

# **Sandra P. Davis v. U.S. General Accounting Office**

**Docket Nos. 00-05 and 00-08**

**Date: July 26, 2002**

**Cite as: Davis v. GAO (7/26/02)**

**Before: Michael Wolf, Member**

**Whistleblowing**

**Retaliation**

**Prohibited personnel practice**

**Performance appraisal**

**Remedy**

**Damages**

## **DECISION**

This matter is before the Personnel Appeals Board (PAB) on three Petitions for Review filed by Petitioner, a Band II analyst in the Denver Regional Office of the U.S. General Accounting Office (GAO). Petitioner filed two Petitions on July 12, 2000, which were consolidated as Docket No. 00-05. She filed a third Petition for Review on August 17, 2000, which was assigned Docket No. 00-08. All three Petitions were consolidated for hearing. Following a protracted discovery process, the evidentiary hearing was conducted from October 29 to November 7, 2001.

The three Petitions charged various Agency personnel with violations of: (1) 5 U.S.C. §2302(b)(8) (reprisal for whistleblowing); (2) 5 U.S.C. §2302(b)(9) (retaliation for engaging in protected activity and for assistance to another employee in the investigation of an EEO complaint); (3) 5 U.S.C. §2302(b)(10) (lowering Petitioner's performance appraisal on the basis of conduct that did not affect performance); and (4) 5 U.S.C. §2302(b)(12)<sup>1</sup> (lowering

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<sup>1</sup> The August 17, 2000 Petition cited 5 U.S.C. §2302(b)(11), but the allegations clearly address a violation of subsection (b)(12). In 1998, Congress adopted a new (b)(11) provision involving veterans' preference. Section 2302(b)(12) was created from the previous (b)(11). P.L. 105-339, 112 Stat. 3182, 3188. I take notice that the Petition clearly intended to allege a violation of Section 2302(b)(12) and that the Agency was put on notice of this fact by the substance of the allegations in the Petition.

Petitioner's performance appraisal in a manner inconsistent with the Agency's published Order governing appraisals).<sup>2</sup>

As remedies for these alleged violations, Petitioner requested: (1) restoration of her 1999 performance appraisal to the level proposed by her immediate supervisor; (2) work assignments permanently outside the management control of certain named officials; (3) an order "barring further retaliation," including "written assurance that she may remain a Band II Evaluator, or its equivalent, in the Denver Office until she is eligible for retirement or GAO as an agency ceases to exist;" (4) expungement of her charges and reference to negative actions threatened or taken against her from Agency records; and (5) disciplinary action against parties who violated GAO policy. She also requested reimbursement of her attorney's fees and costs and "any other relief consistent with law."

## FINDINGS OF FACT

The following material facts are largely, although not entirely, undisputed:

1. Petitioner commenced employment with the Agency in 1987. Tr. 459.
2. At all times relevant to this case Petitioner has been continuously employed in the Denver Regional Office. *Id.*
3. Prior to fiscal year 1999, Petitioner received the following performance appraisals while employed in the Denver Regional Office:<sup>3</sup>

6/89-4/90	Exceptional in 5 categories; superior in 2 categories.
5/90-4/91	Exceptional in 2 categories; superior in 4 categories.
6/91-10/91	Outstanding in 4 categories; exceeds fully successful in 2 categories.
10/91-5/92	Outstanding in 3 categories; exceeds fully successful in 4 categories.

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<sup>2</sup> Petitioner also raised a general allegation, without citing any statutory basis, that "managers and defacto managers fostered an atmosphere of 'group hate' as another method of retaliation towards her." Petitioner did not present evidence or argument in support of this allegation and, accordingly, it is not addressed in this decision.

<sup>3</sup> In some years, Petitioner was not rated in the job dimension for "supervision, appraisal and counseling." This fact accounts for the different number of rating categories in different years. In addition, the rating system changed in 1991. Initially, the top two ratings were "exceptional" and "superior." In 1991, the top two ratings were changed to "outstanding" and "exceeds fully successful."

6/92-4/93	Outstanding in 4 categories; exceeds fully successful in 2 categories.
4/93-9/93	Outstanding in 4 categories; exceeds fully successful in 3 categories.
10/93-9/94	Outstanding in 4 categories; exceeds fully successful in 3 categories.
10/94-9/95	Outstanding in 4 categories; exceeds fully successful in 2 categories.
10/95-9/96	Outstanding in 6 categories.
10/96-9/97	Outstanding in 5 categories; exceeds fully successful in 1 category.
10/97-9/98	Outstanding in 5 categories; exceeds fully successful in 1 category.

P.Ex. 2. In the last six of these appraisals, Petitioner was rated outstanding in the teamwork category.

4. Beginning in 1991, Petitioner was employed as a Band II evaluator in the Denver Regional Office, working in the Health, Education and Human Services (HEHS) Division. At all times relevant to this proceeding, Petitioner was assigned to the Health Care Core Group of the Veterans' Affairs and Military Health Care (VA&MHC) issue area. P.Ex. 2; Tr. 459-60.

5. During the period of time relevant to Petitioner's allegations, the Director of the VA&MHC issue area was Stephen P. Backhus and the Associate Director was Cynthia Bascetta. Ms. Bascetta is now the Director of that issue area, while Mr. Backhus has become Director of GAO's National Preparedness Team. Tr. 985-86, 40.

6. In late 1997, Ronald Guthrie became the Assistant Director in charge of the Health Care Core Group in Denver. Tr. 168, 626-27. As such, he became Petitioner's supervisor. Tr. 478, 480-81, 626-27.

7. Maria Vargas, another employee in the Denver Health Care Core Group, filed a charge of discrimination with the GAO Civil Rights Office based upon the 1997 promotion cycle. P.Ex. 9.

8. In April 1998, Petitioner met with an investigator from the Civil Rights Office who was investigating the Vargas charge. Petitioner provided the investigator an affidavit, which stated, in part: "I have no information regarding Complaint's [sic] allegations of not being promoted because of discrimination." Petitioner's affidavit did, however, describe a dispute between Ms. Vargas and the Denver Acting Regional Manager (James Solomon) over a leave request that Ms. Vargas had submitted. P.Ex. 9. Petitioner did not show her affidavit to anyone other than her husband and the Civil Rights investigator. Tr. 464-65, 598-600, 775.

9. As of October 1, 1998, Petitioner was assigned to be the Evaluator-in-Charge (EIC) on the VA "reasonable charges" job. P.Ex. 39. Petitioner's immediate supervisor on the "reasonable charges" job was Sheila Drake, a Band III Assistant Director located in Washington D.C. Tr. 141-42, 235-36; P.Ex. 27.

10. In December 1998, Mr. Backhus received an anonymous letter making several allegations against Ronald Guthrie, including the following:

Ron takes mere disagreements whether during job discussions or core group meetings as personal criticisms which he later uses against individuals during the assessment period. Individuals are labeled as having bad attitudes and basically black balled as a result.

Of late Ron has harassed and chastised several core group members for trivial things such as not attending a recent training class, missing monthly HEHS video meetings and missing core group meetings despite them having valid reasons for not doing so.

Ron tells members that although they cannot travel; [sic] he will continue to travel. He questions whether travel is essential. He apparently sees his Washington travel as more important than others' travel. He has missed several core group meetings as a result of his travel.

\* \* \* \*

Ron frequently criticizes team members without first determining the facts, often discussing matters with Denver and HQ management without first discussing them with individuals, thus making them look bad, whether warranted or not. A good manager would discuss matters directly with employees before needlessly elevating them to involve upper management.

Ron continually interferes on jobs he has no responsibility for. He seems to resent the fact that he has little control over Denver staff on those jobs.

P.Ex. 10.

11. On or about December 17, 1998, Mr. Backhus visited the Denver Regional Office and conducted individual meetings with every member of the Health Care Core Group who was not on leave. During the interviews, he summarized the allegations in the anonymous letter and asked what each individual knew about the issues raised. Tr. 50, 466-67.

12. Mr. Backhus interviewed eleven employees in face-to-face meetings (including Petitioner) and another three employees by telephone. He informed the employees that their comments would remain confidential. Tr. 1211-12, 49-51, 59.

13. In the course of her interview with Mr. Backhus, Petitioner made critical comments regarding Mr. Guthrie's management style and practices, including allegations that Mr. Guthrie engaged in unnecessary travel. P.Ex. 63.

14. Other employees also made critical comments to Mr. Backhus regarding Mr. Guthrie's extensive travel. P.Exs. 18, 63.

15. On January 13, 1999, Mr. Backhus returned to Denver and reported to Core Group employees the results of his investigation. He stated that he did not find merit in any of the allegations in the anonymous letter, including allegations that Ronald Guthrie had engaged in excessive or unnecessary travel. Mr. Backhus stated that he had personally approved all of Mr. Guthrie's travel. Backhus also stated that employees' misperceptions of Guthrie's travel were probably the result of a lack of communication between Backhus/Guthrie and Core Group members. Tr. 99-100, 489.

16. In the course of the meeting on January 13, 1999, Mr. Backhus advised employees that, if they could not work with Mr. Guthrie, then they probably could not work with him. He stated that he would assist any employee who wished to transfer out of the Core Group. Tr. 107-08, 1225.

17. Subsequent to the January 13, 1999 meeting, Petitioner spoke to other evaluators in Denver who were working on jobs for the National Security and International Affairs Division (NSIAD) in the International Relations and Trade issue area (IRT). Petitioner inquired whether there were jobs that she could perform for NSIAD. Petitioner directed the same inquiry to Lynn Holloway, an Assistant Director with NSIAD in Washington D.C. Tr. 500-03; P.Ex. 24 at 1; P.Ex. 51 at 2.

18. On or about January 27, 1999, Ms. Bascetta assigned Petitioner to work as an "advisor" on the VA "enrollment" job. Tr. 1122. The EIC on that job was Lisa Gardner (another Band II in Denver); the Assistant Director supervising the job was Ronald Guthrie. Tr. 989, 992.

19. Sometime after Petitioner's assignment to the enrollment job, she was removed as EIC on the reasonable charges job. Although Petitioner continued to work on the reasonable charges job, another employee (Terry Hanford) was made the EIC. Tr. 238, 518, 995.

20. Although Ms. Gardner set expectations for other evaluators on the enrollment job and documented the expectations on an Expectation Setting Record (Form 209), she did not complete a Form 209 with respect to Petitioner's assignment on that job. Tr. 1106, 1118.

21. In early February 1999, Petitioner informed Mr. Backhus that she wished to transfer to NSIAD/IRT. Tr. 109, 503-04.

22. After his conversation with Petitioner, Mr. Backhus spoke to Ms. Holloway regarding Petitioner's possible transfer to NSIAD/IRT. Tr. 1235-36.

23. In 1999, NSIAD/IRT did not have a Core Group in Denver. However, Denver staff performed IRT work in 1999 on an ad hoc basis. As of mid-1999, IRT work in Denver was being phased out. Tr. 501-02, 661-62, 999, 1167-68; R.Ex. 16.<sup>4</sup>

24. On February 18, 1999, Petitioner had a conference call with Ms. Bascetta, Mr. Backhus, Sharon Cekala (Director of Operations, HEHS) and Mr. Solomon to discuss her requested transfer to NSIAD/IRT. Tr. 856, 867, 999; P.Ex. 24. In that conversation, Petitioner agreed to continue working on the VA enrollment job until its projected completion date of March 30, 1999. Tr. 533, 536-37.

25. In early March, Petitioner traveled to Washington, D.C. with Ms. Gardner to participate in interviews and team meetings related to the enrollment job. Tr. 1082-83.

26. On March 23, 1999, Ms. Gardner sent Petitioner an e-mail with an assignment on the enrollment job to be completed by Petitioner by March 25. P.Ex. 25 at 2-3; Tr. 1095.

27. On March 23, 1999, Patricia Hinnen, a Denver evaluator doing NSIAD/IRT work, sent Petitioner an e-mail with an attached e-mail from John Brummet (R.Ex. 9):

[Brummet to Hinnen]

If abduction falls through, a possible job for you and perhaps other Denver staff is accountability of aid to Central America (Hurricane Mitch). There would be quite a bit of travel. I know we are not anxious to use the field on this—we want to have the team together in one place and our travel \$\$ constraints are a huge problem. But then we don't have the staff here. Jim Solomon is going to talk with Ben in April when he comes here. My guess is that they will decide then whether it makes sense for IRT to continue using Denver.

[Hinnen to Petitioner]

Just opened this message from Brummet. Doesn't look too promising, in light of the planning document Bob shared with me on IRT's human capital needs....

R.Ex. 9.

28. On March 25, 1999, Ms. Gardner sent the following e-mail to Petitioner:

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<sup>4</sup> Petitioner testified that she did not know whether there was a Denver IRT Core Group. Tr. 501-02, 1359. Anthony Padilla testified that there was an IRT Core Group in Denver, but Thomas Laetz indicated that the IRT work in Denver was performed through a less formal arrangement. Tr. 389-90, 660-61. Petitioner did not offer any documents evidencing a Denver Core Group in 1999.

This message is a follow-up to my e-mail message below and the voicemail message I left you on March 23rd. Since you weren't in the office on March 24 and 25, please contact me as soon as you can so that we can establish a new deadline for the work as discussed in the message below. I will also leave you a voicemail message to this effect.

P.Ex. 25 at 2.

