UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

EDWARD T. KOPSICK,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
AT-1221-13-0323-W-2

DATE: February 18, 2015

Adam J. Conti, LLC, Esquire, Atlanta, Georgia, for the appellant.

Zlatko Jurisic, Esquire, New Cumberland, Pennsylvania, for the agency.

BEFORE
Brian Bohlen
Administrative Judge

INITIAL DECISION

On February 8, 2013, the appellant timely filed a petition alleging reprisal for whistleblowing under the Whistleblower Protection Act (WPA) when the agency prematurely terminated his temporary promotion to a GS-14 position as the Deputy Commander over a supply depot in Kandahar, Afghanistan, reassigned him back to the United States, suspended him for 14 days, and detailed him for six months outside of his normal supervisory duties. Initial Appeal File (IAF), Tab 1.[1] The Board has jurisdiction over this individual right of action (IRA)

[1] The original appeal was dismissed without prejudice on February 14, 2013, and was refiled on July 15, 2013. Documents from within the original appeal are identified as belonging within the Initial Appeal File (IAF), while documents within the refiled appeal are identified as belonging within the Refiled Appeal File (RAF).

appeal under the WPA pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a), *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).[2] The hearing the appellant requested was held on January 7-8, 2014. Refiled Appeal File (RAF), Hearing Compact Disk (HCD), Track 1 (T1). For the reasons discussed below, the appellant's request for corrective action is GRANTED.

ANALYSIS AND FINDINGS

Summary of Decision

In mid-2011, before the unfortunate events of this appeal, the appellant was a GS-13 Division Chief supervising about a hundred employees within the Defense Logistics Agency, Distribution (DLAD) depot at Warner Robins, Georgia. Up to that point, he had enjoyed an exemplary and unblemished 32-year career as a civilian logistics expert and supervisor within the agency. In the late summer of 2011, the appellant was competitively selected for a temporary GS-14 promotion to become the GS-14 civilian Deputy Commander for the recently established DLA Distribution Depot in Kandahar, Afghanistan (DDKA). While DLAD operated 26 supply depots around the world at the time, DDKA was unique in that it was the only DLAD supply depot positioned inside an active combat zone.

Shortly after his arrival at DDKA in early August, 2011, the appellant began reporting through his chain of command deficiencies in inventory accuracy and systemic false reporting by the contractor, Safe Ports, Inc., running the depot on behalf of DLAD. The Vice President of Safe Ports, Raymond Rodon, sent a

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[2] The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before the Office of Special Counsel (OSC) and non-frivolously alleges that (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take, threaten, or fail to take a personnel action. *Yunus*, 242 F.3d at 1371. Conclusory, vague, or unsupported allegations are insufficient to qualify as non-frivolous allegations for IRA jurisdiction. *McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶ 7 (2008).

letter to the chief contracting officer for DLAD complaining in equal measure about the appellant's unwelcome criticism of Safe Ports' work, and also alleging that the appellant had repeatedly brandished a pocket knife and made threatening comments around his staff. DLAD Headquarters (HQ) reacted by temporarily reassigning the appellant to Kuwait while it investigated Rodon's allegations of misconduct.

As discussed within the body of this decision, the agency's investigation was neither thorough nor facially evenhanded. Despite very conspicuous weaknesses in the investigation, DLAD HQ seized upon it to justify terminating the appellant's GS-14 promotion, and shipping him back to Warner Robins where he received a 14-day suspension and was detailed for the next six months to non-supervisory duties.

After carefully reviewing the record, I find that the appellant met his burden of demonstrating that he made protected disclosures about chronic violations of agency contracting rules and systematic false reporting at DDKA. The appellant's involuntary demotion, involuntary reassignment, suspension without pay, and divestiture of his normal supervisory duties are each "personnel actions" under 5 U.S.C. § 2302(a)(2)(A). The close proximity of the appellant's disclosures to these personnel actions facially satisfies the knowledge-timing test, thus establishing that the appellant's disclosures were a contributing factor in the resulting personnel actions. And finally, I find that the agency failed to demonstrate by clear and convincing evidence that it would have taken the identified personnel actions in the absence of the appellant's disclosures.

While the agency was certainly justified in investigating the contractor's allegations about the appellant making unseemly and possibly threatening comments while sometimes brandishing a knife, the agency's failure to conduct a facially fair or thorough investigation into the matter and its inexplicable blindness to significant evidence of potential witness bias fatally undermined the credibility of DLAD's professed innocent motives. After extensive evaluation of

the record, I believe that the agency's personnel actions were significantly tainted by retaliatory motives. Thus, I find that the agency has failed to meet its clear and convincing burden of demonstrating that it would have taken the personnel actions in the absence of the appellant's disclosures, and order corrective action.

Burden of Proof

When reviewing the merits of an IRA appeal, the Board considers whether the appellant has established by a preponderance of the evidence that he made a protected disclosure under 5 U.S.C. § 2302(b)(8) that was a contributing factor in an agency's personnel action. *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 17 (2013). A preponderance of the evidence is "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2).

If the appellant is able to offer such proof, the Board must order corrective action unless the agency can establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Chavez*, 120 M.S.P.R. 285, ¶ 17; *Whitmore v. Department of Labor*, 680 F.3d 1353, 1364 (2012). 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. *Chavez*, 120 M.S.P.R. 285, ¶ 17.

Background Facts

DLA Organization and Mission

In order to understand the context of this appeal it is useful to briefly discuss the mission and structure of DLA. DLA provides worldwide logistics support in peacetime and wartime to the military services. According to the agency's public website, DLA provides nearly 100 percent of the consumable items America's military forces need to operate -- from food, fuel and energy, to

uniforms, medical supplies, and construction and barrier equipment.[3] In 2011 when the facts of this appeal arose, DLAD managed 26 supply depots worldwide, employing nearly 27,000 civilian and military staff members.[4] William Budden, the SES Deputy Commander of DLAD, testified that DLAD is a 2 billion dollar enterprise, with 26 distribution depots globally, storing a total of 106-109 billion dollars in inventory for the Department of Defense and other authorized customers. HCD, T3, 33:30. Despite the vast scope and size of DLA's logistical operations, the DDKA depot was unique in that it was the only DLA depot in the world which was then operating inside an active combat zone. HCD, T2, 51:00-53:00.

Appellant's Background

The appellant began his career as an Army soldier in 1979. He remained a combat arms soldier until he was hired into a temporary GS-4 position within DLA in 1984. He rose through the civilian ranks steadily, taking on managerial and supervisory roles beginning in the mid-1980's, and receiving a GS-13 promotion in 2010. HCD, T2, 17:00-19:00. The appellant is by all accounts extremely knowledgeable of the countless rules and requirements for properly running a DLAD depot to receive and ship goods. Such subject matter expertise was explicitly required by the position description for the GS-14 Deputy Commander position at DDKA,[5] and no witness at any point in the record challenged the appellant's logistics knowledge or skill.[6]

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[3] Administrative notice of these undisputed background facts was taken from DLA's public website at *http://www.dla.mil/Pages/ataglance.aspx* on January 9, 2014.

[4] *Id.*

[5] *See* RAF, Tab 6, p. 18 of 142.

[6] The DDKA Commander, CDR Carl Isett, stated that the appellant "demonstrates a keen sense of propriety in safeguarding government assets and, while sometimes very direct in his business correspondence, he never deviates from the highest levels of

Other than the personnel actions at issue within this appeal, the appellant enjoyed a successful and unblemished 32 year civilian career as a respected logistics expert within DLAD, the majority of which in managerial and supervisory positions. HCD, T2, 21:00. It is undisputed that the appellant had no prior formal discipline or even a negative counseling statement prior to the events underlying this appeal. HCD, T2, 21:40. As a career civilian logistics expert, he worked for DLA outside the United States repeatedly, including three stints in Germany, an assignment in Japan, and a deployment into the Balkan conflict as part of Operation Joint Endeavor in 1996. He also uniformly received exceptional performance appraisals throughout his career, and was lauded as the Employee of the Year for DLA Disposition Services[7] while deployed as a civilian in support of Operation Joint Endeavor. HCD, T2, 20:00-22:00.

In 2008, the appellant was promoted to become a civilian division chief for DLAD's supply depot in Warner Robins, Georgia. The grade for this position was reclassified as a GS-13 position in 2010. Within that position, he supervised about 110 employees and was responsible for overseeing the storage and issuance of all supplies within the depot except classified materials. HCD, T2, 22:00-23:00. While in this position, the appellant applied for a temporary promotion to become the GS-14 Civilian Deputy Commander at the recently established DLA DDKA facility in Kandahar. *Id.*

The DDKA Deputy Commander position was announced as a two-year tour of duty, though the appellant provided undisputed testimony that it could

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professional behavior." RAF, Tab 8, p. 12 of 68. Mr. William Budden, the SES Deputy Director for DLAD, likewise repeatedly acknowledged the appellant's advanced logistics knowledge and skills, and stated that he did a "fairly phenomenal" job of pointing out contractor deficiencies at DDKA. *See* HCD, T3, 44:00, 48:00-49:00.

[7] DLA Distribution Service is a major component of DLA which handles the disposition and repurposing of materials.

potentially be extended for up to five years at the discretion of the agency. The appellant was competitively selected for this temporary promotion on July 17, 2011, and reported for duty in Afghanistan on or about August 2, 2011. RAF, Tab 8, p. 36 of 68; HCD, T2, 24:00.

