

# **The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing**

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The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system<sup>2</sup> by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing, and provide an independent, secure channel for disclosure and resolution of wrongdoing in federal agencies.<sup>3</sup> OSC investigates allegations of reprisal and is authorized to seek corrective action to make a whistleblower whole and to initiate disciplinary action against civilian government officials who commit prohibited personnel practices.

## I. Establishment of OSC

In the wake of the Watergate scandal, as well as well-publicized allegations of retaliation by federal government agencies against employees who had blown the whistle on wasteful defense spending and revelations of partisan political coercion in the federal government, Congress enacted sweeping reform of the civil service system in a bill known as the Civil Service Reform Act (CSRA).<sup>4</sup> The primary purpose of the CSRA—providing review of agencies’ adverse employment actions—was to ensure that “[e]mployees are . . . protected against arbitrary action, personal favoritism, and from partisan political coercion.” S. Rep. No. 95-969, at 19 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2741. To achieve those goals, Congress identified merit system principles and prohibited personnel practices designed to ensure, among other things, protection of whistleblowers, open competition for selections and promotions, pay comparability, efficient use of the work force, and fair treatment of government employees.<sup>5</sup>

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<sup>2</sup> The “merit system” in federal employment refers to laws and regulations designed to ensure that personnel decisions, including hiring and discipline, are taken based on merit.

<sup>3</sup> OSC also enforces the Hatch Act provisions on permissible and impermissible political activity by government employees and protects the employment and reemployment rights of military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act.

<sup>4</sup> Civil Service Reform Act of 1978 (CSRA), October 13, 1978, Pub. L. No. 95-454, 92; *See also* Fong, Bruce D., Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980’s, 40 *Am.U.L. Rev.* 1015, 1017-1018 (1991). Stat. 1111-1116.

<sup>5</sup> The nine merit system principles are set forth at 5 U.S.C. § 2301(b):

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
- (3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
- (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
- (5) The Federal work force should be used efficiently and effectively.
- (6) 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.
- (7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
- (8) Employees should be—
  - (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

The Senate Report accompanying the CSRA reveals that Congress was especially concerned with protecting whistleblowers from retaliation:

In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

S. Rep. No. 95-969, at 8 (1978). To achieve the goals of the CSRA, including whistleblower protection, Congress established the OSC and tasked it with investigating and prosecuting allegations of prohibited personnel practices, obtaining corrective actions for employees subjected to prohibited personnel practices, initiating disciplinary action against civilian government officials who commit prohibited personnel practices, and enforcing the Hatch Act.<sup>6</sup> In 1989, Congress enacted the Whistleblower Protection Act (WPA),<sup>7</sup> which made OSC an independent agency within the executive branch and clarified that OSC's primary role is to protect employees, especially whistleblowers, from prohibited personnel practices.

## II. OSC's Independence and Powers

The OSC is an independent agency in the Executive Branch and the Special Counsel, the head of the OSC, is appointed by the President, with advice and consent from the Senate.<sup>8</sup> Unlike most agency heads, the Special Counsel does not serve at the pleasure of the President. By statute, the Special Counsel serves a 5-year term and "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b).

The Special Counsel has broad powers, including the authority to compel witness testimony under oath; obtain documents; bring petitions for corrective action; file a complaint or

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(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

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

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

The thirteen prohibited personnel practices are set forth at 5 U.S.C. § 2302(b).

<sup>6</sup> The CSRA also established the Merit Systems Protection Board, an independent, quasi-judicial agency that serves as the guardian of Federal merit systems. The MSPB's mission is to protect Federal merit systems and the rights of individuals within those systems. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. This paper refers to the Merit System Protection Board as the Board or the MSPB.

<sup>7</sup> See Pub. L. No. 101-12, Sec. 2 (1989).

<sup>8</sup> As originally established under the CSRA, the OSC was part of the MSPB. The Whistleblower Protection Act of 1989 established OSC as an independent agency. See Pub. L. No. 101-12, 103 Stat. 32 (1989).

make recommendations for disciplinary action; receive, review, and, where appropriate, forward to the Attorney General or an agency head disclosures of violations of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; take depositions, and receive evidence. Significantly, the Special Counsel is also authorized to seek a stay of a personnel action pending an OSC investigation where the OSC has reasonable grounds to believe that the action is the result of a prohibited personnel practice.<sup>9</sup>

### **III. Investigating and Resolving Complaints of Whistleblower Retaliation**

The WPA prohibits using a personnel action to retaliate against a federal employee because of the individual's disclosure of a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>10</sup>

OSC's Complaints Examining Unit (CEU) screens about 3,000 PPP complaints per year, more than half of which allege whistleblower reprisal. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers qualifying matters for Alternative Dispute Resolution (ADR) or to the Investigation and Prosecution Division (IPD) for further investigation, possible settlement, or prosecution.

Once a PPP case is referred to the ADR Unit, an OSC ADR specialist will contact the affected employee and agency. If both parties agree, OSC conducts a mediation session, led by OSC trained mediators who have experience in federal personnel law.

If ADR is unable to resolve a matter, it is referred to IPD, which is responsible for conducting investigations of prohibited personnel practices. IPD attorneys determine whether the evidence is sufficient to establish that a violation has occurred. If not, the matter is closed. IPD's investigation of a reprisal complaint includes obtaining and reviewing pertinent records and interviewing witnesses under oath. Where OSC determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred and the matter has not been resolved, OSC sends a report to the agency head setting forth OSC's findings and the key evidence supporting those findings, and recommending corrective action.<sup>11</sup> In most cases in which OSC issues a prohibited personnel practice report, the agency voluntarily agrees to implement the OSC's recommendations. If an agency declines to take corrective action, OSC can file a petition for corrective action at the MSPB, and the parties then take discovery and try the case on the merits before an MSPB Administrative Law Judge. The MSPB can order corrective action for the complainant as well as impose disciplinary action against responsible agency personnel.<sup>12</sup>

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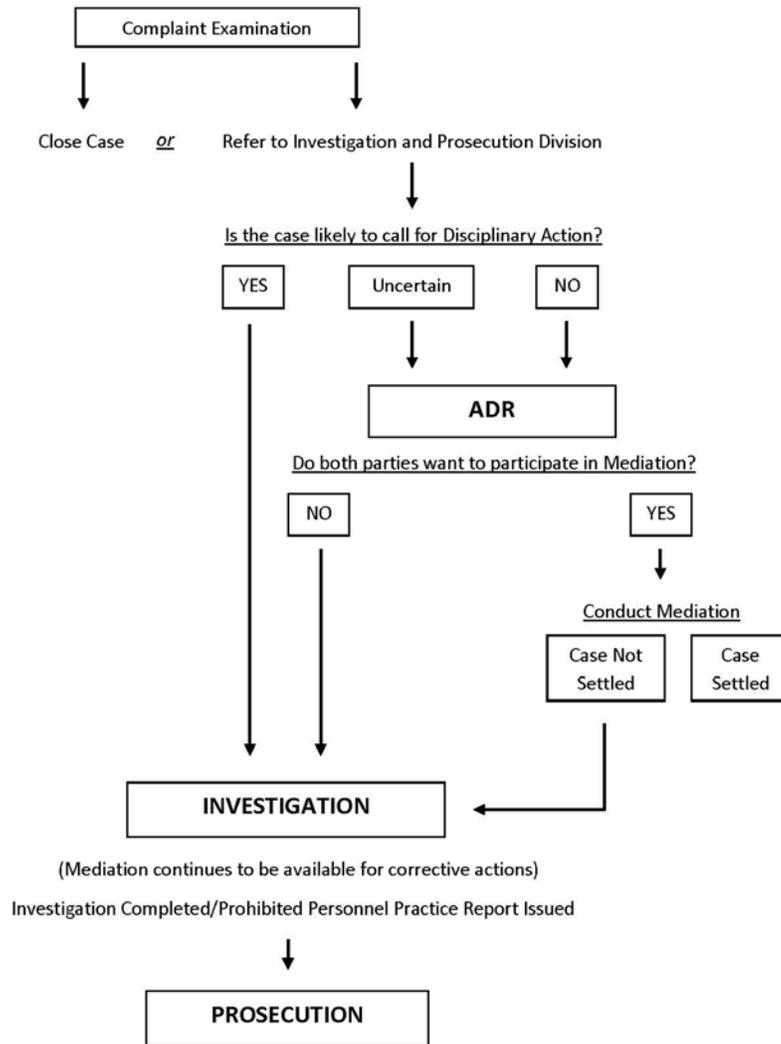
<sup>9</sup> See 5 U.S.C. § 1214(b)(1)(A)(i).

<sup>10</sup> See 5 U.S.C. § 2302(b)(8). Most employees in the civil service can bring a whistleblower reprisal complaint at OSC, but employees of agencies that conduct foreign intelligence or counterintelligence, including the Central Intelligence Agency, are excluded from coverage. See 5 U.S.C. § 2302(a)(2)(C).

<sup>11</sup> See 5 U.S.C. § 1214(b)(2)(B).

<sup>12</sup> See 5 U.S.C. § 1214(b)(2)(D).

The following schematic illustrates the typical route for a PPP complaint:



#### IV. Obtaining Corrective Action for Whistleblowers

In the WPA, Congress clarified that that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish the goal of protecting employees from prohibited personnel practices, “the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.”<sup>13</sup> Corrective action for a PPP violation consists of “make whole” remedies, including reinstatement, back pay (lost wages), medical costs, compensatory damages, any other reasonable and foreseeable consequential charges, and attorneys’ fees and costs.<sup>14</sup>

<sup>13</sup> See Pub. L. No. 101-12, Sec. 2 (1989).

<sup>14</sup> Prior to the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA), the Board was not authorized to award compensatory damages for PPP violations. In *King v. Dep’t of Air Force*, the Board determined the compensatory damages provision in the WPEA does not apply retroactively. 2013 M.S.P.B. 32, ¶9 (August 14, 2013).

In addition, Section 104(c) of the WPEA clarifies that the remedy for a whistleblower subjected to a retaliatory investigation can include “fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for” protected whistleblowing. The WPEA does not define what constitutes a retaliatory investigation, leaving in place the MSPB’s decision in *Russell v. Dep’t of Justice*, 76 M.S.P.R. 317, 323-25 (1997), holding that “[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing.” 76 M.S.P.R. at 324. Retaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or extraordinary reviews of time and attendance records.

The following are recent examples of OSC investigations of whistleblower claims that resulted in corrective action:

Wasteful use of funds. A supervisory auditor employed a private attorney to assist in blowing the whistle on his agency’s gross waste of funds under a million dollar service contract. In the course of his privileged communications with his attorney, the auditor disclosed confidential information concerning an important government audit. Thereafter, the employee made his disclosure to the Inspector General prompting the agency to investigate the employee for having disclosed confidential information to his private attorney. When the investigation confirmed the employee’s conduct, the agency proposed the employee’s removal, later mitigating the removal to a suspension. OSC investigated the complaint to determine whether the agency’s disciplinary action was in retaliation for protected whistleblowing. In a case of first impression, OSC issued a PPP report sustaining the complaint and finding that the agency’s retaliation violated the First Amendment and the WPA. In response, the agency agreed to provide full corrective action to the employee including attorneys’ fees reimbursement, and the employee withdrew his OSC complaint in a settlement.

Inaccurate payment. A supervisor encouraged her subordinate to report a decision that granted payments to a claimant that they believed would result in the erroneous payment of hundreds of thousands of dollars, if not corrected. In retaliation for their disclosure, the manager received a reprimand, was stripped of her supervisory title, and was reassigned to a different duty station. The subordinate whistleblower received a 14-day suspension. OSC obtained full corrective action for the manager. OSC also negotiated a full offer of relief for the subordinate, but the subordinate declined in order to pursue his administrative claims independently.

Repeated violations of air passenger safety. A supervisory employee made several disclosures regarding employee misconduct and violation of workplace rules governing a highly sensitive mission that protects air passenger safety. In retaliation for his disclosures, the employee was fired. In a settlement, OSC obtained full corrective action for the employee, including reinstatement, back pay, and attorneys’ fees.

Fraudulent and wasteful contracting. An employee suffered retaliation in a series of adverse actions after he alleged waste, fraud, and abuse in a government contract valued at a very high amount. He was removed as contracting officer, lost his supervisory duties, received notice of a proposed suspension, suffered a reduction in pay, had his overseas tour shortened, lost overseas leave privileges, and failed to be selected for positions for which he applied. OSC’s

investigation substantiated many of the complainant's allegations, and the agency granted full corrective action and agreed to reassign the employee to a different position in the agency.

Improper program qualifications. An employee disclosed that a private sector customer of the agency with close ties to the agency's local manager provided inaccurate financial information to qualify for the agency's program. In retaliation for her disclosure, the employee reported that her working conditions became intolerable; she suffered harassment, a significant change in working conditions, a reprimand, a lowered performance appraisal, denial of a cash award, and denial of overtime. In a settlement, the agency agreed to reassign the employee to a different office, rescind her letter of reprimand, and pay her attorneys' fees. In return, the complainant withdrew her OSC complaint.

Accounting errors. An employee suffered a series of harassing retaliatory actions because he revealed accounting discrepancies to his managers and to the Inspector General. The actions included changing his work schedule, placing him in an incorrect grade after being converted from the National Security Personnel System, charging him with AWOL, lowering his performance appraisal, reassigning him to a new duty location, and cancelling a promotion. The OSC investigation substantiated the employee's complaint and the agency agreed to retroactively promote him and reassign him geographically with relocation benefits to a position outside of his management chain.

Potential fire hazard. A long-time seasonal employee reported the improper installation of a stove in a remote location as a potential fire hazard. Shortly after her report, the agency terminated the employee's appointment and declined to rehire her in successive seasons for a position she had held for over 10 years. OSC's investigation verified the employee's whistleblowing disclosure and retaliation complaint. In a settlement, the agency agreed to provide the employee with back pay for four seasons of missed work and the employee withdrew her OSC complaint.

## **V. Pursuing Disciplinary Action**

In addition to obtaining corrective action for a whistleblower, OSC is authorized to seek disciplinary action against an employee who has retaliated against a whistleblower.<sup>15</sup> Disciplinary action includes "removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000."<sup>16</sup> Disciplinary action is important to deter retaliation and can send a strong signal to managers or agency officials at every level that they can be held accountable for retaliating against a whistleblower.

Prior to the enactment of the Whistleblower Protection Enhancement Act (WPEA), OSC was hampered in its ability to pursue disciplinary actions because of the Federal Circuit's *Santella*<sup>17</sup> decision requiring OSC to meet an onerous "but for" causation standard in disciplinary action cases. *Santella* further dissuaded OSC from bringing disciplinary action cases at the

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<sup>15</sup> OSC lacks jurisdiction to seek discipline for military officials, i.e. members of the uniformed services, since they are not "employees" as defined by 5 U.S.C. § 2105, i.e., "appointed in the civil service." However, under the Whistleblower Protection Act, OSC may transmit recommendations for disciplinary or other appropriate action (including the evidence on which the recommendations are based) to the head of the agency concerned. 5 U.S.C. § 1215(c)(1).

