UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY SALAZAR, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	)	DOCKET NUMBER SF-1221-15-0660-W-1

BRIEF ON BEHALF OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS AMICUS CURIAE

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus Curiae, the United States Office of Special Counsel (OSC), is an independent federal agency charged with protecting federal employees, former federal employees, and applicants for federal employment from "prohibited personnel practices," as defined in 5 U.S.C. § 2302(b). In particular, OSC is responsible for protecting federal employees against retaliation when they disclose any information that they reasonably believe evidences any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8).

OSC has a substantial interest in a legal issue presented by this case concerning the application of 5 U.S.C. § 2302(f)(2), added as part of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, a comprehensive effort to strengthen the overall protections for federal employee whistleblowers. Section 2302(f)(2) clarified that

disclosures made in an employee's normal course of duties may be protected, subject to an altered evidentiary burden. Specifically, the provision places an additional burden on an employee to demonstrate that a personnel action was taken "in reprisal for" a disclosure that was made in the normal course of duties and not just "because of" that disclosure. Nevertheless, Congress intended section 2302(f)(2) to place only a "slightly higher burden" on whistleblowers. S. Rep. 112-155 at 6.

OSC submits this *amicus curiae* brief to assist the Merit System Protection Board (MSPB or Board) in determining the scope of the "in reprisal for" evidentiary burden in section 2302(f)(2) that an employee must meet to prove a *prima facie* case of whistleblower retaliation for a disclosure made in the normal course of duties. In this case, OSC believes that the MSPB Administrative Judge's formulation of this standard improperly elevated the burden far beyond what the statute requires and what Congress intended. OSC's proffered alternate approach to meet the "in reprisal for" evidentiary burden is consistent with the WPEA's purpose, language, and legislative history, as well as Board precedent. It is also more fair, reasonable, and workable in practice.

STATEMENT OF THE ISSUE

How may an employee meet the "in reprisal for" evidentiary burden under section 2302(f)(2) to prove a *prima facie* case of whistleblower retaliation for a disclosure made in the employee's normal course of duties?

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Anthony Salazar worked as the Motor Vehicle Operator Supervisor for the Department of Veterans Affairs (VA), Greater Los Angeles Healthcare System's Engineering Service. *See Salazar v. Dep't of Veterans Affairs*, No. SF-1221-15-0660-W-1, 2016 WL 2659432, at 2

(M.S.P.B. Initial Decision May 4, 2016). On October 10, 2013, Mr. Salazar emailed his first-level supervisor, Engineering Service Chief [redacted], about problems with agency vehicle and fleet card usage, including unaccounted for vehicles and keys, lax recordkeeping, delinquent maintenance, and irregular purchases with fleet cards. On October 24, 2013, Mr. Salazar sent another email to [redacted] and his second-level supervisor, the Assistant Director for Administration and Facilities, about the continued problems with agency vehicle and fleet card usage. Mr. Salazar described how 30 of the 88 agency vehicles were unaccounted for, explained how ten fleet cards were suspected of fraudulent purchases, and pressed the urgent need for the VA to get the situation under control. *Id.* at 2-4.

As a result, the VA convened an Administrative Investigation Board (AIB) in January 2014 to examine the facts and circumstances surrounding stolen agency vehicles, including whether managerial oversight played a part in the theft of such vehicles. The AIB concluded that managerial oversight contributed to the theft of government vehicles, for which [redacted] received a letter of counseling. The AIB did not recommend, nor did Mr. Salazar receive, any disciplinary action based on the AIB report. *Id.* at 4-6.

In March 2014, [redacted] denied Mr. Salazar's request for team training.[1] In June 2014, [redacted] changed Mr. Salazar's performance standards, which led to a notice of unacceptable performance and placement on a performance improvement plan (PIP) in September 2014. After [redacted] recommended Mr. Salazar's removal for failing the PIP, the VA removed Mr. Salazar from federal service on February 4, 2015. *Id.* at 6.

[1] Mr. Salazar received the team training in September 2014.

