U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel
Report of Prohibited Personnel Practices
OSC File No. MA-19-002763 (WB)

[redacted]
Attorney

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I. INTRODUCTION

This report contains OSC's investigative findings and legal conclusions in File Number MA-19-002763, a complaint filed by WB, a former probationary employee of the Department of the Interior (DOI), Bureau of Reclamation, Pacific Northwest Regional Office, Agency. OSC has concluded that Agency, in violation of 5 U.S.C. § 2302(b)(8), threatened to terminate WB's appointment and thereby coerced his resignation in retaliation for his whistleblowing. In accordance with 5 U.S.C. § 1214(b)(2)(B)–(C), OSC recommends that DOI provide WB with full corrective action. OSC further requests that DOI consider appropriate disciplinary action against and remedial training for the Agency officials responsible for the unlawful retaliation described below.

II. FACTUAL BACKGROUND

From May 28, 2017, to March 14, 2019, WB worked as a mechanic for Agency in , Washington. He belonged to the crew, one of three work crews supervised by , Supervisor.

Until he made his first protected disclosure in or around November 2018, WB was an exemplary employee. All his former co-workers and foremen whom OSC interviewed corroborated his work proficiency. In the last performance evaluation he received before making protected disclosures, WB was rated by Supervisor as "Superior," the second-highest available rating. WB stated that, until his protected activity, he enjoyed an amicable relationship with and received several compliments from Supervisor about his performance.

Thereafter, on at least four occasions from late 2018 to early 2019, WB disclosed various safety concerns and violations to Supervisor and other Agency officials. One of the disclosures concerned Supervisor's own violation of safety protocols. By early January 2019, WB's former co-workers noticed that Supervisor had begun to perceive WB as too outspoken on safety matters.

On January 23, 2019, Supervisor called WB and a co-worker into his office and purported to counsel them for engaging in a lengthy personal conversation earlier that day. The next day, Supervisor launched an internal investigation against WB based on his alleged suspicions that WB had loafed at work, not just during the alleged personal conversation on January 23, but again on January 24. Supervisor testified that WB's behavior was consistent with a long—but never documented—history of loafing and claimed that he had made several past complaints about it to his supervisor, A , Superintendent, and B , Human Resource Specialist at the Pacific Northwest Regional Office. Supervisor never advised WB of the investigation nor interviewed him as part of the investigation.

On March 14, 2019, WB suddenly received instructions from Supervisor to attend a meeting with him and C, Assistant Manager, on an unidentified subject. WB appeared with D, a union steward. Supervisor or C thereupon gave WB the option of either resigning or having his probationary appointment terminated. If he were terminated, they warned, he would never be able to work for the government again. Although he asked, the officials refused to inform him of the charges warranting termination, stating that the charges and supporting evidence would be furnished only if he declined to resign. Believing he was being forced to resign because of his whistleblowing, WB resigned.

III. FACTUAL AND LEGAL ANALYSIS

After WB resigned, he filed a complaint of whistleblower retaliation with OSC. He alleged that because of his whistleblowing, Agency coerced his resignation by threatening to terminate his appointment. OSC's investigative and legal findings on WB 's allegations are reported below.

A. Preponderant evidence establishes a prima facie case that Agency violated 5 U.S.C. § 2302(b)(8) by threatening termination because of whistleblowing.

As relevant here, section 2302(b)(8)(A) prohibits federal agencies from threatening to take or taking personnel actions because federal employees make disclosures of information that they reasonably believe evidence a violation of any law, rule, or regulation or a substantial and specific danger to public health or safety. To establish a prima facie violation of this provision, OSC must demonstrate two elements by preponderant evidence: 1) WB made a protected disclosure, and 2) the disclosure was a contributing factor in the personnel action in question.[1] The evidence gathered by OSC establishes these elements.

1. Preponderant evidence shows WB made protected disclosures.

The standard for protecting disclosures is reasonableness. WB 's disclosures need not be *accurate* to be protected. Rather, they are protected so long as "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by [WB] could reasonably conclude that the actions of the Government evidence[d]" alleged wrongdoing of the kind identified in section 2302(b)(8).[2] This wrongdoing includes disclosures of an alleged violation of law, rule, or regulation or a substantial and specific danger to public health or safety.[3] Under this objective standard, OSC finds WB made protected disclosures.

(a) The ladder policy. At a safety meeting, or a series of safety meetings, in or around November 2018, WB disclosed to Supervisor that Agency 's new pending policy for ladder climbing endangered employees and violated regulations of the Occupational Safety and Health

[1] *See Chavez v. Dep't of Veterans Aff.*, 120 M.S.P.R. 285, 294 (2013).
[2] *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).
[3] 5 U.S.C. § 2302(b)(8)(A).

Administration (OSHA). The specific policy WB highlighted would have required work crews to use double-hook, pelican-type lanyards for all fixed-ladder climbing. WB believed this policy would violate the following OSHA regulations:

- "Fixed ladders shall be provided with cages, wells, ladder safety devices, or self-retracting lifelines where the length of climb is less than 24 feet (7.3 m) but the top of the ladder is at a distance greater than 24 feet (7.3 m) above lower levels."[4]

- "Ladder safety devices . . . shall conform to all of the following: (ii) They shall permit the employee using the device to ascend or descend without continually having to hold, push or pull any part of the device, leaving both hands free for climbing; (iii) They shall be activated within 2 feet . . . after a fall occurs . . . ;"[5]

By mandating the use of double-hook lanyards—which are "ladder safety devices" within the meaning of the regulations—the policy would have prevented crews climbing the ladders to "ascend or descend without continually having to hold, push or pull any part of the device." Instead, due to the lanyard design, a climber on the ladder who needed to ascend or descend with the lanyards would find it necessary to continuously remove the lanyard hook from the ladder rung to which it was latched and latch it to the next rung above or below. Thus, WB reasonably believed that the use of double-hook lanyards would endanger employees and violate the "both hands free for climbing" requirement of the OSHA regulation.

Furthermore, because each lanyard was six feet long, it could not become taut, i.e., "activated," within two feet after a fall, as required by the regulation. Depending on when a fall occurred in a climb, activation of the lanyard might not occur for its entire length, a risk that a disinterested observer could reasonably conclude endangers the user's safety. E, a senior mechanic who also worked for Supervisor, supported WB's concerns. And A recalled that another work crew objected to the new ladder policy, citing OSHA regulations.