29. On March 29, 1999, Petitioner responded to Ms. Gardner's e-mails of March 23 and March 25, prefacing her message with the comment that she had been out of work with a stomach flu.

P.Ex. 25 at 1.

30. On March 29, 1999, Ms. Bascetta sent Petitioner an e-mail requesting that Petitioner telephone her. P.Ex. 25 at 1. On that same day, Petitioner responded by e-mail:

Given your busy schedule and my still woozy state of mind, e-mail might be a better forum for me to address the issues you mentioned in your voicemails to me. With regard to your needing to get input from me in order to "close the loop" on staffing decisions within HEHS' VA & MHC group, I think I have made my preference pretty clear. That is, because I am awaiting re-assignment to NSIAD/IRT, I cannot make a commitment to a new job assignment within HEHS. In line with the agreement we all reached on February 18 with Sharon Cekala, I am wrapping up work on both the VA Enrollment job and on the Reasonable Charges job. That is why I have asked both job teams to bring anything else they need my help on as soon as possible. I am also beginning the 27 hours of computer based training NSIAD requires of its staff. [*Id.*]

31. On April 1, 1999, Ms. Bascetta and Petitioner engaged in the following exchange of e-mails:

[Bascetta to Petitioner]:

Today at 9:30 your time, Lisa has arranged a telephone interview with Mike Loudon and Kathi Patterson to talk about the statement of work for FY 2000; supply and demand issues; and the survey of vets. We would like you to participate in this interview and write it up. Lisa will be calling you about the logistics of the conference call.

Also, on Monday April 5th, please see Jim Solomon first thing in the morning to discuss your next assignment in HEHS. . . .

[Petitioner to Bascetta]:

Based on agreements previously made, I am to begin work for NSIAD/IRT as of today. Therefore, I do not feel comfortable doing additional work for HEHS/VA&MHC until I verify the status of my re-assignment.

R.Ex. 11.

32. On April 6, 1999, Acting Regional Manager Solomon left the following handwritten note in Petitioner's office: "Please stop by to see me when you return to your office." R.Ex. 12. Later that same day, Mr. Solomon gave Petitioner two memoranda, which stated in part:

Subject: Meeting to Discuss Next Assignment

After searching for you for several hours today and not finding you in your cubicle, nor having you respond to my voice mail, I found you in . . . [another employee's] cubicle working on computer based training. At that time I asked you to come to my office because I wanted to talk to you. You wrote a note on a piece of paper that, to paraphrase, that [sic] you thought all of our dealings would be in writing. While I never made such an agreement, since you asked that your next assignment and core group status be in writing, I have a memo prepared for you that lays out that information. As I stated in that memo, written prior to this one, communication by written memo is neither the standard in GAO, nor a practice that I intend to establish now.

The singular purpose of this memo is to direct you to my office so that I can make you aware of your next assignment. Please note that if failure [sic] to come to my office by 3:15 p.m. on April 6, 1999, will be regarded as insubordination and result in appropriate disciplinary action. It is my hope that you comply with the direction offered in this memo and that no disciplinary action need be taken. [P.Ex. 47.]

\* \* \* \*

Subject: Assignment Staffing & Core Group Redesignation

You are currently assigned to the HEHS Veterans Affairs' and Military Health Care (MA[sic]&MHC) core group. You recently told me that you refuse to do any work in the VA&MHC core group because you are awaiting reassignment to the NSIAD International Relations and Trade (IRT) core group.

Although I understand your desire to work on IRT issues, we cannot honor your request to be staffed on an IRT assignment or be transferred to an IRT core group. As you know, there is no IRT core group in Denver. Also, the sole NSIAD core group in Denver (Defense Acquisition) is already two staff members over its staff ceiling. In contrast, your current core group, VA&MHC, is understaffed and requires your contribution.

There is an immediate need to provide support on Sleepwear Flammability Education (code 108397) under the supervision of Frank Pasquier in the Seattle Field Office, and we have decided to assign you to that job. I have spoken with Steve Backhus and Cindy Bascetta, and they have agreed to release you from your current assignment duties, except answering referencing notes on the Reasonable Charges assignment, so you might begin working immediately on the sleepwear job. Therefore, I am directing you to begin work on the sleepwear job effective tomorrow.

Our normal practice in Denver is to discuss core group and job assignments orally. Although I prepared this memorandum to accommodate your request for written directions, future directions will not necessarily be written.

Please note that if you fail to begin work when directed by Mr. Pasquier it will be regarded as insubordination and result in appropriate disciplinary action. It is essential that GAO continue to benefit from your contributions to its work. It is unacceptable for you to refuse to work while being employed and paid by GAO. You must comply with supervisory directions to complete tasks assigned. [P.Ex. 48.]

33. On April 9, 1999, Petitioner responded, *inter alia*, to Solomon's memoranda of April 6:

The purpose of this communication [is] to remind you of the record of events and agreements relating to my assignments while in HEHS/VA&MHC and my reassignment to NSIAD/IRT. These are events of which you are both knowledgeable and in which you took part. In particular, I wish the record to note my objection to your assertion that I ever refused to do work in the VA & MHC core group. This assertion is contrary to fact and every statement, oral or written, that I have made on the subject. In direct contrast to your assertion, the record also shows that I have abided by the agreements I made with HEHS and have been trying to abide by the agreement I made with NSIAD. Therefore, my intent to work on NSIAD/IRT issues has been more than a request; it is a position grounded in proper business practice when oral contracts are

involved. I have fulfilled the conditions of my agreements with HEHS and need to make sure all parties are aware of their obligation to do the same. This is why I have requested that all our communications about this subject be in writing, and insist in the interest of fairness that my reply to your assertions accompany the April 6, 1999 memo in all future communications in which your memo is referenced, cited, quoted, or attached.

\* \* \* \*

Your April 6 memo directs me to begin work on a new HEHS assignment immediately or face disciplinary action. Although I will undertake the Sleepwear Flammability Education assignment; I must remind you that any caution I demonstrated before accepting another HEHS assignment was motivated by my desire to act in good faith and honor our agreement of February 18, 1999. Per this agreement, I was to conclude all work in HEHS by March 30, 1999 and be assigned to a new division. I have met the conditions I agreed to. Although you cite some administrative reasons why you will not reciprocally honor this agreement; they do not appear to be linked to the record of events and oral contracts which have formed the basis of my actions since December 1998 until the present. . . .

P.Ex. 50. The remainder of Petitioner's memoranda, which was also sent to Mr. Backhus, recites her understanding of the events leading up to what she characterizes as an oral contract permitting her to transfer out of HEHS and into NSIAD/IRT. *Id*

34. On April 8, 1999, Ms. Gardner sent Petitioner a "counseling memorandum," which stated in part:

The purpose of this memorandum is to officially counsel you regarding recent instances where your behavior has been unacceptable, specifically; you have been uncooperative, discourteous and disrespectful. The specific basis for this memorandum follows:

\* \* \* \*

During our meeting on March 18th, you told me that your transfer out of the VA&MHC group was none of my business. As we were discussing your completion of specific work products, you told me that you were not on this job to hold my hand; that the work I asked you to do was Band II work and not work for an economist and further stated that since I heard the same information that you did, I could probably do the work myself.

As EIC, it is my job to know about the availability of staff assigned to me and it is my responsibility to make work assignments and to assure that they are completed in a timely manner, not the staff's responsibility to tell me what I can do.

In our March 18th meeting, you also made statements about my calling this meeting only because Ron Guthrie, the Denver VA&MHC core group leader directed me to do so. You further said, "It is clear that when Ron wants to find out information on VA&MHC Denver core group members, Ron directs you to ask questions and provide him the information." These comments were divisive and untrue.

\* \* \* \*

In summary, the uncooperative attitude you have displayed over the past several weeks is unacceptable. While I acknowledge discussions about your being called an "Advisor" on this job, that in no way excused you from completing work products that I have requested from you. Every team member, regardless of title, is expected to contribute to getting the job done.

I have chosen to limit action to a Counseling Memorandum in the hope and expectation that it will be sufficient to impress upon you the seriousness of your actions. This memorandum will not be placed in your official personnel folder. However, you are expressly cautioned that any further acts of such behavior will result in consideration of disciplinary action. . . .

R.Ex. 15.

35. On April 13, 1999, Mr. Solomon sent a memorandum to Petitioner, which stated in part:

In your April 9, 1999, memo to Steve Backhus and me you present your recollections and interpretations of several meeting[s] and seek clarification of your core group designation status. There is little doubt in my mind that you have misrepresented previous conversations and e-mail correspondence involving you, me, Steve Backhus, Cindy Bascetta (Associate Director, VA&MHC), and Sharon Cekala (former HEHS Operations Director). I am providing clarification on your core group below, as well as presenting the recollections and interpretations of others that were involved in these meetings.

Let me begin by stating clearly that you are a member of Denver's VA&MHC core group. While in the past I have repeatedly stated

that I was willing to continue working toward finding you a different core group to work in, as circumstances permit, you have repeatedly refused reassignment to any core group that has an official allocation in Denver. You remain insistent that you are to be transferred to the NSIAD/IRT "core group," a core group that does not exist in Denver.

In order to avoid any further confusion let me address why you remain in the VA&MHC core group. There are myriad reasons for my decision, the foremost is the fact that staffing is a management decision, coordinated between divisions, Issue Area Directors and me or my designate. We are responsible for balancing the many needs and priorities relevant to individual issue areas and across issue areas in GAO. While staff preferences about core group designation are one factor, they are just that—one factor—and must be viewed in light of the needs and priorities of the organization.

Let me now address why you have not been transferred to the IRT "core group." As I have repeatedly explained to you over the past six months, while I understand that you would like to work on IRT issues, Denver has no IRT core group. Rather, we have arranged for some staff who have extensive international experience to help on IRT assignments on a case-by-case basis. Let me reiterate that there is currently no long-term relationship formalized between Denver and the IRT issue area. When you first raised your desire to do NSIAD/IRT work, I spoke with Mr. Ben Nelson (Issue Area Director/IRT) and he told me that he was not at all interested in having additional Denver staff work on his issues.

\* \* \* \*

My conversations with John Brummet (NSIAD/IRT staffing manager), as recently as last Friday, indicate that we currently have four staff who have been lending NSIAD assistance who are coming due for staffing and at least two will not be staffed to NSIAD/IRT because they have no work for them.

In your conversations with me and others and in your April 9, 1999, memo you cite oral contracts to move you to NSIAD/IRT work. These "contracts[?]" were from a NSIAD/IRT Assistant Director and a NSIAD/IRT staff member. Let me begin by saying that in my conversations with Lynn Holloway, the Assistant Director you reference, she indicated that you came to her seeking an assignment and said that you had no work to do in VA&MHC. As we will see below, this is not the case. In fact, VA&MHC

continues to have a backlog of assignments. Upon learning this fact, Ms. Holloway said that she had no need for your assistance. As for any "contract" you may believe that you have with a NSIAD/IRT staff member, please let me remind you that all NSIAD and NSIAD/IRT officials who have the authority to negotiate and approve core group additions, have expressed no interest in moving you, or any other Denver staff member to NSIAD/IRT. These officials are Ben Nelson and Greg McDonald.

\* \* \* \*

I hope you understand, therefore, why it makes no sense to move staff from a formal core group—VA&MHC—with a demand for work that already exceeds the staff available to an area (NSIAD/IRT) where there is no formal core group arrangement and where there is insufficient demand to keep the current staff continuously staffed to assignments.

R.Ex. 16. In the remainder of Mr. Solomon's memorandum, he cautioned Petitioner that performance appraisals are based in part on teamwork and that an unacceptable rating could be given to an employee who "expresses an unwillingness to work with certain people." *Id.*

36. After denial of Petitioner's request to transfer to NSIAD/IRT, she was temporarily assigned to work on a sleepwear flammability job that was outside the VA&MHC issue area. Tr. 1244-46. Petitioner carried out her duties on that job satisfactorily. Tr. 1246.

37. In late June 1999, Richard Hembra, then Assistant Comptroller General for HEHS, visited the Denver core group with Mr. Backhus for the purpose of discussing general expectations for "some of these working relationship issues" that were unresolved in the group. He began with a group session, followed by individual meetings with core group members who were in the office at the time. Tr. 907-08. During the group session, a member expressed concern about individuals taking notes of the meeting and that this might inhibit the flow of discussion. Petitioner was among the note takers. Tr. 910-11. Mr. Hembra told the group not to be concerned about the occurrence of note taking. Tr. 911. One employee also expressed the view that managers fear charges of retaliation and therefore do not take action when employees fail to meet expectations for performance or conduct. Mr. Hembra responded that he had "been sued by the best of them" and would not be deterred from taking action. Tr. 912, 974-75, 1250-51.

38. In his follow-up session with Petitioner individually, Mr. Hembra learned that she had filed a "grievance" [charge] and that she believed that his comments during the group meeting referenced her grievance.<sup>5</sup> Tr. 915.

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<sup>5</sup> Mr. Hembra referred to the filing of a "grievance," but later testified that he did not know the difference between a "grievance" and a "charge." Tr. 942. I find that his discussion with Petitioner in June 1999 most likely related to Petitioner's April 12, 1999 PAB/OGC charge.

39. On July 6, 1999, Ms. Drake proposed a cash “spot award” for Petitioner for work on the reasonable charges job. Mr. Backhus approved the award on July 12, 1999. P.Ex. 5 at 2.