The DDKA Deputy Commander position demanded keen subject matter expertise in depot logistics, as well as bold oversight of the government staff and contractor running daily operations. The position description states that the incumbent must use "a comprehensive understanding and knowledge of supply policy in serving as a the primary depot level technical authority on distribution operations and programs, interpreting DoD Regional and higher level guidance developing local operating instructions and policies." RAF, Tab 6, p. 18 of 142. The position description further states that the Deputy Commander "participates fully in the overall management of the facility, its programs and operations, establishes and implements its goals and objective, long-range plans, and internal management controls for the purpose of controlling operations and determining costs and evaluating performance." *Id.* The position description also required the incumbent to maintain liaison with the higher headquarters about operations and to take a "rolled up sleeves" approach to managing the depot. *Id.*

DDKA Mission, Structure, and Working Conditions

DDKA was established in January, 2011, about eight months before the appellant's arrival there, to provide critical wartime supplies to U.S. soldiers conducting military operations against al-Qaeda militants within Afghanistan. Living and working conditions within DDKA were austere and potentially dangerous. Office, dining, and sleeping facilities were converted shipping containers. The landscape was plagued by dust and stifling heat. Personnel lived under threat of attack from al-Qaeda militants. Rocket and small arms fire near the depot was commonplace and DDKA personnel were frequently evacuated to on-site bunkers. HCD, T1, 8:00-9:00. Federal employees who volunteered to

work in such conditions received additional compensation totaling a 70% increase above normal base pay rates, plus significant overtime. HCD, T2, 24:00-25:00.

Under DLA policy, federal civilian employees at DDKA could chose to wear either the military's desert camouflage uniform or civilian attire while on duty. However, unlike soldiers, the civilian staff was prohibited from carrying a firearm. Nonetheless, there is no evidence that civilian employees were generally prohibited from possessing, displaying, or using knives at DDKA. HCD, T3, 1:00-5:00.

From its inception, daily operations at DDKA were managed by a contractor called Safe Ports. While Safe Ports was responsible for daily operations at DDKA, a handful of government employees including the appellant were present at DDKA to ensure adherence to the contract's terms and DLA policies. HCD, T2, 28:00. Such government employees were referred to collectively as the depot's Continuing Government Activity, or "CGA" staff. Key positions within the CGA staff included the Commander of DDKA, Navy Commander Carl Isett, with command authority over all aspects of the depot's operations; the civilian GS-14 Deputy Commander held by the appellant, who directly supervised the CGA staff and acted as the principle technical advisor for daily operations at the depot; the Contracting Officer's Representative (COR) position held by Mark Wolford, which was the principle liaison between the government and Safe Ports contractor; the Accountable Officer position held by Robert Brown, who was principally responsible for oversight of government property and inventory; and Mr. Orlando Duran, the Security Officer for DDKA.

The Raymond Rodon Letter

The Vice President of Safe Ports at all relevant times was Raymond Rodon. Rodon spent several weeks at DDKA in mid-September and early October, 2011 monitoring operations. During his visit, he wrote a letter dated October 3, 2011, to DLAD's Chief Administrative Contracting Officer, Mednard Kowalski.

Rodon's letter was the first time the appellant was accused of any misconduct while at DDKA. The letter began:

> Med,
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> It is with great concern that I send this note concerning Ed Kopsick, the Deputy Commander. The situation on the ground is deteriorating as issues including unprofessional behavior, demeaning and unprofessional remarks and attempts to undermine the work of Safe Ports at DDKA appear to be escalating. Information herein is what I have personally observed during my almost 3 weeks here or have been briefed on by the management team and employees here on site.
>
> There is no longer a friendly and cooperative working relationship as we had before his arrival as tensions run high wondering what his next e-mail will bring or what activity he does that will cause further disruption. Though he pretends to understand that we do not work for him and that he has no control over our contract his actions dictate otherwise, which I'm sure does not make him happy. He has created a hostile work environment for all concerned. A few of the examples are as noted below.

RAF, Tab 8 (Agency's Response and Motion to Dismiss, Part 2), p. 3 of 68. Rodon then discussed three alleged instances of knife-related misconduct. First, he incorporated an e-mail from a Safe Ports warehouse employee named Mark Anthony Roberts dated October 2, 2011, which stated:

> On October 2, 2011 I was delivering the mail to all Safe-ports and CGA members. I proceeded to deliver Ed Kopsick, Deputy Commander his Mail. I entered the Office and Security Officer, Orlando Duran and Ed Kopsick where (sic) sitting. I gave Mr. Kopsick his mail, as he is viewing his package he asks me the question, "Do you know what a unic (sic) is." Knowing his fascination for knives my reply was, is it a type of weapon. He replies, No, Look it up It is when a man get his d*** cut off and if you don't bring me my mail I going to cut yours off." For the record, we have never joked around before so I don't know whether he was serious or not. Being in the austere conditions of a war zone; I don't feel that this is a proper way to conduct business. I would like to request that this issue be look into for my safety as well as my coworkers.

Id., pp. 3-4 of 68. Rodon then stated in bold type that Roberts **"is currently in the decision process of deciding whether or not he will file a formal complaint with the military police here on KAF."** *Id.*

> Rodon then related two additional knife incidents as follows:
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> a. On the 1st of Sep at 1730 hrs just after the WCM[8] conference call, Ed asked when his office was going to be ready. Bryant [Veasey] made the comment-jokingly that he would have the electrical taken out. Ed then pulled his knife out and made a gesture with the knife toward Bryant and said "I will cut you up." Barron [Marcee] and a CGA member was were (sic) present during the conversation.
>
> b. On Sept 8th a discussion was held at DDKA between the Deputy, JSSC personnel, Barron and Bryant. During the discussion there was an exchange of humor. The deputy then for some reason pulled out his knife (similar to hunting knife – single blade in a sheath) and tried to hand it to the JSSC person, inferring with movement of his head toward Barron and Bryant. The JSCC person just looked at him quizzically and shrugged his shoulders. Barron and Bryant were flabbergasted. This behavior is not only embarrassing, uncalled for and unprofessional, not to mention in front of a third party, but threatening and disrespectful to Barron and Bryant.

Id., p. 4 of 68.

After succinctly relating the above knife concerns in three paragraphs, Rodon wrote ten more paragraphs attacking Kopsick on other grounds. For example, he claimed that "[e]mployees of Safe Ports have heard him remark that he does not like contractors and the there (sic) should only be US government workers here." *Id.*, p. 4 of 68. Similarly, he claimed that U.S. government employees within the CGA "have discussed [Kopsick's] behavior with me and indicated that Ed has said that they [CGA staff] will all be fired and be replaced with his folks from Warner Robins. Most are not comfortable working with him or being around him, though do so because they have to do their mission." *Id.*

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[8] I do not believe this acronym was defined in the record. However, it was described as a weekly or bi-weekly conference call between the senior leadership of DDKA and the DLAD HQ.

Likewise, Rodon charged that "[Kopsick] is continually attempting to undermine Safe Ports operation of the Depot. He talks in public like he is supporting, but his private discussions and emails point differently." *Id.*, p. 5 of 68. Rodon then illustrated this point by discussing Kopsick's recent emails criticizing Safe Ports through a "flurry of continuous and pointed message traffic concerning the movement of trucking assets belittling our capabilities…..Ed is basically persona non grata at the transportation offices because of his meddling and threats to call the CDDOC to 'square' things away." *Id.*

Rodon further criticized the appellant for emailing a memo to DDKA personnel as binding policy, stating, "This is his normal mode of operation, threatening to take some action if we do not comply." *Id.*, p. 19 of 68. Similarly, he complained that Kopsick's effort to dictate operating hours at DDKA was his "most recent digression into attempting to be controlling." *Id.*, p. 6 of 68. On this topic, Rodon stated, "Reading the email [from Kopsick], he clearly is attempting to insert CGA into the decision process for determining the hours of operation and when we will receive and issue. It is not his concern when we receive and issue, it is our concern as the contract holder." *Id.*, p. 6 of 68.

Rodon closed his letter to the DLAD, HQ Administrative Chief of Contracting with the following:

> I apologize for the length of this note but I feel compelled to report what I see and understand to be the truth and feel that at this point Safe Ports is being misaligned[9] by the Deputy. His unprofessional behavior toward my employees will not be tolerated. I request assistance to alleviate further damage to Safe Ports' reputation and demand the respect my employees expect and deserve.

Id.

The Military Police Investigation

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[9] It appears from the context of this statement that Rodon intended to say "malign" here, meaning to speak ill of, or defame.

The day after Rodon dispatched his letter to the DLAD HQ, Roberts filed a complaint with the military police in Kandahar alleging that the appellant's alleged eunuch comment to him two days earlier was threatening. The military police interviewed Roberts, who told the same series of events Rodon had relayed in his letter, adding only that he made "a confused laugh" after Kopsick's alleged comments to him. RAF, Tab 8, p. 25 of 68.

The military police then interviewed the appellant, who provided a hand-written statement where he acknowledged mentioning eunuchs while talking with Duran and Roberts. However, he denied telling Roberts that he would remove his genitals if he did not bring his mail, and he avowed that he "would never dream of performing such a disgusting act." RAF, Tab 7, pp. 54-55 of 57. The military police also interviewed Duran as an eye witness. In his sworn statement, Duran said that when Roberts reported that he had no packages for the appellant, the following transpired:

> Mr. Kopsick asked Mr. Roberts in a joking manner if he knew what a unic (sic) was, Mr. Roberts responded by saying 'a car', then Mr. Kopsick told him no, that a unic (sic) was a person that gets his dick cut off. Mr. Roberts' face looked confused. Then he proceeded to depart the office….I don't think that Mr. Kopsick meant anything threatening towards Mr. Roberts. It looked to me as if it were more of a bad joke than anything else.