(b) The absence of five-gas monitors. WB's second protected disclosure occurred on or around January 7, 2019. He publicly told Supervisor that his crew needed more five-gas monitors to work safely at a particular worksite, which posed an undeniable risk of becoming flooded with a dangerous amount of carbon dioxide. Although no regulation required the use of five-gas monitors, which directly measure carbon dioxide among other gases, OSC concludes that WB reasonably believed his disclosure about the lack of enough five-gas monitors evidenced a substantial and specific danger to public health or safety and therefore qualifies for protection.

[4] 29 C.F.R. § 1926.1053(a)(18).
[5] 29 C.F.R. § 1926.1053(a)(22)(ii)–(iii).

In reaching this conclusion, OSC has applied the following non-exhaustive factors used by the Merit Systems Protection Board (Board): the likelihood of harm to public health resulting from the danger; when the alleged harm might occur; and the nature of the harm, i.e., the potential consequences.[6] In evaluating safety and health disclosures, the Board has adopted a liberal approach, protecting disclosures even where the substantial and specific danger is limited to a specific class of individuals, such as federal employees.[7] In other words, a risk of harm to public health or safety does not require a risk to the public at large; it just needs to apply to an identifiable class of at-risk individuals.

WB believed that a work crew without enough five-gas monitors might not detect the presence of a deadly amount of carbon dioxide in all reasonably foreseeable circumstances. At the time of WB 's disclosure, he and his crew had only one five-gas monitor; their other monitors did not measure carbon dioxide.[8] WB believed that one five-gas monitor was inadequate to ensure the safety of his ten-member work crew because the job necessitated working in a large area with many curvatures. These conditions could easily muffle the pager-like alarm sound of a five-gas monitor. With only one such monitor, he worried that some workers might be too distant to hear the monitor's alarm.

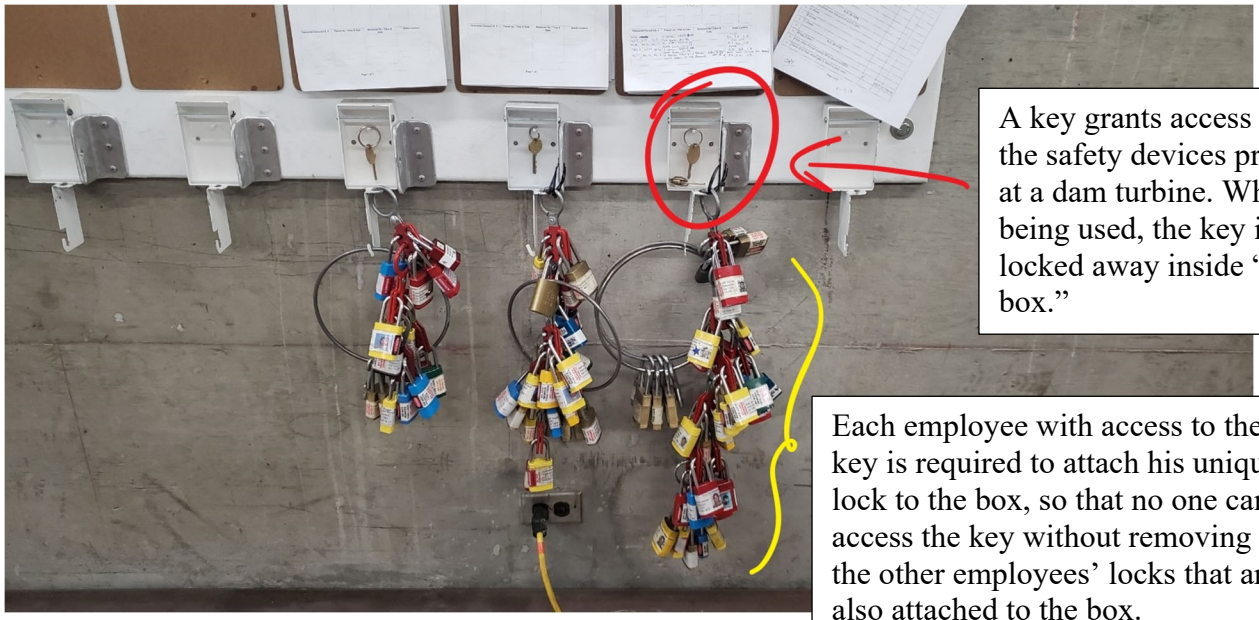
Supervisor disagreed with WB 's concerns because the work crew had four four-gas monitors, each of which tracked the amount of oxygen in its vicinity. According to WB , Supervisor argued that the oxygen tracked by four-gas monitors would indirectly reveal exposure to carbon dioxide by showing any declines in oxygen, which would indicate the likelihood of carbon dioxide. WB disagreed that drawing such an inference was reasonably sufficient to protect the crew. He knew the atmosphere at the worksite contained both oxygen and nitrogen, so he reasoned the undetected presence of carbon dioxide might replace nitrogen rather than oxygen and not be revealed by monitoring oxygen levels. If not for that possibility, four-gas monitors would have been sufficient to alert workers of the presence of carbon dioxide. Considering how little carbon dioxide was needed to become lethal (4%), WB had a reasonable basis to believe that more five-gas monitors were needed to reduce the substantial and specific danger from undetected carbon dioxide.[9]

And he was not alone in his concerns. E also voiced support for more monitors capable of directly measuring carbon dioxide.