<sup>16</sup> See 5 U.S.C. § 1215(a)(3).

<sup>17</sup> *Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994).

MSPB by requiring OSC to pay the attorneys' fees of a manager in a disciplinary action case in which OSC does not prevail. Section 106 of the WPEA overturns *Santella*<sup>18</sup> by clarifying that OSC can prevail in disciplinary action case by demonstrating to the MSPB that the whistleblower's protected disclosure was a "significant motivating factor" in an agency's decision to take the adverse action, even if other factors also motivated the decision. Section 107(a) also provides that the employing agency, not OSC, will be liable for attorneys' fees in disciplinary action cases.

Evidence showing a pattern or "convincing mosaic" of retaliation can be used to prove the significant factor element in a retaliation case. Such mosaic includes pieces of evidence that "[w]hen taken as a whole, provide strong support if all [pieces] point in the same direction...." *Crumph v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-230 (2010) (quoting *Sylvester v. SOS Children's Vill. Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 13 (2008) (quoting *FitzGerald v. Dep't of Homeland Sec.*, 107 M.S.P.R. 666, 675-76 (2008)).

The following are recent examples of OSC obtaining disciplinary action as a result of findings in an investigation of a whistleblower claim:

Mishandling of veterans' remains. Three OSC whistleblowers at the U.S. Port Mortuary alleged that a series of adverse personnel actions were taken against them in retaliation for having disclosed to OSC and to the Air Force's Inspector General numerous incidents of misconduct, mishandling, and regulatory violations in the mortuary's care of the remains of fallen service members. In an extensive PPP report, OSC concluded that Air Force officials retaliated against the whistleblowers because of their disclosures through various harmful actions that included a proposed removal, placement on extended administrative leave, suspensions, significant changes in duties and working conditions, and lowered performance appraisals. The Air Force responded positively to OSC's report by providing full corrective action to the whistleblowers and disciplining the responsible officials. In addition, the Air Force instituted OSC's recommended reforms to improve mortuary operations and train its employees on whistleblower protection.

Improper solicitation of personal benefits. The Merit System Protection Board referred this case for disciplinary action to OSC. The MSPB concluded that an official had retaliated against an employee for disclosing to the agency's ethics officer that the official had wanted the employee to solicit a personal benefit from an agency contractor. The Board found that the official solicited the employee's resignation under threat of a misconduct investigation in retaliation for the whistleblowing. OSC resolved the matter through a settlement wherein the official agreed to accept a suspension with certain probationary conditions.

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<sup>18</sup> *Santella v. Special Counsel*, 86 M.S.P.R. 48, ¶ 10 (2000), *aff'd on recons.*, 90 M.S.P.R. 172 (2001), *aff'd*, 328 F.3d 1374 (Fed. Cir. 2003).

## **VI. Serving as a Secure Channel to Disclose Wrongdoing**

In addition to protecting whistleblowers from retaliation, OSC serves as a secure channel for most federal workers to disclose information about violations of laws, gross mismanagement or waste of funds, abuse of authority, and specific dangers to the public health and safety. OSC does not, however, have jurisdiction over employees of the U.S. Postal Service and Postal Regulatory Commission, members of the Armed Forces, state employees operating under federal grants, employees of federal contractors, Legislative or Judicial Branch employees, and other federal employees that are exempt from federal law. For instance, certain disclosures involving foreign intelligence or counterintelligence must be transmitted immediately to the National Security Advisor.

Upon receipt of a disclosure, OSC attorneys review the information to evaluate whether there is a substantial likelihood that the information discloses one or more of those five categories of wrongdoing.<sup>19</sup> If OSC determines that the disclosure meets the “substantial likelihood” standard, OSC refers information to the head of an agency for an investigation, and the agency must investigate the allegations and submit a written report to OSC on the agency’s findings. Absent the whistleblower’s consent, OSC does not disclose the identity of the whistleblower.<sup>20</sup> If the Special Counsel does not refer the disclosure to the agency head, OSC sends the whistleblower a letter explaining why the Special Counsel did not refer the information. This letter lets the whistleblower know what other disclosure channels may be available. Either way, an OSC staff member will contact the whistleblower within two weeks of filing to explain the process and timing.

The agency report must be signed by the head of the agency and must include the basis for the investigation, the manner in which the investigation was conducted and a summary of the evidence gathered. The report must also list any apparent violations found and include a description of any action to be taken as a result of the investigation. Agency heads frequently task their Offices of Inspector General with the responsibility for investigating disclosures referred by OSC.

Upon receipt, the agency’s report is reviewed to determine whether it contains the information required by the statute and whether or not the report’s findings appear to be reasonable. In addition, the whistleblower is afforded an opportunity to review and comment on the agency report. If the report meets the statutory requirements, the Special Counsel then transmits the report to the President and the congressional committees with oversight responsibility for the agency involved. OSC also posts the report on its website, along with the whistleblower’s comments.

By providing a safe channel for whistleblower disclosures, OSC regularly reins in waste, fraud, abuse, illegality, and threats to public health and safety that pose the very real risk of catastrophic harm to the public, and huge remedial and liability costs for the government. In recent years, OSC has shepherded numerous, harrowing disclosures from courageous FAA employees who have blown the whistle on systemic failures in air traffic control and the oversight of airline safety. For example, aviation safety inspectors disclosed that FAA failed to

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<sup>19</sup> See 5 U.S.C. § 1213.

<sup>20</sup> OSC can disclose the identity of a whistleblower where it “determines that the disclosure of the individual’s identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.” 5 U.S.C. § 1213(h).

timely issue Airworthiness Directives requiring the inspection of aircraft, resulting in unresolved and potentially cataclysmic safety issues. Similarly, an air traffic controller at Detroit Metropolitan Airport disclosed that FAA failed to complete required environmental, noise and safety risk assessments when establishing a procedure for landing aircraft on airport runways, creating a clear and present safety hazard. This disclosure resulted in FAA cancelling the runway procedure. In another case, whistleblower disclosures to OSC resulted in a Department of Transportation finding that staff at a major metropolitan airport did not know which aircraft separation requirements to follow, a recipe for causing mid-air collisions.

A recent significant disclosure stemmed from three whistleblowers at the Department of the Air Force Port Mortuary, Dover Air Force Base alleging 1) the improper preparation of remains of a deceased Marine; 2) improper handling and transport of possibly contagious remains; 3) improper transport and cremation of fetal remains of military dependents; and 4) the failure to resolve cases of missing portions of remains. The investigation substantiated the allegations that Port Mortuary leadership failed to properly resolve two cases in which portions of remains of deceased service members were lost. The report concluded that managers engaged in gross mismanagement, and that the lack of accountability for the portions resulted in “a negligent failure” to meet the requisite standard of care for handling remains and violated several agency rules and regulations. The report also substantiated the allegations of improper cremations without the required authorization. The Air Force did not substantiate the allegations of wrongdoing regarding the preparation of remains, the improper transport of fetal remains of military dependents, or the improper handling and transport of possibly contagious remains. However, the evidence presented in the reports did not support several of the findings and conclusions drawn by the Air Force regarding these allegations; therefore, OSC determined that the findings did not appear reasonable.<sup>21</sup>

In response to the findings, the Air Force took substantial corrective action, even where they did not acknowledge wrongdoing. These corrective actions included enhancing training and implementing policies and procedures to improve the processes and accountability at the Port Mortuary. However, OSC raised concern regarding the insufficiency of the disciplinary action taken against the managers who were found to be responsible for violations of rules and regulations, gross mismanagement, dishonest conduct, and a failure of leadership.

## **VII. Scope of OSC Jurisdiction in Whistleblower Retaliation Cases**

The WPA covers most federal employees, but there are statutory exemptions that exclude certain components of the government, or limit the scope of protection. As explained below, certain law enforcement and intelligence agencies have separate statutory coverage, and are excluded from coverage by the WPA.

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<sup>21</sup> As discussed on pages 8-9, OSC also performed an investigation of retaliation against employees who disclosed mismanagement at the Port Mortuary. While the protected disclosure alleged in a whistleblower retaliation complaint filed at OSC may overlap with a whistleblower disclosure filed at OSC, it is important to remember to file the PPP complaint using Form 11 and the disclosure using Form 12. Those complaint forms are posted on OSC’s website, which also contains an e-filing system that offers the option of filing a PPP complaint or a disclosure electronically.

Type of employer	2302(b)(8) Coverage	Source
Private employers	No	5 U.S.C. §2302(a)(2) 5 U.S.C. §2105 Some states have adopted whistleblower protection laws protecting private sector employees and most states recognize a tort action for wrongful termination in violation of public policy.
Contract employees	No	5 U.S.C. §2302(a)(2); 5 U.S.C. §2105 Employees of DoD and NASA contractors protected under 10 U.S.C. § 2409, and employees of contractors of other government agencies protected under 41 U.S.C. § 4712.
State and Local	No	5 U.S.C. §2302(a)(2); 5 U.S.C. §2105 Most states have adopted whistleblower protection statutes protecting public sector employees.
Non-appropriated Fund	No	5 U.S.C. § 2105(c). <i>See Clark v. Merit Sys. Prot. Bd.</i> , 361 F.3d 647, 651 (Fed. Cir. 2004) (citing with approval <i>Clark v. Army &amp; Air Force Exch. Serv.</i> , 57 M.S.P.R. 43 (1993)). Under 10 U.S.C. § 1587, NAF employees are protected from reprisal for whistleblowing pursuant to procedures adopted by the Secretary of Defense.
National Guard	No	OSC has jurisdiction, but no enforcement authority: The Board and Federal Circuit have held that the Board lacks the authority to enforce an order against the National Guard. <i>Singleton v. Merit Sys. Prot. Bd.</i> , 244 F.3d 1331 (Fed. Cir. 2001) <i>see also, McVay v. Arkansas Nat'l Guard</i> , 80 M.S.P.R. 120, 124-25 (1998).
GAO	No	5 U.S.C. §2302(a)(2)(C)(iii)
Uniformed Military /commissioned corps of HHS or NOAA:	No	excluded by 5 U.S.C. §§ 1221(a); 2105(a); 2101(3); <i>see also Special Counsel ex rel. Hardy v. Dep't of Health &amp; Human Servs.</i> , 117 M.S.P.R. 174, 177 (2011) Members of the Armed Forces are covered under the Military Whistleblower Protection Act, 10 U.S.C. § 1034
Veterans Canteen Service (VCS)	No	<i>See Chavez v. Dept. of Veterans Affairs</i> , 65 M.S.P.R. 590, 593-94 (1994) (finding that the Board lacked jurisdiction over a removal appeal where the appellant's position has been excluded from the appointment provisions of Title 5).
Postal Regulatory Commission:	No	excluded by 5 U.S.C. § 2105(e)

Intelligence agencies & FBI	No	explicitly exempted under 5 U.S.C. § 2302(a)(2)(C)(ii) <sup>22</sup>  On October 10, 2012, President Obama issued a Presidential Policy Directive (PPD) that prohibits retaliation against whistleblowers in the intelligence community (IC) and requires intelligence agencies to establish a review process for claims of retaliation consistent with the procedures in the WPA. <sup>23</sup> The review procedures must be adopted within 270 days of issuance of the PPD.
US Postal Service	Partial	5 U.S.C. § 2302(b)(7) only <sup>3</sup> . Pursuant to 39 U.S.C. § 410, the provisions of Title 5 of the United States Code do not apply to U.S. Postal Service employees, with the exception of certain sections, including 5 U.S.C. § 3110, which restricts the employment of relatives, and 5 U.S.C. § 552, which deals with the public’s access to agency information. Under a Memorandum of Understanding between OSC and the U.S. Postal Service, OSC refers alleged violations of the anti-nepotism statute to USPS for investigation. Additionally, we have jurisdiction for arbitrary and capricious withholding of information under the Freedom of Information Act (FOIA).
All Government Corporations under 31 U.S.C. § 9101	Partial	Covered for 5 U.S.C. § 2302(b)(8) and (9)(A)(i), (B), (C), or (D) in 5 U.S.C. §2302(a)(2)(C)(i)
Federal Aviation Administration	Partial	49 U.S.C. § 40122(g)(2) excludes FAA employees from all prohibited personnel practices <b>except</b> for “section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5.” <sup>24</sup>
Transportation Security Administration	Partial	<i>Post WPEA</i> : 5 U.S.C. § 2302(b)(1), (8), and (9) covered

<sup>22</sup> Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office are all exempted.

<sup>23</sup> See “Protecting Whistleblowers with Access to Classified Information,” Presidential Policy Directive/PPD-19 (Oct. 10, 2012) (posted at <http://www.whitehouse.gov/sites/default/files/image/ppd-19.pdf>).

<sup>24</sup> See *Edwards v. Dep’t of Homeland Security*, 110 M.S.P.R. 243, 248 (2008) (dismissing a 5 U.S.C. § 2302(b)(12) claim for a TSA employee to which 49 U.S.C. § 40122(g)(2) applied, but never addressing whether “relating to whistleblower protection” included (b)(9) claims.”

## VIII. Prohibitions Against Whistleblower Retaliation

OSC enforces two prohibitions against retaliation. Section 2302(b)(8) prohibits retaliation for disclosures that evidence (1) any violation of any law, rule or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) abuse of authority; or (5) a substantial or specific danger to public health or safety. Section 2302(b)(9) prohibits reprisal for (1) exercising an appeal, complaint, or grievance right; (2) testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation; (3) cooperating with or disclosing information to the Inspector General of an agency or the Special Counsel; or (4) refusing to obey an order that would require the individual to violate a law.

### A. Whistleblower Retaliation, § 2302(b)(8)

The elements of 2302(b)(8) are: (1) a protected disclosure; (2) a personnel action taken, threatened or not taken subsequent to the protected disclosure; (3) the accused officials knew of the protected disclosure; and (4) a causal connection between the disclosure and the personnel action.