Mr. Salazar filed a complaint with OSC, challenging the above personnel actions as retaliation because of his disclosures.[2] After OSC closed his complaint, Mr. Salazar timely filed an individual right of action appeal with the MSPB. The Administrative Judge denied Mr. Salazar's request for corrective action because he failed to meet the "extra evidentiary burden" under section 2302(f)(2) to establish that the disclosures made in his normal course of duties were "actually protected under the WPEA." *Id.* at 8, 22-23. In reaching his decision, the Administrative Judge held that Mr. Salazar could not rely on the statutory burden-shifting framework usually applied in whistleblower retaliation cases, which would have required Mr. Salazar to prove by preponderant evidence that his disclosures were a "contributing factor" in the listed personnel actions.[3] *Id.* at 13. Under this established analysis, if Mr. Salazar made this *prima facie* showing, the burden would have shifted to the VA to prove its defense of showing by clear and convincing evidence that it would have taken the same personnel actions even in the absence of Mr. Salazar's disclosures. The Administrative Judge, however, concluded "that meeting the contributing factor standard alone is not enough to meet the appellant's higher evidentiary burden to show his disclosures were protected under the circumstances." *Id.* at 15.

Instead, the Administrative Judge found the agency's defense and related "proof methodology" in the traditional burden-shifting scheme instructive for determining retaliatory motive under section 2302(f)(2). *Id.* at 14 (citing, e.g., *Whitmore v. Dep't of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) and *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318 (Fed. Cir. 1999)).

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[2] Mr. Salazar described other retaliatory actions in his OSC complaint, but we limit our discussion to the four personnel actions analyzed by the Administrative Judge. *See Salazar*, 2016 WL 2659432, at 6.

[3] The contributing factor evidentiary standard is typically met with circumstantial evidence that (1) the agency knew of the disclosure; and (2) the personnel action occurred within a time period that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action (referred to as "knowledge/timing evidence"). *See Carey v. Dep't of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 11 (2003) (citing 5 U.S.C. § 1221(e)(1)). Here, the Administrative Judge concluded that Mr. Salazar's proffered evidence "would satisfy the knowledge/timing test and establish the contributing factor element." *See Salazar*, 2016 WL 2659432, at 15.

Specifically, he incorporated all of the factors typically required in the agency's defense into the complainant's *prima facie* case of whistleblower retaliation. *Id.* He then analyzed the "***totality of evidence in the record*** speaking to the disclosures and personnel actions at issue in light of the factors speaking to the contributing factor ***and*** clear and convincing evidence standards in whistleblower cases" to determine whether Mr. Salazar had met the "in reprisal for" evidentiary burden in section 2302(f)(2). *Id.* at 15 (emphases added). Having found that Mr. Salazar failed to meet this heightened standard and show that his disclosures were protected, the Administrative Judge declined to adjudicate whether the disclosures were a contributing factor in the personnel actions, or whether the VA had proven its defense by clear and convincing evidence. *Id.* at 23.

ARGUMENT

Section 2302(f)(2) is inapposite in this case. Congress intended this provision to apply only to disclosures made by federal employees who regularly investigate and report wrongdoing as their principal job functions, such as auditors and investigators.[4] But even if section 2302(f)(2) applies in this case, the Administrative Judge erred in his formulation of the "in reprisal for" standard.[5] Despite clear congressional intent that section 2302(f)(2) places only a "slightly higher burden" on an employee whose disclosure is made in the normal course of duties, the Administrative Judge upended the WPEA's carefully crafted burdens of proof in whistleblower retaliation cases and imposed an unduly onerous burden on Mr. Salazar.

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[4] *See, e.g.*, OSC's Brief as *Amicus Curiae* at 4-8, *Benton-Flores v. Dep't of Defense*, No. DC-1221-13-0522-B-1 (M.S.P.B. Apr. 12, 2016), *available at* https://osc.gov/Resources/Benton-Flores-Amicus-Brief.pdf; and OSC's Brief as *Amicus Curiae* at 10-12, *Acha v. Dep't of Agriculture*, No. 15-9581 (10th Cir. Apr. 7, 2016), *available at* https://osc.gov/Resources/Acha-Amicus-Brief.pdf. Here, Mr. Salazar's position at the VA did not require that he regularly investigate and report wrongdoing as a core job duty; rather, his disclosures were arguably made under the general obligation on all federal employees to report waste, fraud, and abuse. *See* 5 C.F.R. § 2635.101(b)(11). This general obligation is insufficient to bring a case within the scope of section 2302(f)(2).