(c) Supervisor 's violation of safety protocol. On another occasion in or around January 2019, WB reported to F , who oversaw compliance, that Supervisor breached the hazardous energy control protocol (HECP). Under HECP, an employee may not be present

[6] *Chambers v. Dep't of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).
[7] *See, e.g.*, *Woodworth v. Dep't of the Navy*, 105 M.S.P.R. 456, 463–64 (2007).
[8] WB could not recall if his crew borrowed the five-gas monitors before the work had started or after he had raised his concern to Supervisor He stated that although his crew had borrowed two five-gas monitors, he heard from a crewmember that one of them did not work.
[9] CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, Table of Immediately Dangerous to Life or Health Values (2019), https://www.cdc.gov/niosh/idlh/intridl4.html.

in a clearance area without first performing a series of safety checks. Once completed, the employee attaches a unique lock to "the box" (photographed below) and signs on the clearance roster. WB stated he reported to F that he saw Supervisor in the clearance area, even though Supervisor had not complied with HECP. Although F could not confirm whether WB had disclosed the violation to him, he conceded that WB could have been one of several employees who reported Supervisor. And F explained that he thought the violation had occurred, leading him to confront Supervisor about it. E stated that at other times, other employees had observed Supervisor in the clearance area in contravention of HECP.



(d) The absence of a rescue plan. Finally, at a safety meeting on March 6, 2019, WB disclosed the absence of a viable rescue plan for his crew on a project that required lifting a 275-ton gate to place supporting blocks beneath it. Normally, a crane performed this task by removing the entire gate from its fixtures. But the crane was out of service, so the crew had to raise the gate with a hydraulic pump and support the gate with blocks to enter the space where work would be performed. WB discovered, however, that his crew would need to manually operate the hydraulic pump because all available power was required to run the ventilation fans to bring fresh air to the crew while they worked. The exigencies of the assignment posed three safety issues in WB 's mind. First, the absence of external power might hinder the crew's ability to raise the gate or hold it in place long enough to secure the support blocks. This risked the crew being trapped, pinned, or even crushed if the gate slipped. Second, in the event of any injury to the crew, the crew would be isolated, making timely medical treatment difficult to administer. Third, in the event of an accident, Agency lacked a rescue plan beyond calling the fire department, which WB deemed inadequate. He believed, and later confirmed, that the fire department lacked ropes long enough to rescue an injured crewmember or a device capable of raising a 275-ton structure.

(e) Agency defenses. Agency takes issue with whether WB qualifies as a whistleblower. It asserts that OSHA regulations did not apply to Agency's new ladder policy.[10] And it contends that WB was not the one who disclosed some of these safety issues.[11] Rather, it claims that other employees simply discussed safety issues in WB's presence.[12] In the case of Supervisor's HECP breach, it argues that Supervisor self-reported his own violation.[13]

The evidence does not support Agency's contentions that WB's disclosures are unprotected. First, regardless of whether OSHA regulations applied to Agency, WB reasonably believed they did, as did some of his former co-workers. Moreover, even if OSHA regulations were not legally binding, WB still had a reasonable basis to believe that Agency's change in ladder policy posed substantial and specific safety risks to employees. Indeed, F, a seasoned employee who had worked for Agency for close to a decade, strongly agreed with WB's concerns about the ladder policy. A confirmed that other Agency employees besides WB had concerns.

As for Agency's contention that WB did not make some of the four disclosures discussed above, OSC's investigation did not find corroboration. At least three witnesses (G, a former co-worker; F; and H, a former foreman) said that they witnessed WB making three of the disclosures. As for the remaining disclosure, namely, WB's disclosure of Supervisor's HECP violation, WB gave a credible, detailed statement concerning his disclosure to F, who did not dispute it. F recalled that several employees reported Supervisor to him. And Supervisor's claim that he self-reported his violation does not undermine WB's whistleblower protection for having also done so. This is especially true here, where, as F explained, Supervisor agreed to self-report the violation to A only after F confronted him based in part on WB's disclosure.

In sum, preponderant evidence establishes that WB made the four protected disclosures discussed here.

2. Preponderant evidence shows WB's protected disclosures contributed to the personnel actions.

By statute, a protected disclosure contributes to a personnel action if the official who takes that action knows about the employee's disclosure, and the personnel action occurs within a period of time that allows a reasonable person to conclude that the disclosure is a contributing factor in the personnel action.[14] This is called the knowledge/timing test, which can be applied mechanically. Under this test, WB's whistleblowing contributed to the threat to terminate his appointment and to his ensuing coerced resignation.

[10] Exh. 1 at 001.
[11] Exh. 1.
[12] Exh. 1 at 002.
[13] *Id.*
[14] 5 U.S.C. § 1221(e).

a. The threat to terminate and the resignation are personnel actions.

Before OSC analyzes the knowledge/timing test, however, we first address Agency's dispute over whether what happened on March 14, 2019, counts as a personnel action.

On March 14, 2019, only eight days after WB's last protected disclosure, Supervisor and C called him into a meeting. When he appeared with D, WB was told that he must either resign or face termination of his appointment. He was further told that if he chose termination, he would be ineligible to work for the federal government again. WB and D stated that Supervisor refused to explain the basis for the termination, insisting that an explanation would be provided only if WB chose not to resign. Supervisor disputes that either requested an explanation for the termination, but he confirmed that he did not provide one.

Despite the minor conflict in the accounts, the evidence unequivocally shows Agency threatened to terminate WB's appointment and thereby satisfied the personnel action requirement. As section 2302(b)(8) makes clear, threatening to take a personnel action is itself a personnel action. "Threat" means "to give signs of the approach of (something evil or unpleasant): indicate as impending: PORTEND (the sky [threatens] a storm)" and "to announce as intended or possible ([threaten] to buy a car)."[15] Congress intended a broad interpretation of the word "threatened."[16] And "[t]ermination of a probationer is a 'personnel action'."[17]

The Board makes clear that, in cases where a resignation follows a threatened removal, the key issue is whether the agency's threat is made in retaliation for whistleblowing.[18] The Board in *Zygmunt* explained that an employer is liable for the reasonably foreseeable consequences of the improper threat.[19] In other words, the employee need not show that the agency intended to exact his resignation, only that the employee's resignation was a reasonably foreseeable consequence of the retaliatory threat.[20] Here, it was reasonably foreseeable that WB would resign because of the threat. In fact, WB's resignation was the threat's stated purpose. And the threat was made without telling him of the charges and while misleading him that termination would forever bar him from future federal employment.

