacuation of the passengers. During the evacuation, the flight attendants had some difficulty deploying the aircraft's tail cone emergency exit slide and several passengers were injured, including one seriously. The National Transportation Safety Board (NTSB) was notified about the incident. *Id*. The NTSB opened an investigation which was headed up by Mark George of the NTSB.[7] IAF, Tab 19, Subtab E.

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[7] The investigatory group was known as the Survival Factors Group. IAF, Tab 19, Subtab E. The other members of the group were: Cheryl Bercegeay from AirTran Airways; Susan Cosby from the Association of Flight Attendants; and Judith Palmer from the FAA. *Id*.

The NTSB investigation focused, in part, on AirTran flight attendant training and the appellant was interviewed due to her responsibilities for overseeing cabin safety and flight attendant issues.[8] Other agency employees were also interviewed. The appellant testified that she was notified by Mr. Moyers that the NTSB wanted to talk to her about flight attendant issues related to the accident at some point in April of 2003. HCD (Farrington Testimony). According to the appellant, around this time, the agency had also begun conducting its own parallel investigation of the AirTran Flight 356 accident. *Id*. The appellant was not interviewed by the NTSB until May 22, 2003. IAF, Tab 19, Subtab E at 10.

On May 6, 2003, POI Polomski wrote a letter to Jack Smith, Senior Vice President of Customer Service for AirTran Airways. RAF, Tab 11, Ex. R, 13-14 of 35. The letter stated that due to the problems with the manual operation of the tail cone exit slide during Flight 356's evacuation, the agency was conducting an investigation to discover the "active and latent organizational failures associated with this event." *Id*. at 13. As part of the investigation, agency inspectors had conducted inspections of AirTran's Flight Attendant Training Center, instructors, and active online flight attendants and had discovered that both flight attendant instructors and flight attendants did not know the applicable procedures for "manual slide deployment in the event the automatic system fails." *Id*. The letter set forth a list of five items that AirTran needed to accomplish in order to correct the deficiencies found by the inspections and set forth time limits for doing so.[9] *Id*.

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[8] As an Aviation Safety Inspector, the appellant's duties included participating in accident investigations of air carriers. IAF, Tab 19, Subtab B

[9] Specifically, the letter required AirTran to do the following: modify the tail cone mockup at the AirTran training center to replicate the B-717 aircraft; publish a bulletin for the Flight Attendant Manual to describe the method for manual tail cone jettison and slide deployment in the event of automatic system failure; revise lesson plans for emergency exit operation; retrain flight attendant instructors in the proper operation of

Sometime in May 2003, at the suggestion of the Professional Airways Systems Specialists (PASS) Union Regional Business Agent for the FAA, Charlie Henderson, the appellant wrote an 11-page report detailing complaints she had about her employment with the agency.[10] IAF, Tab 19, Subtab F. The appellant sent a copy of the May 2003 report to Fred Walker, Division Manager for FSDO, and this report is what the appellant alleges is her first protected disclosure.[11]

On May 21, 2003, Dawn Veatch, Assistant Manager for Flight Standards Division, wrote the appellant in response to the May 2003 report. IAF, Tab 19, Subtab G. In her memorandum, Ms. Veatch informed the appellant that her concerns would be investigated. *Id*. Regarding the safety issues raised by the appellant, Ms. Veatch stated that the agency had empaneled a team of impartial specialists from outside of the appellant's work area to look into the issues she had raised. *Id*. With respect to the appellant's allegations that she had not been allowed to travel to Atlanta, Ms. Veatch noted that in fiscal years 2001-2003, the appellant had travelled to Atlanta 40, 61, and 56 days respectively. *Id*.

On May 22, 2003, the appellant met with Mr. George and the Survival Factors Group concerning the AirTran Flight 356 accident. During the meeting, the appellant alleges that she made certain protected disclosures, which the appellant alleges is her third protected disclosure. According to the Survival Factors Group Chairman's Factual Report of Investigation, the appellant was

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all emergency exits in both classroom and hands-on exit operations; retrain all flight attendants in proper operation of emergency exits including both classroom instruction and hands-on exit operations. RAF, Tab 11, Ex. R. at 13-14 of 35.

[10] At the hearing, the appellant testified that she actually began writing the May 2003 report in February of 2003. HCD (Farrington Testimony).

[11] On May 16, 2003, Mr. Moyers sent an email to Mr. Walker. RAF, Tab 11, Ex. 15. The email was titled, "Heads Up Hostile Work Environment claim" and informed Mr. Walker that the appellant had sent him a package because, according to Mr. Moyers, she was "upset at him." *Id*. Thus, it appears that Mr. Walker received the May 2003 Report sometime after May 16, 2003.

interviewed on May 22, 2003. IAF, Tab 19, Subtab E. According to the appellant's testimony, she also provided Mr. George with a copy of her May 2003 report.[12] HCD (Farrington Testimony).

On June 17, 2003, Division Manager, Fred Walker, visited the AirTran CMO to meet with all employees. HCD (Walker Testimony). After the all employee meeting, the appellant met separately with Moyers and this is when she alleges she made her fourth protected disclosure. RAF, Tab 17, Ex. A-14, 66 of 119; HCD (Moyer Testimony). It was not unusual for Mr. Walker to meet with employees after his meeting and he would routinely meet with Aviation Safety Inspectors to discuss safety issues. HCD (Walker Testimony, Ellison Testimony).

Also on June 17, 2003, Klaus Goersch, Vice President of Flight Operations at AirTran, wrote to Mr. Walker complaining about the appellant and requesting that she be removed from oversight of AirTran. IAF, Tab 19, Subtab 4I; RAF, Tab 7, Ex. A-13. 64-65 of 115. In his letter, Mr. Goersch stated that it had become increasing difficult over the past two years to work with the appellant and discussions with the CMO had not resulted in any improvement. *Id.* Mr. Goersch's letter accused the appellant of attempting to force AirTran to change things to meet her personal preference without any regard for regulatory substance or support. Mr. Goersch stated that "Ms. Farrington's lack of knowledge of the FARs and her multiple attempts to force her personal opinions and preferences on AirTran have become unnecessary obstacles . . ." *Id.* The letter also alleged that, on several occasions, the appellant had offered her opinion while observing training, requiring "the class to be interrupted by senior members of the training and standards organization to clarify, reinforce and correct to AirTran policy and the proper content of the FAA accepted Flight Attendant Manual." *Id.* According to Mr. Goersch, AirTran had changed the reporting structure in the Flight Attendant Organization multiple times in an

[12] This was identified as the appellant's second alleged disclosure.

effort to "ensure that 'personality issues' were not the cause for the poor relationships between Ms. Farrington and the airline" but only "temporary improvement was noted, and soon we found ourselves in the same situation as before. The only constant over the past few years has been Ms. Farrington."[13] *Id*. According to CMO Moyers, he was not surprised to see the letter because POI Polomski had previously told him that AirTran was not happy with the appellant's performance and that they were considering writing a letter.[14] IAF, Tab 19, Subtab C at 9; HCD (Moyers Testimony).

On July 11, 2003, Ms. Stahlberg conducted a formal counseling with the appellant about performance issues. HCD (Farrington Testimony). Jim Ellison, at the time a Supervisory Labor Relations Specialist for the Southern Region, had come down from Atlanta to assist Ms. Stahlberg with the meeting.[15] HCD (Ellison Testimony). The parties disagree about what exactly occurred during this meeting. Ms. Stahlberg did not testify at the hearing because she was unavailable.[16] Ms. Stahlberg documented the counseling in a memorandum that

[13] Mr. Walker did not respond to Mr. Groesch's letter until September 15, 2003, at which point the appellant had already stopped coming to work. IAF, Tab 19, Subtab I. In his letter, Mr. Walker stated that he believed the appellant was "a knowledgeable inspector" who needed to learn to work in a more "collaborative fashion." Id. His letter detailed the steps that the agency was taking to work with the appellant in that regard. *Id*. The agency did not remove the appellant from the AirTran CMO.

[14] According to Moyers, during the previous two years, AirTran had raised issues relating to the appellant's conduct during training surveillance. IAF, Tab 19, Subtab C at 10.

[15] According to Mr. Ellison, he had come to assist Ms. Stahlberg who was a new supervisor at the time. HCD (Ellison Testimony).

[16] Ms. Stahlberg had been suffering from a terminal illness for a number of years. Although she was approved to testify as a witness, she was ill and was unable to travel to Orlando for the hearing and was unable to testify by telephone. HCD.

was given to the appellant.[17] RAF, Tab 7, Ex. 22. The appellant testified that she believed the counseling memorandum was not accurate. HCD (Farrington Testimony). Both parties agree, however, the appellant was told during the counseling meeting that she had to limit her direct communication with AirTran. HCD (Farrington Testimony; Ellison Testimony); RAF, Tab 7, Ex. 22.