To defeat a claim under the WPA, an agency must show by “clear and convincing” evidence that it would have taken the challenged actions even in the absence of protected disclosures.<sup>25</sup> This standard imposes a heavy evidentiary burden on an agency. Showing a mere preponderance of the evidence is not enough. The agency must introduce sufficient evidence to “produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.”<sup>26</sup>

#### 1. Categories of Protected Disclosures (Element 1)

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

There is no statutory definition or legislative history for the term “rule” as used in 5 U.S.C. §2302(b)(8) but the MSPB has taken a fairly expansive view of what constitutes a rule. In *Rusin v. Dep’t of the Treasury*, the Board held that “the determination of whether or not something is a ‘rule’ for purposes of the Whistleblower Protection Act (WPA) cannot be based merely on its title” and a “more substantive examination” is required.<sup>27</sup> The Board ultimately concluded that a disclosure of the violation of the instructions pertaining to using government credit cards was a non-frivolous allegation that was possibly protected.<sup>28</sup>

The whistleblower need not identify the law, rule or regulation being violated if the statements obviously implicate misconduct under a particular provision.<sup>29</sup> Even disclosures that are mistaken may be protected if they are reasonably believed, and the reasonableness of the

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<sup>25</sup> 5 U.S.C. § 1214(b)(4)(B)(ii).

<sup>26</sup> *Rychen v. Dept. of Army*, 51 M.S.P.R. 179, 184 (1991).

<sup>27</sup> *Rusin*, 92 M.S.P.R. 298, 305 (2002)

<sup>28</sup> *Id.* at 306-7. The Board elaborated, “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation; or a prescribed guide for action or conduct, regulation or principle.” *Id.*, at 305-307 (citing Black’s Law Dictionary 1330 (7th ed. 1999) and Barron’s Law Dictionary 427 (3<sup>rd</sup> ed. 1991).

<sup>29</sup> See *Langer v. Dep’t of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). (“[W]hen the employee’s statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule or regulation,” he does not have to identify a statutory or regulatory provision by title or number).

subjective opinion that a violation happened is examined in light of applicable training of the whistleblower.<sup>30</sup>

## **ii. Gross Mismanagement: Substantial Risk of Significant Impact on the Mission**

Gross mismanagement is defined as “management action or inaction which creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.”<sup>31</sup> Gross mismanagement is more than *de minimis* wrongdoing or negligence and not all mismanagement qualifies.<sup>32</sup> A disclosure of gross mismanagement must be so serious that it rises above a mere difference of opinion and is not debatable among reasonable people.<sup>33</sup> Where a policy decision does not rise to the level of gross mismanagement, but the policy change could impact the health and safety of the public, it may be a disclosure protected under the latter category.<sup>34</sup>

## **iii. Gross Waste of Funds**

A gross waste of funds is a “more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.”<sup>35</sup>

## **iv. Abuse of Authority**

An abuse of authority is an “arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.”<sup>36</sup> Unlike the phrases “gross mismanagement” and “gross waste of funds,” the phrase “abuse of authority” does not contain an expressed *de minimis* standard.<sup>37</sup> The Board has stated that disclosures of abuses of authority are substantively different from disclosures of the other wrongdoing in 5 U.S.C. § 2302(b)(8)(A)(ii) that contain some sort of qualifying language that specifies a degree to which the wrongdoing must meet and has declined to infer a *de minimis* exception.<sup>38</sup> The Board has indicated that where the use of authority has no appearance of personal gain for the person exercising the authority, or other preferred persons, there is no disclosure. *Downing v. Dep’t of Labor*, 98 M.S.P.R. 64, 70 (2004) (holding that there was no allegation that particular individuals’ rights were affected or that the office closure was for personal gain); *Chambers v. Dep’t. of Interior*, 103 M.S.P.R. 375, 389 (2006) (*partially aff’d, vacated, and remanded on other grounds in Chambers v. Dep’t. of Interior*, 515 F.3d 1362 (Fed. Cir. 2008)) (appellant failed to show that

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<sup>30</sup> See *Herman v. Dep’t of Justice*, 115 M.S.P.R. 386, 391 (2011) (finding appellant reasonably believed Privacy Act was violated given his lack of training in law).

<sup>31</sup> *Lopez v. HUD*, 98 F.3d 1358 (Fed. Cir. 1996) (Table) (*quoting Nafus v. Dep’t of the Army*, 57 M.S.P.R. 386, 395 (1993)).

<sup>32</sup> *Id.*

<sup>33</sup> *White*, 392 F.3d at 1382. *White* is a particularly difficult case to summarize, and was litigated before the full Board and the Federal Circuit multiple times over the course of a decade.

<sup>34</sup> See *Chambers v. Dep’t of Interior*, 515 F.3d 1362, 1368-69 (Fed. Cir. 2008) (Board erred in analyzing disclosure regarding reduction of law enforcement budget as gross mismanagement instead of danger to public safety); *Chambers v. Dep’t of Interior*, 116 M.S.P.R. 17, 29 (2011) (finding appellant’s disclosure of reallocation of law enforcement resources protected as danger to public health and safety).

<sup>35</sup> *Nafus v. Dep’t of the Army*, 57 M.S.P.R. 386, 393 (M.S.P.B. 1993), *overruled on other grounds, Frederick v. DOJ*, 65 M.S.P.R. 517, 531 (M.S.P.B. 1994).

<sup>36</sup> *D’Elia v. Dep’t. of Treasury*, 60 M.S.P.R. 226, 232 (1994), *citing* 5 C.F.R. § 1250.3(f) (1988).

<sup>37</sup> *D’Elia*, 60 M.S.P.R. at 232; *see also Wheeler v. Dep’t of Veterans Affairs*, 88 M.S.P.R. 236, 241 (2001).

<sup>38</sup> *Wheeler*, 88 M.S.P.R. at 240.

officials abused authority because she did not show that they engaged in self-dealing or deprived others of rights).

#### **a. Examples of Abuse of Authority**

*Harassment or intimidation of employees: See, e.g., Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372, 1373 (Fed. Cir. 1999) (profanity in violation of code of conduct and harassment and intimidation of employees); *Murphy v. Dep't of the Treasury*, 86 M.S.P.R. 131, 136 (2000) (supervisor engaged in “threats, swearing, [and] physical acts of aggression” to intimidate employee and other staff members into following the supervisor’s requests without question); *Reeves v. Dep't of Navy*, 99 M.S.P.R. 153, 160 (2005) (supervisor threatened subordinate with physical violence);

*Preferential treatment to an employee with whom the supervisor is perceived to be intimate: Sirgo v. Dep't of Justice*, 66 M.S.P.R. 261, 267 (1995); *Pasley v. Dep't. of the Treasury*, 109 M.S.P.R. 105, 114 (2008) (disclosing that first level supervisor delegated supervisory duties to female subordinate with whom he appeared to have romantic relationship, and threatening career of person drawing attention to this relationship); *but see Special Counsel v. Spears*, 75 M.S.P.R. 639, 655 (1997) (sending flowers with performance award and presenting preferred employee an award in private were too trivial to constitute reasonable belief in intimate relationship).

*Improper personnel selections: Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, 241 (2001); *see also Berkowitz v. Dep't of the Treasury*, 94 M.S.P.R. 658, 661 (2003) (agency manipulated promotion process to allow selection of certain individuals, but exclude others); *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 614 (2000) (use of non-merit factors to reward friends and punish perceived enemies in personnel selections is both abuse of authority and violation of 5 U.S.C. § 2302(b)(6)).

*Mishandling a grievance: Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 613 (2000) (failed to resolve grievance in eleven month period); *Loyd v. Dep't of the Treasury*, 69 M.S.P.R. 684, 688 (1996) (assigning grievance to management official named as subject in the grievance).

#### **v. Substantial and Specific Danger to Public Health and Safety**

In determining whether a disclosure exhibits a reasonable belief that there is a substantial and specific danger to public health and safety, the Federal Circuit analyzes several factors, including: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences.<sup>39</sup>

Although the statute addresses dangers to “public” health and safety, the Board has adopted a liberal approach in evaluating reasonable belief in cases where the alleged danger is limited to a specific class of individuals and not to the public at large.<sup>40</sup> The Board has not specifically analyzed the “public” requirement of this condition and appears to be treating disclosures under this condition on a case-by-case basis.

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<sup>39</sup> *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).

<sup>40</sup> *See Woodworth v. Dep't of the Navy*, 105 M.S.P.R. 456, 463-64 (2007) (perceived danger to a limited number of government personnel and not to the public at large); *Acting Special Counsel ex rel. Finkel v. Dep't of Labor*, 93 M.S.P.R. 409, 413-14 (2003) (protecting disclosure that agency failed to test its inspectors for possible exposure to beryllium where test was inexpensive and exposure could lead to fatal lung ailment).

## **vi. Censorship Related to Scientific Integrity under the WPEA**

Section 110 of the WPEA extends whistleblower protections to government scientists who challenge censorship or make disclosures related to the integrity of the scientific process. In particular, it protects disclosures of information that an employee reasonably believes are evidence of censorship related to research, analysis, or technical information that cause, or will cause, gross government waste or mismanagement, an abuse of authority, a substantial and specific danger to public health or safety, or any violation of law. “Censorship” is broadly defined to include “any effort to distort, misrepresent, or suppress research, analysis, or technical information.” This expansion of WPA protected conduct is consistent with efforts by this Administration to promote scientific integrity, including the March 9, 2009 Presidential memorandum on Scientific Integrity, which requires agencies to adopt policies ensuring scientific integrity.

### **2. Reasonable Belief**

The Congressional intent behind the WPA was to expand protection for those with an honest belief they were reporting waste, fraud, abuse or gross mismanagement. Personal bias or self-interest may affect credibility determination, but does not affect whether the disclosure is protected.<sup>41</sup> In assessing the reasonableness of the discloser’s belief, the following objective test is used: whether, given the information available to the whistleblower, a person standing in his shoes could reasonably believe that the disclosed information evidences one of the identified conditions in the statute.<sup>42</sup>

#### **i. Disclosure Need Not be True to be Reasonable.**

The Board has held “[t]he [whistleblower] 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 he 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).”<sup>43</sup>

#### **ii. Focus is on the Reasonableness of the Perception of the Whistleblower, Not the Listener.**

Generally when assessing the reasonableness of the whistleblower’s belief the Board will ask whether (1) a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant (2) could reasonably conclude that the actions of the government evidence a violation of law, rule, regulation, gross mismanagement, a gross

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<sup>41</sup> See e.g. *Kinan v. Dep’t of Defense*, 87 M.S.P.R. 56, 566-67 (2001) (employee’s bias not dispositive on issue of reasonable belief); *Fickie v. Dep’t of the Army*, 86 M.S.P.R. 525, 530-31 (2000); *Parikh v. Dep’t of Veterans Affairs*, 116 M.S.P.R. 197, 206 (2011) (“vindictive motive” of whistleblower immaterial to whether disclosure is protected). However, a witness’s bias and self-interest will always be a part of the credibility-determination process. Whether one’s bias or self-interest actually results in an unreasonable belief, however, depends on the circumstances.

<sup>42</sup> *Fitches v. Dep’t of the Air Force*, 82 M.S.P.R. 68 (1999); *Gores v. Dep’t of Veterans Affairs*, 68 M.S.P.R. 100 (1995); see also *Ward v. Dep’t of the Army*, 67 M.S.P.R. 482, 485-486 (1995) (using interchangeably “would believe” and “would not be unreasonable to conclude”).

<sup>43</sup> *Ward v. Dep’t of the Army*, 67 M.S.P.R. 482, 485-486 (1995); *Russell v. Dep’t of Justice*, 68 M.S.P.R. 337, 342 (1995).

waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>44</sup>

### 3. Specificity Requirement

The Board has rejected disclosures that lack specificity or are vague. For example, in *Special Counsel v. Costello*, the Board declined to protect a letter which requested help for what the employees believed to be threats, retaliation and micro-management.<sup>45</sup> The Board held that bare allegations, without some examples to support it, could not be protected.<sup>46</sup> More significantly, the Board declined to consider *post hoc* evidence that established the validity of these conditions.<sup>47</sup> Appellant must explain what violations of law, regulation, gross mismanagement, abuse of authority, or substantial and specific dangers to public health or safety were involved.<sup>48</sup>

On the other hand, the Board has held that there is no requirement that a disclosure be so specific that it would permit a law enforcement agency to conduct a reasonably well-focused investigation.<sup>49</sup> Additionally, the Federal Circuit has ruled that when disclosing a violation of law, rule, or regulation, an employee need not identify 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.<sup>50</sup>

### 4. No Proscribed Channel for Whistleblowing

#### i. Generally: Any Person Rule

A whistleblower may disclose information to "any" person. There is no requirement in the statute that the whistleblowing occur through a specific channel (e.g., Office of Inspector General or OSC) unless the information concerns matters required by law or Presidential order to be kept confidential.<sup>51</sup> Congress intended that "disclosures be encouraged [and cautioned that] OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing."<sup>52</sup> Section 101 of the WPEA clarified that a disclosure does not lose protection

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<sup>44</sup> *LaChance v. White*, 174 F.3d 1378, 1381 (Fed.Cir. 1999)

<sup>45</sup> 75 M.S.P.R. 562, 585 (1997), *rev'd on other grounds sub nom. Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372 (Fed. Cir. 1999).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* See also *Huffman v. Office of Pers. Mgmt.*, 84 M.S.P.R. 569 (1999) (Slavet, concurring) (where employee only thinks something has occurred, has no personal knowledge of the wrongdoing, lacks clear understanding of what has occurred, and is reporting incomplete information and rumors, reasonable belief is not present).

<sup>48</sup> *Boechler v. Dep't of Interior*, 109 M.S.P.R. 638, 642 (2008).

<sup>49</sup> *Keefer v. Dep't of Agric.*, 82 M.S.P.R. 687, 693 (1999)

<sup>50</sup> *Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001); *DeSantis v. Napolitano*, 716 F. Supp. 2d 1100, 1107 (D.N.M. 2010); *Kalil v. Dep't of Agric.*, 96 M.S.P.R. 77, 85 (2004); *Ivey v. Dep't of the Treasury*, 94 M.S.P.R. 224 (2003).

<sup>51</sup> 5 U.S.C. § 2302(b)(8)(A).

<sup>52</sup> S. Rep. No. 358, 103rd Cong., 2d Sess. 10, *quoting* S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). "[I]t is inappropriate for disclosures to be protected only if they are made . . . to certain employees or only if the employee is the first to raise the issue." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988).

because it was made to a supervisor or other person who participated in the wrongdoing. There are certain circumstances when a disclosure might not be protected if made as a private citizen.<sup>53</sup>

### ii. No Chain of Command Requirement

There is no requirement in the statute that the discloser proceed incrementally through his chain of command.<sup>54</sup> This is a corollary to the “any person” rule. Any disclosure is protected to any person if it reasonably evidences a statutory condition – with the limited exceptions created by case law.