RAF, Tab 7, p. 40 of 57. The military police took no further action on the complaint, and released the appellant back to CDR Isett.

CDR Isett prepared a Situation Report (SITREP) for DLAD HQ on October 4 detailing the evolution and status of the eunuch comment. Within this report, he stated that he became aware of the issue by receiving a copy of Rodon's letter on October 4. Regarding that letter, he said, "[t]his is the second such letter generated by SP [Safe Ports] in the past few days (the first was concern that a DLA employee who has issued several non-conforming surveillances acted unprofessionally)." RAF, Tab 8, p. 7 of 68. He also recounted personally interviewing Duran about the incident, and he stated that Duran told him that

Kopsick's remarks were made in jest. *Id.* He further reported that the incident had "no significant impact to [the] operational mission." *Id.*

The AR 15-6 Investigation

About ten days after the Rodon letter and CDR Isett SITREP discussed above, Rear Admiral Thomas C. Traaen, the Commander of DLAD HQ, convened an informal investigation under Army Regulation (AR) 15-6.[10] HCD, T4, 8:45. The appellant was assigned to temporary duty in Kuwait while the investigation was underway. Mr. Budden, the Deputy Director of DLAD, ultimately reeassigned the appellant out of the DDKA Deputy Commander position and suspended him for fourteen days based on the results of this investigation. *Id.*, 8:00. Budden testified that Admiral Traaen made the additional decision based on the AR 15-6 results to detail the appellant out of his supervisory position at Warner Robins for six months. Since the AR 15-6 investigation was clearly central to every personnel action which followed, it is discussed and analyzed at length within the latter half of this decision devoted to examination of the agency's professed justifications for its personnel actions.

The Appellant Properly Exhausted His WPA IRA Claims

An employee must show that he sought relief from OSC and exhausted its proceedings on the particular personnel actions alleged to be in reprisal for whistleblowing prior to filing with the Board. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2(b)(1) (2014). The appellant may meet this burden by showing that OSC notified him that it was terminating its investigation or that 120 days have passed since he sought corrective action from OSC. 5 U.S.C. § 1214(a)(3).

It is uncontested that the appellant filed a complaint with the OSC alleging reprisal for whistleblowing on or about May 4, 2012. RAF, Tab 14. On

[10] A copy of the AR 15-6 investigation is in the record at RAF, Tab 7, pp. 21-56 and Tab 8, pp. 3-15. However, the memorandum appointing the investigator and establishing the scope of the investigation was not provided by the parties.

November 15, 2012, OSC advised the appellant that it had made a preliminary decision to terminate its investigation. RAF, Tab 9, pp. 4-6. The appellant responded to OSC on November 27 with an additional detailed explanation of his whistleblower allegations. *Id.*, pp. 7-11. Thereafter, OSC issued a letter which provided notice that it had terminated its investigation and permitted the appellant to file an individual right of action (IRA) appeal with the Board. *Id.*, pp. 12-13. As noted above, on February 8, 2013, the appellant filed his IRA appeal with the Board.

The appellant's initial complaint to OSC on April 20, 2012, and his subsequent letter to OSC on November 27 both identify each of the appellant's alleged disclosures and resulting alleged personnel actions clearly and consistently with his pending Board appeal. I therefore find that the appellant properly exhausted all his pending Board claims within this IRA appeal with OSC.[11]

Discussion of the Appellant's Disclosures

The appellant first arrived at DDKA on August 2, 2011, about eight months after DDKA began operations. HCD, T2, 24:00. The appellant testified that upon his arrival at DDKA, he found that Safe Ports was failing in nearly every functional area under the contract, and he sent emails raising alarms about inventory inaccuracy, missing equipment, and chronic false reporting by the contractor of their performance to hide their deficiencies. HCD, T2, 29:00-30:00.

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[11] The appellant's claim that the agency refused to return him to his prior supervisory GS-13 position as a form of retaliation was omitted from my recitation of the issues within the prehearing conference summary. This omission was caused by the appellant's erroneous failure to mention this as a form of retaliation within his prehearing submission narrative. *See* RAF, Tab 6. However, the appellant's documentary prehearing submissions and his submissions to OSC both identified the issue among his claims. S*ee* RAF, Tab 14, pp. 25-26 of 32. I therefore find that the issue is properly before the Board for adjudication.

During the hearing, the appellant provided unrefuted testimony that one sample inventory check he performed shortly after his arrival yielded an inventory accuracy rate of less than 20% - far beneath the DLA minimum standard of 95% inventory accuracy. He further provided unrefuted testified that inventory accuracy at DDKA during his tenure never exceeded the 80% accuracy range, well below the minimum regulatory DLA standard. HCD, T2, 43:00-47:30.

The appellant's alleged disclosures about inventory management problems are fairly well documented in the record. For example, the appellant sent an e-mail to Richard Nash and Thomas Simones within the DLAD Headquarters on September 4, 2011 stating that his spot checks of inventory accuracy at DDKA had been "catastrophic daily," leaving him "deeply concerned at the accuracy of our inventory." RAF, Tab 6, p. 66 of 142. On October 16, 2014, the appellant reiterated this concern to the Deputy Director of DLAD, William Budden. Among his disclosures to Budden about inventory problems, the appellant told Budden that the depot had to make inventory corrections involving $750,000 worth of government equipment in the days leading up to scheduled formal inventory. RAF, Tab 6, p. 38 of 142. He also provided an email on October 11 involving a poorly documented pallet of charcoal which simply vanished from the depot. *See, e.g.,* RAF, Tab 6, p. 45 of 142.

The agency did not dispute the existence or severity of the inventory problems at DDKA during the appellant's tenure. In fact, Mr. Baron Marcee, the Site Manager for Safe Ports at DDKA, testified that Safe Ports received at least one formal Letter of Concern from DLAD HQ about poor inventory accuracy. HCD, T1, 7:00-8:30.

The appellant also disclosed concerns to CDR Isett, COR Wolford, and the DLAD HQ about Safe Ports allegedly misreporting to the HQ how quickly they were in processing new materials arriving at the depot. Such in-processing is referred to as "receiving" and involves the depot unloading the materials,

checking their quantity and condition, and adding them to the depot's inventory system. The appellant explained that Safe Ports was supposed to generate a Receipt Control Number (RCN) date stamp the day that a truckload of new material arrives, and then sort the new material within a day after generating the RCN. However, he explained that Safe Ports was "gaming the system" by using an "RCN of the day" which essentially meant that the contractors would wait to generate a RCN until they were ready to sort the materials, thus making it appear that they had met the standard for processing new supplies, when in reality, the materials may have sat for weeks at the depot before Safe Ports did anything with them. The appellant explained at the hearing that such gamesmanship hid the contractor's poor performance, but more fundamentally, it rendered significant amounts of available supplies invisible to DLA's customers. The appellant explained that this can be a life or death issue since the depot was the nearest source for critical war items for the war such as sandbags, concertina wire, truck and helicopter parts, etc. HCD, T2, 30:00-37:00, 42:00.

The appellant plainly raised concerns about this issue in a detailed Memorandum for Record (MFR) which he forwarded by email to CDR Isett and COR Wolford on August 19, about two weeks after the appellant's arrival at DDKA. *See* RAF, Tab 6, pp. 23-32 of 142 (Appellant's Prehearing Submissions). He raised this issue again to Budden in the previously mentioned email from October 16. RAF, Tab 6, p. 37 of 142.

The appellant also testified that he disclosed that Safe Ports was providing false shipping data within the DLA supply database to inflate their contract performance. At the hearing, he explained that DLA rules dictate that items can only be reported as "shipped" when they are physically picked up by the carrier for delivery to a requisitioning customer. According to the appellant, Safe Ports had a practice of misreporting within the DLA database that supplies had been "shipped" from the depot before they were actually loaded onto trucks or aircraft. This practice made it appear that Safe Ports was meeting its on-time-shipping

performance requirements which DLAD HQ closely monitored. HCD, T2, 36:00-42:00; RAF, Tab 6, p. 33 of 142. The appellant testified that Safe Ports' false shipping annotations could cause real harm to their warfighting customers and their mission. He explained that their customers could track the status of their requisitioned items within the DLA database, and would be misled into believing that their needed supplies would arrive shortly based on Safe Port's false "shipped" annotations in the database. T2, 40:00-42:50.

The appellant alleged at the hearing that he disclosed the shipping data manipulation issue both to DLAD HQ and to CDR Isett. This testimony was not disputed, and is supported by copies of e-mails on this topic to CDR Isett and Budden on October 12 and October 16 respectively. *See* RAF, Tab 6, pp. 33 and 37 of 142.

The appellant's disclosures to Budden, the DLAD Deputy Director, on October 16 are particularly detailed and comprehensive, summarizing all of his previously-raised concerns with examples from prior e-mails and discussions. Within that letter, he reiterated his concerns about poor governmental training and oversight at DDKA, "catastrophic" inventory problems and loss of accountability of government equipment, and chronically false reporting by Safe Ports to DLAD HQ about how quickly items were inducted into inventory (the 'RCN of the day' issue) and when they were shipped to customers. *See* RAF, Tab 6, pp. 35-42. He also stated to the Budden that the rest of the CGA staff was hired without any prior depot experience and very limited training on DLA policies. This led him to state:

> I show up with a 6+ years of DDC experience and uncover major problems every single day. I have documented them very well and provided them to the J3 and J7 staff,[12] yet nothing changes. I was under the impression that our job was to support the warfighter.