In addition, Agency's threat caused WB's involuntary resignation, which is a personnel action on its own. Agency claims otherwise, citing two U.S. Court of Federal Claims (Federal Claims Court) cases and one Federal Circuit case for the proposition that "resignations submitted to avoid threatened termination have been repeatedly found voluntary and binding."[21]

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[15] *Gergick v. Gen. Serv. Admin.*, 43 M.S.P.R. 651, 656 (1990), *quoting* WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1971).
[16] *Id.*
[17] *Sirgo v. Dep't of Justice*, 66 M.S.P.R. 261, 267 (1995).
[18] *See, e.g., Zygmunt v. Dep't of Health & Hum. Serv.*, 61 M.S.P.R. 379, 384 (1994) ("The central inquiry in this appeal is whether the agency's threat to terminate the appellant constituted reprisal for whistleblowing, not whether the agency constructively discharged her.").
[19] *Id.*
[20] *Id*.
[21] Exh. 1 at 001.

But neither case defeats a claim of coerced resignation. First, the Federal Claims Court hears only monetary claims against the federal government, so its decisions do not create binding, precedential authority on the definition of personnel action under section 2302. Second, *Schultz v. U.S. Navy*, 810 F.2d 1133 (Fed. Cir. 1987), the Federal Circuit case, did not make a blanket ruling that *any* resignation submitted to avoid threatened termination or removal is voluntary.[22] Indeed, the court specifically recognized that "a resignation is not voluntary where an agency imposes the terms of an employee's resignation, the employee's circumstances permit no alternative but to accept, and *those circumstances were the result of improper acts of the agency*."[23] The circumstances are assessed in their totality.[24]

Considering the totality of the circumstances here, Agency's threat of termination was a constructive discharge because it left WB no meaningful option but to resign.[25]

First, the charges on which the threat was predicated resulted, in significant part, from a retaliatory investigation of WB for alleged loafing, as will be discussed *infra*.[26] Second, WB reasonably believed there was no alternative but to resign because management told him that he would be automatically disqualified for future federal positions if he were fired. Notably, that representation was misleading. Employees who do not complete a probationary period are not barred by law from future federal employment. And the Board has held that misleading threats of future employment ineligibility can render a resignation involuntary.[27] In *Gibeault*, the Board analyzed a situation where an agency was alleged to have induced a resignation by telling an employee that "if he fought the action, he would not be eligible for future employment with the [federal] government."[28] The Board found that such a statement was, at a minimum, misleading or incomplete because a fired employee is "not per se ineligible for future employment with the [federal] government."[29]

While in *Gibeault*, the Board ultimately did not find that the appellant was misled, the Board's analysis is still instructive.[30] Here, unlike in *Gibeault*, OSC obtained preponderant evidence that Agency materially misled WB concerning his eligibility for future federal employment. That material misinformation vitiated the voluntariness of WB 's resignation.

Finally, the evidence shows that Agency denied WB material information that he reasonably needed to make an informed decision before resigning. It refused to tell WB the charges that allegedly supported termination—vital information that would have allowed him

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[22] *See id.*
[23] *Schultz*, 810 F.2d at 1136 (emphasis added).
[24] *Brown v. Dep't of Def.*, 109 M.S.P.R. 493, 498 (2008).
[25] *See id*.
[26] *See Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 324 (1997) (recognizing retaliatory investigations as prohibited personnel practices when resulting in a personnel action).
[27] *Gibeault v. Dep't of the Treasury*, 114 M.S.P.R. 664 (2010).
[28] *Id.* at 667.
[29] *Id.*
[30] *See Gibeault v. Dep't of the Treasury*, 2011 M.S.P.B. LEXIS 401, *5–6 (2011).

to weigh the risks in the decision he was forced to make. Moreover, it failed to advise WB of its retaliatory motive for the threat to terminate his appointment. Consequently, WB was denied an opportunity to decide for himself whether his agency held a strong hand or was bluffing. Because the termination charges were factors solely within Agency's control, its withholding of them deprived WB of freedom of choice and rendered his resignation involuntary.[31]

In sum, WB's resignation was involuntary because Agency 1) based the termination charges on the results of a retaliatory investigation, 2) misled WB about the consequences of the termination, and 3) withheld material information from WB necessary for him to make an informed decision.[32] These circumstances show that Agency coerced WB to resign under applicable case law. The withholding of material information also raises a reasonable suspicion that Agency knew or should have known that it could not substantiate what turned out to be weak charges.[33]

b. WB's protected disclosures contributed to the threat of termination and coerced resignation.

Supervisor's actual knowledge of WB's first two disclosures is established by the fact that WB made those disclosures directly to Supervisor, who was the official most responsible for the personnel actions taken against him, and to A, who approved Supervisor's decision to threaten WB's termination. WB's disclosure to A was witnessed by H, WB's foreman at the time, and A did not dispute this in his interview with OSC. And the evidence shows that Supervisor likely would have inferred WB's role in all the disclosures because at the time they were made, as attested by many of WB's former co-workers, Supervisor perceived that WB was too outspoken on safety matters.[34]

WB suffered a personnel action in reasonable proximity to Agency learning of his disclosures. He made all his protected disclosures in the three months before he was threatened with termination and coerced to resign, with his last disclosure occurring less than ten days before the threatened termination. The close timing satisfies the knowledge/timing test because a personnel action occurring even within a year of a protected disclosure is sufficient to find that a disclosure has contributed to a personnel action.[35]

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[31] *See Contreras v. Dep't of the Navy*, 78 M.S.P.R. 281, 287 (1998) (finding involuntariness because "factors within the agency's control operated on the employee's decision-making process that deprived him of freedom of choice").
[32] *See, e.g.*, *Glenn v. U.S. Soldiers' & Airmen's Home*, 76 M.S.P.R. 572, 577 (1997) (finding involuntariness where agency "coerced [the employee] into resigning by threatening to remove her for her undisputed conduct . . . by failing to provide her with information concerning the length of her administrative leave status, by handing her two different SF-52 forms, one blank and the other completed, and asking her to sign both of them on the spot, and by misleading her that she would, or could, receive a comfortable disability retirement annuity").
[33] *See* discussion *infra.*
[34] *See Bonggat v. Dep't of the Navy*, 56 M.S.P.R. 402, 407 (1993).
[35] *See Morel v. Dep't of Veterans Aff.*, 2019 WL 7493465 (Jan. 3, 2020) (appellant's protected disclosures contributed to removal because removal occurred within the year following disclosures).