40. For the period October 1, 1998 to September 30, 1999, Petitioner worked 8.4 staff days on the enrollment job. P.Ex. 37. During that same period, she worked 115 staff days on the reasonable charges job. *Id.* Petitioner worked a total of 181.9 staff days on all her assignments during that fiscal year. *Id.*

41. Sheila Drake was the rater for Petitioner’s Fiscal Year 1999 performance appraisal; James Solomon was the reviewer. R.Ex. 17. Prior to giving Petitioner her final rating, Ms. Drake was instructed by Mr. Backhus to consult with Mr. Solomon, Mr. Guthrie and Ms. Gardner. Tr. 265-71. Ms. Drake complied and took their negative comments into account in giving Petitioner her rating; she also read Ms. Gardner’s counseling memorandum to Petitioner. *Id.* Ms. Drake gave Petitioner an outstanding rating in four categories and exceeds fully successful in three categories. Tr. 248, 254. After considering Ms. Gardner’s input, Ms. Drake gave Petitioner an exceeds fully successful rating in the teamwork category. Tr. 268-71.

42. After preparing her rating of Petitioner, Ms. Drake sent it to Mr. Backhus for review, as she did with all of her performance appraisals. Tr. 247, 256-57, 286. Mr. Backhus returned the rating to Ms. Drake twice; each time he instructed her to lower the rating. Finally, Ms. Drake, at Mr. Backhus’s direction, lowered two of Petitioner’s ratings to fully successful. Tr. 247-48; 256-59. The final rating was:

Planning	Outstanding
Data gathering and documentation	Outstanding
Data analysis	Outstanding
Written communication	Fully Successful
Oral communication	Exceeds Fully Successful
Teamwork, working relationships, and equal opportunity	Fully Successful
Supervision, appraisal, and counseling	Exceeds Fully Successful

R.Ex. 17.

43. On April 12, 1999, August 19, 1999, and November 19, 1999, Petitioner filed three separate charges with the PAB Office of General Counsel alleging that the Agency retaliated against her for engaging in whistleblowing and other protected activities. Right to Appeal Letters, Pleadings File, Tabs 1, 14. This case was initiated by the filing of two Petitions for Review on July 14, 2000. These two Petitions were consolidated under Docket Number 00-05. Petitioner filed a third Petition for Review on August 17, 2000, which was assigned Docket Number 00-08.

44. Petitioner alleged in her three petitions that she was the victim of retaliation/reprisal for engaging in the following protected activities:

- a. Petitioner submitted an affidavit to the GAO Civil Rights Office on behalf of a co-worker (Maria Vargas) who had filed a charge of discrimination.

- b. Petitioner alleged to her Issue Area Director (Backhus) that her immediate supervisor (Guthrie) had engaged in “mismanagement, abuse of authority, and possible violation of travel regulations.”
- c. Petitioner alleged to the Director of Operations of her Division (Cekala) that Mr. Backhus had improperly directed certain employees to transfer out of the Denver Health Care Core Group.
- d. Petitioner filed charges with the General Counsel of the Personnel Appeals Board.

Petitioner additionally alleged that the retaliation/reprisals took the following forms:

- a. Petitioner was denied a transfer to NSIAD.
- b. Petitioner was threatened with discipline for insubordination.
- c. Petitioner was verbally reprimanded.
- d. Petitioner’s immediate supervisor (Sheila Drake) was compelled to lower Petitioner’s 1999 performance appraisal for reasons unrelated to her performance.

45. The Petitions alleged that the above actions constituted prohibited personnel practices under 5 U.S.C. §§2302(b)(8) and (9). In addition, the third Petition alleged that the reduction in Petitioner’s 1999 performance appraisal violated 5 U.S.C. §§2302(b)(10) and (12).

## CONCLUSIONS OF LAW

Although the foregoing facts are largely uncontested, this does not mean that the record is free of disagreements between the parties (or between witnesses) over material facts. Quite the contrary is true. It is clear that there are several key events and actions as to which the parties have vastly differing recollections and interpretations. Credibility determinations must be made in order to resolve these conflicts in testimony. These credibility determinations are explained below in the context of the relevant legal claims asserted by Petitioner.

### A. 5 U.S.C. §2302(b)(8) - Whistleblowing Claim<sup>6</sup>

Petitioner alleged that she suffered reprisals by Management because she had made whistleblowing disclosures, as defined in 5 U.S.C. §2302(b)(8). This provision of the Whistleblower Protection Act (WPA) states in part:

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

\* \* \*

- (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

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<sup>6</sup> Section 2302(b) is incorporated by reference into the General Accounting Office Personnel Act, 31 U.S.C. §§731, 732(b)(2), and is thereby applicable to GAO employees.

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

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

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs....

Under Section 2302(b)(8), Petitioner has the initial burden of proving: (1) that she made a disclosure of information that she reasonably believed was protected under the WPA (*i.e.*, information evidencing either a violation of a law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health or safety) and (2) that the disclosure was a contributing factor in Management’s decision to take or fail to take a personnel action. *Willis v. GAO*, PAB No. 98-02 (1999), *aff’d*, 250 F.3d 757 (Fed. Cir. 2000) (Table); *Powers v. Department of the Navy*, 69 MSPR 150 (1995); *Carolyn v. Department of the Interior*, 63 MSPR 684 (1994), *review dismissed*, 43 F.3d 1485 (Fed. Cir. 1994) (Table). *See also Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

In satisfying this burden, Petitioner is not obligated to prove the truth of her “whistleblowing” claims. She is not required to prove a violation of law or abuse of authority, for example. She is only required to prove that she had a reasonable belief that the disclosed information evidenced such misconduct:

The test for whether a putative whistleblower has a reasonable belief in the disclosure is an objective one. The . . . [employee] need not prove that the condition reported established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A)(i) or (ii), but must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one that a reasonable person in the employee’s position would believe to evidence one of the situations specified at 5 U.S.C. § 2302(b)(8).

*Ward v. Department of the Army*, 67 MSPR 482, 485-86 (1995). *Accord, Sekanick v. GAO*, 1 PAB 170, 174 (1984).

The Federal Circuit also embraced this objective standard in a case involving alleged gross mismanagement:

the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct.

*Lachance v. White*, 174 F.3d at 1381. *Accord, Willis v. GAO*.

The foregoing test must be applied to each of the communications that Petitioner alleges constituted a protected disclosure. However, even if whistleblowing was a contributing factor in a personnel action, the Agency may still avoid liability under the WPA if it demonstrates by clear and convincing evidence that it would have taken the same action vis a vis the whistleblower regardless of the protected disclosure. *Willis v. GAO*; *Paul v. Department of Agriculture*, 66 MSPR 643 (1995); *Lewis v. Department of the Army*, 63 MSPR 119 (1994), *aff'd*, 48 F.3d 1238 (Fed. Cir.) (mem.), *cert. denied*, 516 U.S. 834 (1995).

Before deciding whether Petitioner has carried her initial burden under the WPA, it is necessary to define the categories of disclosures protected in clauses (i) and (ii) of Section 2302(b)(8). If Petitioner's statements do not satisfy these definitions, then her disclosures cannot be deemed "protected" under the Act.<sup>7</sup>

#### Violation of Law, Rule, or Regulation

The Federal Circuit recently concluded the following with respect to disclosures that arguably disclose a violation of a law, rule or regulation:

While our precedent makes clear that protection under the WPA requires that an employee identify a "specific law, rule, or regulation that was violated," *Meuwissen*, 234 F.3d at 13, we hold that this requirement does not necessitate the identification of a statutory or regulatory provision by title or number, when the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule, or regulation.

*Langer v. Department of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). In *Langer*, the employee was an attorney who disclosed statistics suggesting that prosecutors were targeting African-Americans disproportionately for grand jury investigations. The Court concluded that this allegation, without any supporting legal citation, constituted a protected disclosure. *Id.*

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<sup>7</sup> Petitioner has not alleged that any of her disclosures evidence a danger to public health or safety. For this reason it is unnecessary to define this clause in Section 2302(b)(8).

However, if an employee only makes generalized allegations of wrongdoing, without reference either to particularized facts or to specific laws/regulations, that employee's disclosure is not entitled to protection under Section 2302(b)(8)(A). *Chianelli v. EPA*, 86 MSPR 651, 657 (2000), *aff'd*, 2001 U.S. App. LEXIS 9428 (Fed. Cir.), *cert. denied*, 122 S.Ct. 570 (2001); *Carolyn v. Department of the Interior*, 63 MSPR at 690 (no violation where employee failed to disclose "what law, rule, or regulation has allegedly been violated, or exactly how any law, rule, or regulation was violated"). A whistleblower must be able to establish as of the time of disclosure that a disinterested observer could interpret the disclosure as evidencing a violation of a law, rule or regulation. Obviously, each disclosure must be viewed in its factual context. However, common sense dictates that greater specificity in an employee's statement will increase the chances that it will be deemed "protected" as a disclosure under Section 2302(b)(8)(A)(i).

Finally, this Section of the WPA is not designed to protect disclosures of trivial, minor or inadvertent wrongdoing. *Langer v. Department of the Treasury*, 265 F.3d at 1267. Revelations of "minor miscues occurring in [the] otherwise conscientious performance of duties" do not trigger WPA protection. *Id.*

### Gross Waste of Funds

A "gross waste of funds" is defined by the MSPB as follows:

Congress intended the term "gross" to be more than merely a debatable expenditure. Thus, we find that gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.

*Nafus v. Department of the Army*, 57 MSPR 386, 393 (1993).<sup>8</sup> See also *Carolyn v. Department of the Interior*, 63 MSPR at 691. I am adopting the MSPB's definition in this matter.

### Gross Mismanagement

When the WPA was enacted, Congress amended the Civil Service Reform Act to change the statutory protection from disclosure of "mismanagement" to the disclosure of "gross mismanagement." The MSPB has interpreted this change to require the following standard:

"[G]ross mismanagement" is more than de minimis wrongdoing 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

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<sup>8</sup> The MSPB subsequently overruled part of the *Nafus* decision in *Frederick v. Department of Justice*, 65 MSPR 517 (1994), *rev'd on other grounds*, 73 F.3d 349, 352-53 (Fed. Cir. 1996). The Board held in *Frederick* that it is improper for an administrative judge to conclude that an "employee's personal motivation rendered his belief [that a disclosure was protected] not genuine." *Id.* at 530-31. However, *Frederick* left intact those parts of *Nafus* that defined the terms "gross mismanagement" and "gross waste of funds." *Berkley v. Department of the Army*, 71 MSPR 341, 350 n.5 (1996).

wrongdoing. There must be an element of blatancy. Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.

*Nafus v. Department of the Army*, 57 MSPR at 395. The PAB has already applied the *Nafus* definition and should, I believe, continue to apply this standard to whistleblowing cases brought to this Board. See *Willis v. GAO*, slip op. at 22. In addition, this Board should adhere to the rule that conclusory allegations of gross mismanagement without specificity do not constitute whistleblowing disclosures. *Schaeffer v. Department of the Navy*, 86 MSPR 606, 616-17 (2000).

### Abuse of Authority

As held in *Willis v. GAO*:

“abuse of authority” means an “arbitrary and 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 preferred other persons.”

Slip op. at 21-22 (quoting *Sirgo v. Department of Justice*, 66 MSPR 261, 267 (1995)). See also *D'Elia v. Department of the Treasury*, 60 MSPR 226, 232-33 (1993). This same definition should apply to the instant case.

#### 1. Did Petitioner Have a Reasonable Belief that She Was Disclosing Protected Information within the Meaning of the WPA?

The Petitions for Review identify four communications that allegedly constituted whistleblowing: (1) Petitioner's affidavit to the Civil Rights Office investigator, (2) Petitioner's statements to Mr. Backhus regarding Mr. Guthrie during their meeting in December 1998, (3) Petitioner's February 1999 statements to Ms. Cekala regarding Mr. Backhus's comments to the Denver Core Group in January 1999, and (4) Petitioner's charges filed with the PAB Office of General Counsel. Each of these communications was made to an employee of the Agency. The fact that disclosure was made internally to GAO officials, rather than to the public or to other governmental entities, does not deprive Petitioner of the right to invoke the protection of the WPA. See, e.g., *Lachance v. White*, 174 F.3d 1378; *Acting Special Counsel v. Customs Service*, 31 MSPR 342 (1986). See also *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996) (“The purpose of the [WPA] is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press”); *Huffman v. OPM*, 263 F.3d 1341, 1351 (Fed. Cir. 2001) (any supervisor other than the wrongdoer “is in a position to ‘correct’ or ‘remedy’ the abuse by bringing the matter to the attention of a higher authority”).