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[12] The appellant refers here to staff elements within the DLAD HQ. J3 is the staff element within the HQ responsible for executing current operations. J7 is the staff element primarily responsible for unit training.

> From my current perspective, our job is to ensure continued contractor service regardless of their ability to support the warfighter.

Id., p. 37 of 142. The appellant also explicitly argued at length to Budden that the pending investigation into his conduct was being driven by his disclosures ("I now understand how the witches of Salem felt. In now understand how it feels to be tarred and feathered and rode out of town on a rail."). *Id.*, p. 41 of 142.

The Appellant Made Several Protected Disclosures.

A protected disclosure is a disclosure that an appellant reasonably believes evidences a violation of any law, rule or regulation, gross mismanagement,[13] a gross waste of funds,[14] an abuse of authority,[15] . 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior,* 515 F.3d 1362, 1367 (Fed. Cir. 2008). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing listed in section 2302(b)(8)(A). *Lachance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999). The appellant need not prove that the matter disclosed actually established one of the types of wrongdoing listed under section

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[13] The Board has defined "gross mismanagement" to mean management action or inaction that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission. *See Nafus v. Department of the Army,* 57 M.S.P.R. 386, 393 (1993). Gross mismanagement is more than *de minimis* wrong doing or negligence. Thus, gross mismanagement does not include management decisions which are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. *See Id.*

[14] The Board has defined "gross waste of funds" to constitute a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See Nafus,* 57 M.S.P.R. at 393.

[15] An "abuse of authority" occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to a preferred other person. *See McCorcle v. Department of Agriculture,* 98 M.S.P.R. 363, ¶¶ 21-25 (2005), citing *Embree Department of Treasury,* 70 M.S.P.R. 79, 85 (1996).

2302(b)(8)(A); rather, the appellant must show that the matter disclosed was one which a reasonable person in her position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *Schnell v. Department of the Army,* 114 M.S.P.R. 83, ¶ 19 (2010).

It is uncontested that the appellant repeatedly complained to several members of the DLAD HQ J3 and J7 staff, CDR Isett, and Budden about chronic Safe Ports failures to maintain accurate inventories of government equipment, and systemic misuse of RCN numbers and shipping annotations in DLAD's shipping database with the effect of masking poor contract performance. The appellant alleged to OSC and the Board that such conduct violated numerous provisions of DLA's "Swarm" policy guidance.[16] While neither party submitted copies of this "Swarm" guidance or any other regulatory materials governing depot management, the agency did not dispute that the conduct the appellant described would in fact violate DLA rules governing depot operations.

I note that the agency did not allege that the appellant was factually mistaken about any of his disclosures. HCD, T3, 49:30. In fact, Budden praised the appellant's subject matter expertise in logistics, and acknowledged that the appellant did a "fairly phenomenal job" in helping identify the contractor's deficiencies at DDKA. HCD, T3, 44:00-46:00. Budden further admitted that DLAD issued several formal Letters of Concern to Safe Ports based on the issues the appellant and others raised. *Id.*, 50:00. Marcee disputed that Safe Ports provided intentionally false performance data to DLAD HQ, but he acknowledged that Safe Ports received a total of seven formal Letters of Concern from the DLAD HQ regarding their management of DDKA. HCD, T2, 8:30.

I find that the appellant disclosed violations of agency rules governing inventory accounting as well as DLAD rules governing proper receiving and

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[16] I note that the "Swarm" manuals the appellant discussed are training modules for DLA employees which summarize federal laws and DOD and DLA regulations applicable to running a DLA depot.

shipping practices. I further find that his disclosures about Safe Ports' allegedly dismal inventory management and accuracy; its inappropriate "RCN of the day" receiving practices; and its allegedly improper shipping annotations were all sufficiently harmful to the agency's accomplishment of its mission as to constitute an allegation of gross mismanagement. I also find that the appellant's disclosures about "catastrophic" inventory accuracy levels were protected as a disclosure of a gross waste of funds due to potential losses of government property under the contractor's control.[17]

The Appellant Identified Several Alleged Retaliatory Personnel Actions within the Meaning of the WPA.

Pursuant to 5 U.S.C. § 2302(a)(2)(A), a "personnel action" means: (i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of title 5 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of title 5; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions.

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[17] The appellant also disclosed that CGA staff members were sent to DDKA with insufficient training and experience. I find that this assertion is not a protected disclosure of a violation of any known rule, gross mismanagement, a gross waste of funds, an abuse of discretion, or a substantial and specific danger to public health or safety. Agencies are entitled to significant discretion with regard to the selection and training of their personnel. Even a well-founded difference of opinion about such discretionary decisions would not normally constitute a disclosure of an abuse of authority, gross mismanagement or other protected activity.

As noted above, the appellant alleged that the agency: (1) terminated his temporary appointment as the GS-14 Deputy Commander at DDKA; (2) reduced him in grade to his original GS-13 level; (3) suspended him for 14 days for alleged misconduct; and (4) refused for six months after his arrival back at Warner Robins to return him to his prior supervisory duties in retaliation for his protected whistleblowing disclosures. I find that each of these alleged agency actions constitute "personnel actions" under the WPA. The Board has held that termination of a temporary appointment constitutes a personnel action under the WPA. *See Jessup v. Department of Homeland Security*, 107 M.S.P.R. 1, 7 (2007). A disciplinary suspension under chapter 75 of title 5 is also expressly identified as a "personnel action" for purposes of the WPA under 5 U.S.C. § 2302(a)(2)(A)(iii). Likewise, the agency's alleged refusal to return the appellant to his prior supervisory position at Warner Robins for six months is plainly a 'significant change in his duties, responsibilities, and working conditions' under 5 U.S.C. § 2302(a)(2)(A)(xi).

The Appellant Established that his Disclosures were a Contributing Factor in Each Subsequent Personnel Action Through the Knowledge/Timing Test.

Having established that he made protected disclosures, the appellant must show that his protected disclosures were a contributing factor in the personnel actions which he later suffered. The term "contributing factor" means any disclosure that affects an agency's decision to threaten, propose, take or not take a personnel action with respect to the individual making the disclosure. *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 34 (2010) (citing 5 C.F.R. § 1209.4(c)).

The most common way of proving the contributing factor element is the "knowledge/timing test." Under that test, an appellant can prove that his disclosure was a contributing factor in a personnel action through evidence that the official taking the personnel action knew of the whistleblowing disclosure(s) and took the personnel action within a period of time such that a reasonable

person could conclude that the disclosure was a contributing factor in the personnel action. *See* 5 U.S.C. § 1221(e)(1)(A), (B); *Rubendall v. Department of Health & Human Services,* 101 M.S.P.R. 599, ¶ 12 (2006).

The appellant's disclosures about the contractor began shortly after he arrived at DDKA in early August, 2011, and continued until he was reassigned to Kuwait on October 17, 2011.[18] Mr. Budden testified at the hearing that he learned of the appellant's alleged whistleblowing very close to the October 2, 2011 eunuch incident, and he learned of the previously discussed Rodon letter at about the same time. HCD, T4, 43:00. He later testified that he learned of the appellant's disclosures of contractor wrongdoing when he received the appellant's October 16 e-mail laying out the appellant's concerns in detail. *Id.*, 46:30. Whether Budden learned of the appellant's disclosures in early October or later that same month, he plainly knew about them no later than October 16.

Between October 17 and November 29, 2011, the appellant was detailed to Kuwait while the agency conducted its investigation into contractor allegations that he committed misconduct. On November 29, the appellant received an e-mail from the DLAD HQ human resources department stating that under the Return Rights Agreement the appellant had signed and "per the direction of Mr. William Budden, Deputy Commander, DLA Distribution," he was ordered to return to the Supervisory Distribution Facilities Specialist, GS-2030-13, position he held prior to his departure for Afghanistan."[19] RAF, Tab 17 (Appellant's Supplement to Prehearing Submissions), p. 8 of 15.

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[18] The earliest whistleblowing disclosure was the appellant's Memorandum for Record dated August 19, 2011, concerning improper use of the "RCN of the day." *See* RAF, Tab 6, pp. 23-24 of 142. The appellant's October 16 letter to Budden was his last disclosure before he was detailed to Kuwait. RAF, Tab 6, pp. 35-42 of 142.

[19] During the hearing, Budden claimed that he had merely advised on the decision to terminate the appellant's promotion and to return him to the United States. HCD, T3, 36:30. However, such testimony was deemed non-credible in light of the contemporaneous documentary evidence from the human resources officer.

The appellant testified that he returned to the United States from Kuwait in early December, and took a few weeks of annual leave before returning to work at Warner Robins on December 19, 2011. HCD, T3, 15:00-20:00. Within 15 minutes after he entered the depot, the appellant stated that he was directed to report to the office of the Director for DLA Distribution Warner Robins. Upon arrival, the Director, Mr. Frank Holobinko, handed the appellant a notice of proposed 14-day suspension. *Id. 19:00-21:00; see also* RAF, Tab 6, pp. 127-129 of 142 (Proposed Suspension). Mr. Holobinko took this action in his capacity as the appellant's third-level supervisor.[20]

The appellant was also provided notice that same day that he had been detailed out of his normal supervisory GS-13 duties to an undefined set of non-supervisory duties effective immediately. *See Id.*, p. 132 of 142. The personnel action memorializing this detail indicates that the detail would not exceed April 15, 2012, though in reality it continued until mid-May when the appellant complained to the Director that the detail violated the terms of his Return Rights Agreement.[21] HCD, T3, 23:45. While the appellant was on this detail, Mr. Budden issued a decision dated January 13, 2012 which suspended him for 14 days. RAF, Tab 6, pp. 130-131 of 142. The suspension was served between January 23, 2012, and February 5, 2012.