B. Agency cannot sustain a defense under the clear and convincing evidence standard.

Because the knowledge/timing test establishes that WB 's whistleblowing contributed to Agency 's threat to terminate his appointment and his involuntary resignation, there is a legal presumption that Agency violated section 2302(b)(8). To overcome this presumption, Agency must establish by "clear and convincing evidence" that it would have taken the same personnel action even in the absence of WB 's whistleblowing.[36]

"Clear and convincing evidence" is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established."[37] This evidentiary standard requires proof less than beyond a reasonable doubt but more than preponderant evidence.[38] For this reason, it is difficult in whistleblower cases for agencies to prove by clear and convincing evidence that the same personnel action would have happened in the absence of protected activity.

This is as it should be. Congress pointed out that "it is entirely appropriate that the agency bear a heavy burden to justify its actions."[39] The "heightened burden of proof . . . 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."[40]

In evaluating whether Agency can meet the clear and convincing evidence standard, the nonexhaustive *Carr* factors are weighed: the strength of the evidence upon which the investigation was initiated, the existence and strength of any motive to retaliate from Agency officials involved in the decision, and any evidence that Agency treated similarly situated employees in the same manner as whistleblowers.[41] In weighing the strength of the evidence, it is not enough to examine whether the evidence sustains the charges and the penalty imposed against an employee. Rather, "the agency must still prove by clear and convincing evidence that it would have imposed the *exact same penalty* in the absence of the protected disclosures."[42] Where, as here, there was an investigation that was so closely related to the challenged personnel action that it could have been a pretext to gather evidence to retaliate, corrective action must be provided unless the agency shows by clear and convincing evidence that even absent the protected disclosures, it still would have gathered, through investigation, the evidence used to take the challenged personnel action.[43] Under the *Carr* factors, Agency cannot meet its burden.

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[36] *See* 5 U.S.C. § 1214(b)(4)(B)(ii).
[37] 5 C.F.R. § 1209.4(d).
[38] *Hobson v. Eaton*, 399 F.2d 781, 784 n. 2 (6th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).
[39] 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20).
[40] *Id*.
[41] *See Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).
[42] *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012) (emphasis in original).
[43] *See Russell*, 76 M.S.P.R. at 324.

1. The evidence supporting the threat to terminate is weak.

Agency recorded its reasons for threatening to terminate WB 's appointment in a termination letter it prepared to use if he refused to resign.[44] According to the letter, Agency determined that WB had loafed on the job on January 23 and 24, 2019, was insubordinate in doing so, and therefore violated agency policy.[45] The record contained no other justification for its action. OSC investigated the strength of evidence supporting these charges.

a. Agency's evidence to substantiate the charge of loafing was weak.

Agency relied on two specific charges of loafing to support its decision to terminate WB 's appointment.[46] Both charges arose out of incidents that occurred on January 23 and 24, 2019.[47] On the first date, Supervisor claimed that he observed WB waste about 40 minutes conversing with "a group of fellow employees" when he should have been at his worksite instead.[48] But OSC's investigation has determined that Supervisor lacked any specific information about the conversation on which to base his adverse finding. Notably, he made no inquiry of anyone and simply presumed that it was time-wasting when it could have been work-related. The lack of due diligence undermines the strength of Agency 's evidence supporting the charges.

In contrast, WB and I (his former co-worker), the parties to the actual conversation, stated that their conversation concerned work H had ordered them to perform, which H verified.[49] While Supervisor might have been suspicious about the content of the conversation for reasons that he could not identify, a reasonable manager, without any inquiry, would not have proposed termination, the most injurious personnel action, against a probationer based on mere suspicion that a conversation was time-wasting. Without evidence of due diligence and confirmation by Supervisor , OSC cannot conclude that clear and convincing evidence exists for Supervisor 's unsubstantiated suspicion about the January 23 conversation to justify a termination of appointment.

The second charge of loafing appears equally weak. The termination letter asserts that WB loafed for a significant amount of time both before and after a work-required audiogram appointment on January 24.[50] OSC's investigation showed again that Supervisor relied heavily on speculation for this charge, as we explain in detail below

[44] Exh. 2 at 003–004.
[45] *Id*.
[46] *Id.* at 003.
[47] *Id.*
[48] Exh. 3.
[49] H was also a foreman to I at the time.
[50] Exh. 2 at 003–004.

Supervisor said he inferred that WB loafed on the 24th because at or around 6:45 a.m., WB checked out a Agency vehicle to drive to his worksite at the [redacted] Dam, but did not arrive there until after his 7:30 a.m. audiogram appointment at the Administration Building.[51] Supervisor surmised from these limited facts that WB simply loafed for nearly all the 45 minutes that elapsed between checking out his vehicle and receiving his audiogram.[52]

Supervisor 's suspicion, however, could not be corroborated. First, it was based on speculation about what WB did between 6:45 to 7:30 a.m. on January 24, an interval that Supervisor made no genuine effort to investigate beyond reviewing Agency security records to determine when WB entered the [redacted] Dam.

Notably, Supervisor failed to question WB about the 45-minute gap. Had Supervisor done so, WB would have explained that he checked out a vehicle at or around 6:45 a.m. and then drove immediately to the Post #2 gate to gain entry to his worksite at the [redacted] Dam. When he reached the gate, he waited for it to be opened by a security guard, as had always been his practice. But when the gate still had not opened by between 7:10 and 7:15 a.m., he turned his vehicle around and drove to his 7:30 a.m. audiogram appointment.