Having found that Petitioner made “disclosures,” I must decide whether she had a reasonable basis for believing that those disclosures were protected within the meaning of the WPA. In each instance I must determine whether Petitioner's communication was merely an expression of

a policy disagreement or a disclosure of information that could reasonably be perceived by a disinterested observer as falling within one of the categories listed in 5 U.S.C. §2302(b)(8)(A)(i) and (ii), as defined above.

a. Affidavit to Civil Rights Office (CRO)

Petitioner stated in her affidavit to the CRO investigator that she had no knowledge regarding Maria Vargas's allegations of discrimination. The only issue that Petitioner addressed in her affidavit involved a dispute between Ms. Vargas and Mr. Solomon regarding medical leave requested by Ms. Vargas. In her affidavit, Petitioner characterized the dispute between Ms. Vargas and Mr. Solomon as involving a "policy issue" as to who has authority to approve extended medical leave for Band II employees working in the Denver office. P.Ex. 9 at 2. Identifying the existence of a policy dispute over leave is not a protected disclosure under the WPA. *Lachance v. White*, 174 F.3d at 1381. By Petitioner's own admission, therefore, the information she gave did not implicate any of the protected disclosures catalogued in Section 2302(b)(8)(A).

b. Disclosures to Mr. Backhus During the Meeting in December 1998

Mr. Backhus's meeting with Denver employees was precipitated by an anonymous letter that raised several complaints against Ron Guthrie's management of the Health Core Group. Because that letter was the impetus for Mr. Backhus's meeting with Petitioner and because Petitioner asserts that her comments to Mr. Backhus in that meeting were protected under the WPA, it is useful to summarize the complaints raised in the letter:

1. Ron Guthrie showed favoritism toward staff who "support[ed]" him.
2. Employees who disagreed with Mr. Guthrie were "labeled as having bad attitudes" or were "black balled."
3. Mr. Guthrie "harassed and chastised" employees for "trivial things" such as not attending training or missing meetings, even when employees had valid excuses.
4. Mr. Guthrie questioned other employees' travel and restricted their travel, but he continued to travel. "He apparently sees his Washington travel as more important than others' travel. He has missed several core group meetings as a result of his travel."
5. Core group meetings were disorganized.
6. Mr. Guthrie did not communicate with employees before criticizing them.
7. Mr. Guthrie interfered in the work of Denver employees, even when he was not supervising that work.
8. Mr. Guthrie's deficiencies created dissension among Core Group members.

P.Ex. 10.

When Mr. Backhus initially met with Denver employees on December 17, he summarized to them the allegations in the anonymous letter and advised them that he would be asking questions about their knowledge of the allegations. Mr. Backhus made notes during the interviews, which

he eventually had transcribed for this hearing. P.Ex. 63. Those notes have been filed under seal, although both Mr. Backhus and Petitioner testified to portions of their contents. Petitioner admitted that the notes are accurate in summarizing the topics she discussed with Mr. Backhus, although she provided some greater detail in testimony at the hearing. Tr. 468, 471-73, 476-78, 485, 487-88.

For the most part, Petitioner's comments to Mr. Backhus involved various issues about which there was employee dissatisfaction. For example, she discussed what she perceived to be shortcomings in Ron Guthrie's management style and indicated her desire to have as little contact as possible with Mr. Guthrie. Petitioner's post-hearing reply brief accurately summarizes the nature of her complaints to Mr. Backhus:

Petitioner testified that she told Mr. Backhus during his investigation of the anonymous letter she had been mistreated by Ron Guthrie and he had repeatedly and publicly chastised her for not attending a training event. Petitioner did not attend the training because of pressing job commitments. Petitioner testified that she told Mr. Backhus people had expressed that there was an intolerance toward disagreement. Tom Laetz left the VA&MHC Health Core Group because he preferred not to work under Ron Guthrie. Ron Guthrie's nickname in the Denver Health Core Group is "Drive-By" because of his habitual behavior in which he would quickly visit people at their office or cubicle, made an accusatory remark, in an aggressive manner, blurt out a question or a criticism in a staccato manner, and then zoom off. The analogy was like a drive-by shooting.

\* \* \* \*

Petitioner also told Mr. Backhus that when the Denver Region was under travel constraints because of a shortage of travel money, Mr. Guthrie indicated to the core group that he was traveling just to move reports around from desk to desk instead of using e-mail, fax, and other alternative ways [sic], and that she felt this was an abuse of travel.

Reply Br. at 8 (citations to transcript omitted).

Most of these comments clearly were nothing more than expressions of disagreement over Mr. Guthrie's management style and managerial decisions. For the most part, they did not allege gross mismanagement, abuse of authority, etc., as defined in *Nafus*, *Willis*, *Chianelli* and *Carolyn*. Disclosures that Mr. Guthrie had an aggressive manner that drove employees away or that he harassed employees for what he perceived to be their mistakes might have suggested poor management skills, but did not constitute protected disclosures as defined under Section 2302(b)(8).

The only disclosure that arguably fell in a protected category was Petitioner's complaint about Mr. Guthrie's unnecessary travel to Washington D.C. However, the lack of specificity in Petitioner's comments to Mr. Backhus deprives them of the status of protected disclosures. In particular, Petitioner did not cite any laws or regulations that were allegedly violated, did not state how many unnecessary trips were taken by Mr. Guthrie and did not estimate the cost of such trips. The absence of details was apparently the product of Petitioner's reticence in making concrete accusations against Mr. Guthrie and her lack of knowledge about his actual work and travel. The following colloquy between Petitioner and her counsel at trial explains that she purposefully withheld or toned down critical comments about Mr. Guthrie:

A: . . . Actually, what I did, I think, is in most of the meetings, because I was very worried about expressing any dissent, but I felt like I had to be candid with Mr. Backhus, I tried to emphasize my happiness with working for Headquarters Assistant Directors, and how fortunate I felt and tried to contrast their behavior with Ron [Guthrie] kind of obliquely, by talking about what great respect I had for Dan Breyer and other Headquarters AD's and how they treated their staff fairly.

Q: Why did you feel you had to be so guarded?

\* \* \* \*

A: Yes, I wanted to express my experience, but at the same time I wanted to try to express in as positive a way as possible, so that he couldn't misunderstand my remarks, so that he wouldn't think badly of me.

Q: Why were you concerned about him thinking badly of you?

A: I had heard about the questions Steve was asking from other core group members who had gone in before me, just generally, and they were focused at Ron, and I knew that Steve had to have had a hand in selecting Ron for that Band-3 position that he got. So I didn't know what degree of support Steve might have for Ron, and that if I said something too critical of Ron, that he might retaliate against me, that he might think I was a bad employee.

I also knew, because I had been told by other Headquarters staff, that Steve tended to side with managers. When there were complaints against manager [sic] by employees, he tended to attribute the problems to the employees. [Tr. 473-74.]

Petitioner made it clear by this testimony that she tempered her disclosures about Mr. Guthrie because of a fear of retaliation and a concern that she not look bad in front of Mr. Backhus. While I credit this testimony by Petitioner, it supports the finding that she did not make protected

disclosures. Even if she withheld making such disclosures because of a fear of retaliation, I cannot ignore the fact that the disclosures were not made. The WPA does not permit an employee to bootstrap herself into the role of a whistleblower by claiming that she had protected information, but declined to disclose that information because of a fear of retaliation. A protected disclosure is still the initial and necessary first obligation of a whistleblower.

In addition to her decision to edit her own comments, Petitioner also made it clear that, with respect to the travel issue, she did not have very much information. Even if she had wanted to be more forthcoming with such information in her meeting with Mr. Backhus, she simply did not have more information to give:

Q: What else did you tell Mr. Backhus in your meeting with him?

A: Oh, about Ron's travel, that given the travel constraints that we faced, that Ron traveled a great deal, and seemed to indicate to us that he was traveling just to move reports around from desk to desk, even though we had all these alternative ways of doing that. They had e-mail, fax, all those other things. It seemed inappropriate.

Q: What were the travel constraints?

A: They were telling us that we had a shortage of money to travel, that we needed to be very careful and make sure all travel was necessary.

\* \* \* \*

Q: If you know, when Mr. Guthrie was traveling to Washington, what business was he conducting?

A: I do not know other than his statement to me and others that he needed to move, physically carry reports around.

\* \* \* \*

Q: What reports was he working on, do you know?

A: The only report that I would have been aware of at the time might have been associated with the Guam [job] Dawn Shorey and Ms. Gardner were on. I wasn't familiar at all with what he was working on. [Tr. 476-79 (emphasis added).]

While citations to specific regulations were not necessary and while Petitioner was not obligated to prove the truth of her "travel abuse" claim, she was obligated under the WPA to prove that she had a reasonable belief that the information she provided to Mr. Backhus evidenced wrongdoing. Given the lack of specificity in Petitioner's statements to Mr. Backhus and given the fact that she did not even know what work Mr. Guthrie was performing, I cannot find that a reasonable person

would have interpreted Petitioner's complaint about Mr. Guthrie's travel as evidencing a violation of law or regulation, gross mismanagement, a gross waste of funds or an abuse of authority. The vague and broad nature of Petitioner's accusations fell far short of that required for a protected disclosure. See *Chianelli v. EPA*, 86 MSPR 651;<sup>9</sup> *Carolyn v. Department of the Interior*, 63 MSPR 684; *Schaeffer v. Department of the Navy*, 86 MSPR 606.

c. Disclosure to Ms. Cekala that Mr. Backhus had Directed Employees to Transfer Out of the Denver Health Care Core Group

When Mr. Backhus returned to Denver in January 1999, he told employees in a public meeting that if any employee was uncomfortable working with Mr. Guthrie, they probably would not be able to work with him either. He encouraged those employees to transfer to other jobs. Petitioner asserts that Mr. Backhus actually directed disgruntled employees to transfer.

There were many aspects of Mr. Backhus's testimony that I found troubling and lacking in credibility, including this one. Nevertheless, even assuming this comment was made in the manner related by Petitioner, she did not articulate a reason why her repetition of this public comment to Ms. Cekala would amount to a protected disclosure. She did not explain how the comments made by Mr. Backhus rose to the level of a violation of any law or regulation, the gross waste of funds, gross mismanagement or an abuse of authority. Nor can I discern the basis on which a reasonable person would reach such a conclusion. Accordingly, I conclude that this disclosure, even if made as described by Petitioner, was not protected under the WPA.

d. Allegations in Petitioner's Charges Filed with the PAB's Office of General Counsel

The charges filed by Petitioner with PAB/OGC were not made part of the record in this case. The only evidence of Petitioner's allegations to PAB/OGC is the General Counsel's notice of right to sue letters and the three Petitions for Review. Those documents indicate that Petitioner's allegations in her charges to PAB/OGC merely foreshadowed the allegations of the Petitions for Review. Those petitions, in turn, contain the same disclosures and allegations discussed previously in this decision. For the reasons previously stated, the allegations in the PAB/OGC charges do not provide an independent basis for a whistleblower claim.

\* \* \* \*

Based on the foregoing, I conclude that none of the disclosures alleged in the Petitions for Review constituted protected disclosures under Section 2302(b)(8). I therefore conclude that

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<sup>9</sup> The MSPB has held that, even if an employee has not made a protected disclosure, she may be entitled to WPA protection if Management perceived the employee to be a whistleblower. See, e.g., *Schaeffer v. Department of the Navy*, 86 MSPR at 617. I do not need to decide whether this rule should be adopted by this Board, since Petitioner never alleged such a claim in her Petitions for Review. Nor do I find sufficient evidence in the record to permit a finding that Mr. Backhus or any other supervisor perceived her to be a whistleblower. While Management viewed Petitioner as a difficult employee (see discussion of 5 U.S.C. §2302(b)(12), *infra*), I cannot find that supervisors retaliated against her because they believed she had made protected disclosures.

Petitioner has failed to carry her initial burden of proving a prohibited personnel practice under Section 2302(b)(8).

**B. 5 U.S.C. §2302(b)(9) - Retaliation Claim**

Section 2302(b)(9) prohibits retaliation against employees for engaging in activities that may not rise to the level of “whistleblowing.” It states that it is a prohibited personnel practice to:

- (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
  - (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
  - (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
  - (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
  - (D) for refusing to obey an order that would require the individual to violate a law.

Unlike Section 2302(b)(8), a claim under Section 2302(b)(9) does not focus on the substance of a particular disclosure. Instead, it protects employees merely because they exercise certain rights, give assistance to others exercising those rights, or cooperate with Special Counsel or an Inspector General. In other words, an employee’s mere participation in certain protected processes is sufficient to support a claim without an inquiry into the substance of the disclosures made. The MSPB has similarly distinguished between subsections (b)(8) and (b)(9):

section 2303(b)(9)(C) covers those employee disclosures to an Inspector General or the Special Counsel which do not meet the precise terms of the actions described in section 2302(b)(8).

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For example, a disclosure of mismanagement or a waste of funds which does not rise to the level of “gross mismanagement” or “gross waste of funds” required by section 2302(b)(8) would be protected under section 2302(b)(9). Additionally, section 2302(b)(9), unlike section 2302(b)(8), does not impose a reasonability standard. Section 2302(b)(9) requires only that the employee’s or applicant’s disclosures to the Special Counsel or Inspector General of an agency be made in accordance with applicable provisions of law in order to be protected.

*Special Counsel v. Hathaway*, 49 MSPR 595, 612 & n.20 (1991), *aff'd*, *Hathaway v. MSPB*, 981 F.2d 1237 (Fed. Cir. 1992).

Once an employee has established participation in a protected activity, he/she must then prove that: the official accused of taking a retaliatory action was aware of the activity; the personnel action under review could, under the circumstances, have been retaliation; and there was a genuine nexus between the protected activity and the personnel action. *McMillan v. Department of the Army*, 84 MSPR 476, 483 (1999); *Malphurs v. GAO*, 2 PAB 147, 150 (1992). With regard to the last factor, a successful claimant under Section 2302(b)(9) must prove that the protected activity was a “significant factor” in the personnel decision about which the employee is complaining. *Special Counsel v. Costello*, 75 MSPR 562, 610 (1997); *Special Counsel v. Nielson*, 71 MSPR 161, 171 (1996); *see Redschlag v. Department of the Army*, 89 MSPR 589, 623-24 (2001), *app. dismissed*, 2002 U.S. App. LEXIS 11765 (Fed. Cir.).