On July 24, 2003, the appellant stopped reporting for work due to a medical condition and never returned to the Orlando CMO.[18] IAF, Tab 19, Subtab 4m. During the time period that the appellant was absent from work, the agency advanced her 316 hours of sick leave and approved her for the agency's leave donor program where she received 180 hours of sick leave and 18 hours of annual leave that was donated to her from other agency employees. IAF, Tab 19, Subtab 4n.

On January 20, 2004, Mr. Moyers wrote the appellant indicating that he had received the letter from her psychiatrist, Dr. Gutman, indicating that she could not return to duty until at least March 1, 2004. IAF, Tab 4, Subtab 4n. The letter informed the appellant that her position needed to be filled by an employee available on a regular, full-time basis. *Id*. It further stated that disciplinary action could be taken for excessive absenteeism or unavailability for duty if the appellant continued to be absent. *Id*.

On February 4, 2004, Dr. Gutman wrote Mr. Moyers indicating that the appellant had been diagnosed with Adjustment Disorder with anxious and depressed mood. IAF, Tab 4, Subtab 4m. Dr. Gutman noted that although the appellant had improved, she was not ready to return to work but he suspected that

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[17] Although the date on the memorandum is dated June 11, 2003, that appears to be a typographical error. RAF, Tab 7, Ex. 22. The correct date should be July 11, 2003.

[18] During her absence, the appellant continued to provide notes from her psychiatrist indicating that she was not able to work. IAF, Tab 4, Subtabs 4d, 4e, 4f, 4h, 4i, 4j, 4k, 4l, and 4m.

she would be able to do so in the near future. *Id*. However, he indicated that she could not return to work in the Orlando office and recommended that the appellant be transferred to another office. *Id*.

On August 11, 2004, Mr. Moyers proposed the appellant's removal based on her continued unavailability for full-time duty. IAF, Tab 4, Subtab 4c. In his letter, Mr. Moyers indicated that the appellant had been unavailable to perform the duties of her position since July 25, 2003. *Id*. The letter stated, "Your removal, if effected, is not considered a disciplinary action. I simply can no longer continue to hold your position for you . . . ." *Id*. The appellant did not submit a reply to the proposal. On September 16, 2004, Mr. Moyers issued a decision removing the appellant from federal service based on her unavailability for full-time duty. IAF, Tab 4, Subtab 4b. The appellant's removal was effective October 3, 2004. *Id*. She did not file an appeal.

In 2008, the appellant testified that she was contacted by the Chief Counsel of the Office of Special Counsel (OSC) – Mr. Bloch – and that is how she found out about how to file an OSC complaint.[19] The appellant testified that Mr. Bloch told her that OSC knew "about her claim" and that he was going to "assign a SWAT team" and that they were "going to see this through to your satisfaction."[20] HCD (Farrington Testimony). As a result, the appellant filed a complaint with OSC. In February 2009, OSC notified the appellant that it had found "insufficient evidence for corrective action" and informed her of her right

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[19] In 2008, Scott Bloch was the Special Counsel at OSC.

[20] The appellant's testimony about how she ended up at OSC was a bit contradictory. She first stated that Mr. Bloch contacted her but she also testified that a former employee – Gabe Bruno -- may have told her about OSC and that Bruno may have given her name to OSC. HCD (Farrington Testimony). The appellant indicated on her OSC complaint form that she first became aware that she could file a complaint with OSC from a former co-worker, presumably Mr. Bruno. IAF, Tab 8, Subtab A.

to file a Board appeal. On April 17, 2009, the appellant filed an appeal with the Board's Atlanta Regional Office.

Procedural Background

As indicated, *supra*, the appellant filed this appeal on April 17, 2009. *See Kim Anne Farrington v. Department of Transportation*, Docket No. AT-1221-09-0543-W-1; IAF, Tab 1. On March 4, 2010, the appeal was dismissed without prejudice to allow time for the parties to file jurisdictional motions. IAF, Tab 22. On May 4, 2010, the appellant timely refiled her appeal. *See Kim Anne Farrington v. Department of Transportation*, Docket No. AT-1221-09-0543-W-2. Refiled Initial Appeal File (IAF-2), Tab 1. On September 10, 2010, the administrative judge dismissed the appeal for lack of jurisdiction. IAF-2, Tab 3. In her decision, the administrative judge found that the appellant's alleged disclosures were made in the normal performance of her duties and reported through normal channels and thus were not protected disclosures under *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001). IAF-2, Tab 3 at 11. The appellant filed a petition for review.

On July 16, 2012, the Board granted the appellant's petition for review and remanded the appeal back to the administrative judge for further fact finding. *See Farrington v. Department of Transportation*, 118 M.S.P.R. 331 (2010); Remand Appeal File (RAF), Tab 1. In its decision, the Board found that the appellant had made a non-frivolous allegation that her disclosure to Mr. Walker was made outside of normal reporting channels and that she was entitled to a hearing on that disclosure. *Farrington*, 188 M.S.P.R. at ¶8. Accordingly, the Board remanded the appeal for a hearing on that issue. *Id*. at ¶ 10.

During the prehearing conference conducted on November 8, 2012, the administrative judge informed the parties that she would take evidence on the issue of whether the appellant's disclosure to Mr. Walker followed typical customs and practices in the workplace and, at the conclusion of the testimony on that issue, she would rule on whether the appellant had proved by preponderant

evidence that her disclosures were made outside of normal channels. RAF, Tab 21. If the appellant met her burden of proof, the parties would be allowed to present evidence on other issues in the appeal.[21] *Id*. On November 14, 2012, the administrative judge held a hearing.[22] After the appellant testified, the agency moved to dismiss the appeal for lack of jurisdiction. Hearing Transcript (HT) at 66-72. After allowing the appellant to make a response, the administrative judge indicated that she was going to find in favor of the agency on the *Huffman* issue. HT at 74. At that point, the administrative judge offered the appellant the opportunity to go forward with the second portion of the hearing in order to preserve the record and the appellant indicated that she did not wish to do so.[23] HT at 74-75. The administrative judge indicated that she would keep the record open for a period of time to allow the parties to submit closing arguments. HT at 75.

However, before the administrative judge issued an initial decision, the Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law on November 27, 2012, significantly changing whistleblower law for federal

[21] The administrative judge identified the other issues as: whether the appellant can show, by preponderant evidence, that her disclosures were protected under the WPA; whether the appellant can show, by preponderant evidence, that her disclosures were a contributing factor in the personnel actions at issue; and whether the agency can show by clear and convincing evidence, it would have taken the same personnel action absent any protected activity. RAF, Tab 21.

[22] Although no decision was issued due to subsequent events, the administrative judge had indicated to the parties that she had planned to dismiss the appeal for lack of jurisdiction under *Huffman*. HT.

[23] The agency also indicated that it did not wish to go forward with the hearing. HT at 75.

employees.[24] On December 14, 2012, the Board certified an interlocutory appeal, *Day v. Department of Homeland Security*, DC-1221-12-0528-W-1, to decide the issue of whether the changes to the WPEA were retroactive to appeals that were pending when the WPEA went into effect. As a result of the interlocutory appeal, the administrative judge dismissed the appellant's appeal without prejudice to refiling after the Board had issued its decision in *Day*. On June 26, 2013, the Board issued its decision in *Day*. *See Day v. Department of Homeland Security*, 119 M.S.P.R. 589 (2013). On July 16, 2013, the appellant requested that her appeal be refiled. Refiled Remanded Appeal File (RAF-2), Tab 1. On July 23, 2013, the appeal was refiled and the appeal was assigned to the undersigned administrative judge as the administrative judge originally assigned to this appeal had retired. RAF-2, Tab 2.

Impact of the WPEA

The Board's decision in *Day* impacted this appeal. Specifically, the Board found that the provisions of the WPEA providing protection to disclosures made in the course of an employee's normal duties applied to cases that were already pending with the Board before the effective date of those provisions. *See Day*, 119 M.S.P.R. at 26. Accordingly, certain determinations previously made in this appeal were impacted by this decision because one of the changes made by the WPEA was to provide protection, under certain circumstances to employees who made disclosures while carrying out their job duties effectively overruling *Huffman* by statute. *See* WPEA, Pub. L. No. 112-199, sec. 101(b)(2)(C), 126 Stat. 1465, 1465-66 (2012). In amending the WPA, however, the WPEA created an additional burden where investigating and reporting wrongdoing is an integral part of an employee's everyday job duties. Specifically, section 2303(f)(2)

[24] For example, federal employees are now protected from reprisal if they are not the first person to disclose the misconduct; if they disclose the misconduct in the normal course of their duties; or if they disclose misconduct to co-workers or their supervisors.

requires employees whose job consists of such responsibilities to demonstrate that a personnel action was taken "in reprisal for" a disclosure that was made during the normal course of duties and not just "because" of that disclosure. 5 U.S.C. § 2302(f)(2). In adding this additional burden, Congress was distinguishing between employees who have a general obligation to report wrongdoing and those employees whose very job involves investigating such as auditors and investigators. *See, e.g.*, S. Rep. No. 112-155 at 5. I find that the appellant as an Aviation Safety Inspector responsible for ensuring compliance with the FARs falls under this provision.