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[20] It is unclear why Mr. Holobinko, and not a lower level supervisor, proposed the discipline. The agency's disciplinary guidance directs that "the authority to initiate disciplinary action should be delegated to the lowest practical level of supervision consistent with good management. Normally, this authority will be placed at the first level of supervision where the full range of personnel management responsibility is exercised." *See* RAF, Tab 8, pp. 37-38 of 68 (DLA Instruction 7106, September 15, 2009, para. 4e).

[21] I note that DLA Instruction 7410, para. 3c(3), required DLA to return employees who accept an overseas assignment "to the employee's former position or a position of like seniority, status, and pay." The agency did not point to any exception to this policy which justified its decision to immediate detail the appellant outside of his normal duties upon his return to the United States. *See* RAF, Tab 8, pp. 26-35 of 68. It thus appears that the appellant's return rights under this policy were likely violated.

The Board has found that a period of more than 1 year between a protected disclosure and a personnel action can satisfy the knowledge/timing test. *See Jones v. Department of the Interior,* 74 M.S.P.R. 666, 676 (1997) (the Board found that the appellant's disclosures were a contributing factor in the lower rating the agency gave him in his performance evaluation, which occurred over a year after he made the disclosures). Mr. Budden testified that he was aware of the appellant's disclosures in early October, 2011. The record establishes that he personally directed the appellant's return to the United States and associated demotion on November 29, 2011, and imposed the appellant's suspension on January 13, 2012. In other words, Budden took all these actions between two and four months after learning of the appellant's protected disclosures. Given the Board's case law concerning the knowledge/timing test cited above, I find that the appellant has met his burden of demonstrating that his disclosures were a contributing factor for these personnel actions by Budden.

With respect to the six-month non-supervisory detail, Budden provided undisputed testimony that Rear Admiral Thomas C. Traaen, the Commander for DLAD, personally decided to impose this personnel action. HCD, T4, 56:00 – 58:30. Admiral Traaen was not called by either party as a witness and there are no statements from him in the record. However, several pieces of circumstantial evidence support a finding that Admiral Traaen was aware of the appellant's disclosures before he made the decision to put him on the detail. First, Admiral Traaen was the head of the DLAD HQ to which the appellant made his disclosures of wrongdoing. Second, Budden, Admiral Traaen's deputy, received a thorough run down of the appellant's disclosures and concerns of reprisal in the appellant's October 16 email. Budden repeatedly praised the appellant's zealous oversight of the contractor during the hearing and said that his allegations warranted remedial measures. HCD, T3, 42:00-43:00. I find it highly unlikely that Budden would not immediately inform his supervisor, Admiral Traaen, of Kopsick's credible concerns about the contractor, especially in light of the

counter allegations Safe Ports' Vice President Rodon began hurling at the appellant during the same timeframe. Additionally, Budden testified that the Rodon letter was discussed between himself and Admiral Traaen in October. That letter alludes repeatedly to the appellant's concerns about Safe Ports. Moreover, since Admiral Traaen personally convened the AR 15-6 investigation, he would have received a copy of the appellant's statement within the report of investigation which explicitly alleged that the allegations against him were based upon retaliation for his disclosures about the contractor. RAF, Tab 7, p. 48 of 57. Based on the above circumstantial evidence, I find that the appellant met his burden of demonstrating that Admiral Traaen was aware of his disclosures prior to his decision to detail the appellant outside his normal supervisory duties on or about December 18, 2011. Given the Board's case law concerning the knowledge/timing test cited above, I find that the appellant has met his burden of demonstrating that his disclosures were a contributing factor for the six month detail imposed by Admiral Traaen.[22]

The Agency Failed to Meet its Burden by Clear and Convincing Evidence of Demonstrating that Each Personnel Action Would Have Been Taken in the Absence of the Appellant's Protected Disclosures.

Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). This is a higher standard than a "preponderance of the evidence," which is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient

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[22]The Board has also held that an appellant may show that a disclosure was a contributing factor in a subsequent personnel action by proving that the acting official was influenced by an individual with actual knowledge of the disclosure. *See, e.g., Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶23 (2010); *Chambers*, 116 M.S.P.R. 17, n. 8 (2011). As an alternative finding, I conclude that Admiral Traaen was influenced by his deputy, Mr. Budden, and had - at a minimum - imputed or "constructive" knowledge of the appellant's disclosures before he imposed the detail.

to find that a contest fact is more likely true than untrue. *Id.*, see 5 C.F.R. § 1201.56(c)(2); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 28 (2001). As explained by one of the sponsors of the WPA, "clear and convincing evidence" is as intentionally high standard of proof:

> 'Clear and convincing evidence' is a high standard of proof for the Government to carry. It is intended as such for two reasons. First, this standard of proof comes into play only if the employee has proven by a preponderance of the evidence that whistleblowing was a contributing factor in the action against him or her – in other words, that the agency action was tainted. Second, this heightened burden of proof on the agency recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bears a heavy burden to justify its actions.

135 Cong. Rec. S2780 (Mar. 16, 1989) (statement of Sen. Levin); quoted in *Chambers*, 116 M.S.P.R. at ¶28.

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following so called "Carr" factors based on the name of the Federal Circuit decision which originally announced them: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Chambers,* 116 M.S.P.R. at ¶ 29; *see also Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Because direct evidence of a deciding official's retaliatory motive is rare, appellants are entitled to rely on circumstantial evidence giving rise to an inference of impermissible intent. *Fellhoelter v. Department of Agriculture,* 568

F.3d 965, 971 (Fed. Cir. 2009); *see Webster v. Department of the Army,* 911 F.2d 679, 689-90 (Fed. Cir. 1990), *reh'g en banc denied*, 926 F.2d 1149 (Fed. Cir.), *cert. denied*, 502 U.S. 861 (1991); *see also Sheehan v. Department of the Navy,* 240 F.3d 1009, 1014 (Fed. Cir. 2001). As the Board's reviewing court has recognized, "evidence of retaliatory motive [may also be] relevant to the [appellant's] prima facie case; for example, evidence of an employee's assertions of misconduct by a supervisor can be relevant to whether the employee has made a protected disclosure and also whether the supervisor has a strong motivation to retaliate." *Fellhoelter,* 568 F.3d at 971.

The Agency's Evidence Supporting the Personnel Actions was Poor.

The agency explicitly pinned the legitimacy of its personnel actions almost entirely upon the outcome of its informal AR 15-6 investigation. HCD, T3, 36:00-39:00. Other than reportedly discussing the matter with HR and legal, Budden cited no other source of information beyond this investigation and the appellant's response to the proposed suspension as a basis for his decisions. *Id.* Admiral Traaen did not testify and provided no statement. Thus, I can only assume that he would have also claimed the same basis for his decision to impose the detail.

As previously noted, the AR 15-6 investigation was convened based upon allegations made by Rodon in his October 3 letter to the Chief Contracting Officer for the DLAD HQ, Mednard Kowalski. In my view, even a cursory reading of Rodon's letter should have put the DLAD command and the assigned investigating officer on notice of a grave potential for widespread witness bias against the appellant for reasons having nothing to do with the knife allegations.[23]

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[23] Rodon complained longer and with at least equal passion about Kopsick's unwelcome oversight activities as he did about the alleged knife incidents. He railed against the appellant for his criticism of the contractor's efforts to timely arrange the shipment of goods from the depot, *See* RAF, Tab 8, p. 5 of 68; he criticized the appellant for forwarding mandatory DLA policy guidance, *Id.*, p. 6 of 68; and he bitterly attacked the appellant for attempting to dictate the depot's operating hours.

Rodon's letter claimed that the entire Safe Ports staff and most of the CGA staff resented and feared Kopsick, who they reportedly believed was working to eliminate their jobs at DDKA.[24] An important gauge of the fairness and sufficiency of the investigation which followed is whether and how the investigator addressed the rather glaring potential for bias among Safe Ports and CGA employees as highlighted by Rodon's letter. Such a discussion is wholly lacking.

The investigating officer stated at the outset of her report,

> In conducting the investigation, several witnesses identified in the Safe Ports, Inc. complaint letter [Rodon's October 3 letter discussed above] (exhibit 1) as well other (sic) individuals having knowledge of these allegations were interviewed. List of interviewees are identified in Exhibit 3. Of special note; while conducting interviews with previously identified witnesses, an additional allegation of Edward Kopsick putting a knife to a DLA employee (sic) neck was uncovered. Given that this allegation was also related to Edward Kopsick pulling out his knife, I determined that further investigation was warranted (exhibits 7 and J). As a final point, none of the allegations were 100% corroborated.

The investigating officer then briefly recounted the evidence supporting and opposing each of the alleged incidents.

Investigation of the Alleged September 1 Incident

With respect to the September 1 alleged incident, the investigating officer found that the incident "could not, in its entirety, be confirmed. Information provided in two separate sworn statements, points out that Edward did pull out his knife. However, there are inconsistencies regarding Edward's comments."

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[24] Rodon explicitly alleged that Safe Ports employees had heard the appellant say that he did not like contractors and that the depot should be run by U.S. government employees. He further stated that the appellant had told members of the CGA that they would all be fired and replaced with the appellant's preferred employees from Warner Robins. He reported that "most [of the CGA staff] are not comfortable working with him or being around him, though they do so because they have to do the mission." RAF, Tab 8, p. 4 of 68.