The kinds of activities protected under Section 2302(b)(9) are limited. Petitioner has not alleged a violation of clause (D), so that provision need not be addressed. With regard to clauses (A) through (C), Petitioner’s disclosures to Mr. Backhus and Ms. Cekala clearly do not satisfy these criteria. Her discussion with these two Management officials did not constitute the exercise of an “appeal, complaint or grievance right granted by any law, rule or regulation” and were not in aid of anyone else’s exercise of such right. Nor did either of these officials work for Special Counsel, the Inspector General or the PAB General Counsel. This means that the only activities alleged by Petitioner that arguably fall within the protection of Section 2303(b)(9) were her affidavit on behalf of Ms. Vargas’s Civil Rights Office complaint and her charges filed with the PAB Office of General Counsel.

1. Affidavit to the Civil Rights Office (CRO)

The filing of complaints of discrimination with the Agency’s Civil Rights Office is protected by statute and regulation. 31 U.S.C. §732(b)(2), incorporating by reference 5 U.S.C. §2302(b)(9); 31 U.S.C. §732(f)(2); *see* 42 U.S.C. §2000e-3; GAO Order 2713.2 ch. 1, ¶5.b (Dec. 2, 1997). The affidavit signed by Petitioner shows on its face that it was prepared as part of the investigation into the Vargas discrimination complaint. Although not terribly helpful to Ms. Vargas, the affidavit clearly was given in aid of Ms. Vargas’s lawful participation in the EEO process. As such, it qualified as a protected activity under Section 2302(b)(9).

This conclusion leads to the question whether any of the Management officials who allegedly retaliated against Petitioner were aware of this activity. The only person Petitioner identified as having knowledge of her affidavit on behalf of Ms. Vargas was Mr. Solomon.<sup>10</sup> Petitioner testified that, after she met with the CRO investigator, Mr. Solomon saw her leaving the meeting. She stated that she then asked Mr. Solomon how she should account for her time. Mr. Solomon denied any knowledge of the contents of the affidavit until shortly before trial and stated that he could not recall if he knew that Petitioner had given a statement. Tr. 814-15.

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<sup>10</sup> While one might assume that other Management officials knew of the Petitioner’s affidavit, there is no evidence to this effect in the record. Since knowledge of the protected activity by retaliating officials is an essential element of a claim under Section 2302(b)(9), I am unwilling to assume such knowledge without some evidentiary support.

The issue, as explained above, is not whether Mr. Solomon was aware of the contents of the affidavit, but whether he knew that Petitioner had provided assistance to another employee who was exercising a statutory right. In this conflict between Petitioner and Mr. Solomon, I credit Petitioner.

The evidence clearly establishes that there was considerable turmoil and discontent among Health Care Core Group employees in 1998. As Acting Regional Manager, Mr. Solomon would have known of this problem. He certainly would have known that a complaint of discrimination had been filed by an employee against Denver Management. Indeed, he admitted knowing that a CRO investigator was visiting the Regional Office to interview employees at the time that Petitioner gave her statement:

Q: Were you aware that Ms. Davis submitted an affidavit in April of 1998?

A: I know the examiner came to the office. I know the examiner spoke to several people. At that time I don't recall if—I don't recall if at that time I knew she spoke to Ms. Davis or not. [Tr. 815.]

Mr. Solomon further testified at trial that he did not remember having a conversation about Petitioner's affidavit with anyone. *Id.* This may all be true, but it does not answer the critical question under subsection (b)(9). His inability to recall Petitioner's meeting with the CRO investigator is not the same as denying knowledge of such a meeting during the relevant time period. Mr. Solomon may have forgotten about this incident three years after the fact.

Petitioner, on the other hand, had a clear and credible recollection of her discussion with Mr. Solomon immediately after the interview. Given the level of discontent among employees, including Petitioner, it is plausible that she would remember running into Mr. Solomon immediately after giving an affidavit describing a dispute between Ms. Vargas and Mr. Solomon. It is the sort of fortuitous event that is likely to have made Petitioner nervous and thereby heightened her memory of the incident. Moreover, I found Petitioner to have generally been a straightforward witness. I found Mr. Solomon's lack of recollection to have been insufficient to discredit Petitioner's testimony on this issue. I find that, as of April 1998, Mr. Solomon knew that Petitioner had met with the CRO investigator in aid of an EEO investigation involving the Denver Regional Office.

The last question, then, is whether there is sufficient proof that Mr. Solomon had retaliated against Petitioner because of her protected activity. The personnel actions in which Mr. Solomon arguably participated were the denial of Petitioner's requested transfer to NSIAD/IRT, his threats of discipline against Petitioner, and the lowering of her performance rating for 1999.<sup>11</sup>

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<sup>11</sup> Because Petitioner has only identified James Solomon as having knowledge of the CRO affidavit, there is no need to discuss alleged retaliatory actions committed by other individuals. Section 2302(b)(9) requires proof that the retaliating official knew of the protected activity. Petitioner has not offered proof that anyone in Management other than Mr. Solomon knew of her participation in the EEO process. Even

I do not find sufficient evidence to establish that there was a nexus between Petitioner's CRO affidavit and any of these actions.

Initially, I note that the affidavit was given in April 1998. The alleged retaliation occurred no earlier than January 1999. The passage of so much time is itself evidence that Management was not practicing retaliation. *See, e.g., Mesrick v. General Electric Co.*, 950 F.2d 816, 826-28 (1<sup>st</sup> Cir. 1991), *cert. denied*, 504 U.S. 985 (1992); *Filipovic v. K&R Express Systems, Inc.*, 176 F.3d 390, 398-99 (7<sup>th</sup> Cir. 1999). Additional evidence that neither Mr. Solomon nor anyone else practiced retaliation is found in the fact that Petitioner received a performance appraisal for 1998 that had outstanding ratings in five categories and exceeds fully successful in one category (the same rating as in 1997). Petitioner was also named EIC on the "reasonable charges" job in October 1998. These actions by Management strongly argue against retaliation.

With respect to Petitioner's efforts to transfer to NSIAD/IRT, the most that the evidence shows is that Patricia Hinnen, a Denver evaluator doing NSIAD/IRT work, was interested in having Petitioner come to work for her. In addition, Ms. Cekala, Mr. Backhus and Mr. Solomon indicated to Petitioner during a February 18, 1999 conference that they would consider a transfer after completion of the VA enrollment job.

Significantly, however, Ms. Hinnen sent Petitioner an e-mail on March 23, 1999 stating that a transfer "[d]oesn't look too promising." R.Ex. 9. There was no follow-up from Ms. Hinnen or anyone else in NSIAD/IRT altering this assessment. When Petitioner e-mailed Ms. Bascetta on March 29, 1999 that she was "awaiting reassignment to NSIAD/IRT" (P.Ex. 25), she was engaging in, at best, wishful thinking. There is no document or credible testimony in this record indicating that an agreement to transfer had actually been consummated. There is no evidence to corroborate Petitioner's statement to Ms. Bascetta in an e-mail dated April 1, 1999 that she was to "begin work for NSIAD/IRT as of today" (R.Ex. 11). Similarly incomprehensible was Petitioner's assertion that she had a "contract" to transfer. Not a shred of evidence in this record—other than Petitioner's own conclusory statements—supports this misperception of the facts.

Even if I were to interpret Petitioner's claim as alleging a denial of a transfer (as opposed to a revocation), I could not find that she failed to obtain a transfer because of her CRO affidavit. Petitioner's own witness, Thomas Laetz, testified that, although he transferred into NSIAD/IRT in June 1998, GAO never created an IRT core group in Denver, thereby supporting Mr. Solomon's repeated assertions that there was no such core group into which Petitioner could transfer. Tr. 647-49, 659-61. Mr. Laetz further testified that all NSIAD/IRT work in Denver was phased out in the summer of 1999 and that he eventually found other work. Tr. 657-62. Again, this testimony was consistent with the repeated statements by Management witnesses that Petitioner's transfer into NSIAD/IRT was not feasible, either on a permanent or an ad hoc basis.

I therefore find that Petitioner's failure to receive a transfer into NSIAD/IRT was motivated solely by operational needs. There is no evidence that Mr. Solomon or officials in NSIAD/IRT

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if she had offered such proof, the delay in the alleged retaliation and the intervening performance appraisals, discussed *infra*, would undermine Petitioner's claim.

were motivated by Petitioner's affidavit to CRO. These officials were merely recognizing the reality of the staffing and organizational needs that existed in the Denver office at the time.

Petitioner identified three separate memoranda from Mr. Solomon in which he threatened disciplinary action. On April 6, 1999, Mr. Solomon directed Petitioner to come to his office and advised her that a failure to comply would be deemed insubordination and subject to discipline. P.Ex. 47. This memorandum was written after Mr. Solomon had verbally requested a meeting with Petitioner, and Petitioner, in response, had written a note requesting that their communications be in writing. Mr. Solomon's memorandum stated that he was complying with this request in that instance, but that he would not establish a practice of communicating with Petitioner only in writing.

In a second memorandum on that same date, Mr. Solomon advised Petitioner "we cannot honor your request to be staffed on an IRT assignment." Instead, Petitioner was directed to begin work immediately on a "sleepwear flammability" assignment. This directive came after Petitioner had informed Mr. Solomon that she could not undertake further work for the Health Care Core Group because of her expected assignment to NSIAD/IRT.<sup>12</sup> Mr. Solomon closed his memorandum by stating that he would consider Petitioner insubordinate and subject to discipline if she did not begin work on the new assignment. P.Ex. 48.

The third memorandum by Mr. Solomon was written on April 13, 1999. It gives a lengthy recitation of his understanding of events during the preceding several months. At one point in the memorandum, he implies that Petitioner could be downgraded in the teamwork/working relationships/equal opportunity category in her annual performance appraisal if she continued to express an unwillingness to work with Mr. Guthrie. P.Ex. 51.

The issue posed by Petitioner is whether her protected activity caused Mr. Solomon to threaten discipline. I cannot find sufficient evidence to support this proposition. I have no doubt that Petitioner found herself in an uncomfortable position at work. She was involuntarily required to work on the VA enrollment job, under the overall supervision of Mr. Guthrie. At the same time, she was removed as EIC on the reasonable charges job.<sup>13</sup> While these changes in her job were undoubtedly stressful, the proper response, if she believed them to be unlawful, was to file charges with the PAB/OGC. Instead of limiting herself to this appropriate response, Petitioner reacted to these events by showing greater and greater hostility towards her supervisors and towards Ms. Gardner.

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<sup>12</sup> In a later memorandum, Petitioner contested Mr. Solomon's suggestion that she had refused to perform work. I credit Mr. Solomon in this respect, however. In her April 1, 1999 e-mail to Ms. Bascetta, Petitioner stated that because of her desire to transfer, "I do not feel comfortable doing additional work for HEHS/VA&MHC until I verify the status of my re-assignment." R.Ex. 11. While this statement does not constitute outright insubordination, it does support Mr. Solomon's characterization of her attitude towards new assignments from the Health Care Core Group.

<sup>13</sup> Petitioner did not allege in her Petitions for Review that her removal from the EIC position on the reasonable charges job was a prohibited personnel practice. Accordingly, I do not reach the question whether that action by Management constituted retaliatory action. In any event, there is no proof that Mr. Solomon was responsible for this change in duties within the Health Care Core Group.

Petitioner's persistent claims that she had a contractual agreement to transfer to NSIAD/IRT have no evidentiary support. No reasonable person could have come to such a conclusion. Yet, Petitioner acted upon this belief to tell Ms. Bascetta, Mr. Solomon and Ms. Gardner that she did not wish to undertake further work for the Health Care Core Group. By repeating this preference not to perform core group work, Petitioner was in danger of becoming GAO's version of Bartleby the Scrivener.<sup>14</sup> Her insistence that Mr. Solomon only communicate with her in writing further served to mark her as someone who was, at least temporarily, uncooperative in the workplace.

I find that Petitioner's reaction to Management's directives in 1999 was unjustified and provocative. Her actions in early 1999—and not Petitioner's participation in the EEO process—motivated Mr. Solomon to issue his memoranda. I do not find probative evidence to support a claim that he threatened discipline against Petitioner because of her CRO affidavit in April 1998. Instead, I find that Mr. Solomon's threats of discipline (none of which were acted upon) were motivated solely by Petitioner's own documented resistance to performing further Core Group work and her generally uncooperative attitude.