[5] The Administrative Judge held, and Mr. Salazar appeared to admit during his hearing testimony, that Mr. Salazar made his disclosures in the normal course of his duties. *See Salazar*, 2016 WL 2659432, at 8-13. Mr. Salazar, however, now disputes that his disclosures were made in the normal course of his duties. *See* Petition for Review at 5-6, *Salazar v. Dep't of Veterans Affairs*, No. SF-1221-15-0660-W-1 (M.S.P.B. June 6, 2016).

Specifically, the Administrative Judge improperly evaluated the totality of the record evidence with overly rigorous scrutiny to find that Mr. Salazar failed to meet his *prima facie* case of whistleblower retaliation. OSC proffers a better approach, based on the WPEA's language and purpose, prior Board decisions, and past experience that effectively balances the WPEA's goal of strengthening whistleblower protections with an agency's legitimate need to manage and evaluate a certain category of federal employees whose very jobs regularly require investigating and reporting wrongdoing.

I. Imposing an Onerous Evidentiary Burden under Section 2302(f)(2) is Inconsistent with the Purpose, Language, and Legislative History of the WPEA.

Section 2302(f)(2) of the WPEA states in full:

> If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to the employee in reprisal for the disclosure.

5 U.S.C. § 2302(f)(2). The purpose of this provision in the WPEA was to expressly overrule previous decisions of the Federal Circuit (and the MSPB) that unduly restricted whistleblower protections, such as *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) and *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001). Indeed, in a Senate report, Congress admonished the Federal Circuit and the Board for "undermin[ing]" the WPEA's predecessor statute—the Whistleblower Protection Act of 1989 (WPA)—and the "clear legislative history" meant to protect "any disclosure" of specified government wrongdoing. S. Rep. 112-155 at 4-5. Congress expected the law to encourage, not inhibit, ordinary employees—like Mr. Salazar—to disclose wrongdoing they observed in the federal workplace.

The scope of the additional burden outlined in section 2302(f)(2) is narrow. It is to fairly and reasonably balance a supervisor's ability to manage a specific set of employees who must regularly investigate and report wrongdoing in carrying out their basic job functions while still ensuring those employees are protected from retaliation. The Senate report specifically states:

> This extra proof requirement when an employee makes a disclosure in the normal course of duties is intended to facilitate adequate supervision of employees, such as auditors and investigators, ***whose job is to regularly report wrongdoing***. Personnel actions affecting auditors, for example, would ordinarily be based on the auditor's track-record with respect to disclosure of wrongdoing; and therefore a provision forbidding any personnel action taken because of a disclosure of wrongdoing would sweep too broadly.

S. Rep. No. 112-155 at 5-6 (emphasis added) (clarifying that *Willis* and *Huffman* wrongly excluded disclosures made in the normal course of an employee's investigatory and reporting duties). Significantly, nothing in the WPEA altered the statutory language describing the burden-shifting structure used in all whistleblower retaliation cases seeking corrective action. *See* 5 U.S.C. §§ 1214(b)(4)(B), 1221(e)(1); *see also* 5 C.F.R. § 1201.57(c)(4).

By including section 2302(f)(2) in the WPEA, Congress intended that certain employees who allege retaliation for a disclosure made in the normal course of duties merely offer "extra proof" that the agency took or threatened the personnel action with "an improper, retaliatory motive." S. Rep. 112-155 at 5. But Congress did not expect this to be an onerous evidentiary burden. The Senate Report stated:

> [Section 2302(f)(2)] is intended to strike the balance of protecting disclosures made in the normal course of duties but [*sic*] imposing a ***slightly higher burden*** to show that the personnel action was made for the actual purpose of retaliating against the [employee] for having a made a protected whistleblower disclosure.