<u>Law of the Case</u>

While the WPEA has impacted the scope of this appeal, certain aspects are governed by the law of the case doctrine as this appeal was remanded from the Board. *See Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 552 (1993). The law of the case doctrine holds that matters that were decided in a prior decision in an appeal are not reopened. *Id*. This includes matters raised both explicitly and by implication. *Id*.; *see Smith International Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1577 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 827, 106 S. Ct. 87, 88 L.Ed.2d 71 (1985). In her initial decision, the administrative judge found that the appellant had alleged that she made four protected disclosures as follows:

> (1) a May 2003 written report to Fred Walker, Division Manager, Flight Standards Division, Southern Region;
>
> (2) a copy of that same report sent in May 2003 to Mark George, who worked for the National Transportation Safety Board (NTSB), and was a member of the NTSB's Survival Factors Group;
>
> (3) a May 22, 2003 verbal interview with Mark George; and,
>
> (4) a verbal conversation with Fred Walker at some time in June 2003.[25]

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[25] At the prehearing conference conducted on December 12, 2013, I identified a fifth disclosure allegedly made in October 2000 to Gabe Bruno, Manager of the FAA Orlando Flight Standards District Office of violations of Federal Aviation Regulations

IAF-2, Tab 3 at 4; IAF, Tab 19, Subtab F.[26] The administrative judge further found that the appellant was raising the following personnel actions:

> (1) her removal;
>
> (2) three actions that occurred on July 11, 2003 – her threatened removal, a counseling, and an employee counseling moratorium which significantly changed her duties;
>
> (3) being forced to sign a voluntary disclosure form by her supervisor, Martin Polomski, on June 27, 2003; and
>
> (4) two actions involving a failure to accommodate her for a medical condition.[27]

IAF-2, Tab 3 at 4-5. The initial decision found that the appellant's removal and the three actions alleged to have occurred on July 11, 2003 (threatened removal, counseling, and significant change in job duties) – number (1) and (2) above – were "personnel actions" under 5 U.S.C. § 2302(a)(2)(A). *Id*. at 5. However, because the administrative judge was dismissing the appeal for lack of jurisdiction, she did not decide whether failure to accommodate the appellant's medical condition was a "personnel action" in her initial decision. IAF-2, Tab 3 at 5 n. 7. She found, however, that being forced to sign a voluntary disclosure – number (3) above – was not a "personnel action" under the statute. *Id*.

The administrative judge found that the appellant had exhausted her administrative remedies in regard to the four disclosures and the personnel actions set forth above before the OSC. IAF-2, Tab 3 at 5. Thus, I find that

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and FAA policy. RAF-2, Tab 32. However, in her initial decision, the administrative judge found that disclosure had been withdrawn by the appellant. IAF-2, Tab 3 at 4 n.5. Accordingly, I find that issue is not properly before me. *See Hoover*, 57 M.S.P.R.at 552.

[26] At the hearing, the appellant identified this document as the written report dated May 2003 that was sent to Fred Walker. Hearing Compact Disc (HCD) (Testimony of Kim Farrington).

[27] On ???, the administrative judge informed the parties that she found that this was not a personnel action. R**AF, Tab 22**.

pursuant to the law of the case doctrine those are the disclosures and personnel actions that remained when the case was remanded by the Board on July 12, 2012.

ANALYSIS AND FINDINGS

Applicable Law

The Whistleblower Protection Act (WPA) prohibits any federal agency from taking, failing to take, or threatening to take or fail to take, any personnel action against an employee in a covered position because of the disclosure of information that the employee reasonably believes to be evidence of 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. 5 U.S.C. § 2302(a)(2), (b)(8); *see Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 7 (2013); *McCarthy v. International Boundary and Water Commission,* 116 M.S.P.R. 594, ¶ 29 (2011), *aff'd,* 497 Fed.Appx. 4 (Fed. Cir. 2012).

In order to secure corrective action from the Board in an IRA appeal, the appellant must first prove by a preponderance of the evidence that she exhausted her administrative remedies before OSC.[28] 5 U.S.C. § 1214(a)(3); *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶¶ 9-10 (2014) (citing *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶ 5 (2012)). When reviewing the merits of an IRA appeal, the Board considers whether the appellant has established by preponderant evidence that she made a protected disclosure under 5 U.S.C. § 2302(b)(8) that was a contributing factor in the agency's personnel action. *Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428, ¶ 5 (2014). In addition, under the WPEA, an individual such as the appellant whose job involves investigating and reporting wrongdoing must also show that a personnel action was taken "in reprisal" for a disclosure. 5 U.S.C. § 2302(f)(2). If the appellant satisfies her burden in this regard, the Board will order corrective action unless the agency can establish by clear and convincing evidence that it

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

would have taken the same personnel action in the absence of the disclosure. *Id*. Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *Id.*

The appellant has failed to show by a preponderance of the evidence that her disclosures are protected under 5 U.S.C. § 2303(b)(8).

The determination of whether an employee has a reasonable belief that she made a protected disclosure turns on the facts of the particular case. *Herman v. Department of Justice*, 193 F.3d 1375, 1382 (Fed. Cir. 1999). To show that a belief is reasonable, the appellant must show that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by her reasonably could conclude that the regulation had been violated. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). In order to show that a disclosure evidences a violation of substantial and specific danger to public health and safety, the inquiry into whether a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA is guided by several factors, among these: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences. *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010).

As discussed above, during the initial appeal, the administrative judge identified four alleged disclosures that the appellant had exhausted before OSC. At the hearing, the appellant provided additional evidence to support her claims that these disclosures were protected under the WPA and that they were a contributing factor in the agency's decision to take the identified personnel actions against her. The evidence and allegations supporting her claims relating to disclosures 1 through 4 are discussed in turn below.

Disclosure 1 and 2 – May 2003 Report

The first two disclosures concern the May 2003 report. The appellant sent the report to Mr. Walker in May 2003 and also provided it to Mr.

George that same month. IAF, Tab 19, Subtab F. The report chronicles the appellant's employment beginning in 1997 when she was first hired by the agency.[29] The first four pages of the report concern the appellant's employment history before her arrival in Orlando in February of 2000. *Id*. at 1-4. With respect to her complaints about the Orlando CMO, the appellant alleges that she complained about a "lack of management support and funding to effectively accomplish proper cabin safety surveillance and provide technical assistance to the Flight Attendant Program and Instructor Staff at AirTran Airways." *Id*. at 5. She also alleges that she had a lack of management support and funding approval.[30] *Id*. In addition, the May 2003 report contains general complaints about lack of money and funding to attend flight attendant training and complaints about her supervisor's management style which she found to be "insulting" and unsupportive. *Id*. at 6-7. She also raises concerns over manuals and training at AirTran areas which in her position as Aviation Safety Inspector (Cabin Safety), she was responsible for reviewing.[31] *Id*. at 5, 7, 10; IAF, Tab 19, Subtab B. The appellant also raises concern that her position was located in Orlando but that flight attendant training for AirTran flight attendants was conducted in Atlanta, and discusses her belief that this resulted in inadequate surveillance, and greatly jeopardized onboard safety of the flight attendant

[29] In her initial decision, dated September 1, 2010, the administrative judge discussed this disclosure and made general findings regarding whether the disclosure was protected. *See* IAF-2, Tab 3, Initial Decision, slip op. at 6-8, 14-15. Because the Board's remand was not clear with respect to this issue, I am addressing it in this decision.

[30] The appellant uses the term "Supervisor" and "Manager" throughout the document but indicates that she is referring to the CMO Manager, who at the time would have been Jack Moyers. IAF, Tab 19, Subtab F at 8; HCD (Moyers Testimony).

[31] With respect to information in manuals that was contrary to regulations and FAA policy guidance, the appellant stated that, "I coordinated with the Acting POI and worked with the carrier to correct these deficiencies." *Id*. at 5.

workforce and passengers. *Id*. at 10. The appellant alleges that this report, particularly her complaints about deficiencies in flight attendant training, disclosed violations of the FARs, as well as disclosing a substantial and specific danger to public safety.