Lastly, Petitioner complained about her lowered performance appraisal for 1999. However, the evidence of Mr. Solomon's involvement in the lowering of the appraisal is not persuasive. Sheila Drake testified that she consulted Messrs. Solomon and Guthrie prior to her initial rating. Tr. 265-67. At that time, Mr. Solomon made negative comments about Petitioner intimidating co-workers, giving the example that she would take notes in meetings when she disagreed with the speakers. Tr. 267-68. However, these comments were reflected in Ms. Drake's initial proposed rating that was submitted to Mr. Backhus. This proposed rating was higher than what ultimately appeared in the performance appraisal; Petitioner does not contend that this proposed rating was unfair. Instead, she is complaining about the lowered ratings that Ms. Drake was forced to give Petitioner after Mr. Backhus's intercession. As discussed in paragraphs 41-42 of the findings, it is clear that Stephen Backhus was the official involved in the lowering of Petitioner's rating. Tr. 247-48, 256-59. There is no evidence that Mr. Solomon's personal input caused the "fully successful" rankings about which Petitioner complains. More importantly, there is no evidence that Mr. Solomon's purported negative input was motivated by Petitioner's CRO affidavit 17 months earlier. I do not find a plausible nexus between the CRO affidavit and Mr. Solomon's negative statements regarding Petitioner during the rating process.

## 2. Charges Filed with PAB/OGC

Employees of the Agency who wish to challenge an alleged prohibited personnel practice must first file a charge with the PAB Office of General Counsel. 4 C.F.R. §28.18(a). Once the charge is filed, the PAB/OGC acts, in several respects, in a capacity analogous to the Special Counsel identified in 5 U.S.C. §2302(b)(9)(C). I therefore conclude that Petitioner's filing of charges with the PAB/OGC was a protected activity within the meaning of Section 2302(b)(9)(A) and (C).

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<sup>14</sup> Melville, Herman, Bartleby, the Scrivener (1853).

Petitioner's charges were filed with PAB/OGC on April 12, August 19 and November 19, 1999. Some of the alleged retaliatory actions (*e.g.*, the lowered performance appraisal) occurred after Petitioner first filed charges and thus arguably constituted retaliation for the filing of these charges. In order to succeed in a claim under Section 2302(b)(9), Petitioner has the burden of proving that the alleged retaliating officials knew of the protected activity and that they retaliated in response to that activity.

As previously explained, none of the PAB/OGC charges were put into evidence by Petitioner. My knowledge of the substance of those charges and the Management personnel allegedly identified as responsible officials can only be gleaned from the Right to Appeal letters issued by PAB/OGC, which are part of the pleadings file in this case.

a. April 12, 1999 PAB/OGC Charge

The Right to Appeal letter relating to the April 12, 1999 PAB/OGC charge did not identify the responsible officials by name. It merely stated that Petitioner had alleged that "management" of the Denver Field Office and HEHS in Washington "took actions against [Petitioner] that constituted prohibited personnel practices. Specifically, you claim that management denied your request for reassignment (transfer) out of the HEHS core group and threatened [you] with disciplinary action because you told management about problems in the HEHS core group." The allegedly retaliatory actions raised by Petitioner that took place after this charge was filed were the April 13, 1999 memorandum from Mr. Solomon, the comments made by Mr. Hembra at the June 1999 meeting, and Petitioner's rating for the 1999 performance cycle. The question to be answered is whether any of these three actions constituted retaliation for the filing of the April 12 PAB/OGC charge.

As to the April 13 letter, there is absolutely no evidence that Mr. Solomon would have learned of the April 12 PAB/OGC charge so quickly. Therefore, resolution of this retaliation claim hinges on the remaining two events that took place after that date.

Mr. Hembra testified that his comments during the June 1999 meeting with the Core Group and separately with Petitioner were not intended to threaten anyone and merely reflected his view that the filing of employee grievances would not deter him from taking what he considered to be appropriate Management action. I credit Mr. Hembra. His statements were not threatening, but rather, conveyed the view that litigation could take place while the group went about performing its work and that action would be taken if appropriate when individual conduct or performance was not up to standards. In other words, he did not care if individuals chose to exercise their right to pursue charges. He further testified credibly that it was during the individual session with Petitioner—after the group meeting—that he first learned of her April 12 charge. Accordingly, I conclude that he did not make threatening remarks to Petitioner during the June 1999 visit, and that his remarks could not have been retaliation for that charge.

There remains the question whether Petitioner's 1999 performance appraisal was lowered because of the filing of the April 12 charge. Ultimately, resolution of this issue depends on whether the officials responsible for the appraisal were aware of the charge at the time they took the allegedly retaliatory action. The only officials identified by Petitioner as being responsible

for her 1999 performance appraisal (either directly or indirectly) were Ms. Drake, Mr. Solomon, Mr. Guthrie, Ms. Gardner and Mr. Backhus. Tr. 247-48, 266-71, 574-75; R.Ex. 17. There is no evidence in this record when, if ever, each of these officials became aware of the April 1999 PAB/OGC charge. As noted above, I could assume such knowledge and I could assume that it was timely received (*i.e.*, prior to the appraisal), but doing so would unfairly absolve Petitioner of the obligation to prove her *prima facie* case.

In particular, the evidence makes it very clear that the lowered rating was largely the product of Mr. Backhus's insistence that Ms. Drake lower the rating in two categories. Tr. 266-71. There is no evidence in the record of when Mr. Backhus learned that the April 12 charge had been filed. Mr. Backhus did testify as to his awareness in June 1999, in the course of the meeting with Mr. Hembra and the Denver Core Group, that "some people in the group . . . were litigating against other people in the group." Tr. 1251. This statement is not sufficient to establish that Mr. Backhus was aware of Petitioner's charge filing at that time. Indeed, I take judicial notice that other individuals in Denver had charges pending in June 1999.<sup>15</sup>

While Mr. Backhus's roles in the December 1998 investigation of the anonymous letter and the February 1999 discussion concerning Petitioner's assignment suggest that he likely would have been contacted by counsel after the charge was filed, this connection in logic rather than in evidence is not sufficient to meet Petitioner's burden of showing knowledge on the part of the acting official. This is especially true in the circumstance presented here, with Mr. Backhus himself approving a cash "spot award" for Petitioner on July 13, 1999—three months after the charge was filed. P.Ex. 5. In fact, he gave his approval within one week of Ms. Drake's proposing the award. *See id.* Absent some proof that Mr. Backhus knew about Petitioner's April 12, 1999 PAB/OGC charge prior to his involvement in the 1999 appraisal process, this record does not permit a conclusion that the filing of this charge led to a violation of Section 2302(b)(9).<sup>16</sup>

b. August 19, 1999 PAB/OGC Charge

The August 19, 1999 charge, according to the Right to Appeal letter, "allege[d] that Richard L. Hembra, former Assistant Comptroller General for . . . (HEHS), threatened to take disciplinary and other personnel actions against you if you continued to pursue your protected activities." The issue under Section 2302(b)(9) is whether Mr. Hembra or any other relevant Management official knew of the August 19 charge and whether such official(s) took any retaliatory action after learning of this charge. Petitioner failed to meet either of these burdens of proof.

As Assistant Comptroller General, Mr. Hembra visited the Denver Core Group in June 1999 and met individually with the Core Group members, including Petitioner. Mr. Hembra testified credibly and without contradiction that he first learned that Petitioner had filed a charge during

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<sup>15</sup> *See, e.g.*, PAB Docket Nos. 00-01, 00-04.

<sup>16</sup> *Cf. Redschlag v. Department of the Army*, 89 MSPR 589 (2001), *app. dismissed*, 2002 U.S. App. Lexis 11765 (Fed. Cir.) (officials had been questioned about when they became aware of protected activities); *Richard v. Department of Defense*, 66 MSPR 146, *app. dismissed*, 68 MSPR 161 (1995) (Table) (extrinsic evidence contradicted deciding official's denial of knowledge that EEO activity had occurred).

this June 1999 meeting with Petitioner. Tr. 915-16. Moreover, Mr. Hembra testified that he left his position with HEHS only a few weeks after the June 1999 meeting and assumed new duties as Managing Director of GAO's Office of Quality and Risk Management on August 1, 1999. *Id.* at 903-04, 924. He was not individually named in a charge until after that date—on August 19, 1999. While one might assume that he was informed of the charge subsequent to being named, this would have occurred after he had departed his duties at HEHS. *Id.* at 972-73. His best recollection placed his notification of the charge at “some point after I had assumed the new position within GAO.” Tr. 972. There was no other evidence in the record relative to this assertion.

Prior to June 1999, Petitioner's transfer to NSIAD/IRT had been definitively rejected, Mr. Solomon had written his allegedly threatening memoranda and Ms. Gardner had issued her counseling memorandum. Similarly, the allegedly threatening remarks made during Mr. Hembra's June 1999 visit pre-date the August charge. Thus, even if these actions had been retaliatory, they could not have been taken in response to the August 19, 1999 charge lodged against Mr. Hembra.

The only allegedly retaliatory action that occurred after the June 1999 meeting was the lowering of Petitioner's performance appraisal for 1999. However, by the time the appraisal was prepared, Mr. Hembra was long gone from HEHS. Moreover, Petitioner has not alleged that Mr. Hembra participated in the performance appraisal process. Accordingly, I conclude that he did not cause Petitioner's performance appraisal to be lowered for retaliatory reasons.

It is possible that other Management officials learned of the August 19, 1999 charge in time to take retaliatory action (*i.e.*, to use it as the basis for lowering Petitioner's performance appraisal), but Petitioner has not offered proof that anyone beyond Mr. Hembra (*e.g.*, Mr. Solomon, Mr. Backhus, Ms. Bascetta) actually knew of this charge or when they might have learned of it.

Although individuals other than Mr. Hembra are alleged to have taken action against Petitioner, I cannot find that such action was retaliatory without having evidence that they knew of the protected activity. Specifically, the individual acting behind the scenes on Petitioner's performance appraisal was Stephen Backhus. As in the case of the April 12, 1999 charge, there is no evidence that Mr. Backhus knew of the August 19 charge against Mr. Hembra prior to the preparation of Petitioner's 1999 performance appraisal. Since Mr. Hembra was individually named in the August charge, there is even less reason to assume that Mr. Backhus would have had knowledge of the August activity (as compared to the April charge) in time to retaliate in the performance appraisal process. Moreover, in light of Mr. Backhus's approval of the July 1999 “spot award” for Petitioner after the June 1999 meeting and well after the April charge that likely involved him, I cannot find that he retaliated against Petitioner for filing the August 19, 1999 PAB/OGC charge. I therefore conclude that Petitioner has not met her burden of proof under Section 2302(b)(9) with respect to the August 1999 charge.

c. November 19, 1999 PAB/OGC Charge

This PAB/OGC charge was filed after all of the allegedly retaliatory actions had already occurred. This charge could not therefore give rise to a claim of retaliation under Section

2302(b)(9).

**C. 5 U.S.C. §2302(b)(10)**

Petitioner alleged in the third of her Petitions that her performance appraisal for 1999 violated 5 U.S.C. §2302(b)(10). That provision makes it a prohibited personnel practice for the Agency to:

discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States.

This provision “is designed to prohibit personnel practices that are taken in response to an employee’s off-duty conduct or interests that are unrelated to job performance.” *Thompson v. Farm Credit Administration*, 51 MSPR 569, 585 (1991) (citing *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cir. 1988)). *See also Harvey v. MSPB*, 802 F.2d 537, 551 (D.C. Cir. 1986) (“[S]ection 2302(b)(10) speaks only to an employee’s conduct totally unrelated to his job performance, such as a conviction for crime or sexual propensity”).

As previously explained, Messrs. Backhus, Solomon, and Guthrie and Ms. Gardner were the persons involved in the rating process who caused Petitioner to be downgraded in her 1999 rating. However, the sole basis for their input was their understanding of Petitioner’s actions on the job. Whether that understanding was right or wrong, fair or unfair, there can be no denying that their assessment of Petitioner was prompted by on-the-job conduct by Petitioner. For this reason, Section 2302(b)(10) does not apply to this case.<sup>17</sup>

**D. 5 U.S.C. §2302(b)(12)**

Section 2302(b)(12) of Title 5 makes it a prohibited personnel practice for an Agency to:

take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

In the instant case, Petitioner alleged that the Agency managers “are in continuing violation of 5 U.S.C. 2302(b)(11) [sic] by coercing and/or participating in the coercion of Petitioner’s

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<sup>17</sup> To the extent that Petitioner’s affidavit in the *Vargas* EEO case could arguably give rise to a violation of 5 U.S.C. §2302(b)(10), I find, for the reasons previously stated, that the EEO affidavit had no bearing whatsoever on Petitioner’s 1999 performance appraisal.

supervisor, Sheila Drake, to lower Petitioner’s performance appraisal to reflect alleged behaviors not included in published GAO performance standards; and GAO policy requiring performance appraisals to be based on predominant performance.”<sup>18</sup> Order 2430.1 (1992) established the Agency’s performance appraisal program and incorporated by reference the separate performance appraisal system for Band I, II, and III employees and its governing manual. R.Ex. 20 at ¶¶3, 4.a(1). The manual applicable to this case is the October 1997 Performance Appraisal System for Band I, II and III Employees (R.Ex. 22). The 1992 Personnel Supplement to Order 2430.1 details guidance and procedures to implement the Order (R.Ex. 21).<sup>19</sup>

Under the chapter “Additional Guidelines,” the Supplement states that “every supervisor should . . . base appraisals on predominant performance.” R.Ex. 22 ¶3-1-c. The concept of predominant performance inheres in the appraisal system, which is designed “to provide a systematic and uniform method to evaluate the job performance of GAO evaluators . . . on the basis of job-related criteria.” R.Ex. 22 at 2. This is evidenced in the published standards for performance appraisals, which involve selecting the appropriate category for rating a Band II evaluator based upon whether the individual “almost always,” “frequently,” or “usually” performs in the manner described for each critical element. *See* R.Ex. 22 at 19-36. *See also* Tr. 281. Moreover, Agency managers, as well as Petitioner, provided clear testimony that “predominant performance” is the governing standard for GAO evaluator performance. Tr. 263-64, 302-03, 588, 1266. Under this standard, evaluators are rated on the basis of how “they perform most of the time during the year.” Tr. 264. *See Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. Cir. 1977). *See also Hamlet v. U.S.*, 63 F.3d 1097, 1104 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996).