Had Supervisor exercised good faith, he would have sought WB 's explanation for the latter's activities before the audiogram and perhaps then made a limited inquiry. He did neither. Had Supervisor done so, WB could have furnished the following photo he took shortly after reaching the Post #2 gate on the morning of January 24 that would have supported his explanation:[53]

[redacted]'s photo

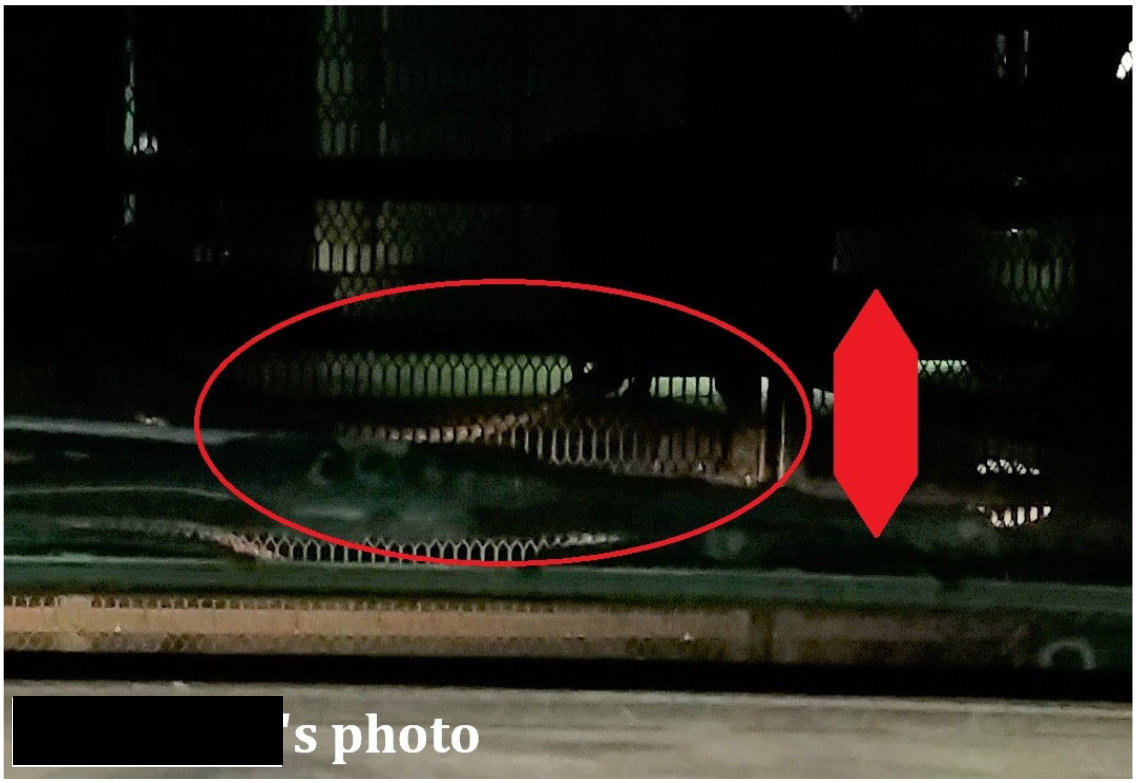
[51] *Id.*
[52] *Id.* at 004.
[53] Exh. 6.

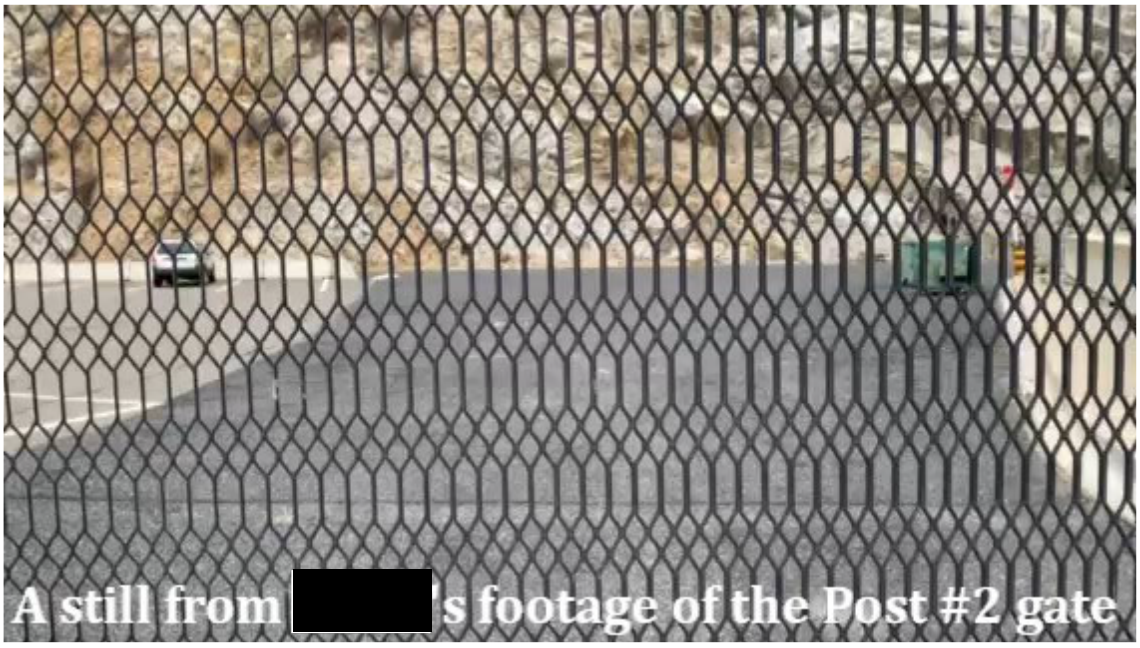
WB took this photo because of his concern that Supervisor would use his delay at the Post #2 gate to accuse him of loafing, just as Supervisor had done the day before in counseling him about his conversation with I. He took the photo while he sat in a Agency vehicle in front of the closed Post #2 gate at 7:03 a.m.

OSC has determined that WB 's photo is authentic. The photo includes a digital footprint that establishes the time and date it was taken: 7:03 a.m. on January 24, 2019.[54] The photo further establishes that at this time and date, WB was in a Ford Escape, the same model he checked out on the morning of January 24. Here is a photo showing a Ford Escape operated by Agency, which appears to be the same make and model as the vehicle that appears in WB 's photo:[55]

WB 's photo also shows enough of what is outside his vehicle to prove that he was at the closed Post #2 gate. Although the original of the photo was too dark to clearly show much of anything outside WB 's vehicle, OSC was able to achieve greater clarity by brightening and zooming in on the photo. This technique revealed a diamond pattern of a chain-link fence. This pattern is consistent with the closed Post #2 gate. For comparison, WB 's enhanced photo and a daylight photo of the closed Post #2 gate are provided here:[56]

[54] *Id.*
[55] Exh. 7.
[56] Exh. 8.