In her initial decision dated September 1, 2010, the administrative judge noted that to the extent the appellant was disagreeing with the amount spent for her to travel to Atlanta, those statements did not constitute whistleblowing disclosures because they were disagreements with policy decisions made by the agency. IAF-2, Tab 3 at 14-15; *see Langer v. Department of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). I agree. In addition, the appellant's complaints that she was not being allowed to travel to Atlanta to do her job are not supported by the testimony and evidence in this appeal. The appellant does not dispute that she spent almost two months in Atlanta – July 2002 and September 2002 – observing and assisting AirTran with improving and redeveloping its initial flight attendant training program. IAF, Tab 19, Subtab F. In fact, as stated *supra*, the appellant received numerous awards and recognition from AirTran for these efforts. *See* RAF-2, Tab 16, Ex. 3 at 38; IAF-2, Tab 11, Ex. O at 33; RAF, Tab 11, Ex. L at 29. In addition, according to the undisputed testimony at the hearing, as an FAA employee, the appellant could fly to Atlanta to observe training and spot check issues at any time, at no cost to the agency. HCD (Farrington Testimony). Accordingly, I find that the appellant's assertion that she was not being allowed to travel to perform her job, thereby creating a safety risk, is not supported by the evidence and is not objectionably reasonable. While the appellant's trips requiring travel and per diem may have been limited due to agency budget constraints, that limitation did not prevent the appellant from performing the responsibilities of her position such as surveillance. Rather, the appellant could perform spot checks and surveillance regularly. Because I find the appellant was not prevented from performing her duties and could make

regular daily inspection trips, I find her claim that safety was being jeopardized due to her alleged travel restrictions to be without merit.

While the appellant also argues that her May 2003 report discloses violations of the FAR, the report contains no specific citations to the FAR, does not explain how the appellant believes the FAR is being violated and briefly states that regulatory requirements are not being met without elaboration. A disclosure must be specific and detailed, not a broad-brush accusation that amounts only to a vague allegation of wrongdoing. *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 13 (2006); *Gryder v. Department of Transportation*, 100 M.S.P.R. 564, ¶ 13 (2005). At best, the appellant's May 2003 report amounts to a vague allegation of wrongdoing on the part of AirTran and I find that the May 2003 report is not entitled to protection on the grounds that it disclosed a violation of law, rule or regulation.

The appellant also alleges that her May 2003 report disclosed substantial and specific danger to public safety. The inquiry into whether a disclosure is sufficiently "substantial and specific" to be protected under the WPA is determined by evaluating several factors, including (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences. *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010). General criticism by an employee that an agency is not doing enough is not protected. *Id*. at 1368-69. The appellant's disclosure of inadequate funding for surveillance does not rise to the level of creating a specific and substantial danger to public safety because a reasonable person with the facts objectively known to the appellant could not have believed that she could not adequately perform her surveillance duties for AirTran. As indicated, supra, the appellant could travel to Atlanta at any time to perform surveillance duties at AirTran – at no cost to the agency. Only overnight

trips were limited due to the agency's budget issues.[32] Thus, the facts do not support the appellant's allegation that she was unable to perform her surveillance duties. Thus, I find the appellant has failed to assert any objectively reasonable harm because I find she was not prevented from performing her duties.

For all of the above reasons, I find that the appellant's May 2003 report is not protected.

Disclosure 3 – Verbal Disclosures made to Mark George on May 22, 2003

On May 22, 2003, the appellant was interviewed by the NTSB Survival Factors Group which was tasked with investigating the accident of AirTran Flight 356 that resulted in an emergency evacuation at LaGuardia Airport on March 26, 2003. *See* IAF, Tab 19, Subtab E. The appellant's interview was summarized in the Chairman's Factual Report of Investigation (ROI), dated April 11, 2004, which is included in the record.[33] *Id*. at 10-12. The appellant testified at the hearing that she did not receive a transcript of her interview. HCD (Farrington Testimony). I find that the NTSB's summary of the appellant's interview is the best indicator of what she actually told Mr. George during her 2003 interview because it was written contemporaneous to the interview itself. In addition, at the hearing, the appellant did not testify in detail about what she said during her interview with Mr. George, other than to say that she answered his questions

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[32] From October 2002 until February 2003, the agency was under a continuing budget resolution and, as a result, funding requests for certain activities were delayed during that time period. IAF, Tab 19, Subtab C at 7.

[33] During the emergency evacuation, the flight attendant tasked with opening the tail cone door was unable to get the emergency evacuation slide to fully inflate after opening the door. IAF, Tab 19, Subtab E at 2, 6. The appellant testified at the hearing that the flight attendant responsible for opening the tail cone door did not know how to operate it and could not get the tail cone door open. HCD (Farrington Testimony). This testimony is contrary to the findings in the NTSB report, however, that found the flight attendant opened the tail cone door but had problems getting the slide to manually inflate after it did not do so automatically upon opening of the tail cone door. IAF, Tab 19, Subtab E.

about flight attendant training and told him about her previous findings.[34] HCD (Farrington Testimony).

According to the ROI, the appellant noted that she did not have direct approval authority on the AirTran CMO, but rather made recommendations to the POI for approval. IAF, Tab 19, Subtab E at 10. She stated the POI was receptive to her input and recommendations "most of the time." *Id.* The appellant explained generally about the flight attendant manual, the location of flight attendant training for AirTran being in Atlanta versus the CMO being located in Orlando, and her difficulty in getting travel approved to go to Atlanta to conduct surveillance training due to budget constraints. *Id.* at 10-11. She also told the Survival Factors Group that the AirTran training program was 'in compliance' with the FARs; however, she thought that there might be occasions when the training was not conducted in compliance with the training program.[35] *Id.* at 11.

The appellant stated that sometime in 2000, she told the POI that AirTran's tail cone mockup was not adequate because it was for a DC-9, not a Boeing-717 (B-717). *Id.* The appellant believed that the regulations required all flight attendants to operate all exits on all aircraft in all modes, and that the AirTran flight attendants would not be in compliance with the FAR unless they completed hands on training on a B-717 tail cone mockup. *Id.* According to the appellant, she did not receive a response from the POI and the training device was not changed and had not been changed at the time of the appellant's interview with the NTSB.[36] *Id.*

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[34] The appellant had requested Mr. George as a witness but withdrew her request to call him at the prehearing conference. RAF-2, Tab 32.

[35] The appellant's statement to the NTSB that AirTran was in compliance with the FARs directly contradicts her hearing testimony, where she testified that AirTran had been deficient with respect to the FAR for 3 ½ years. HCD (Farrington Testimony).

[36] The appellant's statement was incorrect, however, because at the time of her interview with the NTSB, Mr. Polomski had already sent a May 6, 2003 letter to

At the hearing, the appellant testified that, in 2000, AirTran was the launch customer for the B-717 aircraft and that the airline had to be certified by the FAA before it could operate the airplane.[37] HCD (Farrington Testimony). According to the appellant, when she initially went to Atlanta, AirTran did not have a mockup of the tail cone exit for a B-717, which she believed was required by the regulations. *Id.* When she asked AirTran where their mockup was, they told her they did not have one because the POI at the time, Bridget Craig, had not required them to get one. Ms. Craig had left the agency by the time this conversation was taking place. The appellant reported her conversation, and the lack of a mockup to POI Polomski. Mr. Polomski informed her that AirTran did not need a mock up for the B-717 because it had the same type rating as the DC-9, so it could use the DC-9 mockup.[38] *Id.*

Mr. Polomski testified that he had a professional relationship with the appellant and he thought they worked together pretty well as peers. HCD (Polomski Testimony). He testified that he recalled the issue of the tail cone exit coming up in connection with the March 2003 AirTran Flight 356 accident. *Id.* According to Mr. Polomski, the NTSB investigation discovered that the tail cone cover that protected the emergency slide pack used to AirTran's mockup did not correctly replicate what was actually on the airplane. *Id.* He and the appellant disagreed about what training needed to be done to fix this. The appellant believed all of the flight attendants needed to be taken off-line and given hands on training immediately between the two slide pack covers, which would have

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AirTran informing them that they needed to modify their tail cone mockup to replicate the B-717 aircraft. *See* RAF-2, Tab 24, Ex. R.

[37] Launch customer means that AirTran was the first U.S. airline to fly the B-717 in the United States. HCD (Farrington Testimony).

[38] According to the appellant's testimony, she was later called into the office of the CMO at the time, and told that she had no business talking or documenting something that had already been approved by the office. HCD (Farrington Testimony).

forced the airline to shut down. *Id*. While Mr. Polomski agreed that additional training was needed, he disagreed with the appellant over how it should be done. *Id*.

The appellant alleges that she disclosed that flight attendants were being trained on a DC-9 tail cone mock up instead of on a B-717 mock up and that this was in violation of 14 C.F.R. § 121.417, an FAA regulation governing crewmember emergency training. The regulation states that training programs must provide emergency training for "each airplane type, model, and configuration, each required crewmember, and each kind of operation conducted, insofar as appropriate for each crewmember and the certificate holder." 14 C.F.R. § 121.417(a). The regulation further provides that instruction must be provided in the operation of "Emergency exits in the emergency mode with the evacuation slide/raft pack attached (if applicable), with training emphasis on the operation of the exits under adverse conditions." 14 C.F.R. § 121.417(b)(2)(iv). The regulation further provides that "Each crewmember must accomplish the following emergency training during the specified training periods, using those items of installed emergency equipment for each type of airplane in which he or she is to serve . . ." and that such training must be on each "type of emergency exit in the normal and emergency modes. . ." 14 C.F.R. § 121.417(c)(2)(A). The appellant argues that this regulation required the AirTran flight attendants to be trained on an actual B-717 mock up and argues that her informing management that they were not training on one evidenced a violation of the regulation and was therefore a protected disclosure.