RAF, Tab 7, p. 21 of 57. The evidence on this allegation included Marcee's statement which recounted the incident as follows:

> There was a conversation regarding the electrical in this living container and getting it ready for Ed to move in as soon as possible. I don't know if he was joking or nor, Bryant made a comment, 'that container, we may have pulled the electrical.' Ed pulled out his knife and made a gesture moving his knife in an up and down motion. If I could improvise, the gesture to me meant, this is what I do to people. **Whether he meant that in a threatening mode, probably not. Personally I thought he was joking**.... (Emphasis added)

Analysis of the Investigation of the Alleged September 1 Incident

The investigator did not mention in her report that neither Marcee nor Veasey claimed to have felt threatened by this incident, and Marcee explicitly reported that he thought the appellant was joking.

While the investigator correctly reported that the appellant denied that the September 1 incident occurred, she omitted mentioning that the appellant identified a rather important corroborating witness to his denial, CDR Isett, his own supervisor and the DDKA Commander. Kopsick specifically stated of this incident, "I never said anything like that. I don't even recall such a conversation. If it took place as stated [just after the WCM conference call], then CDR Isett would have been present and been a witness." RAF, Tab 8, p. 46 of 57. CDR Isett provided a statement corroborating the appellant's denial as follows:

> I have no recollection of the 01 September 2011 conversation described in the letter between Mr. Marcee, Mr. Bryant Veasey, and Mr. Kopsick. I am usually involved in the WCM conference call but I have no recollection of the conversation described....I have never observed Mr. Kopsick display a knife in an inappropriate manner. I have never witnessed Mr. Kopsick exhibit aggressive or threatening behavior.

RAF, Tab 8, p. 12 of 68. The investigator also did not explain why she credited the accuracy of Marcee and Veasey's statements, since they both identified COR Mark Wolford as an eyewitness but Wolford provided a sworn statement denying

that he saw or heard any such incident. RAF, Tab 7, p. 30 of 57. Similarly, she did not explain why did not believe the appellant or CDR Isett. She also omits mentioning that over a month passed between the alleged incident and Rodon reporting it. And finally, there is no discussion at all of potential witness bias despite Rodon's claim that Safe Ports employees believed Kopsick was threatening their jobs.

Investigation of the Alleged September 8 Incident

The original allegation from Rodon's letter was that while the appellant was talking with Timothy Niemczyk, Barron Marcee, and Bryant Veasey, he tried to hand Niemczyk a knife while motioning with his head toward Marcee and Veasey. According to Rodon, Niemczyk was confused by the incident, and Marcee and Veasey were "flabbergasted." He described the whole incident as "threatening" and "disrespectful" toward Marcee and Veasey.

Marcee stated of this incident that on September 8, he was talking with the appellant, Niemczyk, Veasey, and "another guy by the name of Lyle." He stated, "I forget the total conversation, it was in reference to something being done. Ed proceeded again to pull out his knife in a joking mode and tried to hand it to [Niemczyk]. [Niemczyk] didn't take the knife, he gestured back as to say 'no.'" Marcee then recalled saying "Ed, knock, knock" which he said was his term for saying "get real. Kind of like no need." RAF, Tab 7, pp. 26-27, of 57. Veasey recounted the incident fairly similarly, saying that "[Niemczyk] asked for something. [Marcee] said, I don't know if I'm going to be able to do that for you. Kind of like they were playing around. Ed pulled his knife out and motioned towards Tim. Tim looked as if what am I supposed to do with that." RAF, Tab 7, p. 29 of 57.

Niemczyk recalled the discussion very differently than Marcee and Veasey, but very similarly to the appellant. He recounted that "[w]e were having a conversation about rocket attacks on a NATO Base and force protection. We were

joking around and Ed said the Commander has a gun and that is force protection. Ed then pulled out his knife and said this is our force protection when the Commander is gone." According to Niemczyk, the appellant did not try to hand the knife to him or make any gestures. *Id.*, p. 24 of 57.

The appellant stated of the incident that he was having a conversation with Niemczyk about force protection near the perimeter fence and did not recall anyone else present. During the conversation, he mentioned to Niemczyk that when the commander walks out of this depot, the appellant's 2 inch knife is their only force protection. He recalled pulling out his small knife out as he made this comment. RAF, Tab 7, p. 48 of 57.

From the above statements, the investigator concluded, that "information provided in three separate sworn statements confirmed that Edward Kopsick did in fact pull out a knife. However, there are inconsistencies as to who was present and Edward's comments and gestures." RAF, Tab 7, p. 21 of 57. The investigator then noted that Marcee and Veasey made similar statements about the alleged incident, while "Edward's comments, gestures, and who was present during the incident could not be corroborated." RAF, Tab 7, p. 21 of 57. The investigator further stated, "Collusion suspected between Timothy Niemczyk and Edward Kopsick," due to Kopsick's answer to one of her questions. *Id.*, p. 22 of 57. These findings are each analyzed discussed below.

Analysis of the Investigation of the Alleged September 8 Incident

The investigator's findings concerning the alleged September 8 incident are deeply flawed. As an initial matter, the investigator failed to note rather profound differences between Rodon's report of this incident to the DLAD HQ and the accounts of every eye witnesses. Contrary to Rodon's report of the incident, neither Marcee nor Veasey recalled the appellant gesturing toward them while attempting to hand Niemczyk the knife. In fact, Niemczyk and the appellant both testified that the appellant just held the knife out without trying to

hand it to anyone, or making any gestures. *Id.*, pp. 24 of 57. Also contrary to Rodon's report, neither Veasey nor Marcee reported feeling threatened, "flabbergasted," or disrespected during this discussion. *See* RAF, Tab 7, pp. 25, 27, and 29. In fact, Marcee reported that the appellant's comment was "in a joking mode" and Niemczyk said they were just "joking around." *Id.*, pp. 24, 27 of 57. The investigator's failure to debunk Rodon's sensational claims about this incident is significant because Rodon's account was made Exhibit 1 of her report, and had also been previously sent to the HQ as the starting point for the investigation. Thus, even though no actual witness recounted the incident as anything more than a harmless exchange between the appellant and Niemczyk, Rodon's original unfounded report that this was a threatening and disrespectful jab at Safe Ports staff was not corrected by the investigator.

The investigator also erroneously found that the appellant's account of this incident was not corroborated. This finding is plainly wrong, and ignores striking similarities between the appellant's and Niemczyk's accounts including: (1) they both said the underlying discussion was about force protection; (2) they both said that the appellant pulled out his two inch knife in a joking manner; and (3) they both said that the appellant pulled out his knife to illustrate the extent of DDKA's force protection when the commander was away. The only material point upon which the appellant and Niemczyk disagreed was that Niemczyk recalled that "there were others present, but I don't know their names" while the appellant said, "as far as I can recollect, we were alone." *See* RAF, Tab 7, pp. 24, 48.

The investigating officer's stated suspicion that the appellant and Niemczyk had committed "collusion" was neither supported nor appropriate. She claimed to reach this conclusion based upon his responses during the following exchange:

Q: Do you know Timothy Niemczyk?

A: Yes.

Q: How long have you known Timothy Niemczyk?

A: Since he came to Afghanistan about 3 or 4 weeks after I got there.

Q: How would you describe your relationship with Timothy?

A: We worked a lot together because he is a project manager. We talk frequently.

Q: On 8 Sep 2011, at DDKA, there was a conversation between Barron Marcee and Timothy Niemczyk in which Timothy was asking Barron for something and Barron responded by saying, "I don't know if I am going to be able to do that for you." In as much detail as possible, report what was said during the conversation. Be very specific about your comments and gestures and any comments and gestures made by other individuals."

A: I don't recall that.

Q: Why do you think three individuals provided sworn statements attesting to the fact you were present during the conversation?

A: I don't sit there and record all of my conversations, the date, the time, the subject. **I do not recall a conversation on that subject.**

Q: Do you recall pulling out a knife and making gestures to hand a knife towards Timothy?

A: What you are referring to is not what you were told.

Q: What am I referring to?

A: I am prior Army, combat arms. Force protection is very important, which we don't have. We are on the southern border of the base perimeter. Our gate is about 20 feet from the perimeter of the facility and the gesture you are referring to, nobody was present but the two of us. They may have witnessed something from a distance. What they witnessed was when the commander walks out of this depot this is the affect of our force protection. I pulled out my 2 inch knife and said, "This is the level of force protection." If they are standing 100 feet away and see that, I can understand their interpretation but, they weren't there. They are only assuming based on gestures.

Q: Are you saying no one was standing near you during this conversation?

A: That is not true. As far as I can recollect we were alone.

Q: On 8 Sep 2011, when you pulled out a knife during this conversation, what did Timothy say?

A: He didn't say anything.

RAF, Tab 7, pp. 47-48 of 57.

The investigator claimed to have suspected collusion because the appellant disagreed with the version of alleged events she described to him in her very suggestive question, and he seemed to have been aware that her understanding of the facts did not match what at least one witness had told her. The appellant was factually correct in observing that the investigator's question wholly adopted Marcee and Veasey's account, while disregarding what Niemczyk told her about the context of the discussion. The term "collusion" is defined within the Sixth Edition of Blacks Law Dictionary as:

> An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose.

The 2004 edition of the more layman-friendly Merriam-Webster Dictionary similarly defines "collusion" as "a secret agreement or cooperation for an illegal or deceitful purpose."