S. Rep. 112-155 at 6 (emphasis added). Thus, imposing a heavy evidentiary burden would be inconsistent with the purpose, structure, and legislative history of the WPEA, which Congress passed "to strengthen the rights of and protections for federal whistleblowers so that they can

more effectively help root out waste, fraud, and abuse in the federal government." S. Rep. 112-155 at 1.

II. The Administrative Judge Imposed an Unduly Onerous Evidentiary Burden under Section 2302(f)(2).

Section 2302(f)(2) requires that an employee demonstrate that a personnel action was taken "in reprisal for" a disclosure that was made in the normal course of duties and not just "because of" that disclosure. As such, this provision establishes a heightened causation standard between the disclosure and the personnel action in this limited context. An employee seeking to meet this additional burden in his *prima facie* case must produce some "extra proof" of retaliatory motive beyond the evidence necessary to meet the contributing factor causation standard in these cases before shifting the burden to the agency to prove its defense of showing by clear and convincing evidence that it would have taken the same personnel action even in the absence of the disclosure. S. Rep. 112-155 at 5-6. Here, the Administrative Judge committed two errors that required Mr. Salazar to go far beyond the "slightly higher burden" contemplated by the WPEA.

First, the Administrative Judge misconstrued the proper application of the "in reprisal for" standard in section 2302(f)(2) within the *prima facie* analysis. Specifically, he stated that "when (as here) the disclosure was made in the normal course of duties, the appellant must ***first*** show that the agency took an action in reprisal for that disclosure before [the Administrative Judge] can conclude it was a ***protected*** disclosure." *Salazar*, 2016 WL 2659432, at 13 (emphases added). Admittedly, the statutory language in section 2302(f)(2) is muddled in that it states that a *disclosure* made in the normal course of duties should *not be excluded* from section 2302(b)(8) if it satisfies the additional "in reprisal for" burden. One plausible reading of section 2302(f)(2) could require an employee to satisfy the heightened causation standard to establish

merely the first element, a protected disclosure, of the *prima facie* case. This reading, however, frustrates the WPEA's central purpose of eliminating obstacles that impede broad whistleblower protections for "any disclosure" of specified government wrongdoing. S. Rep. 112-155 at 4-5. This interpretation also falls apart in practice. For example, an employee who meets the higher "in reprisal for" standard to prove that a disclosure made in the normal course of duties is *protected* must, by design, also satisfy the lower "because of" standard to demonstrate that such disclosure was a contributing factor in the personnel action. Under such an approach, the entire *prima facie* analysis collapses into the initial inquiry regarding whether the disclosure is protected and results in the potentially awkward and circular analytical framework found in this case. Here, although the Administrative Judge had expressly found that Mr. Salazar's disclosures were a contributing factor in the personnel actions, *see Salazar*, 2016 WL 2659432, at 15, the Administrative Judge ultimately "decline[d] to adjudicate whether those disclosures were a contributing factor in the personnel actions at issue" because Mr. Salazar failed to meet the additional evidentiary burden under section 2302(f)(2), *id.* at 23. This painstaking approach is odd, confusing, and unnecessary, particularly when it is undisputed that the "in reprisal for" causation standard is part of the employee's *prima facie* burden.

Second, by considering the totality of the record evidence during the *prima facie* stage of the case, the Administrative Judge upended the statutory burden-shifting paradigm in whistleblower retaliation cases and required that Mr. Salazar in effect meet both "the contributing factor and clear and convincing evidence standards" to show that his disclosures were protected under section 2302(f)(2). *Salazar*, 2016 WL 2659432, at 15. In his decision, the Administrative Judge focused his inquiry on the *Carr* factors relevant to the agency's clear and convincing defense. And doing so meant that he unfairly analyzed Mr. Salazar's burden of proof

with the exacting scrutiny usually applied to the agency. *See Whitmore*, 680 F.3d at 1367 (noting that clear and convincing evidence is a "high burden of proof for the *Government* to bear") (citing 135 Cong. Rec. H747-48 (daily ed. Mar. 21, 1989)) (emphasis added). Consequently, the Administrative Judge relied on evidence proffered by the VA to discredit, again and again, the proof Mr. Salazar submitted to establish his *prima facie* case. *Salazar*, 2016 WL 2659432, at 18-19 ("declin[ing] to credit the appellant's challenges" and finding the agency's evidence to be "relatively strong"). Repeatedly, he improperly weighed the VA's evidence together with Mr. Salazar's evidence to determine whether "on balance" there was proof of a retaliatory motive. *Id.* at 15, 17, 22.