### iii. “Any Disclosure” Rule

When the WPA reformers substituted “any disclosure” for “a disclosure” in the statute, they intended the small change to signify their intent to protect *all* disclosures. Congress stated explicitly it was reacting to its perception that OSC, the Board and courts had been erecting technical barriers to exclude certain disclosures from protection.<sup>55</sup> So, the drafters added the word “any” to modify “disclosure” in order to, in their words, “stress that any disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential).”<sup>56</sup>

But several Federal Circuit decisions construing the WPA substantially narrowed the scope of protected conduct by creating loopholes that were contrary to Congressional intent. Those decisions include: (1) *Horton v. Dep’t of the Navy*,<sup>57</sup> holding that disclosures to the alleged wrongdoer are not protected; (2) *Willis v. Dep’t of Agriculture*,<sup>58</sup> excluding from WPA protection a disclosure made as part of an employee's normal job duties; and (3) *Meuwissen v. Dep’t of Interior*,<sup>59</sup> holding that disclosures of information already known are not protected. Sections 101 and 102 of the WPEA restore the original intent of the WPA to adequately protect whistleblowers by clarifying that a disclosure does not lose protection because: (1) the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed; (2) the disclosure revealed information that had previously been disclosed; (3) of the employee or applicant's motive for making the disclosure; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time which has passed since the occurrence of the events described in the disclosure. Section 101(b)(2) also clarifies that a disclosure is not excluded from protection because it was made during the employee's normal course of duties, providing the employee is able to show that the personnel action was taken in reprisal for the disclosure.<sup>60</sup>

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<sup>53</sup> *Van Ee v. EPA*, 64 M.S.P.R. 693, 697 (1994) (opinions expressed as a private citizen in the course of settlement discussions may be protected); *Garrett v. Dep’t of Defense*, 62 M.S.P.R. 666, 671 (1994) (protecting disclosures to supervisor); *Braga v. Dep’t of the Army*, 54 M.S.P.R. 392, 397-98 (1992), *aff’d*, 6 F.3d 787 (Fed.Cir. 1993) (Table) (protecting memo to supervisor, oral statements made in meeting with agency officials, and memo to Chairman, Joint Chiefs of Staff, assuming disclosure to be reasonably based).

<sup>54</sup> *Detrich v. Dep’t of Navy*, 251 Fed.Appx. 679, 681 (Fed. Cir. 2007) (“An Agency cannot require that protected disclosures be made only to supervisory personnel”).

<sup>55</sup> S. Rep. No. 100-143, 100th Cong., 2d Sess. 13 (1988).

<sup>56</sup> *Id.*

<sup>57</sup> 66 F.3d 279, 282 (Fed. Cir. 1995).

<sup>58</sup> 141 F.3d 1139, 1144 (Fed. Cir. 1998).

<sup>59</sup> 234 F.3d 9, 12–13 (Fed. Cir. 2000).

<sup>60</sup> In *Thomas Day v. DHS*, 2013 MSPB 49 (2013), the Board held that the WPEA definition of “disclosure” applies to cases pending at the time of enactment because the WPEA clarifies existing law.

#### **iv. Disclosures Made under Grievance or Appeal Procedures**

The Board may deny whistleblower protection for disclosures of information which might otherwise qualify as a protected disclosure under section 2302(b)(8) if the disclosure is protected by another subsection of section 2302(b) (e.g. (b)(9)). The two most frequent categories of disclosures for which the Board has excluded protection are disclosures made in the EEO complaint process or the grievance process.

An allegation made during the exercise of an appeal, complaint or grievance right granted by law, rule or regulation that an employer has violated some law or regulation does not necessarily qualify as whistleblowing under 5 U.S.C. § 2302(b)(8) but may be protected by (b)(1) or (b)(9).

##### **1. Exceptions to Exclusion Rule (the following may still be protected by (b)(8)):**

###### **a. Certain EEO-Related Matters**

Not all EEO matters that can be raised under (b)(9) lose their (b)(8) protection when raised outside of a formalized adjudication proceeding. *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1035 (Fed. Cir. 1993). In several instances, the Board has protected EEO related disclosures, often where the discrimination is pervasive or blatant. *See, e.g., Kinan v. Dep't of Defense*, 87 M.S.P.R. 561, 566 n. 2 (2001) (disclosures by equal opportunity specialist raised outside EEO process that management failed to remedy under-representation in EEO office, failed to enforce sexual harassment policy, and tolerated nepotism).<sup>61</sup>

###### **b. OWCP Claims**

An OWCP claim is not an exercise of appeal right under 5 U.S.C. § 2302(b)(9) and normal whistleblower analysis applies. *Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 509 (1993); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 626 (1994). However, the MSPB analyzed an employee's allegations of reprisal for an OWCP claim solely as an assertion of 5 U.S.C. § 2302(b)(9). *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229 (2010). In *Crump*, the MSPB did not cite to *Von Kelsch* or *Owen* but instead analyzed the claim under section 2302(b)(9), and found no retaliation. At least one MSPB Administrative Judge (AJ) has since cited to *Crump* for the proposition that filing an OWCP claim is protected activity (although the initial decision also involves a union activity). *Burton v. United States Postal Serv.*, 2011 MSPB LEXIS 1904 (Mar. 24, 2011). Because the MSPB did not specifically overrule *Von Kelsch* or *Owen*, it is probably best to continue to analyze these cases for disclosures rather than assuming that they are protected only under 5 U.S.C. § 2302(b)(9). Disclosures in an OWCP claim may be protected under 5 U.S.C. § 2302(b)(8).<sup>62</sup>

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<sup>61</sup> *Gonzales v. HUD*, 64 M.S.P.R. 314, 318-19 (1994) (disclosures alleging agency denigrated rights of Spanish speaking persons denied equal opportunity to file housing discrimination claims was protected, as was disclosure that official was insensitive towards disabled); *Oliver v. Dep't of Health and Human Servs.*, 34 M.S.P.R. 465, 470 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table) (disclosures of discrimination in awarding grants, as well as racist hiring practices).

<sup>62</sup> *Special Counsel v. Costello*, 75 M.S.P.R. 562, 586 (1997), *rev'd on other grounds sub nom. Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372 (Fed. Cir. 1999).

### **c. OSHA Complaints**

*OSHA Complaints.* A disclosure to the Occupational Safety and Health Administration may be protected if the employee reasonably believes that the matters disclosed evidence a violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety. *Smith v. Dep't of Agric.*, 64 M.S.P.R. 46, 53 (1994); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 628-30 (1994).

### **d. Intertwined Disclosure**

Disclosures that are intertwined with a grievance or EEO complaint which have independent bases for (b)(8) protection may be protected if made outside the grievance or EEO process.<sup>63</sup> However, in this context the employee may have to provide evidence to prove the disclosure was a contributing factor in the personnel action.

### **e. Disclosure of Failure of Process**

A disclosure that an agency failed to process a grievance over an 11-month period was found to be a disclosure of an abuse of authority.<sup>64</sup>

### **f. Disclosure of Discrimination**

The Board has excluded from whistleblower protection disclosures of illegal discrimination prohibited by Title VII or other EEO-related activity even when those disclosures were not made within the EEO complaint process on the grounds that they are protected by sections 2302(b)(1)(A) or (9).<sup>65</sup> Although not specifically overruled, this authority has competing authority as illustrated by *Kinan v. Dep't of Defense*, 87 M.S.P.R. 561, 566 n.2 (2001), where the Board found an EEO-type disclosure not made within the EEO complaint process to be protected, citing *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1035 (Fed. Cir. 1993) as support.<sup>66</sup>

### **g. Disclosures to the Inspector General**

Disclosures made to an Inspector General (IG) which qualify as whistleblowing under 5 U.S.C. § 2302(b)(8) are protected under sections (b)(8) and (b)(9).<sup>67</sup> Even where the employee does not initiate the disclosure to the IG, but makes a disclosure in response to the IG's inquiries, the disclosure is still protected.<sup>68</sup> If the disclosure fails to qualify as whistleblowing under 5 U.S.C. § 2302(b)(8), then the discloser may rely on 5 U.S.C. § 2302(b)(9)(C) for protection.<sup>69</sup>

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<sup>63</sup> *Loyd v. Dep't of the Treasury*, 69 M.S.P.R. 684, 688-89 (1996). See also *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000) (although filing EEO complaint alleging discriminatory treatment does not constitute whistleblowing disclosure under (b)(8), coverage under (b)(9) does not necessarily exclude it from (b)(8), if appellant also made a disclosure based on same operative facts outside of his (b)(9) activity).

<sup>64</sup> *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 613 (2000).

<sup>65</sup> *Applewhite v. EEOC*, 94 M.S.P.R. 300 (2003); *Nogales v. Dep't of the Treasury*, 63 M.S.P.R. 460, 464 (1994); *Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 509-510 (1993); *Marable v. Dep't of the Army*, 52 M.S.P.R. 622, 630 (1992).

<sup>66</sup> See also *Sutton v. Dep't of Justice*, 94 M.S.P.R. 4 (2003); *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297 (2000).

<sup>67</sup> see 5 U.S.C. § 2302(b)(8)(B); *Schlosser v. Dep't of Interior*, 75 M.S.P.R. 15, 21 (1997) *Paul v. Dep't of Agric.*, 66 M.S.P.R. 643, 648 (1995); *Williams v. Nat'l Labor Relations Bd.*, 59 M.S.P.R. 640, 646 (1993).

<sup>68</sup> *Tullis v. Dep't of the Navy*, 117 M.S.P.R. 236, 241 (2012).

<sup>69</sup> *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031 (Fed. Cir. 1993) (prior disclosure in grievance does not vitiate protection of similar subsequent disclosure to IG); *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), *aff'd*

## **h. Disclosures to the Office of Special Counsel**

The Board has held that “[a]gency reprisal for bringing a matter to the attention of OSC is prohibited by 5 U.S.C. § 2302(b)(8).”<sup>70</sup> The Board has further held that the disclosure of a prohibited personnel practice made in an OSC complaint qualifies as protected whistleblowing; as such, retaliation for the disclosures made in an OSC complaint constitutes retaliation for whistleblowing.<sup>71</sup>

### **5. Perceived whistleblowing**

In perceived whistleblower cases, “the Board will focus its analysis on the agency’s perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302 (b)(8). In those cases, the issue of whether the appellant actually made protected disclosures is immaterial; the issue of whether the agency perceived the appellant as a whistleblower will essentially stand in for that portion of the Board’s analysis in both the jurisdictional and merits stages of the appeal.”<sup>72</sup>

In *King*, the Board affirmed it will focus its analysis on the agency’s perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidence one or more of the five categories of a protected disclosure.

### **6. Exception to Protected Conduct: Disclosures Prohibited by Law**

A disclosure is not protected under § 2302(b)(8) where it is “specifically prohibited by law” or where the information being disclosed is “required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”<sup>73</sup> However, such disclosures to OSC or to an Inspector General are protected. In some cases, the specific law prohibiting disclosure allows the employee the additional option of making a disclosure of restricted information to a congressional member or committee with the necessary clearance to receive the information.

There are two important limitations to this narrow exception to § 2302(b)(8) protected conduct. First, the “specifically prohibited by law” exception to protected conduct does not encompass agency rules or regulations. *MacLean v. Dep’t of Homeland Security*, \_\_\_ F.3d \_\_\_ (Fed. Cir. 2013). Second, the law barring disclosure must be specific. In particular, only “a

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*sub nom. Hathaway v. Merit Sys. Prot. Bd.*, 981 F.2d 1237 (Fed. Cir. 1992); *see also Schlosser v. Dep’t of Interior*, 75 M.S.P.R. 15 (1997).

<sup>70</sup> *Johns v. Dep’t of Veterans Affairs*, 95 M.S.P.R. 106, 110 (2003) (appellant filed PPP complaint with OSC alleging, among other things, that agency officials made false statements to federal agencies regarding firearms qualification scores); *see Thomas v. Dep’t of the Treasury*, 77 M.S.P.R. 224, 230-31 (1998), *overruled on other grounds by Ganski v. Dep’t of the Interior*, 86 M.S.P.R. 32 (2000).

<sup>71</sup> *McDonnell v. Dep’t of Agric.*, 108 M.S.P.R. 443, 449 (2008); *Wheeler v. Dep’t of Veterans Affairs*, 88 M.S.P.R. 236, 240-244 (2001); *but see Redschlag v. Dep’t of the Army*, 89 M.S.P.R. 589 (2001) (declining to consider whether an employee’s previous complaint to OSC constituted a protected disclosure for purposes of (b)(8) because the activity was protected by (b)(9)); *Dean v. Dep’t of the Army*, 57 M.S.P.R. 296, 302 (1993) (upholding AJ’s finding that retaliation for complaints to OSC are covered by (b)(9), not (b)(8), without discussing substance of allegations).

<sup>72</sup> *King v. Dep’t of the Army*, 116 M.S.P.R. 689, 696-97 (2011). (*King v. Dept. of the Army*, slip op. Docket No. AT1221110037W1 (M.S.P.B. September 14, 2011).)

<sup>73</sup> 5 U.S.C. § 2302(b)(8)(A) and (B).

statute which requires that matters be withheld from the public as to leave no discretion on the issue, or which establishes particular criteria for withholding or refers to particular types of matters to be withheld” could qualify as a sufficiently specific prohibition.” *Id.* (citing S. Rep. No. 969, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2743). Two statutes that fall within this narrow exception to protected conduct are the Trade Secrets Act, 18 U.S.C. § 1905, and § 6013 of the Internal Revenue Code, which prohibits federal employees from disclosing tax returns.

## 7. Covered Personnel Actions (Element 2)

The MSPB construes broadly what can constitute a personnel action, and does not view the list of personal actions at 5 U.S.C. §2302(a)(2)(A) to be exhaustive. The case law is similarly broad and is consistent with legislative intent behind the WPA where the “intent of Congress was to provide a broad bulwark to protect federal employees from any reprisal following disclosures of waste, fraud, abuse or threats to public health and safety through good faith whistleblowing . . . Congress was well aware that whistle-blowers faced a variety of retaliatory actions and sought to protect them from any retaliation.”

### i. Failures and Threats

Failure to extend or renew a temporary appointment is a failure to appoint.<sup>74</sup> An employer’s failure to reinstate an employee after he/she resigns may be a failure to appoint,<sup>75</sup> and non-selection is a failure to appoint.<sup>76</sup> Nonselection for promotion is a failure to promote.<sup>77</sup> Similar to appointments, where an employee’s promotion is denied due to the cancellation of the vacancy announcement, and ultimately no one is promoted or appointed to the position, the cancellation can still be a covered personnel action.<sup>78</sup> Additionally, failure to non-competitively promote an individual, such as through reclassification of the position, can constitute failure to promote or a “decision concerning pay.”<sup>79</sup>

The MSPB has interpreted the term “threaten” very broadly, and ruled that a memorandum of warning threatening to take chapter 75 or other disciplinary or corrective action is a threat to take a personnel action. A performance improvement plan (PIP) is a threat to reduce in grade or pay or to remove based on performance, and thus is a threat of disciplinary or corrective action. A record of the agency’s investigation into an employee’s purported questionable conduct, for which he faced possible disciplinary action, was a threat to take disciplinary action.<sup>80</sup>

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<sup>74</sup> See generally *O’Brien v. Office of the Indep. Counsel*, 79 M.S.P.R. 406, 410-11 (1998); *Special Counsel v. Department of the Interior*, 68 M.S.P.R. 19, 23 (1995); *Kern v. Department of Agric.*, 48 M.S.P.R. 137, 140 (1991); *Special Counsel v. Department of the Army*, 48 M.S.P.R. 13, 16 (1991).