There is no indication in the record that the investigating officer invoked her authority under AR 15-6, ¶3-8d to instruct any witness not to discuss his or her testimony with other potential witnesses.[25] Thus, the fact that witnesses may have discussed their testimony with other prospective witness provided no cause for accusing anyone of fraud, secret agreements, or other wrongdoing. Moreover, the investigator's question was slanted in favor of the account provided by Marcee and Veasey about the incident while disregarding a very different account by Niemczyk. The investigator's dubious examination tactics and unfounded

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[25] Under AR 15-6, para. 3-8d., an investigating officer may direct witnesses who are subject to Army authority, and request other witnesses, not to discuss their statements or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. As noted, there is no indication that the investigating officer made such an instruction to any witness.

allegation of "collusion" further call into question the objectivity of this investigation.

Investigation of the September 10 Knife Incident

During the course of the AR 15-6 Investigation, a new allegation surfaced that the appellant had at some point held a knife up against the neck of the Accountable Officer, Robert Brown. The investigating officer contacted Mr. Brown who provided the following sworn statement account of the incident:

> On or about 10 September 2011, in the afternoon, while walking the DDKA Depot with Mr. Kopsick, we were discussing the location of the containers for the MRAP support to recent rocket attacks and insurgent activity. We were also discussing the wearing of Dessert Camouflage Uniforms (DCU). I voiced my opinion regarding the wearing of DCU's by civilians and that previously being in a combat zone (Iraq) while on active duty, I continuously had a 9mm handgun with leg holster and that since DoD civilians were not allowed to carry a weapon, I didn't agree with the policy of wearing the DCU and being more of a target than if I were to wear professional looking civilian attire. Mr. Kopsick then stated something to the affect that he didn't need a handgun to protect himself and at that time pulled out a knife from under his DCU blouse and put it to my neck. He did not do so in a threatening manner. It is my opinion that he was just demonstrating to me how quickly he could pull his knife from his uniform to defend himself. Again, being a former active duty service member in a combat zone, I was not personally intimidated or threatened in any manner, however about 15-20 minutes after it happened, as I was walking back to my work tent, I thought to myself that Mr. Kopsick acted in an inappropriate and unprofessional manner. At the time, I didn't feel that an incident report was warranted and dismissed it, even though I verbally communicated the incident to several of the existing CGA members.

RAF, Tab 7, p. 44 of 57.

The appellant provided a statement indicating that he did not recall this incident. RAF, Tab 7, p. 49 of 57. The investigating officer briefly summarized Brown's statement and mentioned that the appellant did not recall such an

incident. However, glaringly absent were any analysis or findings about whether the contested incident actually happened. RAF, Tab 7, p. 22 of 57.

Analysis of Investigation of the Alleged September 10 Incident

The investigation at issue was identified as an informal investigation under Army Regulation 15-6. Regarding the duties of the investigator, AR 15-6 states at para. 1-6:

> **It is the duty of the investigating officer** or board to ascertain and consider the evidence on all sides or each issue, thoroughly and impartially, and **to make findings and recommendations** that are warranted by the facts and that comply with the instructions of the appointing authority. (Emphasis added).

A "finding" under AR 15-6 is defined at para. 3-10a as:

> *General.* **A finding is a clear and concise statement of a fact that can be readily deduced from evidence in the record. It is directly established by evidence in the record or is a conclusion of fact by the investigating officer or board.** Negative findings (for example, that the evidence does not establish a fact) are often appropriate.

The absence of any analysis or findings concerning conflicting testimony for a matter under investigation was a serious flaw in the investigation. An investigation is simply not facially complete in the absence of such analysis and findings on a contested issue.

Investigation of the alleged October 2 Eunuch Incident

Regarding the alleged October 2 eunuch incident, the alleged victim, Mark Roberts, provided the following account:

> Basically, when I walked into Ed's office and gave Ed his parcel mail, Ed asked me, Do you know what a "unic" is? From seeing him around in the past, I know he likes guns and knives so I said, "what is that a knife?' Ed said, No, it's when a man gets his dick cut off and if you don't bring me my mail, verbatim, "I'm going to cut your dick off.' I looked at him and Orlando and I walked out of the office and reported it to Barron Marcee, Bryant Veasey, and Raymond Rodon.

RAF, Tab 7, p. 33 of 57.

Roberts also related that he did not take the comment as a joke, and he felt threatened by the comment. *Id.* Orlando Duran, the Security Chief for DDKA, and the appellant, both provided additional statements which acknowledged that the appellant asked Roberts if he knew what a eunuch was. However, they each denied that the appellant threatened to cut Roberts' penis off if he did not deliver the appellant's packages. Duran also stated that he believed the comment was intended as a joke. RAF, Tab 7, p. 38 of 57.

The investigating officer said that there were several contradictions between the appellant's handwritten statement at the police station about the eunuch incident, and his later statement during the AR 15-6 investigation. However, she did not say what the alleged inconsistencies actually were. She also concluded that the appellant provided "false information" during his police interview on October 4. In support of this conclusion, she noted that in his handwritten statement to the police, the appellant wrote of the incident, "There was a discussion between the contractor mail clerk and our security officer." She concluded from this comment that the appellant initially tried to implicate as the person who made the eunuch statement to Roberts. This interpretation of the appellant's statement to the police is ludicrous. The appellant's statement at the police station in was recorded as follows:

> I have been accused of conveying a threat to an unnamed person. The discussion involves the subject of unics (sic). I have not been provided with any additional information to provide this statement. I have not been informed of the actual words that I supposedly said. **There was a discussion in my office between the contractor mail clerk and our security officer.** I did read a complaint sent by the company to the contracting office that claims that I told the mail clerk that I would remove his genitals if he did not bring me my mail and am waiting for the contracting office to request a statement from me….

Throughout the remainder of the appellant's statement, he did not allege that Duran had made any comments to Roberts. Instead, he consistently identified

Duran as a witness to what was said between himself and Roberts. The military police officer conducting the questioning did not file a report alleging that the appellant was evasive or uncooperative in his responses. The officer's questions remained focused on what the appellant did and said, and he never asked any questions about what Duran and Roberts said amongst themselves. In context, it strongly appears that the appellant's mention of the "discussion in my office between the contractor mail clerk and our security officer" was simply his attempt to make sure he was identifying the right incident and the witnesses present during the discussion he thought he was being asked about. Contrary to the conclusion of the investigating officer, I see no evidence of any attempt by the appellant to shed blame on Duran, or to mislead the military police about what was said, or by whom. The investigator's conclusion that the appellant deliberately lied to the police about this incident was baseless.

One of the most remarkable defects in the AR 15-6 investigation is the fact that the investigator never acknowledged or discussed the issue of potential witness bias against the appellant among DDKA staff, since Rodon had claimed that Safe Ports employees and most of the CGA staff resented the appellant's criticisms and thought he was trying to eliminate their jobs. This omission is all the more striking in light of the testimony COR Wolford provided when the investigator asked him whether he had heard the appellant make any "threatening comments" at DDKA. Wolford responded:

> Yes, I guess. But I have 26 years in the military so comments threatening to me would not be threatening to someone else. I guess some of these comments could be construed to be threatening. He would make statements like, **this should be a government ran organization. Comments that the CGA team should be replaced.** Which to me is just his idea. For someone to hear that, it's like **threatening their jobs**. Maybe he was trying to get a point across but he did it in an unprofessional way. (Emphasis added)

Wolford's statement seems to confirm Rodon's earlier allegation that both Safe Ports personnel and CGA staff believed the appellant's continued presence at

DDKA was a threat to their jobs. The appellant also expressly raised concerns about witness bias to the investigator when he was asked why DDKA personnel would make statements against him:

> A: **Because those individuals do not want me around.** Ray is a retired colonel stationed at DLA headquarters has a lot of friends that **knows how to get rid of people. They don't want me here because I do my job.** Nobody else at the depot has the wherewithal that I do on depot operations. So when I got there, not a single person working at the depot except Ethlin knew anything about running a depot. When I got there, **I uncovered all kinds of things that were wrong. I tried to help them on the road to recovery. They got tired of me telling them that they are messing up. They don't want me there/ this is a plot to get me out of there.** (Emphasis added)
>
> Q: Who is Ray?
>
> A: Ray is the vice president of field operations for Safe Ports.
>
> Q: You mean Raymond?
>
> A: Yes, everyone calls him Ray.

RAF, Tab 7, pp. 47-48 of 57. The investigator made no findings about potential bias or Rodon's alleged influence within the DLAD HQ. There is also no evidence that Rodon was even interviewed as part of the investigation, though he claimed in his October 3 letter to have information about the allegations from "what I have **personally observed during my almost three weeks here** [at DDKA]…." (Emphasis added). The investigator's failure to look into glaringly obvious allegations of bias, or to even interview Rodon, are inexplicable under the circumstances.

Conclusions About the AR 15-6 Investigation

Viewing the agency's evidence in support of the personnel actions as a whole, I find the AR 15-6 investigation to be analytically flawed, facially incomplete concerning the September 10 allegation, and uniformly blind to evidence and arguments which cast doubt upon the existence or measure of the appellant's alleged wrongdoing. Under AR 15-6, para. 2-3b, the appointing

authority for the investigation -- Admiral Traaen in this case -- was required to seek legal review of the investigation since the findings and recommendations could (and did) result in adverse administrative action. It is astonishing that this investigation passed such scrutiny.