Thus, to prevail under the Administrative Judge's conflated burden-shifting scheme, an employee would essentially have to establish retaliatory motive not by the lower preponderance of the evidence standard of proof prescribed by the statute, but by the more stringent clear and convincing evidence standard required of agencies. *See Whitmore*, 680 F.3d at 1367 ("The 'clear and convincing standard' is understood to be reserved to protect particularly important interests in a limited number of civil cases.") (internal quotation marks omitted). In other words, to meet the "in reprisal for" evidentiary burden under section 2302(f)(2) as conceived by the Administrative Judge, Mr. Salazar would in effect have to prove by more than preponderant evidence that the VA would ***not*** have taken the same personnel actions against him even in the absence of his disclosures. *See Salazar*, 2016 WL 2659432, at 17 ("On balance, I find [the VA official's] explanation for the change to [Mr. Salazar's] performance standards ***compelling***.") (emphasis added); and 20 (analyzing as part of Mr. Salazar's *prima facie* burden, not the VA's defense, that "what I [the Administrative Judge] find most telling, [Mr. Salazar] offered no challenge to the remainder of the PIP[.]"). Using this faulty and unworkable analysis, the VA

also could likely prevail on its defense with a mere preponderance of the evidence, given that the question of retaliatory motive would essentially become moot after the *prima facie* stage of the case when all of the record evidence would be evaluated. This outcome could not have been what Congress intended by adding section 2302(f)(2) to the WPEA, particularly when nothing in the statute (or its legislative history) modified the allocations of the burdens of proof used in corrective action cases, much less increased the whistleblower's burden to prove retaliation so substantially. *See* 5 U.S.C. §§ 1214(b)(4)(B), 1221(e)(1).

III. OSC's Proffered "Contributing-Factor-Plus" Approach for Analyzing Whistleblower Retaliation Cases under Section 2302(f)(2) is Consistent with the WPEA, Fair, and Workable in Practice.

OSC offers the following contributing-factor-plus approach to analyze a whistleblower retaliation case under section 2302(f)(2). To establish a *prima facie* case, the employee must first show that he or she "reasonably believes" that the disclosure evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *see also Shannon v. Dep't of Veterans Affairs*, 121 M.S.P.R. 221, ¶ 22 (2014) (citing *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)); *Linder v. Dep't of Justice*, 122 M.S.P.R. 14, ¶ 14 (2014) (concluding that an employee need not prove the alleged wrongdoing actually occurred). Next, the employee must demonstrate that the disclosure is a contributing factor in the alleged personnel action. As discussed, this is most often shown with knowledge/timing evidence. *See* 5 U.S.C. §§ 1214(b)(4)(B)(i), 1221(e)(1). In other words, the employee shows that the agency official taking the personnel action knew of the disclosure, and the personnel action occurred within a period of time such that "a reasonable person could conclude" that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1).

If the employee occupies a position requiring regularly investigating and reporting wrongdoing as a principal job function, and the disclosure occurs in the normal course of duties, the employee must offer additional evidence of retaliatory motive that the alleged personnel action was taken "in reprisal for" for the disclosure. 5 U.S.C. § 2302(f)(2). An individual may demonstrate this retaliatory motive using direct or circumstantial evidence. Relying primarily on Board precedent and OSC's past experience with these types of cases, OSC proffers the following non-exhaustive list of factors that may be used, individually or in combination, to demonstrate retaliatory motive:

(1) whether the whistleblowing was personally directed at the proposing or deciding official(s), *Stiles v. Dep't of Homeland Security*, 116 M.S.P.R. 263, ¶ 24 (2011) (citing *Daniels v. Dep't of Veterans Affairs*, 105 M.S.P.R. 248, ¶ 16 (2007));