<sup>75</sup> *Holloway v. Department of the Interior*, 82 M.S.P.R. 435, 440, n.4 (1999).

<sup>76</sup> *Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 635 (1996); *DiPompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48 (1994).

<sup>77</sup> *Monasteri v. Merit Sys. Prot. Bd.*, 232 F.3d 1376, 1380 (Fed. Cir. 2000); *Askew v. Dep’t of the Army*, 88 M.S.P.R. 674, 683 (2001); *Ward v. Dep’t of the Army*, 67 M.S.P.R. 482, 485 (1997); *Zimmerman v. Dep’t of Hous. and Urban Dev.*, 61 M.S.P.R. 75, 79 (1994); *Niswonger v. Dep’t of the Air Force*, 60 M.S.P.R. 655, 658 (1994).

<sup>78</sup> *Ruggieri v. Merit Sys. Prot. Bd.*, 454 F.3d 1323, 1325 (Fed. Cir. 2006).

<sup>79</sup> *Briley v. Nat’l Archives & Records Admin.*, 71 M.S.P.R. 211, 222 (1996); but see *Tackett v. Dep’t of Agric.*, 89 M.S.P.R. 348 (2001) (failure to upgrade an employee’s prior position after he was reassigned out of it is not a constructive demotion).

<sup>80</sup> *Gergick v. General Servs. Admin.*, 49 M.S.P.R. 384, 387 and 392 (1991).

## ii. Personnel Action – Significant Change in Job Duties or Working Conditions

Personnel actions are generally anything that requires a Standard Form 50 (SF-50) to document, but an SF-50 is not definitive proof of a personnel action.<sup>81</sup> Thus an SF-50 may be sufficient to prove a personnel action, but is not necessary to prove that a significant change in working conditions has taken place. The most obvious examples of personnel actions are appointment, demotion, promotion, or significant changes in duties or assignments.

Appointment, whether intermittent, permanent, seasonal, or temporary is still appointment to a position, and refusal to renew or reappoint due to whistleblowing is not permitted.<sup>82</sup> Two essential prerequisites of an appointment are (1) an authorized appointing officer who takes an action that reveals his awareness that he is making an appointment in the United States civil service; and (2) action by the appointee denoting acceptance.<sup>83</sup> The best evidence of an appointment is a formal document, typically the SF 50 or 52, execution of which is the “the *sine qua non* to plaintiff’s appointment.”<sup>84</sup>

Demotion, reduction in pay, reduction in grade, furlough of 30 days or less, removal, suspension, administrative leave, letter of warning, reduction in force (RIF),<sup>85</sup> reprimand,<sup>86</sup> and an oral reprimand are considered to be disciplinary actions by the MSPB. However, in the case of oral reprimand, though the MSPB considers it a personnel action, no meaningful corrective action is available for such an action, and the MSPB may dismiss for that reason.<sup>87</sup> Constructive demotion, where an employee is effectively – if not formally – demoted to performing duties associated with a lower position, is also a personnel action.

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<sup>81</sup> “An SF-50 is not a personnel action in itself, but is merely an after-the-fact record of a personnel action previously taken.” *Nasuti v. Merit Sys. Prot. Bd.*, 376 Fed.Appx. 29, 33 (Fed. Cir. 2010) (non-precedential). This decision affirmed a part of the MSPB decision which held that “The approval of an SF-50 by an agency is a clerical documentation task which customarily occurs after the effective date of a personnel action.” *Nasuti v. Dep’t of State*, 112 M.S.P.R. 587, 595 (2009) (citing *Vandewall v. Dep’t of Trans.*, 52 M.S.P.R. 150, 155 (1991); *Scott v. Dep’t of the Navy*, 7 MSPB 741, 8 M.S.P.R. 282, 287 (1981); see *Grigsby v. Dep’t of Commerce*, 729 F.2d 772, 775 (Fed.Cir.1984) (“the SF-50 is not a legally operative document controlling on its face an employee’s status and rights”).

<sup>82</sup> See 5 U.S.C. § 2302(a)(2)(A)(i)

<sup>83</sup> *Watts v. Office of Pers. Mgmt.*, 814 F.2d 1576, 1580 (Fed. Cir. 1987); *Brock v. Dep’t of the Navy*, 49 M.S.P.R. 564, 566 (1991); *Robinson v. U.S. Postal Serv.*, 92 M.S.P.R. 37 (2002).

<sup>84</sup> *Goutos v. U.S.*, 552 F.2d 922, 924 (Ct. Cl. 1976); *Costner v. U.S.*, 665 F.2d 1016, 1022 (Ct. Cl. 1981); *Horner*, 803 F.2d at 693.

<sup>85</sup> The MSPB has held that a reduction in force (RIF) is “other disciplinary or corrective action” if it affects the employee for reasons personal to the employee. *Rutberg v. Occupational Safety and Health Admin.*, 78 M.S.P.R. 130, 136 (1998); *O’Shea v. Department of Transp.*, 65 M.S.P.R. 512, 514 n. (1994); *Sanders v. Department of the Army*, 64 M.S.P.R. 136, 141 (1994), *aff’d*, 50 F.3d 22 (Fed. Cir. 1995) (Table); *Moran v. Department of the Air Force*, 64 M.S.P.R. 77, 87 (1994); *Carter v. Department of the Army*, 62 M.S.P.R. 393, 399 (1994).

<sup>86</sup> See generally *Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 699 (1994); *Gonzales v. Department of Hous. and Urban Dev.*, 64 M.S.P.R. 314, 319 (1994); *Onasch v. Department of Transp.*, 63 M.S.P.R. 158, 163 (1994); *Charest v. Federal Emerg. Mgt. Agency*, 54 M.S.P.R. 436, 442 (1992).

<sup>87</sup> *McGowen v. Department of the Air Force*, 72 M.S.P.R. 601, 606-07 (1996) (case dismissed for failure to state a claim for which the MSPB could award effective relief), *aff’d*, 135 F.3d 777 (Fed. Cir. 1998) (Table); *but see Special Counsel v. Spears*, 75 M.S.P.R. 639, 664-65 (1997) (where MSPB held that *oral counseling*, even when documented by a memorandum from the supervisor, was not a personnel action, raising question of whether there is a difference between “oral reprimands” and “oral counseling”).

The Board has held that harassment can be an actionable personnel action. *See Covarrubias v. Soc. Sec. Admin.*, 113 M.S.P.R. 583, 589 n. 4 (2010).

### **iii. Employment Actions That Are Not “Personnel Actions” under 2302(b)**

The Board has found that certain actions do not qualify as personnel actions for the purposes of whistleblower protection. For example, arrest by an agency police officer, or comments directing the employee to “find another job,” are not personnel actions.<sup>88</sup> Revocation of a security clearance, without something more, is also not a personnel action under 5 U.S.C. § 2302(a).<sup>89</sup> Thus, although removal can be a personnel action under the statute, when the basis for removal is due to the revocation of a security clearance, OSC has no authority to review the underlying merits of the revocation or the subsequent removal.<sup>90</sup>

Opening an investigation into the employee is not necessarily a personnel action, but the WPA now permits the whistleblower to seek compensation for defending against a retaliatory investigation. Specifically, under the WPEA, an employee may recover “fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.”<sup>91</sup>

## **8. Actual or Constructive Knowledge of the Disclosure (Element 3)**

Knowledge of the deciding official can be among the most difficult elements to prove, as there may be no direct proof of actual knowledge of the protected disclosure.

### **i. Actual Knowledge**

Actual knowledge may be demonstrated directly or through circumstantial evidence.<sup>92</sup> However, there are no reported cases where the Board has found actual knowledge based solely on circumstantial evidence. The Board has credited unequivocal testimony of actual knowledge over equivocal denial of actual knowledge to establish this element.<sup>93</sup>

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<sup>88</sup> *Shivae v. Department of the Navy*, 74 M.S.P.R. 383, 387 (1997) (holding that supervisor’s statement to “find another job” was not a threat to remove the employee). *Weber v. Gen. Serv. Admin.*, 54 M.S.P.R. 444, 446 (1992). (Agency did not take a personnel action against an employee when an agency police officer arrested him.) While it has not been overruled, *Weber* preceded the 1994 amendments to the WPA which amended the CSRA definition of personnel action from “any other significant change in duties or responsibilities which is inconsistent with the employee’s salary or grade level,” to “any other significant change in duties, responsibilities, or working conditions.”

<sup>89</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 526-32 (1988); *Hesse v. Department of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000) (holding that because 5 U.S.C. § 2302(a)(2) lacks specific language authorizing the Board to review security clearance determinations, the Board is without the authority to do so).

<sup>90</sup> Note that Presidential Policy Directive 19 (Oct. 10, 2012) prohibits executive agencies from taking any action affecting an employee’s eligibility for access to classified information in reprisal for whistleblowing. The Directive requires establishment of an internal review procedure for employees who assert that an agency denied or revoked their security clearance or access to classified information in retaliation for protected whistleblowing. Namely, such employees will be entitled to an internal appeal followed by an External Inspector General review. If they prevail, they are entitled to similar status quo ante relief that a prevailing whistleblower would be entitled to under 5 U.S.C. §§ 1214 and 1221.

<sup>91</sup> 5 U.S.C. § 1214(h).

<sup>92</sup> *Bonggat v. Department of the Navy*, 56 M.S.P.R. 402, 407 (1993); *McClelland v. Department of Defense*, 53 M.S.P.R. 139, 147 (1992).

<sup>93</sup> *See Jones v. Department of Interior*, 74 M.S.P.R. 666, 674 (1997).

## **ii. Constructive Knowledge is Sufficient**

Constructive knowledge is present where an official with actual knowledge influenced the deciding official.<sup>94</sup>

### **9. Protected Disclosure was a Contributing Factor in the Personnel Action (Element 4)**

The MSPB will construe this factor broadly, and will consider any factor alone, or in connection with others that tends to affect in any way the outcome of the personnel action at issue. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that (1) the official taking the personnel action knew of the disclosure, and (2) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.<sup>95</sup>

#### **i. Prima Facie Case can be Proven by Knowledge-Timing Test, and Test is Retroactive.**

The Board has held that knowledge and timing are, by themselves, enough to establish a prima facie case of retaliation.<sup>96</sup> The Board has further held that if knowledge-timing are present, a prima facie case has been established, and it is improper for the AJ to consider other evidence to determine that the contributing-factor standard has not been met.<sup>97</sup> The Board applies the knowledge-timing test retroactively to all actions covered by the WPA.<sup>98</sup>

#### **ii. The Knowledge/Timing Test is Only One of Many Possible Ways to Satisfy the Contributing Factor Standard.**

Where knowledge-timing is not met to infer contributing factor, the Board will consider any other circumstantial evidence to determine whether the contributing factor test has been met.<sup>99</sup> The Federal Circuit has elaborated:

So long as a protected disclosure is a contributing factor to the contested personnel action, and the agency cannot prove its affirmative defense, no harm can come to the whistleblower. We thus view the WPA as a good-government statute. As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures. A principal office of the WPA is to eliminate that disincentive and freely encourage employees to disclose that which is wrong with our government. How a protected disclosure is made, or by whom, matters not to

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<sup>94</sup> See *McClellan v. Dep't of Defense*, 53 M.S.P.R. 139 (1994).

<sup>95</sup> Pub. L. 103-424, § 4(b), *codified at* 5 U.S.C. § 1221(e)(1).

<sup>96</sup> See *Shriver v. Dep't of Veterans Affairs*, 89 M.S.P.R. 239, 245-46 (2001) (appellant made non-frivolous allegation that non-selection for promotion was retaliatory where selecting official knew of disclosure and denied promotion within eight months).

<sup>97</sup> *Carey v. Dep't of Veterans Affairs*, 93 M.S.P.R. 676, 681-82 (2003).

<sup>98</sup> *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323 (1997); *Special Counsel v. Costello*, 75 M.S.P.R. 562, 587-88 (1977), *rev'd on other grounds sub nom. Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372 (Fed. Cir. 1999); *Jones v. Dep't of Interior*, 74 M.S.P.R. 666, 671 (1997); *Scott v. Dep't of Justice*, 69 M.S.P.R. 211, 238-40 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996).

<sup>99</sup> See *Jones v. Dep't of Interior*, 74 M.S.P.R. 666, 678 (1997) (failing to find contributing factor); *Powers v. Dep't of the Navy*, 69 M.S.P.R. 150, 156 (1995).

the achievement of the WPA's goal. The elements of misgovernment must be disclosed before they can be cured in satisfaction of the WPA's *raison d'être*.<sup>100</sup>

#### a. Reasonable Time Period for Inferring Nexus

What constitutes a reasonable time period varies, but the MSPB has considered actions taken within several months of the protected disclosure to be close enough in time under the knowledge-timing test.<sup>101</sup> When a personnel action comes more than two years after the protected disclosure, it will probably be difficult to prove there was a nexus.

### 10. Agency Burden

Once OSC proves by a preponderance of the evidence that a protected disclosure was a contributing factor, the agency can avoid liability only if it demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing. In determining whether the agency can meet that burden, the Board considers the following three factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

As the Federal Circuit pointed out in *Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012), the clear and convincing standard is an exacting burden for agencies:

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

*Id.* at 1367. And in *Whitmore*, the Federal Circuit explained the policy reasons for holding agencies to a high burden:

The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary

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<sup>100</sup> *Marano v. Dep't of Justice*, 2 F.2d 1137, 1142 (Fed.Cir. 1993).