Petitioner alleged that Mr. Backhus’s pressure on Ms. Drake to lower her ratings in two categories violated the Agency’s own performance appraisal rules. I agree. Order 2430.1, which incorporates the principle of predominant performance, constitutes an Agency “rule or regulation” implementing “merit system principles.”<sup>20</sup> I find that Petitioner’s 1999 rating violated that Order and that the Agency thereby violated 5 U.S.C. §2302(b)(12).

Under the separate Performance Appraisal System for Band I, II and III Employees established by Order 2430.1, a performance appraisal is to be prepared “by the person who is in the best position to assess the ratee’s performance. Usually this is the ratee’s immediate supervisor—the

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<sup>18</sup> Petition No. 00-08 at 2.

<sup>19</sup> Future references to Order 2430.1 in this decision, unless specified otherwise, refer to the Order, its Personnel Supplement and the implementing manual “Performance Appraisal System for Band I, II and III Employees.”

<sup>20</sup> 5 U.S.C. §2301(b)(6), for example, defines the following merit system principle: “Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.” The Agency’s Order 2430.1 implements this principle by creating and defining the Performance Appraisal System. Moreover, GAO’s merit pay system is statutorily required to be consistent with the principles of merit pay based on performance appraisals, as required in the executive branch through October 31, 1993. 31 U.S.C. §731(b); *see* 5 U.S.C. §5401 (repealed as of November 1, 1993).

same person who sets expectations and assigns and reviews work.” R.Ex. 22 at 10. When an employee has had more than one supervisor in a rating period, the “rating preparation should be a collaborative process with each supervisor providing input on the employee’s performance.” *Id.* at 11.

The role of a reviewer is much more limited than that of a rater:

The reviewing official is responsible for

- ensuring that the rater understands the performance system, knows how to properly prepare performance appraisals, is knowledgeable about applicable performance standards, and maintains reasonable consistency in applying standards and
- checking each appraisal to ensure that it complies with instructions and standards.

If the reviewer believes that the rater has not properly applied the performance standards or that the narrative is not consistent with the rating, the reviewer may return the appraisal to the rater for additional justification or a change in the rating. If the rater and reviewer disagree on a rating and the reviewer has knowledge of the ratee’s performance or believes the rater has not properly applied the standards, the reviewer may assume responsibility for the rating on the dimension(s) in question. The reviewer will (1) obtain approval from the next higher responsible official (if the reviewer is not the unit head) and document the reasons and approval; (2) change the rating for the dimension(s) in question; and (3) if necessary, provide the appropriate narrative support for the revised rating.

P.Ex. 22 at 12-13.

For the period between April 26, 1993 and September 30, 1998, Petitioner received 6 performance appraisals. In every one of those appraisals, she received an outstanding rating in the category of teamwork/working relationships. During that time, she never received a rating below "exceeds fully successful" in any category. P.Ex. 2.

In 1999, Petitioner worked a total of 181.9 staff days. Less than 5 percent of that time was spent on the enrollment job. Almost two-thirds of her time was spent on the reasonable charges job, under Sheila Drake's supervision. P.Ex. 37. Ms. Drake therefore was properly designated as Petitioner's rater, with Mr. Solomon as the reviewer. Although Mr. Backhus apparently "reviewed" all of Ms. Drake's ratings, he had no formal function as either rater or reviewer vis a vis Petitioner. Tr. 286.

In carrying out her duties as rater, Ms. Drake engaged in the required collaborative effort by consulting with Mr. Solomon, Mr. Guthrie and Ms. Gardner, all of whom had worked directly with Petitioner. Tr. 265-71. Ms. Drake was also given a copy of and considered Ms. Gardner's counseling memorandum to Petitioner prior to preparing her rating. Tr. 270-01. Although Ms. Drake's personal observations led her to conclude that Petitioner worked well with other team members, she lowered Petitioner's rating in the teamwork category after consulting with the Denver supervisors. Tr. 244-45, 268-71. Whereas Petitioner was previously rated outstanding in the teamwork category, Ms. Drake now rated her at exceeds fully successful. Tr. 268-71.

Ms. Drake testified that the rating she sent to Mr. Backhus was based on the principle of "predominant performance" (Tr. 263-64, 285), as required by Order 2430.1. That appraisal rated Petitioner outstanding in four categories and exceeds fully successful in three categories. Tr. 254. Ms. Drake testified—and I credit this testimony—that Mr. Backhus returned the appraisal at least twice to her for downward revisions. Tr. 247, 257-59. Ultimately, Mr. Backhus instructed Ms. Drake to lower Petitioner's ratings in both the teamwork and written communication categories. *Id.* Ms. Drake did not agree with Mr. Backhus, but made the changes. Tr. 256-59. The final appraisal given to Petitioner rated her as fully successful in both the teamwork and written communication categories. Tr. 271-72, 257-59.

Mr. Backhus testified that he reviewed Petitioner's 1999 rating because he "was in the chain of command for that assignment" and "had knowledge of her performance during the rating period." Tr. 1255. He also testified that he returned Ms. Drake's initial rating because in the areas of written communication and working relationships he "didn't see the support in the rating to justify the checkmarks that she was giving" and because she needed to consult with other supervisors who had worked with Petitioner (*e.g.*, Solomon). Tr. 1256-57. Mr. Backhus recalled that Ms. Drake then revised the rating and returned it to him; he further recalled that Ms. Drake expressed satisfaction with the revised rating. Tr. 1259-60. Mr. Backhus denied taking any action to cause Petitioner's 1999 appraisal to be lowered: "I don't tell anybody ever to lower ratings." Tr. 1262-63.

Clearly, Sheila Drake and Stephen Backhus have different recollections regarding their communications over Petitioner's performance appraisals. In this conflict, I credit Ms. Drake. Her testimony was succinct, straightforward and believable. Indeed, it took some courage for her to testify in support of a subordinate in a dispute with Ms. Drake's own supervisor. Considering the risk she ran of angering a more senior Agency official, I can discern no reason why she would have prevaricated in favor of Petitioner. Mr. Backhus, on the other hand, was not a credible witness with respect to several topics, including the subject of Petitioner's performance appraisal. His answers were frequently discursive, and he often did not provide direct answers to fairly simple questions. Many of his answers were defensive in tone and anything but straightforward.<sup>21</sup>

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<sup>21</sup> For example, Mr. Backhus insisted that the problem in Denver was caused by a lack of communication among team members, when it was quite clear that many members of the Health Care team perceived Ron Guthrie's management as the source of the difficulties. *See* Tr. 67-71, 79-81, 83, 88-91, 93-95, 97-99. In his testimony, Mr. Backhus did not address many of the specific criticisms of Mr. Guthrie. He also characterized several employee interviews as not confirming any allegations in the anonymous letter,

In reaching this credibility determination, I am not relying solely on Mr. Backhus's "style" in answering questions. In fact, his defense of his own actions, going back to January 1999, was often implausible or contradicted other witnesses. For example, Mr. Backhus testified that the reason that Petitioner could not transfer from the issue area was that "we needed to have some kind of a replacement because we were just overwhelmed with work." Tr. 134. Yet—without any explanation—he admitted that Petitioner was assigned a job outside the Core Group in April 1999. Tr. 135. Further, there is nothing in the record to indicate that VA&MHC was inundated with new work between Mr. Backhus's statement in January that individuals should seek transfer if they could not work with Mr. Guthrie and the period some two months later when a staff shortage allegedly precluded such transfers.

Mr. Backhus also suggested that his assignment of Petitioner in January 1999 to work under Mr. Guthrie was intended to actually benefit her. Tr. 115-17. That contention defies common sense. When Mr. Backhus interviewed Petitioner in January 1999, she told him that she had serious problems with Ron Guthrie's management of the Health Care Core Group. After soliciting precisely this kind of honest feedback in the one-on-one meetings with Denver employees, Mr. Backhus then turned around and took two actions that had an adverse effect on Petitioner: removal of Petitioner as EIC on the reasonable charges job and her assignment to work under Mr. Guthrie's supervision on the enrollment job.

Mr. Backhus stated that he assigned Petitioner to work with Mr. Guthrie because she had not previously worked with him directly and that the enrollment job would be a good opportunity to do so. He stated that he viewed this as a "vote of confidence in her." Tr. 1230-31. Apart from Mr. Backhus's questionable judgment in forcing Petitioner to work directly for a man she had just accused of poor management, there is no amount of sugar-coating that can lessen the negative implications of Petitioner's removal as EIC on the reasonable charges job. Assignment as an EIC on a job is coveted. An EIC sets expectations for other employees on a job, has day-to-day responsibility for planning and completing a job, and is involved in rating other employees on a job. As a consequence, EIC status creates advantages for employees seeking a promotion. Tr. 230, 508, 1030, 1057-58.

The negative implications of Petitioner's loss of her EIC position and assignment to the enrollment job were exacerbated by the fact that Lisa Gardner (the EIC on the enrollment job)

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despite his own notes indicating otherwise. *See, e.g.*, Tr. 61, 67, 69-71, 79-80, 83, 88-90, 93-95, 99-103; P.Ex. 63.

Moreover, Mr. Backhus's efforts to explain Petitioner's "advisor" role on the reasonable charges job exemplify his equivocation on the witness stand. He stated that Petitioner was asked "to take on a significant role. We call it, for paperwork purposes, we gave her the title of advisor, but that's a matter of how you crank in people's roles and titles on the job for recordkeeping purposes. In substance it was a very substantive role, very substantive, very challenging. . . ." Tr. 117-18. As the testimony progressed, he explained that the advisory role "provides flexibility." "It permits that expectations can be set and specific work can be assigned, all the way to performing on an ad hoc basis. So there's a range. It provides that an individual can have a structured flexible kind of an arrangement on a job." Tr. 122-23 (emphasis added). I found his efforts to defend Petitioner's removal as EIC and the supposed benefits of her advisor role to be bureaucratic doubletalk.

never gave Petitioner written expectations for her work on the job. Although written expectations are not mandatory, Ms. Gardner gave the two employees listed as “members” on that job written expectations. Petitioner certainly performed “member” duties, having traveled to Washington with Ms. Gardner to conduct interviews; these tasks went well beyond giving economic advice. If, as appears, Petitioner was a *de facto* member with a different title, she was the only member of the job left with verbal directions.<sup>22</sup> See P.Ex. 38 at 2. In addition, a rater is required to complete a Form 209 (“Expectation Setting Record”):

GAO Form 209 ... has been developed to help guide and document the formal expectation setting process. A signed copy of GAO Form 209 for each ratee must be completed and filed in the geographical unit. The employee's signature indicates that expectations have been communicated.

R.Ex. 22 at 6 (emphasis added). Ms. Gardner admitted that she did not complete a Form 209 for Petitioner. Tr. 1117-18. As a result, there was no written record of the instructions given to Petitioner at the outset of her work on the enrollment job. Mr. Backhus apparently paid no attention to these details of Petitioner's assignment, although he admitted that he was the official responsible for her assignment to that job.

Mr. Backhus endeavored to portray Petitioner's removal as EIC on the reasonable charges job and assignment to work with Mr. Guthrie on the enrollment job as benign, if not advantageous. He was completely unpersuasive in this effort. The foregoing factors lend credence to Petitioner's claim that Mr. Backhus's actions were not intended to help Petitioner and were instead retaliation against her for criticizing the operation of the Denver Health Care Core Group. While Mr. Backhus's actions did not rise to the level of a prohibited personnel practice under Sections 2303(b)(8) or 2302(b)(9), they nevertheless are probative evidence that his later involvement in Petitioner's performance appraisal was tainted by considerations that were irrelevant to Order 2430.1 and that were antithetical to an objective performance appraisal system.

Petitioner's reaction to her reassignment was swift—she requested a transfer. Although Mr. Backhus stated in his January 1999 meeting that he would aid any dissatisfied employee who sought a different job (Tr. 108), Management of VA&MHC unanimously opposed Petitioner's request. At this point, Petitioner's own judgment became questionable. Although Mr. Backhus's decision to assign Petitioner to Mr. Guthrie and Ms. Gardner was provocative, Petitioner's response was unjustified. She increasingly insisted that she be allowed to transfer to a job that did not exist and, as her frustration increased, she became uncooperative with Mr. Solomon and Ms. Gardner. For this reason, I find that Petitioner's own actions in March/April 1999 warranted a downgrading of her rating in the category of teamwork from outstanding to exceeds fully successful.

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<sup>22</sup> Ms. Gardner stated she did not give Petitioner written expectations because she did not want to appear “authoritarian.” Tr. 1106-08. That explanation is not credible given her willingness to give written expectations to other employees. Tr. 1106-08, 1119-20. Besides, it was her job as an EIC to do so.