Probably due to the passage of time and the fading of memories, the testimony at the hearing was a bit confusing. The appellant focused primarily on the discrepancies between the tail cone training device, while Mr. Polomski testified about the differences in the slide pack. According to Mr. Polomski, after the AirTran Flight 356 accident, the agency discovered that the tail cone cover protecting the slide pack that was being used for training did not correctly

replicate what was on the airplane. HCD (Polomski Testimony). This discrepancy, according to Mr. Polomski, was not significant and he believed that AirTran was in compliance with the regulations although he acknowledged that the appellant did not think that they were. He also thought that more training would be a good idea. *Id*.

During its investigation, the NTSB requested information from the FAA to explain how the crewmember emergency training program was in compliance with 14 C.F.R. § 121.417(c)(2)(A) at the time of the accident since AirTran did not possess a B-717 tail cone training device until June 2003 and did not possess a DC-9 tail cone training device that contained a slide pack that corresponded in appearance and function to any slide pack in any of the DC-9s in their fleet until June 2003. RAF-2, Tab 26, Ex. LLL at 107 of 126. The agency responded back that the FAA regulations stated that "Type, as used with respect to the certification of aircraft, means those aircraft which are similar in design." RAF-2, Tab 26, Ex. LLL at 108 of 126; *see also* 14 C.F.R. Part 1, Definitions and Abbreviations. The agency went on to explain that the B-717 was approved in accordance with Type Certificate Number A6WE and that Type Certificate Number A6WE was also held by the DC-9. RAF-2, Tab 26, Ex. LLL at 108. Thus, the aircraft were deemed by the FAA to be of the same "type." The agency further stated that under 14 C.F.R. § 25.807 which defines types of exits on transports category airplanes, the DC-9 and B-717 have the same three types of required emergency exits: Type I, Type II, and Tail cone. *Id*. Since the DC-9 and the B-717 was manufactured under the same certificate, and had the same tail cone exit, the agency had determined that separate tail cone training devices were not necessary to comply with the requirements of 14 C.F.R. § 121.417(c)(2)(i)(A)

because the aircraft were of the same "type." *Id*. The agency provided a similar response with respect to the slide pack. *Id*. at 109 of 126.[39]

Based on the above, I find that a disinterested observer with knowledge of the essential facts known to and readily ascertainable to the appellant could not have reasonably concluded that the regulation in question had been violated. As a preliminary matter, AirTran was approved by the FAA to train its flight attendants on the DC-9 tail cone mockup. *See also* RAF-2, Tab 25, Ex. DD at 15 of 99. The appellant was informed by Polomski and others that the airline was in compliance with the regulations in using the mockup for its training because the B-717 was considered the same type as the DC-9.[40] HCD (Polomski Testimony). In fact, at the time the appellant was raising this issue, the agency's official position was that AirTran was in compliance with the regulation as later explained by Mr. Polomski in his response to the NTSB. An agency is entitled to deference in the interpretation of its own regulations. *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). The fact that the agency later changed its position on how the regulation should be interpreted does not change the reasonableness of its position at the time. Thus, I find that the appellant's insistence that AirTran was violating the regulation in light of the above was not objectively reasonable

[39] At a later point in time, in November 2003, possibly in response to pressure from the NTSB due to the accident, the agency changed its interpretation of the term "type" as it related to aircraft emergency exits. RAF-2, Tab 26, Ex. TT at 55 of 99. It concluded that although the DC-9 and the B-717 had the same type rating and the same type of emergency exits, the tail cone exit and slide pack were different and therefore hands-on training was required. *Id*. By this point, AirTran had retired most of its DC-9 airplanes and the agency had already required all of AirTran's flight attendants to have hands-on retraining pursuant to Mr. Polomski's May 6, 2003 letter.

[40] Mr. Polomski testified at the hearing that it was not unusual to approve training on a mock up that was not identical to the actual aircraft. HCD (Polomski Testimony). For example, he stated that pilots would train in cock pit simulators and then review pictorials that showed differences between airplanes. *Id*.

and at most amounts to a policy disagreement over the agency's application of its own regulation that is not entitled to protection.[41] *See Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 9 (2015).[42]

Disclosure 4 – Verbal Conversation with Fred Walker in June 2003

The appellant's fourth disclosure took place during a meeting with Fred Walker on June 17, 2003. After sending Mr. Walker the May 2003 report referenced in disclosures 1 and 2 above, the appellant asked to meet with Mr. Walker on June 17, 2003, when he was in Orlando for an "All Hands" meeting with the employees of the AirTran CMO. HCD (Farrington Testimony; Walker Testimony). There are no detailed notes taken during the meeting, however, Mr. Walker took some handwritten notes during his meeting with the appellant and they are part of the record. RAF, Tab 7, Ex. 14. Included in his notes are references to "717 aft door," "no crew members trained hands on" with an arrow and the reference "121.417."[43] *Id*.

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[41] While I recognize that the appellant's allegations against AirTran do not directly implicate government wrongdoing, the Board and Federal Circuit have held that if the government's interests and good name are implicated in the alleged wrongdoing, a disclosure may be protected if the person making it has the requisite reasonable belief. *See Arauz v. Department of Justice*, 89 M.S.P.R. 529, ¶ 6 (2001). Because I have found that the appellant's disclosures are not protected, I am not addressing this issue.

[42] At the hearing, the appellant testified about an incident where Merielle Landry of AirTran disclosed to her that individuals were not correctly performing emergency slide jump drills. HCD (Farrington Testimony). The appellant informed Mr. Polomski who decided the incident should be treated as a voluntary disclosure of a violation by AirTran instead of an investigation. HCD (Polomski Testimony; Farrington Testimony). The appellant disagreed with Mr. Polomski's decision to treat the violation in this manner. I find no evidence that the appellant included this incident in her May 2003 report or discussed in her conversations with Mr. George or Mr. Walker. Thus, I find no evidence that she made this disclosure to management.

[43] His notes also included the reference "Klaus . . .V.P. – go ahead . . grd us! Cannot comply." Klaus Goersch was the Vice President of Flight Operations at AirTran at the time and was involved in discussions over the retraining of flight attendants as discussed, *supra*.

The appellant did not specifically testify about what she told Mr. Walker during the meeting. After reviewing his notes to refresh his recollection, Mr. Walker testified that the appellant's concerns centered on cabin safety and oversight responsibilities but stated that his notes made more sense to him when he wrote them then they did when he was testifying. HCD (Walker Testimony). He did recall the appellant raising the issue of hands on training on with the B-717 simulator that was really a DC-9. The rest of his testimony consisted of him reading his notes and commenting on them. He stated he did not recall what 121.417 was at the time of the hearing, and noted that he had a comment in his notes that said Klaus Goersch had said, "Go ahead and ground us" or words to that effect. *Id*. Walker commented that an airline's non-compliance would have to be so egregious and the impact on the public would have to be so severe – putting public safety at risk – for the agency to ground an airline and he did not recall that ever happening under his watch. *Id*.

The appellant's discussion with Mr. Walker did not raise any new issues not previously raised in her discussion with Mr. George and I find, for the same reasons stated above, that it is not entitled to protection.

<u>The appellant has not shown the agency's personnel actions were taken in reprisal for her disclosures</u>.

Even assuming, arguendo, that the appellant's disclosures are protected, she has not shown that any personnel actions were taken against her in reprisal for making those disclosures. *See* 5 U.S.C. § 2302(f)(2). In order for disclosures made as part of an employee's job duties to be protected, the employee must demonstrate that the personnel action was taken "in reprisal for that disclosure." *Id*. Although it does not appear the Board has specifically addressed this provision of the WPEA or the applicable analytical framework for it, the logical placement for it is as part of the appellant's initial burden of showing that she made a protected disclosure. As such, the appellant would be required to show by a preponderance of the evidence that the personnel actions were taken in reprisal

for her disclosure. For the reasons set forth below, I find that the appellant has failed to meet that burden with respect to the personnel actions at issue here.

Removal

The appellant was removed on October 3, 2004, after she had been absent from work since July 25, 2003, for medical reasons. Prior to removing the appellant, the agency gave the appellant advanced sick leave and approved her for placement in the agency's leave donor program, through which she received approximately 198 hours of donated leave. On January 20, 2004, Mr. Moyers informed the appellant that her position needed to be filled by an employee available for full-time duty and that she could be subject to disciplinary action if she continued to be absent from work. Kishawn Griffin, at the time a labor and employee relations specialist for the agency, advised management in the appellant's case. HCD (Griffin Testimony). Ms. Griffin testified that she provided assistance and guidance to Mr. Moyers throughout the process of the appellant's absence including the decision to remove her and that removal was appropriate because there was no foreseeable end to her absence. *Id*. The agency also provided evidence of five other agency employees who had been out for extended periods of time, including several who had approved workers' compensation claims, that were also removed because there was no foreseeable end to their absence. *See* RAF, Tab 7, Ex. A-22 at 91-117 of 119.