(2) whether the proposing or deciding official(s) had a desire or motive to retaliate against the individual, *id.*, such as statements of animus or the proposing or deciding official(s) suffered adverse impact because of the whistleblowing;

(3) whether particularly close timing existed between the disclosure and the personnel action, *Fitzgerald v. Dep't of Homeland Sec.*, 107 M.S.P.R. 666, ¶ 20 (2008);

(4) the seriousness of the information disclosed;

(5) whether the disclosure occurred outside of the direct chain of command or normal channels for reporting wrongdoing;

(6) evidence pertaining to the strength or weakness of the agency's reasons for taking the personnel action, *Stiles*, 116 M.S.P.R. 263, ¶ 24;

(7) whether the agency treated similarly-situated employees who were not whistleblowers better; or

(8) other bits and pieces of information from which an inference of retaliatory motive might be drawn, *Fitzgerald*, 107 M.S.P.R. 666, ¶ 20 (describing the "convincing mosaic" of retaliation), *overruled on other grounds by Savage v. Dep't of the Army*, 122 M.S.P.R. 612, ¶ 43 (2015).

Under this contributing-factor-plus approach, an employee need only show one piece of additional proof of retaliatory motive—either from this list of factors or otherwise—to meet the

slightly higher burden in section 2302(f)(2). Producing this "extra proof" beyond traditional knowledge/timing evidence allows a factfinder to determine that "a reasonable person could conclude" that the personnel action was taken "in reprisal for" the disclosure.[6] *See* 5 U.S.C. § 1221(e)(1).

Once this showing is made, the employee has established the *prima facie* case, and the burden shifts to the agency to prove its defense of showing by "clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. §§ 1214(b)(4)(B)(ii), 1221(e)(2). Specifically, the agency can use the *Carr* factors to provide a fuller context to demonstrate that, despite the employee's evidence of retaliatory motive, the personnel action was not taken "in reprisal for" the disclosure.

OSC's contributing-factor-plus approach to analyzing a whistleblower retaliation case under section 2302(f)(2) comports best with the purpose and legislative history of the WPEA, which was enacted to bolster the protections for federal employee whistleblowers. *See* S. Rep. 112-155 at 1. The WPEA, like its predecessor, the WPA, is remedial legislation that the MSPB construes liberally "to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act." *Fishbein v. Dep't of Health and Human Servs.*, 102 M.S.P.R. 4, ¶ 8 (2006). Congress has consistently counseled 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." S. Rep. 103-358 at 10 (quoting S. Rep. 100-413 at 13). OSC's proposed evidentiary burden also better accounts for the statutory requirement of "extra

[6] As discussed above, OSC interprets section 2302(f)(2) as setting a slightly higher causation standard for connecting personnel actions to disclosures made in the normal course of duties. Our proffered approach is consistent with the WPEA's desire to protect "any disclosure" of specified government wrongdoing, and offers the most practical analytical framework to consider the employee's "extra proof" of retaliatory motive during the *prima facie* analysis of a whistleblower retaliation case.

proof" that an agency took a personnel action "in reprisal for" a disclosure made in the normal course of duties, without imposing a burden so onerous that it thwarts the WPEA's objectives.

OSC's contributing-factor-plus approach also fairly preserves the scope of protection for employees alleging whistleblower retaliation under section 2302(f)(2), while allowing agencies the ability to effectively manage and evaluate employees who must regularly investigate and report wrongdoing as part of their basic job functions. This recommended analysis strikes the correct balance between these competing interests while remaining faithful to the burden-shifting structure in the WPEA that the Board has properly and consistently employed in these cases. By contrast, the analytical framework in the Administrative Judge's decision abandons this critical evidentiary paradigm by improperly weighing the "totality of the evidence in the record" at the *prima facie* stage of a case, and then placing an unfair and arduous burden on the employee. *Salazar*, 2016 WL 2659432, at 15, 20.