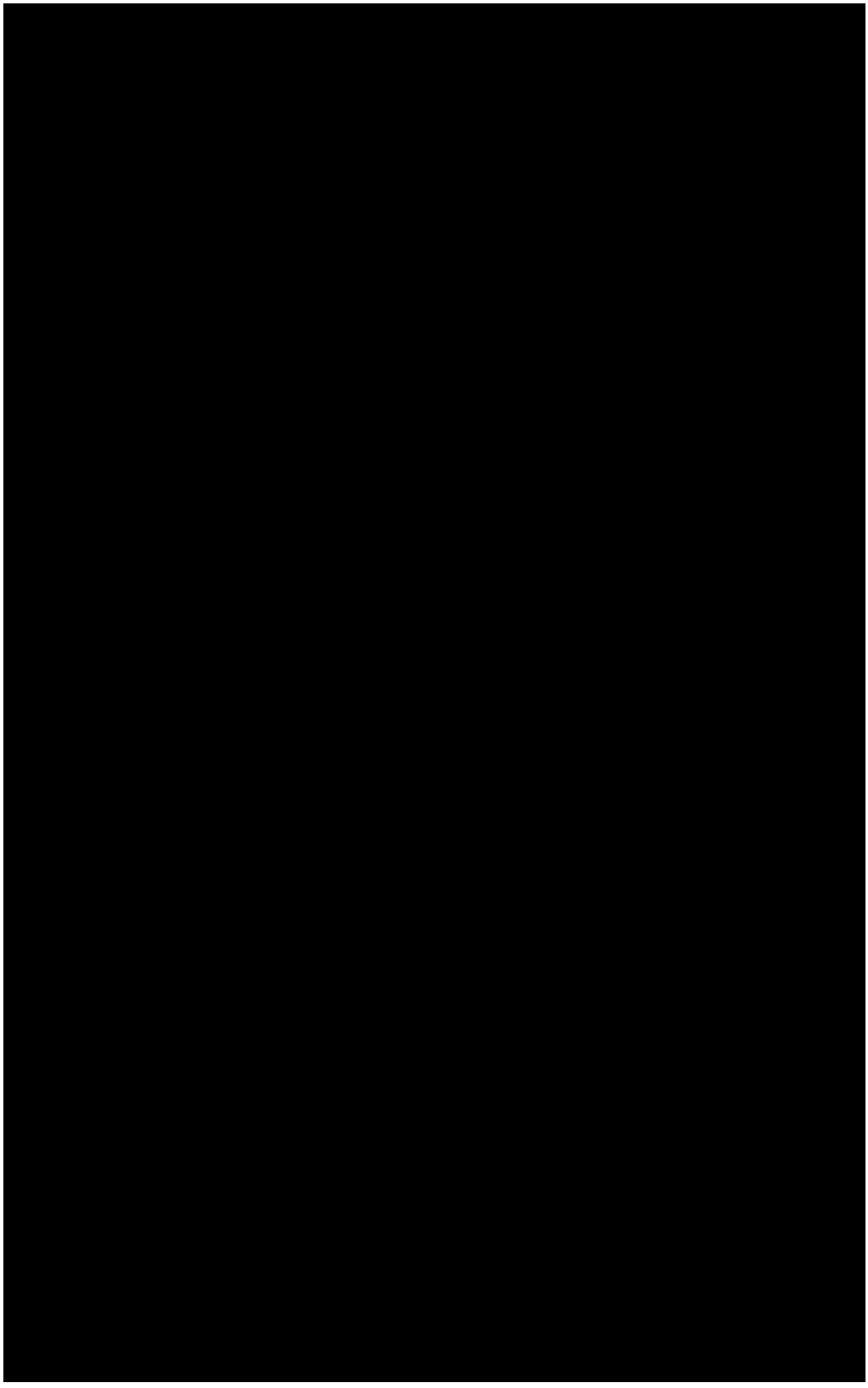
Thus, it is more likely than not that WB ’s photo was taken from the driver’s seat of a Agency vehicle parked in front of the closed Post #2 gate at 7:03 a.m. on January 24, 2019, as WB stated.

Agency's failure to seek, much less acquire, the foregoing evidence relevant to its decision to terminate WB 's appointment undermines its affirmative defense. WB 's photo and statement, which Supervisor failed to obtain, refute his supposition that WB was loafing during the period between 6:45 and 7:30 a.m. on January 24. They corroborate the fact that WB drove to his worksite after checking out a Agency vehicle, only to be blocked by the closed Post #2 gate. Agency's charge of loafing against WB therefore cannot be substantiated by credible evidence—much less clear and convincing evidence.

OSC has carefully considered whether Agency could have countered WB 's narrative and photographic evidence if it had exercised due diligence and not acted in haste to terminate his appointment. OSC concludes that it could not and that WB 's statement about his activities is truthful and reasonable. So, he was not guilty of loafing as charged by Agency.

First, we note that WB 's presence at the Post #2 gate suggests that he was not loafing, but instead trying to access his worksite. It is implausible that he would have chosen to loaf by sitting in a car in front of a gate he did not control. Rather, he must have had a reason to be there, which he supplied without contradiction. That is, he was driving to his worksite but could not enter through the gate leading there, requiring him finally to leave to avoid missing his 7:30 a.m. audiogram appointment. OSC concludes that this cannot be reasonably considered loafing sufficient to support termination of an appointment in a whistleblower case.