Mr. Moyers testified that he sent the letter to the appellant in January of 2004, because he needed a Cabin Safety Inspector and someone to do cabin safety surveillance of AirTran and the Division recommended that he send the letter. HCD (Moyers Testimony). According to Mr. Moyers, he did not immediately move forward with a proposal to remove the appellant because he wanted to give her an opportunity to see her doctor and return to work. *Id*. Mr. Moyers testified that he "wanted her to come back to work," and that others were doing the appellant's job in her absence but it was not working well and "she would have had a job" if she had returned to the AirTran CMO. *Id*.

Mr. Ellison testified that the agency was "absolutely not" trying to get rid of the appellant. HCD (Ellison Testimony). According to Mr. Ellison, it would have taken them at least a year to hire and train someone to do the appellant's duties and "if we feel an employee has the duties and abilities to do the job," as Veatch, Moyers, and Stahlberg had conveyed to him the appellant could, it is better to have the employee return to do it. *Id*. In addition, Mr. Ellison testified that Ms. Stahlberg did not want to get rid of the appellant. *Id*.

I found the testimony of Mr. Moyers to be direct and forthcoming and I found him to be a credible witness. With regards to Mr. Ellison, I also found him to be a compelling witness with no motive to lie or be untruthful. Although the appellant tried to portray Mr. Ellison as vindictive and out to get her, my observation of his demeanor and the content of his testimony do not support the appellant's characterization. To the contrary, Mr. Ellison testified that he was sent to Orlando to make sure that management did things correctly and I found his testimony in this regard to be believable.

The appellant, on the other hand, was frequently contradictory in her testimony. I also found her testimony to be inconsistent with some of the contemporaneous documentation and her own prior statements. I developed the distinct impression that the appellant was embellishing the truth in hindsight to create a scenario that was not grounded in fact, and was using the AirTran Flight 356 accident to turn her workplace complaints about her managers into something far more than they were at the time that she made them.

Some notable examples of the appellant's inconsistencies include the following. For example, the appellant testified that after she had been complaining about the AirTran flight attendant program since her arrival and that it was catastrophically deficient but no one would listen to her complaints. Yet during the period from May of 2002 through February of 2003, she observed two month long flight attendant trainings at AirTran assisted them with redeveloping their flight attendant training program and received awards for her efforts from

Mr. Moyers and praise from Mr. Clements at AirTran, who characterized the training program as "second to none" as a result of her efforts. In his affidavit filed in support of the appellant in this appeal, Mr. Clements states that the appellant was "instrumental in assisting AirTran with compliance and training" and notes that she spent many hours reviewing policies and training curriculum development resulting in "marking improvement in the quality and standards of cabin attendant candidates." RAF-2, Tab 26, Ex. JJJ at 79-80 of 126 (Affidavit of Steven Clements). In addition, Mr. Clements noted that the appellant "routinely called or visited the AirTran training facilities in College Park, Georgia." *Id*. at 79. I find the appellant's receipt and acceptance of these awards and praise to be greatly at odds with her later testimony concerning the continuing catastrophic deficiencies in AirTran's training program.

In her May 2003 report, she stated that the CMO – Mr. Moyers – adjusted the tag on her shirt, a gesture she viewed as "extremely inappropriate, invading my personal space and a means of intimidation." IAF, Tab 19, Subtab F at 11. However, during the hearing, she testified that Mr. Moyers had never offered a kind gesture to her before the tag incident and she thought his action was a kind gesture on his part and did not view it as a negative thing. HCD (Farrington Testimony). Also, during the hearing, the appellant testified that the AirTran program never met the regulatory requirements. *Id*. However, when she was interviewed by the NTSB, she told them that AirTran was in compliance with the FARs. IAF, Tab 19, Subtab E AT 10. During the hearing, the appellant testified that in May of 2003, she met with Mr. Polomski and Ms. Stahlberg to discuss the findings of her parallel investigation into AirTran. HCD (Farrington Testimony). According to the appellant's testimony, she informed them that she believed that the flight attendants all needed to be retrained because they were not properly trained based on the regulations, and that they both disagreed with her, and Stahlberg was yelling, "stop trying to press the issue, we disagree" or words to that effect. *Id*. However, on May 6, 2003, Mr. Polomski sent a letter to AirTran

informing them that the agency's investigation had revealed a lack of knowledge by both flight attendant instructors and online flight attendants in the applicable procedures for manual slide deployment and requiring that both instructors and flight attendants be retrained in the "proper operation of all emergency exits including both classroom instruction and hands-on exit operations."[44] RAF, Tab 11, Ex. R, at 13-14 of 35. In addition, the appellant testified that she had been reporting for 3 ½ years that the flight attendants at AirTran were deficient in the regulations and that the tail cone situation was "catastrophic," yet her May 2003 report does not even mention the tail cone mockup, the slide pack, § 121.417, or any regulation whatsoever. During the hearing, the appellant tried to explain that she began writing her May 2003 Report in February 2003, before the AirTran accident occurred, but that does not adequately explain why she failed to include this information in her report if that was the main focus of her complaints, as she now alleges that it was. I found her attempt to explain this during the hearing to be evasive and unconvincing. On the whole, I found the appellant's testimony to be self-serving, self-assured and confident on direct but evasive and elusive on cross examination.[45] Thus, I credit the testimony of Mr. Moyers and Mr. Ellison over that of the appellant.

At the time of her removal, the appellant had been absent from work for over 14 months with no projected return date. The deciding official, Mr. Moyers,

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[44] The letter also required AirTran to modify the tail cone mockup at its training center to replicate the B-717 aircraft. RAF, Tab 11, Ex. R. at 13-14 of 35. The appellant testified that the agency did not require AirTran to develop a mockup for the B-717 tail cone until after a legal opinion was issued on the training requirements required by 14 C.F.R. § 121.417(c)(2)(A). HCD (Farrington Testimony). However, the memorandum clarifying the training requirements was issued on November 21, 2003, six months after Mr. Polomski had already instructed AirTran to modify the tail cone mockup to replicate the B-717.

[45] I found particularly troubling the appellant's detailed recall of conversations that had taken place 10 years before which she recounted with a questionable degree of precision given the passage of time.

testified that he never saw the package that the appellant sent to Mr. Walker and did not recall having a conversation with him about it. HCD (Moyers Testimony). With respect to the June 2003 meeting that the appellant had with Mr. Walker, Mr. Moyers testified that he was not aware of it and he did not recall Mr. Walker telling him about it. *Id.* However, Mr. Walker would often meet with employees without the managers or supervisors being present.[46] *Id.* Based on the evidence above, I find a preponderance of the evidence supports the decision to remove the appellant and I find no evidence that the action was taken in reprisal for any disclosures that she may have made.

July 11, 2003 Actions – Counseling, Threatened Removal, Employee Moratorium

The appellant alleges that during a counseling meeting conducted on July 11, 2003, she was threatened with removal and her duties were significantly changed. Specifically, with respect to her duties, the appellant was instructed to not have any direct contact with AirTran. The oral counseling was later documented in writing and is part of the record although the appellant disputes the accuracy of this document. RAF, Tab 7, Ex. 22; HCD (Farrington Testimony).

A counseling is not normally considered a personnel action and a memorandum documenting that an oral counseling occurred is not a formal disciplinary action under 5 U.S.C. § 2302(a)(2), and, thus, it does not constitute a "personnel action." *Special Counsel v. Spears*, 75 M.S.P.R. 639, 670 (1997); *Johnson v. Department of Health and Human Service*, 87 M.S.P.R. 204, ¶ 11 (2000). However, the purpose of the counseling was to discuss performance deficiencies with the appellant. The Board has found that the line between counseling and a threat is fact-dependent, and a notice of a performance

[46] This testimony was corroborated by Mr. Walker who testified that he would regularly excuse management from his meetings to talk to employees after which he would invite any employee that wanted to meet privately with him to do so. HCD (Walker Testimony).

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deficiency could be viewed as an implied threat to issue a retaliatory performance appraisal in some circumstances. *See Koch v. Securities & Exchange Commission*, 48 Fed.Appx. 778, 787 (Fed.Cir.2002) ("The line between a counseling measure and a threat is not a bright one, and the distinction between the two is very fact-dependent."); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 669 (1997) (acknowledging that there may be circumstances in which notice of a performance deficiency would be an implied threat to issue a retaliatory performance appraisal); *see also Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 600, 608–09 (1991) (finding a threatened personnel action where an employee was informed that he should not expect a highly satisfactory rating the next year), *recons. denied*, 52 M.S.P.R. 375, aff'd, 981 F.2d 1237 (Fed.Cir.1992); *Mastrullo v. Department of Labor*, 123 M.S.P.R. 110, ¶ 24 (2015) (finding that the appellant made a non-frivolous allegation that he viewed statements about performance deficiencies in his work performance during his midyear performance review meeting to be a threat). Even considering this factor, I find that even assuming the appellant's counseling meeting was a personnel action, she has failed to show it was held in reprisal for any allegedly protected disclosures. I further find that the appellant's assertions that she was repeatedly threatened with removal is not supported by the facts, and I find a preponderance of the evidence does not support her assertion that the employee moratorium that placed restrictions on her contact with AirTran were taken in reprisal for any protected disclosures.