A specific example helps illustrate why the contributing-factor-plus approach makes sense. Suppose an Internal Revenue Service (IRS) Agent, whose principal job function is to regularly investigate and report wrongdoing, conducts a tax audit and uncovers a tax delinquency by a private company. The Agent discloses the tax delinquency to her supervisor, which qualifies as a disclosure of a violation of law, rule, or regulation that is made in the Agent's normal course of duties under sections 2302(b)(8) and (f)(2). The Agent's report does not implicate any wrongdoing by the IRS, but the Agent's report is poorly written and fails to comply with agency policy. The Agent's supervisor reviews the report and requests changes that may result in the tax delinquency being excused, but the Agent refuses. The IRS then downgrades the Agent's performance evaluation. The Agent's tax delinquency disclosure, however, would not be protected because the IRS imposed the lowered performance evaluation

on the Agent only "because of" her disclosure and not "in reprisal for" her disclosure. There is no "extra proof" available that the Agent's supervisor or other IRS management took the personnel action with an improper, retaliatory motive.

In a slightly different context, though, the Agent's tax delinquency disclosure may be protected. Suppose that the Agent uncovers the tax delinquency, discloses it to her supervisor, and the supervisor requests changes to the Agent's report that may result in the tax delinquency being excused, which the Agent refuses. The Agent knows that the supervisor has a personal relationship with the company's chief executive officer. The IRS subsequently downgrades the Agent's performance evaluation. Assuming direct or circumstantial evidence exists of her supervisor's personal relationship with the company's chief executive officer, the Agent can show by preponderant evidence that the IRS lowered her performance evaluation "in reprisal for" her disclosure because she can offer "extra proof" of the improper motive to retaliate—*i.e.*, the disclosure is directed at her supervisor and may subject her supervisor to disciplinary action.

Under the Administrative Judge's overly-strict formulation of the "in reprisal for" evidentiary burden under section 2302(f)(2), the Agent could not show preponderant evidence of an improper, retaliatory motive because she could not disprove that the IRS would have taken the same personnel action in the absence of her disclosure. By contrast, OSC's contributing-factor-plus standard allows the Agent to use relevant and available record evidence to demonstrate that "a reasonable person could conclude" that the lowered performance evaluation was given "in reprisal for" the disclosure; only then would the burden shift to the agency to prove that, despite the evidence of retaliatory motive, it would have given the lowered performance evaluation to the Agent. Moreover, OSC's proffered approach conforms to the WPEA's purpose and structure to "strike the balance of protecting disclosures made in the normal course of duties" without

hampering an agency from taking justified personnel actions. S. Rep. 112-155 at 6. As a result, this evidentiary standard will not only ensure that the WPEA is construed broadly to embrace all cases within its scope, it will also employ a fair and practical approach for litigating and resolving these cases. *See Fishbein*, 102 M.S.P.R. 4, ¶ 8.

Here, using the contributing-factor-plus approach discussed above, the Administrative Judge should, on remand, analyze Mr. Salazar's whistleblower retaliation claim under the traditional burden-shifting scheme in the WPEA. Thus, he should determine under the preponderance of the evidence standard whether Mr. Salazar established a *prima facie* case by showing (1) he reasonably believed that his disclosures evidenced a category of wrongdoing under section 2302(b)(8); (2) the disclosures were a contributing factor in the personnel actions taken against him, *see* 5 U.S.C. §§ 1214(b)(4)(B)(i), 1221(e)(1); and (3) some additional evidence of retaliatory motive to meet the "in reprisal for" standard, *see* 5 U.S.C. § 2302(f)(2). If Mr. Salazar make this *prima facie* showing, the burden shifts to the VA to prove, by clear and convincing evidence, that it would have taken the same personnel actions in the absence of Mr. Salazar's protected disclosures, *id.* §§ 1214(b)(4)(B)(ii), 1221(e)(2).[7]

CONCLUSION

Based on the foregoing, and assuming section 2302(f)(2) applies to the facts of this case, OSC requests that the Board remand this case to the Administrative Judge for adjudication by applying the correct "in reprisal for" evidentiary burden for disclosures made in the normal course of duties.

Dated: August 3, 2016

Respectfully submitted,

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[7] OSC takes no position on whether Mr. Salazar can meet his burden of proof on remand using the correct "in reprisal for" evidentiary standard.

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