<sup>101</sup> See generally *Inman v. Dep't of Veterans Affairs*, 112 M.S.P.R. 280, 283-4 (2009) (reassignment 15 months after disclosure). *Kalil v. Dep't of Agric.*, 96 M.S.P.R. 77, 85 (2004) (suspension proposed six months after disclosure). *Ivey v. Dep't of the Treasury*, 94 M.S.P.R. 224 (2003) (recommendation for removal occurred four months after whistleblowing). *Carey v. Dep't of Veterans Affairs*, 93 M.S.P.R. 676 (2003) (interval of a few months). *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589 (2001) (suspension was 18 months after disclosure to one party, and slightly more than a year after another; removal was three and a half months after most recent disclosure); *Agoranos v. Department of Justice*, 119 M.S.P.R. 498 (June 7, 2013) (personnel actions taken more than 2 years after a protected disclosure can meet the knowledge – timing test where they are part of a continuum of related performance-based actions stemming from the protected disclosure).

disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment actions against a whistleblower carries its statutory burden to prove – by clear and convincing evidence – that the same adverse action would have been taken absent the whistleblowing. . . . Congress decided that we as a people are better off knowing than not knowing about [the matters disclosed by whistleblowers], even if it means that an insubordinate employee . . . becomes, via such disclosures, more difficult to discipline or terminate. Indeed, it is in the presence of such non-sympathetic employees that commitment to the clear and convincing evidence standard is most tested and is most in need of preservation.

*Id.* at 1377. In sum, the causation standard and burden-shifting framework in 2302(b)(8) claims is favorable to employees.

### **B. Retaliation for Exercising Whistleblowing, Complaint, Appeal or Grievance Rights, § 2302 (b)(9)**

5 U.S.C. § 2302(b)(9) makes it a prohibited personnel practice for an agency to take a personnel action against an employee in retaliation for exercising certain appeal or grievance rights, for assisting another individual in exercising such rights, for cooperating with an IG or OSC the Special Counsel, or for refusing to violate a law. To establish a *prima facie* violation of section 2302(b)(9), the proponent must show the following by preponderant evidence:

1. The employee (or someone identified with the employee) engaged in a protected activity;
2. The employee was subject to the taking, failure to take, or threat of a personnel action;
3. The official(s) responsible for the personnel action had knowledge of the employee’s protected activity; and
4. There is a causal connection (i.e., nexus) between the employee’s protected activity and the personnel action.

#### **1. Protected Activity (Element 1)**

##### **i. Exercise of Any Appeal, Complaint, or Grievance Right**

Subsection (b)(9)(A) prohibits personnel actions taken, not taken, or threatened on the basis of an employee’s exercise of “any appeal, complaint, or grievance right granted by law, rule, or regulation.” The Board has held that the types of activities protected by this section involve “formalized adjudicative proceedings.” *See Owen v. Dep’t of the Air Force*, 63 M.S.P.R. 621, 627 (1994)(discussing that Congress intended for (b)(9) to apply to complaints lodged in a formal adjudicative process not informal complaints, gripes or objections). The WPEA split (b)(9)(A) claims into two subcategories: (i) those which deal with remedying a violation of 2302(b)(8) and (ii) all others that do not deal with remedying a violation of 2302(b)(8). The WPEA makes significant distinctions between these two subcategories in the areas of causation standards and appeal rights.

**a. Activity Protected as the Exercise of Any Appeal,  
Complaint, or Grievance Right**

- (a) *Filing EEO Complaints and Appeals*<sup>102</sup> – See, e.g., *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679 (Fed.Cir. 1992)(finding that MSPB subject matter jurisdiction over whistleblowing activities pursuant to (b)(8) does not extend to allegations of retaliation for filing a complaint of discrimination with the EEOC; allegations involving retaliation for filing EEOC complaints of discrimination may be heard pursuant to (b)(9)(A)); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 623-24 (2001)(finding no retaliation based on gravity of misconduct); *Wright v. Dep’t of Transp.*, 89 M.S.P.R. 571, 574 (2001)(finding filing of agency grievance not election of remedies under 7121(g)); *Luecht v. Dep’t of the Navy*, 87 M.S.P.R. 297, 302 (2000)(finding EEO complaints, Board appeals and grievances were (b)(9) activity, not (b)(8)); *New v. Dep’t of Veterans Affairs*, 82 M.S.P.R. 609, 617-18 (1999)(finding no causal connection between appellant’s disability discrimination and retaliation claims and the agency denial of appellant’s request for priority consideration for reemployment); *Jaramillo v. Dep’t of the Army*, 81 M.S.P.R. 469, 480 (1999)(appellant failed to prove that manager’s actions constituted retaliation for filing an EEO complaint and manager had significant nonretaliatory reason for his actions in that he was acting to ensure the safety of his subordinates); *Dorsey v. Dep’t of the Air Force*, 78 M.S.P.R. 439, 450 (1998) (finding that AJ incorrectly applied wrong elements of proof to appellant’s retaliation claim and matter was remanded for a determination as to whether there was a genuine nexus between the alleged motive to retaliate and the appellant’s removal); *Shelly v. Dep’t of Treasury*, 75 M.S.P.R. 677, 680 (1997)(appellant failed to show that there was a general nexus between her EEO complaint and her removal); *Jones v. Dep’t of the Army*, 75 M.S.P.R. 115, 122 (1997)(appellant failed to show that motive to retaliate outweighed gravity of appellant criminal misconduct); *Duffrin v. Dep’t of Transp.*, 70 M.S.P.R. 557, 562 (1996)((b)(9) prohibits taking or failing to take a personnel action such as reinstatement or reassignment because of the filing of an EEO complaint); *Richard v. Dep’t of Defense*, 66 M.S.P.R. 146, 154 (1995)(although relevant agency officials knew appellant had been appointed to her position as a result of a successful EEO complaint, appellant did not establish that these officials had any involvement in the discriminatory acts and therefore appellant failed to show that her removal for failing to comply with a management directed reassignment could have been retaliation) .
- (b) *Filing Grievances*<sup>103</sup> – See, e.g., *Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1574-75 (Fed.Cir. 1996)(claim that employee suffered reprisal for filing a grievance is an alleged prohibited personnel practice under (b)(9)(A); *Redschlag v. Dep’t of the Army*, 89 M.S.P.R. 589, 623-24 (2001)(appellant failed to show any causal connection or nexus between her protected activity and her removal action); *Gustave-Schmitt v. Dep’t of Labor*, 87 M.S.P.R. 667, 675 (2001) (noting that “union activity” is protected); *Luecht v. Dep’t of the Navy*, 87 M.S.P.R. 297, 302 (2000)(finding EEO complaints, Board appeals and grievances (b)(9)

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<sup>102</sup> Under the CSRA, the Board interpreted “any appeal right” to include EEO complaints. *In re Frazier*, 1 M.S.P.R. 163, 190-92 (1979) (noting that the EEO process is “granted by,” “required by,” and “enacted pursuant” to law, rule, or regulation).

<sup>103</sup> Under the CSRA, the Board interpreted “any appeal right” to include grievances. *Dunning v. National Aeronautics and Space Admin.*, 10 M.S.P.R. 183, 185 (1982); *Gerlach v. Federal Trade Comm’n*, 9 M.S.P.R. 268, 272 (1981).

activity, not (b)(8)); *McMillan v. Dep't of the Army*, 84 M.S.P.R. 476, 483 (1999)(the exercise of a grievance right is an activity protected by (b)(9)); *Special Counsel v. Dep't of Veterans Affairs*, 84 M.S.P.R. 314, 316 (1999)(MSPB granted OSC request for a 45 day stay finding that there were reasonable grounds to believe that the agency failed to extend employee's employment in retaliation for filing grievances); *Lednar v. Social Security Admin.*, 82 M.S.P.R. 364, 369 (1999(Board found that agency would have removed appellant based on misconduct even absent his protected activity which included filing a grievance and therefore no nexus between the alleged retaliation and adverse action)).

- (c) *MSPB Appeals*<sup>104</sup> – See, e.g., *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000)(discussing that EEO complaints, Board appeals and grievances (b)(9) activity, not (b)(8)); *Noble v. Dep't of Justice*, 68 M.S.P.R. 524, 528 (1995)(Board remanded case for determination if personnel action was retaliation for prior appeal to the Board); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 630 (1994)(filing an appeal with the Board is protected activity under (b)(9)); *Metzenbaum v. Dep't of Justice*, 54 M.S.P.R. 32, 36 (1992)(Board appeals are (b)(9) activity not (b)(8)); *Ruffin v. Dep't of the Army*, 48 M.S.P.R. 74, 78 (1991)(agency is prohibited from retaliating against an employee for filing a Board appeal by (b)(9) and not (b)(8)).
- (d) *Unfair Labor Practice Charges*<sup>105</sup> – See, e.g., *Grant v. Dep't of the Air Force*, 61 M.S.P.R. 370, 377 (1994)(appellant's claim that her removal was retaliation for filing an unfair labor practice (ULP) charge is reviewable under (b)(9) not (b)(8)); *Coffer v. Dep't of the Navy*, 50 M.S.P.R. 54, 57 (1991)(filing a (ULP) is not whistleblowing under (b)(8), it is activity protected by (b)(9).
- (e) *Requests Under the Privacy Act to Correct Allegedly False Information in Personnel Records* – *Santillan v. Dep't of the Air Force*, 53 M.S.P.R. 487, 491 (1992).
- (f) *PPP Complaints to OSC*<sup>106</sup> – *Booker v. U.S. Postal Serv.*, 53 M.S.P.R. 507, 509 (1992), *aff'd*, 982 F.2d 517 (Fed.Cir. 1992) (Table).
- (g) *Civil Lawsuits*<sup>107</sup> – *Creer v. U.S. Postal Serv.*, 62 M.S.P.R. 656, 660 (1994).
- (h) *Preparatory Activity*<sup>108</sup> – The Board has protected union-related duties, such as helping members to file grievances, EEO complaints, and ULPs. See *Page v. Dep't of the Navy*, 101

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<sup>104</sup> Under the CSRA, the Board interpreted “any appeal right” to include MSPB appeals. *Cofield v. Government Printing Office*, 22 M.S.P.R. 392, 395 (1984); *Ritchey v. U.S. Postal Serv.*, 19 M.S.P.R. 170 (1984); *Mitchell v. U.S. Postal Serv.*, 19 M.S.P.R. 120, 123 (1984).

<sup>105</sup> Under the CSRA, the Board interpreted “any appeal right” to include filing an unfair labor practice charge. *Ireland v. Department of Health and Human Serv.*, 34 M.S.P.R. 614, 620 (1987).

<sup>106</sup> Under the CSRA, the Board interpreted “any appeal right” to include filing a complaint with OSC. See *Hawes v. Department of the Navy*, 14 M.S.P.R. 591, 595-96 (1983).

<sup>107</sup> Under the CSRA, the Board interpreted “any appeal right” to include filing civil lawsuits. *Neff v. Department of Treasury*, 39 M.S.P.R. 142, 146 (1988); *Parker v. Department of Interior*, 4 M.S.P.R. 97, 99 (1980); *Crawford v. Department of the Army*, 1 M.S.P.R. 428, 429 (1980).

<sup>108</sup> Under the CSRA, the Board interpreted “any appeal right” to include conduct that precedes the formal filing of an appeal. This included: (1) the announced intention to file an EEO complaint, *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 291 (1988); (2) contacting an EEO counselor for advice, *Johnson v. Department of the Army*, 37 M.S.P.R. 95, 97 (1988) and *Bartel v. Federal Aviation Admin.*, 14 M.S.P.R. 24, 33 (1982); (3) efforts to organize and establish a union, *Ireland v. Department of Health and Human Serv.*, 34 M.S.P.R. 614, 620 (1987); (4) writing, but not necessarily sending, a letter to OSC, *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 603-04 (1984) (holding

M.S.P.R. 513, 516 (2006)(preparation for a grievance is (b)(9) not (b)(8)); *Wooten v. Dep't of Health and Human Serv.*, 54 M.S.P.R. 143, 146 (1992)(union related duties on behalf of union members is protected by (b)(9)). The Board has also protected the announced intention by an employee to grieve the handling of his performance rating. *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 169-72 (1996).

- (i) *Classification Appeal* – The Board noted that retaliation for complainant's classification appeal would be a violation of (b)(9) and not (b)(8). *Cook v. Dep't of the Army*, MSPB Docket No. CH-0752-05-0830-S-1, slip op. at 5 (denying stay request because insufficient showing that employee made protected disclosures which were contributing factors in his removal).
- (j) *VEOA* – Retaliation for filing a claim under the Veterans Employment Opportunities Act may be considered under b(9). *Shaver v. Dep't of the Air Force*, 106 M.S.P.R. 601, 605 n. 3 (2007).

**b. Activity Not Protected as the Exercise of Any Appeal, Complaint, or Grievance Right<sup>109</sup>**

- (a) *Filing a Workers' Compensation Claim* – The Board has held that filing Form CA-1, Federal Employee's Notice of Traumatic Injury, is not an initial step toward taking legal actions against an employer for perceived violation of an employee's rights, and thus, is not a protected activity under section 2302(b)(9)(A). *Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 508-09 (1993).<sup>110</sup>
- (b) *Informal Complaints* – i.e., complaints of dissatisfaction with management's handling of grievances and EEO complaints, and the settlement of those matters. *Garst v. Dep't of the Army*, 56 M.S.P.R. 371, 386-87 (1993).
- (c) *Informal Advocacy* – i.e., advocacy on behalf of someone who fails to exercise any kind of appeal, complaint, or grievance right. *Stover v. Dep't of Interior*, 63 M.S.P.R. 46 (1994).
- (d) *OSHA Disclosures* – i.e., disclosures to an agency safety office and to the Occupational Safety and Health Administration (OSHA). *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 628 (1994). Note, such disclosures were held to fall under (b)(8).
- (e) *Disclosing Information Obtained While Acting as an EEO Counselor* – *Gonzalez v. Dep't of Housing and Urban Dev.*, 64 M.S.P.R. 314, 318 (1994) (however, such disclosures were protected under (b)(8)).

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subject official's awareness of Complainant's intent to file a complaint with OSC was protected), *rev'd on other grounds*, 802 F.2d 537, 547 (D.C. Cir. 1986).

<sup>109</sup> Under the CSRA, the Board failed to protect activity that was not clearly preparatory to the invocation of a protected remedial process or was significantly disassociated from such processes. *See, e.g., Lewis v. Bureau of Engraving and Printing*, 29 M.S.P.R. 447, 451 (1985) (inquiries about position classifications prior to EEO complaint); *Ledeaux v. Veterans Admin.*, 29 M.S.P.R. 440, 444 (1985) (employee's criminal charges against his supervisor for assault and battery); *Barnes v. Department of the Army*, 22 M.S.P.R. 243, 247 (1984) (false and malicious statements made off-duty); *Leveritt v. Department of the Air Force*, 5 M.S.P.R. 168, 172 (1981) (distribution of an allegedly libelous EEO complaint to employees outside the EEO complaint process).

<sup>110</sup> *But see Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229 (2010). In *Crump*, the MSPB did not cite to *Von Kelsch*, but analyzed the claim under section 2302(b)(9)

(f) *Requesting Accommodation – Fitzsimmons v. United States Postal Serv.*, 102 M.S.P.R. 485 (2006).