Counseling

The appellant's supervisor, Vicki Stahlberg, was not available to testify at the hearing. However, Mr. Ellison testified about his role in the counseling session. According to Mr. Ellison, he was asked by Ms. Veatch to go to Atlanta to assist Ms. Stahlberg with the counseling session because Ms. Stahlberg was a new supervisor. HCD (Ellison Testimony). Mr. Ellison testified that he had been told that there were issues with the appellant, they had received some complaints, and that management had decided to limit her interaction with AirTran. *Id*. She

was not being pulled off of the certificate and he does not believe any of her duties were being taken away – the main purpose of the meeting was to let the appellant know that her contact with AirTran was being limited. *Id*. According to Mr. Ellison, Ms. Veatch had told him that there had been some interaction problems between the appellant and the airline that were contrary to the more collaborative approach the agency was taking at that time, a more collaborative, self-disclosure approach . *Id*. The agency was operating under what it called a Customer Service Initiative which it believed would foster a more collaborative relationship with the airlines an encourage self-disclosure of regulatory violations. Ms. Veatch also referenced the appellant's interaction in a training situation involving AirTran and wanted him to ensure that the appellant understood how management wanted her to communicate with the airline. *Id*.

The appellant testified that when she went to the counseling meeting, Mr. Ellison told her that the meeting was to discuss her performance and he had the report that she had given to Mr. Walker and the letter from Mr. Goersch. HCD (Farrington Testimony). She testified that she asked for examples of her poor performance and Mr. Ellison told her that she was "not getting it." *Id*. He said to her, "here's the deal, you are being placed on an employee counseling moratorium that will last for 6 days, 6 weeks, 6 months, or 6 years, you are not to communicate with the carrier. If you initiate communication with the carrier, you will be terminated. If you accept any work activity unless approved by your supervisor, you will be terminated."[47] *Id*.

Although the appellant testified that she was unaware that she had any performance issues, there is other evidence in the record that supports the agency's position that the appellant had some performance issues and that the

[47] Mr. Ellison did not specifically deny telling the appellant she could be on the moratorium for 6 days or 6 weeks or 6 years but he denied telling her she would be removed. HCD (Ellison Testimony).

agency was justified in counseling her regarding them.[48] In the email dated May 16, 2003, informing Mr. Walker that the appellant had sent him the May 2003 report, Mr. Moyers states,

> There will probably be an addendum added to her claim, as I had instructed Vickie to get with Kim and Martin Polomski (POI) and find out how Kim was going to complete her work program which generated an additional 50 or so "R" items in the High Probable category on AirTran's Flight Attendant Program. We are in the process of requesting some help from ESO-31 on the process used to generate these items. We feel that the SEP mod 3 process was not followed completely. This discussion occurred yesterday afternoon late, and I have been told the meeting became a little controversial.

RAF, Tab 7, Ex. 15. This notation about the appellant's performance issues and trouble completing "R" items occurred before the contents of her May 2003 report were known and before she made any allegedly protected disclosures.[49] Mr. Moyers testified that the appellant's "R" items had to be assigned to others to complete because the appellant did not complete them. HCD (Moyers Testimony). Mr. Moyers told the NTSB that the appellant had problems completing her work program that required other inspectors to come in to help her complete her required items ("R items"). IAF, Tab 19, Subtab C at 24. It was not uncommon for the appellant to have failed to complete the majority of her required work program functions in the fourth quarter of the year, requiring others be reassigned to assist her. *Id*. at 25.

At the hearing, Mr. Polomski testified that AirTran personnel and employees had voiced concerns to him about the appellant's behavior, that there was a lot of friction between the appellant and the airline's technical writers due to the amount of time it took to get technical changes approved. HCD (Polomski

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[48] The agency's Aviation Safety Inspectors did not receive annual performance evaluations.

[49] "R" items are required items that must be completed during the fiscal year. HCD (Farrington Testimony).

Testimony). The appellant wanted changes to the flight attendant program including the way the instructors conducted classes and delivered material. However, as long as the material is presented in accordance with an approved training program and the FAR is not implicated, the airline has the discretion in how to present the material, so the airline would call him with concerns that he would pass on to Moyers or Stahlberg. *Id*. With respect to the appellant's "R" items, at the end of the year a lot of them were not being completed and had to be reassigned to other operations inspectors causing a safety concern because these involved safety inspections. *Id*. In addition, prior to the counseling meeting, the agency had received the letter from AirTran raising some of the same issues identified above.

There is no evidence that Mr. Ellison saw the May 2003 report or was aware of what was discussed at the appellant's meetings with Mr. George or Mr. Walker. Ms. Veatch could not be located to testify at the hearing. However, based on the above, I find that a preponderance of the evidence supports that the appellant had issues with completing her work and issues with communicating with AirTran. I credit the testimony of Mr. Polomski and Mr. Ellison over that of the appellant on this issue. This coupled with the letter the agency received from AirTran regarding issues with the appellant and the agency's desire to deal with the airline through a more customer oriented approach – the Customer Service Initiative – all support the agency's decision to counsel the appellant. I find a preponderance of the evidence does not support that the counseling was done in reprisal for any protected disclosures the appellant may have made.

Threatened Removal

The appellant testified that Mr. Ellison repeatedly told her that she would be fired if she did not comply with the agency's instructions to limit her contact with AirTran. HCD (Farrington Testimony). According to the appellant, Mr. Ellison stated, "If you initiate any communication with the carrier, you will be terminated, if you accept any work activity unless approved by your supervisor,

you will be terminated." *Id*. Mr. Ellison denies that he threatened the appellant with removal during the performance counseling. HCD (Ellison Testimony). A threat to take a personnel action is a considered a prohibited personnel practice under 5 U.S.C. § 2303(b). However, I have already found that the appellant was not credible in her testimony and I likewise find that she was not credible with respect to her allegation that she was threatened with removal during the employee counseling meeting. Specifically, I find it improbable that someone in Mr. Ellison's position – at the time a Supervisory Labor Relations Specialist – would overtly threaten the appellant with removal during the meeting. I credit his testimony that he did not do so. His testimony is also supported by the testimony of other agency employees that emphasized that they were not out to get rid of the appellant. Thus, I find that the appellant was not threatened with termination during this meeting.

<u>Moratorium</u>

Ms. Stahlberg summarized the counseling session in written memorandum which details what has been characterized as a "moratorium." IAF, Tab 19, Subtab J. The memorandum purported to summarize what took place during the oral counseling session. The appellant testified at the hearing that the memorandum was not accurate. HCD (Farrington Testimony). The agency argues that the appellant's duties were not really changed by the counseling session and that after the counseling she still continued to perform all of her job duties. The appellant argues that her job duties were changed by the counseling because she was instructed to cease communications with AirTran and such communications were ordinarily part of performing her regular job duties. Thus, the appellant argues that this was a significant change in her duties and was therefore a personnel action. *See* 5. U.S.C. § 2302(a)(2)(A). I agree.

The memorandum indicated that during the counseling the appellant was instructed to "to immediately cease communications with AirTran. Except for a safety of flight issue that may be observed during surveillance, any

communications with AirTran should be directed to the Principal Operations Inspector, Martin Polomski. If you receive a call from an employee of AirTran, you should take a message and check with Martin for direction. During this time, I would like you to observe how these communications between Martin and AirTran and/or myself and AirTran take place and in the manner, which they are communicated. Learn from these observations." RAF-2, Tab 22, Ex. 22. The appellant's responsibilities as an Aviation Safety Inspector required frequent interaction with the airline and these restrictions amounted to a significant change. Accordingly, I find that they were a personnel action.

Although I have found the requirement to cease communications with AirTran to be a personnel action, I find a preponderance of the evidence does not support that it was done in retaliation for any protected disclosures the appellant may have made. As discussed above, the agency had received complaints about the appellant from AirTran for some time, which seemed to culminate in the letter the agency received from Mr. Goersch on July 17, 2003.[50] In addition, the appellant was clearly resistant to the agency's Customer Service Initiative approach to dealing with airlines as evidenced by her resistance to dealing with the slide jump issue as a voluntary disclosure. Thus, the agency's counseling and moratorium on her conversations with AirTran seemed designed to assist her with her interaction skills as the agency has suggested.[51] Thus, I find no basis to conclude that the moratorium was done as a result of the appellant's May 2003 report or the subsequent meetings that she had with Mr. George or Mr. Walker.