On November 29, the appellant was notified that Budden had permanently removed him from his GS-14 Deputy Commander position at DDKA, and was ordering him to return to his prior GS-13 position at Warner Robins. RAF, Tab 17 (Appellant's Supplement to Prehearing Submissions), p. 8 of 15. Budden later imposed a 14-day suspension on January 12, 2012. Budden testified that these decisions were all based upon the outcome of the AR 15-6 investigation. HCD, T3, 35:30-36:30. He stated that he considered the appellant's response to the proposed suspension, but agreed with the investigator that the actions occurred as alleged. *Id.*, 42:00. He said that he considered the appellant's claim that the contractor used the allegations to try to get rid of him, but rejected the claim for the following reason:

> The claim that the contractor was attempting to have Mr. Kopsick removed was very consistent with when they issued the letter to the commander saying that his conduct was unbecoming and inappropriate. We also didn't have any other documentation or evidence that would show that that was in fact true.
>
> In a military organization, the commander is ultimately responsible for the performance of the organization, and ultimately he was the person responsible for signing off of the contractor's performance. So, there really isn't any reason for the contractor to try and have Mr. Kopsick removed. He was doing I think a fairly phenomenal job in helping the contractor identify where their problems were, and doing the training and helping them with their system support. I would have…I guess this is a presumption on my part, but if I were the contractor, I would have targeted CDR Isett, as the competent authority, and not Mr. Kopsick, who, I think was trying to help them through any of the difficulties they were having in getting spun up on the contract.

HCD, T3, 43:18-44:40.

The strained logic and willful blindness of Budden's comments was not remotely persuasive. On one hand, Budden acknowledged that the appellant was doing a phenomenal job of disclosing problems with the contractor's performance, and yet he seemed to expect the contractor to be grateful to the appellant for such disclosures – despite Rodon's seething letter to the contrary. His further theory that CDR Isett would make the most logical target for Safe Ports' wrath was simply bizarre, and again ignored strong evidence that Safe Ports chafed under the appellant's zealous gaze, and wished him gone.

Budden's testimony that there was no other document or evidence supporting the appellant's claim that the allegations were contrived to get rid of him was also factually wrong. The appellant's response to the proposed suspension included a new statement from a current Safe Ports employee named James Thompson. Mr. Thompson alleged the following within his statement:

> Shortly after my arrival, sometime in August, 2011, I was in the Safe Port office an (sic) overheard a conversation with Barron Marcee, Bryant Veasey and another Safe Port person. **They were complaining about the different things Mr. Kopsick has discovered that are wrong with the operation of the depot and were talking about different ways that they could get him relieved of duty.** (Emphasis added).

RAF, Tab 6, p. 141 of 142. Thompson's allegations directly supported and expanded upon the appellant's allegations that he was framed. Inexplicably, Budden did not address Thompson's statement as part of his decision imposing the 14-day suspension, nor did he explain during the hearing how or why he ignored such damning allegations. Thompson testified at the hearing, and I found his testimony to be consistent with his prior statement, frank, and credible.[26] HCD, T5, 45:45; T6, 5:00 – 7:00.

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[26] At the hearing, Thompson also provided undisputed testimony corroborating the appellant's disclosures about Safe Ports habitually using the "RCN of the day" and reporting items as "shipped" before they actually left the depot.

Budden also overlooked another glaring flaw in the evidence he cited in support of discipline. Budden repeatedly testified that the appellant's alleged action of holding a knife to another employee's throat was a major factor in his decision to remove him from the Deputy Commander position and to suspend him. However, this allegation came up for the first time during the AR 15-6 investigation, and Budden showed no awareness that the investigator actually provided no analysis or findings about whether this disputed event actually occurred. Every indication is that Budden, in his rush to judgment, simply assumed that the existence of the allegation was entitled to the weight of an established fact. Such sloppy - if not downright prejudiced - thinking strongly supports the appellant's claim that the agency's judgment was hopelessly clouded by retaliatory animus.

Discussion of the Agency's Motive to Retaliate

The second *Carr* factor concerns evidence of the agency's motive to retaliate. As previously noted, the agency claimed that its sole motivation was to take appropriate disciplinary actions based upon misconduct revealed by its investigation. This argument would be very powerful if the record supported a finding that the agency's investigation was facially fair, complete, and analytically sound. However, such was not the case. A good agency investigation lights the path to show the difference between truth and fiction, right and wrong. However, this investigation was a prop built to look like a streetlamp, casting only its own dark shadow. In my view, this fake lamp gave the agency precisely what it wanted – an official looking post to lean on for support – while avoiding the inconvenience of real illumination.

DLA spent thousands of dollars and months of time to recruit, medically screen, equip, and send the appellant to one of the most remote and hostile places on the planet to oversee an admittedly struggling contractor running a depot in a war zone. By all accounts, the appellant was uniquely well suited for the job,

with thirty-two years of expert logistics knowledge and the good health required to endure conditions on the ground. Also by all accounts, he performed his oversight duties in a "fairly phenomenal" way at DDKA, and was making notable improvements in training both the CGA and Safe Ports staffs to proper standards.

While it was reasonable for the agency to temporarily pull the appellant out of DDKA while it investigated Rodon's alarming allegations, the testimony even of Rodon's subordinates revealed that Rodon's claims were greatly overinflated. What credibly remained was evidence that the appellant was involved in a handful of nonthreatening jokes and horseplay involving a small knife, and he had made an off-color remark about eunuchs to the contractor delivering the mail. Given the appellant's impeccable background, it is fair to assume that CDR Isett could have permanently ended such shenanigans through a stern talk or perhaps a written counseling. Budden's testimony and CDR Isett's report to the DLAD HQ about the eunuch incident strongly suggest that this would have been precisely CDR Isett's approach had Budden not intervened to take the decision for himself. *See RAF, Tab 8, p. 20 of 68; HCD T4, 19:00-24:30.*

DLAD's argument that if the appellant had not been a whistleblower it would have nonetheless removed him from a key war-time post based on its investigation was unworthy of belief. The agency's further argument that it would have also suspended him for two weeks and stripped him of his normal supervisory duties for six more months was preposterous. Having reviewed the record in great detail, I find the appellant's whistleblower allegations are the only plausible explanation for DLAD HQ's incomprehensibly flawed and biased investigation; it's willingness to harm its own mission by pulling a key staff member from a war-zone post; and its severe overreaction to what even witnesses with strong motives toward bias generally described as nonthreatening horseplay and salty language.

Discussion of the Agency's Treatment of Similarly Situated Non-Whistleblowers and the Agency's Table of Penalties

The final *Carr* factor requires consideration of how the agency treated non-whistleblowers in similar circumstances. Mr. Budden testified that he was aware of one prior non-whistleblower deputy commander who was removed from an overseas position for creating a hostile work environment toward a subordinate through derogatory remarks, unsupported discipline, and failing to provide the employee with necessary training. HCD, Tab 4, 35:00. This comparator was not, however, suspended without pay, and did not receive a six month detail outside of his normal duties upon return to the United States. I find the offered comparator does not demonstrate that the agency took similar discipline against non-whistleblowers for like conduct. Rather, even a supervisor that tried to use his position to sabotage a subordinate's career was treated far more gently than the appellant.

The best evidence in the record for how the agency typically deals with first offense transgressions like the appellant's alleged conduct came from the agency's Table of Penalties. The proposing official noted in the proposed 14-day suspension that he did not believe the appellant intended to threaten or harm anyone during any of the incidents. Thus, the appellant was plainly not accused of communicating a threat through his words or deeds. Holobinko further expressly noted that the proposed discipline was for a first offense of misconduct within the agency. *See* RAF, Tab 6, pp. 127-128 of 142.

While the agency's Table of Penalties allows a range of penalties up to removal for a first offense of making a threat, the highest range of suggested penalties for "rude and discourteous conduct" was a one-day suspension. Likewise, a first disciplinary action for use of abusive or offensive language, horseplay which interferes with work, disorderly conduct, or offensive language warranted no greater than a five-day suspension under the Table. RAF, Tab 8,

pp. 50-53 of 68. The agency's chosen penalty against the appellant – a model thirty-two year employee who had committed his first offense - included stripping him of a promotion, involuntarily reassigning him back to the United States, detailing him to a make-work non-supervisory detail for six months,[27] and suspending him for 14 days. I find that this disciplinary reaction dwarfed the range of suggested penalties for such conduct within the agency's own published policy guidance.

Conclusion

I find that the appellant met his burden to prove by preponderant evidence that he made protected disclosures. I further find that the appellant established by preponderant evidence that those disclosures were a contributing factor in the agency's decisions to demote, reassign, suspend, and detail him to non-supervisory duties. The agency was unable to meet its burden of demonstrating by clear and convincing evidence – or any lesser legal standard for that matter - that it would have taken these actions in the absence of the appellant's disclosures.

DECISION

The appellant's request for corrective action is GRANTED.

ORDER

I **ORDER** the agency to rescind the 14-day suspension and pay the appellant by check or through electronic funds transfer the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than **60 calendar days** after the date this initial decision becomes final.

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[27] The appellant referred to the detail as his banishment to "the mushroom cave." He testified credibly that he was given little, if any, work to do throughout this lengthy detail. HCD, T3, 23:00; T7, 12:00-14:00.

I further **ORDER** the agency to modify the agency's personnel files to reflect the appellant's continued employment in his former GS-14 position for the amount of time which he would have encumbered that temporary position had the retaliation not occurred. The agency shall then pay the appellant by check or through electronic funds transfer the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than **60 calendar days** after the date this initial decision becomes final.

I further **ORDER** the agency to provide the appellant with such additional consequential relief as would put him in as nearly as possible the same situation he would have been in had the agency not retaliated against him for whistleblowing.

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

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

I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If the parties are unable to agree on the proper amount of consequential or other damages, the appellant may file a motion for initiation of an addendum proceeding to address damages. Such a motion must be filed by the appellant no later than **70 calendar days** after the date on which this decision becomes final.

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

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: ____/S/_____
Brian Bohlen
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 25, 2015**, 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.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and

evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO 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.

NOTICE TO THE PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8).

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

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

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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