**ii. Testifying For or Lawfully Assisting the Exercise of Any Appeal, Complaint or Grievance Right<sup>111</sup>**

The WPA codified protection for “testifying for or otherwise lawfully assisting any individual in the exercise of any [appeal, complaint, or grievance right granted by any law, rule, or regulation].” 5 U.S.C. § 2302(b)(9)(B). Under this subsection, the Board has protected:

- (a) Executing an Affidavit During an EEO Investigation – *Adair v. U.S. Postal Serv.*, 66 M.S.P.R. 159, 165 (1995).
- (b) Providing Information During an EEO Investigation – *Peterson v. Dep’t of Transp.*, 54 M.S.P.R. 178, 183 (1992)(Board found that AJ erred by analyzing appellant’s claim under (b)(8) instead of (b)(9); *Thornhill v. Dep’t of the Army*, 50 M.S.P.R. 480, 489-90 (1991)(employee’s testimony in discrimination complaint is protected activity under (b)(9)).
- (c) Allegedly Refusing to Cover-Up an EEO Violation – *Marable v. Dep’t of the Army*, 52 M.S.P.R. 622, 630 (1992).
- (d) Testifying at an EEO Hearing – *Adair v. U.S. Postal Serv.*, 66 M.S.P.R. 159, 165 (1995)(Board found that AJ erred in determining that the appellant’s supervisor had no knowledge of the appellant’s EEO testimony); *Cloonan v. U.S. Postal Serv.*, 65 M.S.P.R. 1, 4 (1994)(Board affirmed AJ decision that agency changed appellant’s schedule because of appellant’s testimony in an EEO matter); *Shively v. Dep’t of the Army*, 59 M.S.P.R. 531, 533, 536 (1993)(employee’s allegations of reprisal for involvement in EEO activities implicates behavior protected under (b)(9)); *Viens-Koretko v. Dep’t of Veterans Affairs*, 53 M.S.P.R. 160, 163 (1992)(appellant’s act of testifying at an EEO hearing is protected under (b)(9)(B)).
- (e) Union Officials Acting on Behalf of Members in Connection with ULPs and EEO Complaints – *Wooten v. Dep’t of Health and Human Serv.*, 54 M.S.P.R. 143, 146 (1992).

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<sup>111</sup> Under the CSRA, the Board construed the exercise of an appeal right under (b)(9) to include protection for individuals who invoked the aid of established remedial processes. *Bodinus v. Department of Treasury*, 7 M.S.P.R. 536, 540 (1981). Thus it protected those who testified for or assisted others in the exercise of an appeal right. *Special Counsel v. Brown*, 28 M.S.P.R. 133 (1985); *Acting Special Counsel v. Department of Defense*, 13 M.S.P.R. 380, 383 (1982); *Bodinus*, 7 M.S.P.R. at 540; see also *Watson v. Department of Treasury*, 49 M.S.P.R. 237, 243 (1991); *Boomer v. Department of the Navy*, 34 M.S.P.R. 636, 640 (1987); *Ketchum v. Department of Transp.*, 28 M.S.P.R. 268, 273 (1985); *Monczewski v. Department of the Air Force*, 12 M.S.P.R. 362, 365 (1982).

The purpose for extending protection beyond the exercise of an appeal right was to preserve the integrity of the appeal process. *Bodinus*, 7 M.S.P.R. at 540; *In re Frazier*, 1 M.S.P.R. 163, 192-93 (1979). The Board protected false, but non-malicious, statements made during the course of a grievance proceeding. *Kennedy v. Department of the Army*, 22 M.S.P.R. 190, 192-94 (1984). Where protection was unnecessary to preserve the integrity of the process, the Board demonstrated unwillingness to protect. Thus, where an employee made false and malicious statements in the EEO process, the Board declined to protect those statements. *Johnson v. Department of the Army*, 48 M.S.P.R. 54, 60-62 (1991); *Oliver v. Department of Health and Human Serv.*, 34 M.S.P.R. 465, 474-75 (1987), *aff’d*, 847 F.2d 842 (Fed.Cir. 1986) (Table).

## 2. Cooperating With or Disclosing Information to Inspector General or OSC<sup>112</sup>

The WPA codified protection for “cooperating with or disclosing information to the Inspector General of any agency or to [OSC], in accordance with applicable provisions of law.” 5 U.S.C. § 2302(b)(9)(C) This section will cover those disclosures made to an Inspector General or OSC that do not meet the precise terms of a protected disclosure under 5 U.S.C. § 2302(b)(8). *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 169-70 (1996)(OSC did not prove that employee was terminated because of his cooperation with the IG, an alleged violation of (b)(9)(C)); *Booker v. U.S. Postal Serv.*, 53 M.S.P.R. 507, 509-10 (1992)(claim of reprisal for cooperating with IG investigation is (b)(9) and not an independent source of Board jurisdiction) ; *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991)((b)(9)(C) covers employee disclosures to an IG or OSC which do not meet the precise terms of actions described in (b)(8)), *reconsideration denied*, 52 M.S.P.R. 375 (1992), *aff’d, sub nom. Hathaway v. Merit Sys. Prot. Bd.*, 981 F.2d 1237 (Fed.Cir. 1992).

## 3. Refusing to Obey Order Requiring a Violation of Law

The WPA added new protections for individuals who refuse “to obey an order that would require the individual to violate a law.” 5 U.S.C. § 2302(b)(9)(D). There is no case law directly addressing the application of (b)(9)(D). However, the Board mentioned (b)(9)(D)’s application in passing in a case where the Board held that it lacked jurisdiction over the claims of an employee who filed an IRA. The allegation underlying the IRA was that agency officials retaliated against the employee by lowering his performance rating and denying him a promotion because he failed to perform a task that would have required violating the law and regulations applicable to the certification of travel vouchers. The court noted that this particular allegation by the employee might be properly evaluated under 5 U.S.C. § 2302(b)(9)(D), but was not cognizable as a (b)(8) allegation. *Davis v. Dep’t of Defense*, 103 M.S.P.R. 516, 519 (2006).

### i. The Traditional “Obey and Grieve” Rule

Under the CSRA, the Board uniformly applied the traditional “obey and grieve” rule which obligated an employee to obey an agency’s order while taking appropriate action to challenge the validity of the order. *See, e.g., Ingram v. Dep’t of Justice*, 44 M.S.P.R. 578, 582 (1990)(employee does not have unfettered right to disregard an order merely because it is improper), *aff’d*, 925 F.2d 1479 (Fed.Cir. 1991); *Cooney v. Dep’t of the Air Force*, 34 M.S.P.R. 183, 186 n.1 (1987)(Board mitigated removal to 30 day suspension finding that appellant’s refusal to obey order was understandable, but appellant still had duty to follow order), *aff’d on remand*, 37 M.S.P.R. 240 (1988), *aff’d*, 883 F.2d 1027 (Fed.Cir. 1989) (Table); *Blevins v. Dep’t of the Army*, 26 M.S.P.R. 101 (1985)(appellant was obligated to obey agency’s order while taking appropriate action to challenge validity of order).

The Board has carved out limited exceptions to the traditional “obey and grieve” rule. Thus, for example, in *Fleckenstein v. Dep’t of the Army*, 63 M.S.P.R. 470, 475-76 (1994), *overruling Gragg v. Dep’t of the Air Force*, 13 M.S.P.R. 296 (1982), the Board held that a charge of insubordination could not be sustained in the absence of a showing that the agency was

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<sup>112</sup> Under the CSRA, the Board construed (b)(9) to protect individuals who cooperated with or disclosed information to the Inspector General of an agency or to OSC. *See, e.g., Special Counsel v. Harvey*, 28 M.S.P.R. 595, 604 (1984), *rev’d on other grounds*, 802 F.2d 537, 547 (D.C. Cir. 1986).

entitled to have its order obeyed. In *Fleckenstein*, the agency could not make such a showing because some of the documents demanded by the supervisor were privileged under the attorney work product doctrine. 63 M.S.P.R. at 475-76. In *Cooke v. U.S. Postal Serv.*, 67 M.S.P.R. 401, 407-08 (1995), the Board added another requirement to the *Fleckenstein* exception – namely, that obeying the order must also cause the employee irreparable harm. See also Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 61 Admin. L. Rev. 531, 9-10 (1999) (discussing that (b)(9)(D) provides a more limited basis for relief than (b)(8) to employees who refuse to obey an order which would require them to violate a law or their ethical responsibilities) .

#### **4. Personnel Action and Knowledge (Elements 2 and 3)**

See Sections VII.A7 and A8 for discussion of the elements of personnel action and knowledge.

#### **5. Causal Connection (Element 4)**

The fourth and final element of a (b)(9) case concerns the causal connection between the protected activity and the personnel action at issue. The method by which the causal connection will be evaluated by the Board depends on the type of case being brought before the Board. Specifically, the causal connection will be evaluated using different legal standards based on whether the matter at issue is:

1. a corrective action case brought by OSC pursuant to (b)(9);
2. a disciplinary action case brought by OSC pursuant to (b)(9), where OSC is seeking disciplinary action against the agency official responsible for taking a personnel action against an individual because of that individual’s protected activity; or a
3. a matter appealed by an individual facing disciplinary action under 5 U.S.C. § 7701 who alleges (b)(9) as an affirmative defense.

##### **i. Contributing Factor Causation in OSC Corrective Action Cases**

Prior to the WPEA , based on dicta from *Santella*, the causation standard in (b)(9) corrective action cases required 1) OSC to show by a preponderance of evidence that the protected activity was a “substantial,” or “motivating” factor in the personnel action; 2) then the burden shifted to the agency to rebut by preponderant evidence that it would have taken the same action in the absence of the protected activity. *Santella* at 456. While this test should still apply for cases brought under (b)(9)(A)(ii), the WPEA changed the causation standard for cases brought under (b)(9)(A)(i), (B), (C), and (D), adopting the “contributing factor” test that already applied to corrective action cases brought under (b)(8). 5 U.S.C. § 1214(b)(4)(B)(i).

##### **ii. Significant Factor Causation in Disciplinary Action Cases**

For disciplinary actions in (b)(9) cases, OSC must establish causation by showing that the protected activity was a significant factor in the adverse personnel action. *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 171 (1996). In *Nielson*, the Board relied on *Eidman* and *Santella* and clarified that a significant factor in a disciplinary action case is one that played an important role in the allegedly retaliatory action,” not a factor that was “tangentially related” to the protected activity. *Nielson* at 171.

- (a) *Special Counsel v. Costello*. 75 M.S.P.R. 562 (1997). Similarly, in a subsequent (b)(9) disciplinary action, *Costello*, the Board applied the significant factor test and held that although the agency official considered the details contained within the employee’s grievance in making his reassignment decision, it was one of four or five other factors under consideration, and therefore the Board was unable to conclude that the filing of the grievance was a significant factor in the agency official’s decision to take the personnel action. *Costello* at 611.
- (b) *Mt. Healthy*<sup>113</sup> Subsumed by Disciplinary Action Significant Factor Test. The Board has held that the “significant factor” test subsumes the *Mt. Healthy* defense and therefore in (b)(9) disciplinary cases separate or burden shifting analysis of evidence is not necessary. The Board reasoned that if OSC was able to establish that an employee’s protected conduct played a significant role in the adverse personnel action taken by the respondent, the respondent would necessarily be unable to present a successful *Mt. Healthy* defense. *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 171 (1996), quoting *Special Counsel v. Santella*, 65 M.S.P.R. 452, 458-59 (1994), *aff’d*, 77 M.S.P.R. 672 (1998).
- (c) WPEA Codified Significant Factor Test and Restores Mt. Healthy Defense in most (b)(9) Cases. The WPEA codified the significant motivating factor test for disciplinary action claims brought under 2302 (b)(8) and (b)(9)(A)(i), (B), (C), and (D). Specifically, “the Board may impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) was a significant motivating factor, even if other factors also motivated the decision, for [the agency official’s] decision to take, fail to take, or threaten to take or fail to take a personnel action unless that [agency official] demonstrates by a preponderance of the evidence, that the [agency official] would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.” 5 U.S.C. § 1215(a)(3)(B).

The legislative history behind the WPEA states that the change was done specifically to adopt the *Mt. Healthy* test.<sup>114</sup> As such, the *Mt. Healthy* defense is no longer subsumed by the significant factor test for many disciplinary action cases brought under (b)(9). An interesting question would be what standard would apply to a disciplinary action case brought under 2302(b)(9)(A)(ii). On the one hand, Congress specifically excluded section (b)(9)(A)(ii) in its amendment of the disciplinary action standard in section 1215(a)(3)(B), which suggests that *Nielsen* still applies. On the other hand, the legislative change adopting the *Mt. Healthy* defense could be read as a rejection of *Nielsen*’s holding that the *Mt. Healthy* defense should be subsumed by the significant factor test.

### iii. Employee Appeals (b)(9) Affirmative Defense Causation Standard

In order to show to causation using (b)(9) as an affirmative defense to an adverse personnel action, the employee must show that there was a genuine nexus between the protected

<sup>113</sup> *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). Under the *Mt. Healthy* test, OSC would have to show that protected whistleblowing was a “significant motivating factor” in the official’s decision to take or threaten to take a personnel action, even if other factors were considered in the decision. If the OSC makes such a showing, the official would then have the opportunity to show, by a preponderance of the evidence, that he or she would have taken or threatened to take the same personnel action even if there had been no protected activity.

<sup>114</sup> S. Rep. No. 112-155, April 19, 2012, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt155/html/CRPT-112srpt155.htm>.

activity and the adverse action. *Warren v. Dep't of the Army*, 804 F.2d 654, 656-58 (Fed.Cir. 1986).

A. *Nexus Causation Standard When the Evidentiary Record Is Not Complete.* When the evidentiary record is not complete, the Board will employ a burden shifting analysis. First, the appellant may make a *prima facie* case by establishing a genuine nexus between the protected activity and the adverse action. The Board must weigh the intensity of the motive to retaliate against the gravity of the misconduct. *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, 624-26 (2001);

The retaliatory intensity of the motive to retaliate must outweigh the gravity or seriousness of the misconduct. *Jefferson v. U.S. Postal Serv.*, 81 M.S.P.R. 607, 612 (1999). If the appellant successfully establishes this, the agency may defend against a *prima facie* case under (b)(9) by introducing evidence that it would have taken the same personnel action, even in the absence of protected activity. *Thornhill v. Dep't of the Army*, 50 M.S.P.R. 480, 490 (1991); *Westmoreland v. Dep't of Transp.*, 49 M.S.P.R. 574, 577 (1991).

B. *Nexus Causation Standard When the Evidentiary Record Is Complete.* When the evidentiary record is complete, an administrative judge or the Board will not inquire as to whether the employee established a *prima facie* case, or whether some other threshold of proof has been met so as to shift the burden to the agency. Instead, the inquiry proceeds to the ultimate question of whether the employee met the overall burden of proving retaliation based upon weighing the evidence presented by both parties. *Simien v. United States Postal Service*, 99 M.S.P.R. 237, 249 (2005).