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[50] Mr. Moyers told the NTSB that he had to sit down with the appellant as early as 2002, to discuss how she was coming across towards AirTran during her surveillance activities. IAF, Tab 19, Subtab C at 10.

[51] In addition, one of the appellant's witnesses, Judith Palmer, testified that she believed the agency was limiting the appellant's interaction with AirTran to protect her, and that it was a sign that they "had her back at the time because to have another FAA person there with her would be a good thing." HCD (Palmer Testimony).

The agency's affirmative defense of laches is granted.

The agency filed a motion to dismiss this appeal due to laches.[52] IAF, Tab 19. Laches is an affirmative defense for which the agency has the burden of proof. In its motion, the agency argued that many documents requested by the appellant in discovery had been destroyed pursuant to the agency's document retention and records management policies. *Id.* The agency also argued that many of the agency's witnesses did not have a detailed recollection of their interaction with the appellant due to the passage of time as evidenced by their deposition testimony. *Id.* The agency was instructed to present evidence of laches at the hearing. RAF-2, Tab 32.

The equitable defense of laches bars an action where an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken. *See, e.g., Social Security Administration v. Carr*, 78 M.S.P.R. 313, 330 (1998), *aff'd*, 185 F.3d 1318 (Fed. Cir. 1999). The party asserting laches must prove that the delay was both unreasonable and inexcusable and that they were materially prejudiced by it. *Id.; see Nuss v. Office of Personnel Management*, 974 F.2d 1316, 1318 (Fed. Cir. 1992); *Hoover v. Department of the Navy*, 957 F.2d 861, 863 (Fed. Cir. 1992); *Pepper v. United States*, 794 F.2d 1571, 1573 (Fed. Cir. 1986). The agency bears the burden of establishing prejudice by a preponderance of the evidence.

The agency argues that the appellant stopped reporting for duty on July 23, 2003, and was removed by the agency on October 3, 2004. RAF-2, Tab 9. The appellant did not file her IRA appeal until almost five years later. Prior to filing her appeal, the appellant had no contact with the agency, did not respond to the

[52] The agency previously raised the defense of laches before the previous administrative judge. RAF, Tab 22. The agency was instructed to raise the defense at the start of the hearing if it wished to pursue it. *Id.*

proposed removal, and did not file an appeal of her removal. IAF, Tab 19. Consequently, the agency argues that it was prejudiced by the delay.

The appellant has argued that the agency waited too long to raise the defense of laches. I find no merit to this argument, however, because the agency has continuously raised this issue throughout the appeal process. However, the strength of the agency's argument has changed as the circumstances in this case have evolved in part due to changes made by the WPEA and the Board's decision in *Day*. As indicated, *supra*, laches is appropriate where a party will be materially prejudiced by the delay. *Nuss,* 974 F.2d at 1318. Due to the changes made by the WPEA, specifically the overruling of *Huffman,* the agency's burden in this appeal has changed significantly from a largely legal argument based on *Huffman* to a factual one, particularly if it is required to show that it took the personnel actions at issue here by clear and convincing evidence. Thus, I find the agency should not be prejudiced by its decision to not vigorously pursue laches when it appeared the appeal would proceed under *Huffman* and I find it is appropriate to consider laches with respect to the agency's burden of showing by clear and convincing evidence that it would have taken the personnel actions at issue here in the absence of the appellant's alleged disclosures.

As a preliminary matter, the appellant has not adequately explained why she waited over four years to pursue an action against the agency if she believed she was being wrongfully removed.[53] The appellant testified that she sought out several attorneys who told her they could not help her but she did not explain why she did not simply follow the instructions in the removal letter for filing a Board appeal. As someone familiar with reading and interpreting regulations, the appellant was certainly capable of understanding what options were available to

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[53] At the hearing, she testified that when she received the decision to remove her, she believed the agency was removing her due to her "unavailability" and their need to fill the position. HCD (Farrington Testimony).

her had she put some effort into it. The appellant testified that she purchased a Passman and Kaplan book on "How to Survive the Federal Government" in 2004 but did not understand it. HCD (Farrington Testimony). Based on the appellant's testimony that she sought out attorneys and purchased a book, it is apparent that, as early as 2004, the appellant thought her removal was improper. I find her delay in filing an appeal was unreasonable and inexcusable particularly in light of the fact that she was provided with information on filing a Board appeal in her removal letter.[54] IAF, Tab 4, Subtab 4b.

As previously noted, several key witnesses – Ms. Anderson, Ms. Veatch and Mr. Goersch – were not available to testify at the hearing in this matter because they could not be located. In addition, Ms. Stahlberg who had been suffering from a terminal illness for some time, was ill and was unable testify. I find that the agency was materially prejudiced by the unavailability of these witnesses, particularly Ms. Veatch and Ms. Stahlberg. Both Ms. Veatch and Ms. Stahlberg were key witnesses in the decision to counsel the appellant and the appellant's claim that her duties were restricted in the counseling memorandum. For example, Ms. Veatch was involved in the follow up of the appellant's May 2003 report and was the person that Mr. Walker relied upon to handle the day-to-day matters in the Division. In addition, Ms. Veatch had asked Mr. Ellison to be at the counseling meeting with the appellant. HCD (Walker Testimony; Ellison Testimony). Thus, it appears that she was involved in the decision to counsel the appellant and limit her interaction with AirTran. Without her testimony, it is not possible to determine her role in the counseling of the appellant or the decision to

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[54] The appellant's explanation as to how she came to file an OSC complaint was also inconsistent with documentary evidence. As indicated, *supra*, she testified that Scott Bloch, the Special Counsel, contacted her and told her he had a staff waiting to take up her complaint. However, on her OSC complaint, in response to the question "How did you first become aware that you could file a complaint with OSC?" the appellant responded that she found out about it from a "former co-worker." IAF, Tab 8, Subtab A.

limit the appellant's interaction with AirTran. Likewise, Ms. Stahlberg was the appellant's direct supervisor during the counseling and participated in the meeting and the decision to limit her interaction with AirTran. Without her testimony, it is not possible to reach the clear and convincing standard required under the WPA.[55]

With respect to the appellant's removal, Mr. Walker could not independently recall what was discussed during the meeting that he had with the appellant, even after seeing the contemporaneous notes he had taken during his meeting. Likewise, Mr. Moyers testified that he never saw the May 2003 report that the appellant sent to Mr. Walker but he could not recall if Mr. Walker discussed it with him. HCD (Walker Testimony). Mr. Moyers also testified that he was not aware of the appellant meeting with Mr. Walker and did not recall if Mr. Walker had spoken to him about his meeting with the appellant.[56] *Id*.

Based on the above, I find that the appellant has provided no satisfactory explanation for her delay in bringing this action. See *Brown v. Department of the Air Force*, 88 M.S.P.R. 22, ¶ 9 (2001)(laches appropriate where loss of documents and personnel resulted due to passage of time and the appellant provided no satisfactory explanation for delay). I also find that her delay has caused material prejudice to the agency's ability to defend itself in this appeal to the extent it would not be able to establish certain personnel actions by clear and convincing evidence. Thus, I find it would be appropriate to dismiss this appeal

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[55] Mr. Ellison testified that he went to the counseling meeting at Ms. Stahlberg's and Ms. Veach's request because of problems with the appellant. HCD (Ellison Testimony). Thus, he was acting at the behest of others and did not have personal knowledge.

[56] In fact, the only person at the hearing who was able to testify with any specificity was the appellant, who was somehow able to recount entire conversations that had occurred 10 years previously nearly verbatim. However, as indicated previously, due to the inconsistencies in her testimony, I do not find her account of these conversations to be credible.

under the equitable theory of laches if the appellant had been able to show that she made disclosures that were protected under 2302(b)(8).

Conclusion

Accordingly, for all of the reasons discussed above, I find the appellant has failed to prove that she made any protected whistleblower disclosures and, even assuming she had, she failed to show that any personnel actions were taken in reprisal for her disclosures. In addition, should the agency be required to show by clear and convincing evidence that they would have taken the personnel actions at issue in the absence of any protected disclosures, I find that laches must be applied to this appeal. Accordingly, the appellant's request for corrective action must be DENIED.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: _______/S/____________________
Sharon J. Pomeranz
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **July 6, 2016**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of

Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific

evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

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

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

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

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United

States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

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

http://www.fedcirbar.org/olc/pub/LVFC/cpages/misc/govt_bono.jsp

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 27, 2023, I caused the Opening Brief of Petitioner to be served through this Court's electronic filing system on all counsel of record; and that on October 13, 2023 and October 23, 2023 I did so with this Corrected Opening Brief.

/s/ Thad M. Guyer

Thad M. Guyer

RULE 32(A)(7)(C) CERTIFICATE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

> this brief contains 12,408 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

> this brief has been prepared in a proportionally spaced typeface using Open Office in 14-point proportional typeface, Times New Roman.

Dated: October 13, 2023 Respectfully submitted by:

/s/ Thad M. Guyer

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Thad M. Guyer