The problem for Mr. Backhus is that Ms. Drake credibly testified that she had already lowered Petitioner's teamwork rating based on the information provided by Mr. Solomon, Mr. Guthrie and Ms. Gardner. Mr. Backhus's statement that he did not direct a further lowering of the rating and that Ms. Drake voluntarily and willingly lowered Petitioner's rating cannot be credited. I specifically find that Petitioner's fully successful ratings in the teamwork and written communication categories were the direct result of Mr. Backhus's instructions to Ms. Drake.

Having caused Petitioner's rating to be lowered, Mr. Backhus failed to adequately explain why he was involved so directly in the changes to Petitioner's performance appraisal. The performance appraisal manual states that a reviewer who disagrees with a rater's ratings may directly change those ratings. However, James Solomon, not Stephen Backhus, was the reviewer for Petitioner's performance appraisal in 1999. It appears that Mr. Backhus usurped Mr. Solomon's role as reviewer. Even assuming that Mr. Backhus properly played the role of a *de facto* reviewer, he did not follow the procedures required by Order 2430.1:

If the rater and reviewer disagree on a rating and the reviewer has knowledge of the ratee's performance or believes the rater has not properly applied the standards, the reviewer may assume responsibility for the rating on the dimension(s) in question. The reviewer will (1) obtain approval from the next higher responsible official (if the reviewer is not the unit head) and document the reasons and approval; (2) change the rating for the dimension(s) in question; and (3) if necessary, provide the appropriate narrative support for the revised rating.  
[R.Ex. 22 at 13.]

These protections afforded to a ratee were not followed in this case, since Mr. Backhus declined to assume responsibility for the two lowered ratings. Mr. Backhus provided no explanation for his deviation from these procedures. Instead, he endeavored to shift the blame to Ms. Drake for the changes in the rating, an effort that I have already found not to be credible. One can only surmise that Mr. Backhus declined to assume direct responsibility for lowering Petitioner's rating because he did not want to be identified as the official making this change.

Mr. Backhus also suggested that his discussions with Ms. Drake were appropriate because he had knowledge of Petitioner's performance during the rating period. In fact, the record before me leads to the finding that Mr. Backhus had virtually no personal knowledge of Petitioner's performance on the three main jobs to which she was assigned during the 1999 appraisal period. His direct involvement with Petitioner during this period was largely limited to her participation in the December 1998 and January 1999 meetings regarding Mr. Guthrie and her request to transfer to NSIAD/IRT. He did not testify to any direct knowledge of Petitioner's actual work on the enrollment, reasonable charges or sleepwear flammability jobs; it appears from this record that his knowledge of her work on those jobs was derived from other employees.

Mr. Backhus's lack of knowledge was most noticeable with respect to the written communication rating. In the 1997 and 1998 performance appraisals, Petitioner received outstanding and exceeds fully successful ratings, respectively. P.Ex. 2. In 1999, Ms. Drake had

initially rated Petitioner at one of the two higher ratings. Mr. Backhus directed Ms. Drake to lower that rating to fully successful. During his testimony, he explained that "I thought that we had made extensive revisions to that report" and that Petitioner had written a segment of that report. Tr. 1265-66 (emphasis added). Yet, neither Mr. Backhus nor anyone else who worked on that job testified to the quality of Petitioner's written work product. None of her written work product was put into evidence. There is no evidence in this record that any of her work on that report had to be re-written. It is not even clear that Mr. Backhus knew which segments of the report were authored by Petitioner. As a result, there is no evidence to support Mr. Backhus's directive that Petitioner's written communication rating be lowered from Ms. Drake's original assessment.

Finally, Mr. Backhus claimed that his discussions with Ms. Drake were only intended to ensure that there was a proper narrative to match the ratings being given in the teamwork and written communication categories. That explanation also is not credible. If Mr. Backhus had truly been concerned with the format or completeness of Petitioner's 1999 appraisal, he should also have noted that the appraisal form did not contain a description of the expectations given to Petitioner for the enrollment job. *See* Tr. 1274-75. The instruction manual for performance appraisals states that "Part I(B) [of the rating form] should summarize the expectations for the ratee's role and responsibilities and major work products, including evaluation plans, questionnaires, reports, report chapters, or testimonies." R.Ex. 22 at 14. Part I(B), the Summary of Ratee Expectations, on Petitioner's 1999 appraisal form states with respect to the enrollment job that "[Petitioner] is expected to assist the EIC in developing a job approach to satisfy the job objectives." In contrast to this vague entry, the same section of the form lists five detailed expectations for the reasonable charges job. P.Ex. 4 at 1.

Considering Ms. Gardner's testimony and the e-mails in evidence, it is clear that the 1999 appraisal form does not accurately describe the expectations given to Petitioner at the outset of the enrollment job. Because Ms. Gardner never prepared a Form 209, which should have memorialized the expectations, it is impossible to know precisely what instructions Petitioner had been given. Nevertheless, the evidence is sufficient to conclude that the 1999 appraisal form did not comply with the performance appraisal manual and that Mr. Backhus expressed no concerns about this particularly deficiency. His ostensible desire for a complete and accurate appraisal form for Petitioner was selectively enforced.

Mr. Backhus's purported concern about the lack of narrative in Ms. Drake's initial proposed rating is also not borne out by the final ratings that he approved. In the written narrative section of the final appraisal, there is no description of Petitioner's work (either positive or negative) on the teamwork and written communication components of the enrollment job. When this was pointed out to Mr. Backhus during his testimony, he stated that a fully successful rating does not require a narrative. However, Ms. Drake included a fairly detailed (and favorable) narrative of Petitioner's work on the reasonable charges job, including narratives relating specifically to teamwork and written communication. While these favorable narrative comments were included with respect to the reasonable charges job, there is no explanation for the complete silence with respect to Petitioner's work in the same categories on the enrollment job. This appraisal is incomplete in this respect, since it fails to describe the negative aspects of Petitioner's work, at least as perceived by Mr. Backhus.

In sum, Order 2430.1 and its implementing manual and guidance prescribes a procedure to be followed when a reviewer disagrees with a rater regarding a particular rating. That Order is central to the merit principles governing employees at the Agency and therefore is covered by Section 2302(b)(12). When Mr. Backhus directed Ms. Drake to lower Petitioner's rating in two categories, he violated that procedure and thereby violated Section 2302(b)(12). This violation is magnified by the fact that his decision to lower the rating was motivated, in my view of the evidence, by a desire to take action against Petitioner for her prior criticisms of Management. Even if those criticisms did not rise to the level of whistleblowing, Mr. Backhus distorted and ultimately violated the merit system principles designed to ensure that annual appraisals are based upon employees' performance and not upon the personal—and in this case hostile—motives of a particular supervisor.

#### **E. Remedy**

Petitioner has prevailed on only one of her claims—violation of Section 2302(b)(12). This conclusion requires a determination of an appropriate remedy for such a violation. Section 1214 of Title 5 (Section 8 of the WPA amendments of 1994), governs employee remedies when the Office of Special Counsel successfully proves a prohibited personnel practice:

- (g) If the [Merit Systems Protection] Board orders corrective action under this section, such corrective action may include—
  - (1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and
  - (2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

In the Executive Branch of the federal government, employees are entitled to prosecute individual claims of whistleblowing, but are not entitled to individually prosecute other claims of prohibited personnel practices. *Compare* 5 U.S.C. §1214 with 5 U.S.C. §1221. At GAO, however, employees are entitled to prosecute individual cases of alleged prohibited personnel practices after filing charges with the PAB Office of General Counsel. 4 C.F.R. §§28.18(a), 28.12(d). *See generally* *Sekanick v. GAO*, 1 PAB 170 (1984). In the event that an individual GAO employee successfully prosecutes a claim of prohibited personnel practice under Section 2302, as has occurred here, that employee is entitled to the relief provided under Section 1214.<sup>23</sup> *See, e.g.,* *Marshall v. GAO*, 2 PAB 270, 333-34 (1993); *Murphy v. GAO*, 2 PAB 132, 140 (1992); *Rojas v. GAO*, PAB Docket No. 96-03, slip op. at 45 (1998).

Under Section 1214, Petitioner is entitled to be made whole; that is, she should be put in the position she would have been in if the prohibited personnel practice had not occurred. In the instant case, such a remedy requires the Agency to restore Petitioner's 1999 performance appraisal to the rating proposed by Ms. Drake prior to Mr. Backhus's directive that she lower the

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<sup>23</sup> 5 U.S.C. §1214(g) authorizes corrective action where a prohibited personnel practice has occurred; *see also* 5 U.S.C. §§1214(b)(4) and 1206 (predecessor statutes).

appraisal. *Cf. Turner v. GAO*, PAB Docket No. 94-07, slip op. at 29 (1995). All official personnel records should be corrected to reflect the revised performance appraisal.

In addition, since Agency employees are given pay and awards based on merit, Petitioner may also be entitled to have her earnings adjusted for 1999 and thereafter, based on the revised performance appraisal. 5 U.S.C. §1214(g)(2). If such adjustment is necessary, then Petitioner is also entitled to interest on the additional earnings. 5 U.S.C. §5596 (Back Pay Act). Section 5596 provides that an employee is entitled to interest whenever there is a finding of an “unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee. . . .” The Agency’s violation of Petitioner’s rights under Section 2302(b)(12) falls in this category, thereby entitling her to an award of interest on her back pay.

Finally, a prevailing employee may be entitled to the remaining remedies identified in Section 1214(g)(2): reimbursement of attorney’s fees, medical costs, travel expenses and “reasonable and foreseeable consequential damages.” Attorney’s fees are to be requested pursuant to the procedures and timetable provided for in 4 C.F.R. §28.89; such a request at this juncture would be premature.<sup>24</sup> As to the remaining types of relief, Petitioner has not alleged and has not presented any evidence of medical costs or travel expenses. The only evidence of consequential damages that Petitioner presented related to non-pecuniary injuries (*e.g.*, emotional distress) that she allegedly suffered as a result of the Agency’s actions.

In *Bohac v. Department of Agriculture*, 239 F.3d 1334 (Fed. Cir. 2001), the Federal Circuit Court of Appeals recently addressed the parallel provision of the WPA relating to remedies for whistleblowing violations. That provision (5 U.S.C. §1221(g)) is virtually identical to 5 U.S.C. §1214(g). The Court held that consequential damages in that statute is not equivalent to compensatory damages and that “section 1221, like section 1214, was designed to allow only for reimbursement of out-of-pocket costs.” *Id.* at 1342. In its ultimate conclusion, the Court stated that “‘consequential damages’ in section 1221(g) is limited to reimbursement of out-of-pocket costs and does not include non-pecuniary damages.” *Id.* at 1343. Because Congress intended the same scope of recovery under both Sections 1214(g) and 1221(g), it follows that Petitioner’s recovery here must be limited to pecuniary damages.

Petitioner’s underlying Petition for Review in Docket No. 00-08 did not request any form of consequential damages and did not specify what forms of pecuniary or non-pecuniary injuries she had allegedly suffered. One could argue that this failure to articulate the exact relief she was seeking fatally undermined any request at the hearing for monetary relief beyond back pay. It is unnecessary to reach that conclusion, however, in light of the fact that the only evidence presented by Petitioner at the hearing in support of damages described non-pecuniary injuries. Since the Court in *Bohac* has already concluded that non-pecuniary damages are not within the purview of the WPA, Petitioner’s request for such relief is denied.

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<sup>24</sup> The record in this matter raises at least a question whether full reimbursement would be appropriate for the one successful claim (5 U.S.C. §2302(b)(12)) in Docket No. 00-08. The record of the hearing as well as the case file reflect that Petitioner repeatedly relitigated issues already resolved, protracted the discovery process, and caused substantial delays in the actual conduct of the hearing. These issues, however, will have to be addressed at a later time.

Finally, Petitioner argued at the hearing that she is entitled to receive compensatory damages for the retaliation against her. She offered an exhibit on the fifth day of the hearing (Petitioner's proposed Exhibit 62A) purporting to justify a request for \$300,000 in compensatory damages. Her counsel also endeavored to elicit testimony from Petitioner on the subject of compensatory damages. Petitioner argued that her request for this relief was analogous to the compensatory damages permitted under the Civil Rights Act of 1991. 42 U.S.C. §1981a. The Agency objected to the admission of that document, contending, *inter alia*, that Petitioner had refused to engage in discovery relating to damages and that it would be prejudiced by this new evidence. I reserved judgment on whether the document should be admitted into evidence and whether additional testimony on damages should be permitted until after I had decided the merits of the case. Tr. 748-60.

Petitioner never alleged in her three Petitions for Review that she had been a victim of discrimination covered by the 1991 Civil Rights Act or by any other civil rights act. Section 1981a of Title 42 therefore has no direct applicability to this case. *Willis v. GAO*, PAB Docket No. 95-03, slip op. at 10 (1996). Moreover, the decision in *Bohac* explicitly holds that the right to consequential damages under Section 1221(g) is not synonymous with the right to compensatory damages under the 1991 Civil Rights Act; the same conclusion must apply to Section 1214(g). Therefore, even if Petitioner had prevailed in her reprisal/retaliation claims under Sections 2302(b)(8) and 2302(b)(9), she would not be entitled to compensatory damages. Of course, she did not prevail in these claims, for the reasons explained above; accordingly, even under her theory of relief, she would not be entitled to compensatory damages. For all of these reasons, this dispute over damages is moot; additional evidence relating to damages is unnecessary.

**SO ORDERED.**