## **6. Evolving Issues in (b)(9) Cases**

### **i. Individual Rights of Action**

The WPEA expanded individual right of action (IRA) appeals to cases falling under 2302(b)(9)(A)(i), (B), (C), and (D) but not under 2302(b)(9)(A)(ii). This means that a complainant who brings a (b)(9)(A)(i), (B), (C), or (D) claim to OSC but whose case is closed will be able to independently bring a claim before the Board. Previously, such IRA rights were given only to complainants who had brought a 2302(b)(8) allegation to OSC but had their cases closed. The Board has not yet weighed in on exactly what qualifies as a (b)(9)(A)(i) allegation (an appeal, complaint, or grievance with regard to remedying a violation of 2302(b)(8)) as opposed to a (b)(9)(A)(ii) one (an appeal, complaint, or grievance that is not with regard to remedying a violation of 2302(b)(8)).

### **ii. Mosaic Theory of Retaliation**

The Board has recognized that direct evidence of reprisal is often rare. Therefore, to establish retaliation based on circumstantial evidence, the Board has held that an employee must provide evidence showing a “convincing mosaic” of retaliation. *Rhee v. Dep't of the Treasury*, 117 M.S.P.R. 640, 651 (2012). This mosaic includes three general types of evidence: 1) Evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; 2) Evidence that employees similarly situated to the appellant have been better treated; and 3) Evidence that the employer’s stated reason for its action is pretextual. *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-230 (2010); *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 11 (2008).

At present, the mosaic concept has been developed within the context of employee appeals. However, as (b)(9) law continues to evolve it may be possible to successfully argue that the evidence presented pursuant to a mosaic theory is applicable to (b)(9) corrective action and disciplinary action cases. An implementation of the mosaic theory in OSC (b)(9) original jurisdiction cases would likely make it easier to establish causation under the respective corrective action and disciplinary action causation standards.

## **IX. Procedural Issues**

Before exercising remedies afforded under the WPA, it is critical to assess the unique and potentially confusing procedural issues that arise in federal sector whistleblower cases.

### **A. Three Avenues for MSPB Adjudication of a Whistleblower Claim**

There are three options available to employees to bring a whistleblower reprisal complaint before the MSPB.

#### **1. Affirmative Defense in an Otherwise Appealable Action Case**

In an appeal of an adverse action brought under 5 U.S.C. § 7513<sup>115</sup> or an appeal of a performance-based action brought under 5 U.S.C. § 4303, the appellant can assert a PPP as an affirmative defense. *See* 5 U.S.C. § 7701(c)(2) (“the agency’s decision may not be sustained . . . if the employee . . . shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title.”). The appellant has the burden to show by a preponderance of the evidence that the decision was based on a PPP.

#### **2. Individual Right of Action Appeals**

There are two ways in which an employee can bring an IRA appeal at the MSPB: 1) if OSC does not seek corrective action within 120 days of the filing of the complaint; or 2) if OSC closes its investigation of the complaint, the complainant has 65 days from the date of the written notice, or 60 days from the date of receipt of the notice, to file an IRA appeal. 5 U.S.C. § 1214(a)(3); The regulation incorporates the presumption of 5 C.F.R. § 1201.4(l) that a letter is received 5 days after mailing as applicable to the 60-day deadline for filing specified in the statute.

Prior to the enactment of the WPEA, the IRA appeal option was available only for § 2302(b)(8) claims.<sup>116</sup> The WPEA expanded IRA appeals to cases brought under the following provisions of § 2302(b)(9):

- 2302(b)(9)(A)(i) – exercising any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of paragraph (8)
- 2302(b)(9)(B) – testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

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<sup>115</sup> Actions directly appealable to the MSPB include (1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less. *See* 5 U.S.C. § 7512.

<sup>116</sup> Congress created the IRA remedy to “assure whistleblowers . . . an opportunity to argue their case in a hearing – with or without the OSC’s involvement.” S. Rep. No. 100-413 at 17 (1988).

- 2302(b)(9)(C) – cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel; and
- 2302(b)(9)(D) – refusing to obey an order that would require the individual to violate a law.

The IRA option is not available for claims brought under § 2302(b)(9)(A)(ii), *i.e.*, exercising any appeal, complaint, or grievance right granted by any law, rule, or regulation other than with regard to remedying a violation of paragraph (8).

In an IRA appeal, the Board may consider only the charges of whistleblowing that the appellant raised before OSC, *i.e.*, the IRA appellant must prove exhaustion of administrative remedies. *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1036 (Fed. Cir. 1993); *Coufal v. Dep’t of Justice*, 98 M.S.P.R. 31, 37 (2004). Therefore, if the complainant is subjected to additional retaliation after filing an initial complaint with OSC, it is critical to document efforts to supplement the initial complaint. An AJ’s inquiry into exhaustion of administrative remedies is limited to identifying (1) the whistleblowing disclosures and (2) the personnel actions that the appellant raised before OSC. The appellant must “give the [OSC] sufficient basis to pursue an investigation which might have led to corrective action.” *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992) (*citing Knollenberg v. Merit Sys. Prot. Bd.*, 953 F.2d 623, 626 (Fed. Cir. 1992)).

IRA appeals are *de novo*, *i.e.*, the IRA appeal must be viewed independently from OSC’s decision to close the complaint. Section 1221(f) of title 5, United States Code, expressly states: “[A] decision to terminate an investigation under subchapter II may *not* be considered in any action or other proceeding under this section.” 5 U.S.C. § 1221(f) (emphasis added). Section 1214 contains a similar prohibition:

A determination by the Special Counsel under this paragraph *shall not be cited or referred to* in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

5 U.S.C. § 1214(a)(3) (emphasis added). Under this statutory scheme, OSC’s internal decisions regarding an appellant’s complaint have no legal relevance to whether an appellant may proceed with an IRA. Congress took pains to protect OSC’s internal deliberations regarding the disposition of a complaint from Board review “to ensure that a whistleblower is not ‘penalized’ or ‘prejudiced’ in any way by OSC’s decision not to pursue a case.” *Costin v. Dep’t of Health and Human Servs.*, 64 M.S.P.R. 517, 531 (1994). The MSPB can only order an appellant to produce OSC’s determination letter if the AJ explains why the letter is necessary and provides the opportunity to consent. *See*, 5 U.S.C. § 1214(a)(2)(B); *Bloom v. Dep’t of Army*, 101 M.S.P.R. 79, 84 (2006).

### 3. OSC Original Jurisdiction Cases

OSC can file a complaint at the Board seeking corrective or disciplinary action. If the case proceeds to a hearing, the judge will issue an initial decision and can order corrective or disciplinary action. If neither party files a petition for review by the Board within 35 days after the date of issuance of the initial decision, then the initial decision becomes the final decision of the Board. If the Board grants a petition for review, the Board may affirm, reverse, modify, or

vacate the initial decision of the judge. The Board may issue a final decision and, when appropriate, order a date for compliance with that decision.

## **B. Election of Remedies**

An employee subjected to a covered personnel action in retaliation for protected whistleblowing that is also appealable to the Board may elect to pursue a remedy through one of three remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance under a collective bargaining agreement; or (3) a complaint filed with OSC, which can be followed by an IRA appeal filed with the Board.”<sup>117</sup> Whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums. *Agoranos*, ¶ 13. This election of remedies does not affect the right to pursue an EEO complaint, *i.e.*, an employee can pursue both an EEO complaint and an OSC complaint simultaneously.

When an agency takes an action against an employee that is directly appealable to the Board, it must provide notice of the avenues of relief available to the employee and of the preclusive effect of electing a remedy. *See* 5 C.F.R. § 1201.21(d). An election of remedies under 5 U.S.C. § 7121(g) “must be knowing and informed, and, if it is not, it will not be binding upon the employee.” *Agoranos*, ¶ 16.

The Board recently summarized the election of remedies rules that apply to members of collective bargaining units:

[W]here an employee is affected by an action that is otherwise exclusively committed to the negotiated grievance procedure under § 7121(a)(1), but that may also be a prohibited personnel practice under section 2302(b)(1), *i.e.*, unlawful discrimination, the employee may ‘raise the matter under a statutory procedure or the negotiated procedure, but not both.’ 5 U.S.C. § 7121(d)(1). Similarly, with regard to matters covered under sections 4303 and 7512, which are also covered by a negotiated grievance procedure, the employee may elect to pursue the contractual remedy or relief through the Board’s appellate procedures, but not both. 5 U.S.C. § 7121 (e)(1). In both instances, whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums.

*Agoranos*, ¶ 13.

In deciding whether to appeal an adverse action to the MSPB or instead to file a PPP complaint arising from the adverse action, it is important to consider that in an IRA appeal, the only issues before the Board are those listed in 5 U.S.C. § 1221(e), *i.e.*, whether the appellant has demonstrated that whistleblowing or other protected activity was a contributing factor in one or more covered personnel actions. 5 C.F.R. § 1209.2(c). In an IRA appeal, the appellant may not raise affirmative defenses, such as claims of discrimination or harmful procedural error. Note also that in an IRA appeal arising from an adverse action, the agency need not prove its charges, nexus, or the reasonableness of the penalty. *Id.*

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<sup>117</sup> *See* 5 C.F.R. § 1209.2(d).

### **C. OSC Deferral to EEO Process**

Discrimination based on race, color, religion, sex, handicapping condition, gender, nationality, or age is a prohibited personnel practice. 5 U.S.C. § 2302(b)(1). Nevertheless, it was not intended that OSC duplicate or bypass the procedures established in the agencies and the EEOC for redressing discrimination complaints. 5 C.F.R. § 1810.1. Therefore, when a complaint alleging discrimination is filed at OSC, the agency generally defers to the EEO process to adjudicate that complaint. If the EEOC makes a finding of unlawful discrimination, OSC may pursue disciplinary action against the supervisory official who engaged in unlawful discrimination. And if OSC is investigating a PPP other than § 2302(b)(1) and the complainant also alleges a strong § 2302(b)(1) claim, OSC may at its discretion investigate the § 2302(b)(1) and seek corrective action to remedy a § 2302(b)(1) violation.

### **D. Stays**

OSC may request any member of the Board to stay any personnel action for a period of 45 days if OSC determines that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. 5 U.S.C. § 1214(b)(1)(A)(i). OSC may also file a stay request after the effective date of a personnel action. *Special Counsel ex rel. Perfetto v. Dep't of Navy*, 83 M.S.P.R. 169, 173 (1999).

OSC applies the following criteria in determining whether a stay is warranted:

1. There are reasonable grounds to believe that the personnel action was taken or is about to be taken constitutes a prohibited personnel practice; and
2. Absent a stay the employee will be subjected to removal, a suspension for more than 14 days, a reduction in grade, a significant reduction in pay, a geographic reassignment, the non-renewal of an appointment, or any other personnel action which the complainant demonstrates by compelling evidence will result in serious immediate hardship;
3. In any other case where, based on available information, there exists a substantial likelihood that the personnel action that was taken, or is about to be taken, was the result of a prohibited personnel practice; or
4. Where the Special Counsel, in her sole discretion, determines that a stay would be appropriate and consistent with OSC's statutory mission to request a stay from the Board.

An informal stay is granted by the agency voluntarily. Generally it is a verbal commitment not to take the action for a specified period of time while OSC investigates and determines the merits of the claim. Depending on the case, an informal stay may be negotiated with the agency human resources office or personnel office, the general counsel's office or the program office. OSC generally attempts to negotiate an informal stay before petition the Board.

Formal stays are those granted by the MSPB pursuant to the filing of a formal petition by OSC. In evaluating the sufficiency of a stay request, the Board views the facts in the record in the light most favorable to a finding that there are reasonable grounds to believe that the personnel action is the result of a prohibited personnel practice. *Special Counsel v. Dep't of Treasury*, 70 M.S.P.R. 578, 580 (1996).

The Board may extend the period of a stay for any further period that the Board considers appropriate. 5 U.S.C. § 1214(b)(1)(B); *Special Counsel, ex rel. Tines v. Department of Veterans Affairs*, 98 M.S.P.R. 510, 511 (2005). In evaluating a request for an extension, the Board views

the record in the light most favorable to OSC, and typically grants a stay extension request if OSC's prohibited personnel practice claim is not clearly unreasonable. *Special Counsel, ex rel. Waddell v. Dep't of Justice*, 105 M.S.P.R. 208, 210 (2007). OSC's stay request need merely fall within the range of rationality to be granted. *Office of Special Counsel, ex rel. Hopkins v. Dep't of Transportation*, 90 M.S.P.R. 154, ¶ 157 (2001).

An IRA appellant can also request a stay from the Board. See 5 C.F.R. § 1209.9. The appellant must show that “[t]here is a substantial likelihood that the appellant will prevail on the merits of the appeal.” 5 C.F.R. § 1209.9(a)(6)(iii). That standard is higher than the “reasonable grounds” standard that OSC must meet to obtain a stay. See 5 U.S.C. § 1214(b)(1)(A)(i).

### **E. Legal Representation in OSC Investigations**

OSC permits witnesses<sup>118</sup> and subjects<sup>119</sup> to have personal legal counsel present at an investigative interview to provide advice and counsel. An attorney representing a subject or fact witness in an OSC investigation must enter an appearance by signing and submitting OSC's Designation of Representation form (Designation Form), which is posted on OSC's website. That form contains a certification signed by both the witness and the legal representative stating that the designated individual is serving as the “personal legal representative” of the witness.

### **F. OSC Deferral to MSPB Proceedings**

When a complainant elects to pursue an IRA appeal or an adverse action appeal at the Board, OSC will generally close its investigation of the case. Because the MSPB has authority to make authoritative determinations with regard to the personnel actions under investigation and OSC would be bound by OSC's adjudication of the issues, there is usually no basis for OSC to further investigate a matter while it is being litigated at the MSPB. OSC may choose to intervene in a matter being litigated at the MSPB if OSC deems the matter highly significant to the proper functioning of the merit system, such as a case presenting a critical issue defining the scope of protected conduct under the WPA. In IRA appeals and adverse action appeals, OSC must obtain the consent of the appellant prior to intervening.

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<sup>118</sup> Fact witnesses in OSC PPP investigations are employees who have information about the matter under investigation, but who do not have personal responsibility for the alleged violation under investigation. Witnesses generally do not retain counsel to represent them in an OSC interview.

<sup>119</sup> Subject officials in OSC PPP investigations are agency officials who recommended, initiated, approved and/or threatened to take the personnel action(s) at issue in the investigation or who are alleged to have violated a law, rule or regulation under OSC's enforcement jurisdiction.