Second, no supporting evidence suggests that WB fabricated his own delay at the Post #2 gate. He explained plausibly (and, again, without contradiction) that once he checked out his vehicle on January 24, he drove to the gate and waited for it to be opened for 7 to 12 minutes, as supported by his photo of the gate at 7:03 a.m. This explanation is consistent with the layout and distances between the Dam, where WB worked, the , where he checked out his vehicle, and the Administration Building, where his mandatory audiogram was scheduled. As illustrated below, the route through the Post #2 gate was the shortest way, and therefore the most reasonable way, for WB to reach his worksite at the Dam from the :



Agency might have argued (if it had obtained WB 's explanation of his activities) that WB somehow knew he could not enter the Post #2 gate, and that he used this knowledge to waste time. This hypothesis, however, is farfetched if only because it assumes WB adopted an unusually laborious method of loafing for 45 minutes. Moreover, evidence supports the veracity of WB 's explanation of events. The quickest way to enter the Post #2 gate, which was unmanned at the time, was to scan a pre-authorized employee badge and enter a PIN number on an electronic reader installed at the gate. WB 's badge was not pre-authorized, however, so he normally drove to the gate and waited for the security guards—who were stationed elsewhere but were supposed to observe incoming vehicles through the camera pictured below—to come to the gate and open it manually:[57]

J , WB 's former co-worker, explained that in the past he had also entered the Post #2 gate using this procedure. WB and J both affirmed that they had frequently entered the Post #2 gate by waiting between 5 and 15 minutes for the guards to notice their presence at the gate through the camera shown above or while patrolling the area. Accordingly, it appears plausible that no guards admitted WB at the Post #2 gate on January 24.

By the time OSC became involved in this case and interviewed Agency security officials, they expressed skepticism about the statements of WB and J , opining that WB could have easily called the guards by phone to ask them to open the Post #2 gate. The security officials appeared unaware that neither WB nor J knew the phone number to the security office. This number was not posted at the gate and did not officially circulate among the employees who needed to regularly enter there. Indeed, WB confessed that he did not even know such a phone number existed. Moreover, all WB 's former co-workers whom OSC interviewed agreed that they had never received training on the diverse ways to enter all the secure locations at Agency, including the Dam, and primarily relied on word-of-mouth to ascertain the most convenient entry method.

[57] Exh. 9.

In any event, without the security office phone number, WB had no choice but to wait to be noticed on the Post #2 gate camera, unless he requested entry at the nearest guard station. But the latter option was impractical. The guards closest to Post #2 were at Post #3:

To directly ask the Post #3's guard to open the Post #2 gate, WB would have needed to drive back to Post #3 from his location at the Post #2 gate, park and exit his car, walk to the guard hut, wait for the guards inside the hut to respond, show his badge for identification, and—because the Post #3 guards lacked the ability to remotely open the Post #2 gate—ask the guards to drive to the Post #2 gate to manually open it. For these reasons, J estimated that the process of backtracking from the Post #2 gate to arrange for a Post #3 guard to open the Post #2 gate could take at least half an hour, which would have been impossible for WB to accomplish and still make his 7:30 a.m. audiogram appointment, much less to appear for work at the Dam first.[58]

In short, Agency not only lacked evidence to support its charge that WB had loafed right before his audiogram, but it failed to make a reasonable effort to seek and evaluate all the pertinent evidence. These failures are indicia of retaliatory intent.

Of equal importance is Agency's weak evidentiary support for charging WB with loafing immediately after he finished his audiogram. WB completed his audiogram at or around 7:53 a.m. and entered the tower containing the elevator to his worksite at the Dam at 8:18 a.m.[59] Supervisor claimed that 25 minutes was an excessive amount of time for WB to get through the tower.[60]

[58] On his way to the Post #2 gate, WB could have stopped at Post #3, located en route, and asked the guard there to open the Post #2 gate. He did not do so, however, because he expected the gate to open by the usual process, which had rarely failed to grant him entry.
[59] Exhs. 10–11.
[60] Exh. 2 at 004.

However, Supervisor made this claim despite possessing evidence that offered a reasonable explanation for this passage of time. Shortly after his audiogram, while still in the building where his audiogram was performed, WB encountered and spoke to K, who worked for a different supervisor. Human resource specialist B requested and K provided a written statement—which was part of the evidence packet attached to the termination letter—that K had spoken to WB inside the Administration Building for approximately ten minutes.[61] Again, neither Supervisor nor B could have known the content of this conversation, but both nevertheless concluded that the conversation must have reflected further loafing. To the contrary, during this conversation, WB complained to K that Supervisor was treating him with hostility. Although K could not recall the details of this conversation, he conceded that it could have been as WB described. He remembered WB talking to him several times before this conversation about the latter's whistleblowing, fear of reprisal, and concern about Supervisor's subsequent hostility. There is no credible evidence that Agency forbade casual conversations among employees of the kind WB described, much less that Agency used such conversations to justify taking disciplinary actions. Nor would it be permissible to fire an employee who discloses to a fellow employee information related to a hostile work environment. And significantly, K suffered no scrutiny for conversing with WB.

In any event, given his conversation with K, WB would have taken only 15 additional minutes to get to his worksite, which required him to 1) exit the Administration Building and walk to the car he parked in the outdoor parking lot; 2) drive to the closest entry point, which was manned by security guards; 3) show his badge to the security guards stationed at the guard hut for visual identification; 4) enter the entry point and drive along the top of the dam to the parking lot near the Post #2 gate; 5) park the car in the lot and walk over to the tower that functioned as his worksite entrance; and 6) swipe or scan his badge at the tower containing the elevator shaft leading to his worksite inside the Dam, as illustrated below:

[61] Exh. 12.

WB stated that 15 minutes was a reasonable amount of time to perform these steps. And even if he could have theoretically acted more quickly, the time saved would have been minimal at best, which may explain why Agency never defined how much time WB supposedly wasted in getting to his worksite after his audiogram.

A chart showing WB 's version of his activities on January 24 highlights the minor amount of time Agency could claim he wasted in support of the termination of his appointment:

~ 06:45–07:03	WB	drove from the [redacted] to the Post #2 gate.
~ 07:10–30	WB	traveled from the Post #2 gate to the Administration Building.
~ 07:30–53	WB	underwent an audiogram.
~ 08:00–10	WB	conversed with K about his problems with Supervisor.
~ 08:10–18	WB	traveled from the Administration Building to the tower.
08:18	WB	entered the tower.

Any unidentified amount of time in the foregoing that can theoretically represent loafing does not constitute clear and convincing evidence of wrongdoing that justifies terminating any employee, much less one who had been rated superior and had never been charged with failing to timely complete an actual work assignment.

A careful examination of another piece of specific evidence Agency relied on to prove WB 's alleged loafing also shows the weakness of the loafing charge. According to B , Supervisor claimed to B and C that he received a voicemail on his cell phone from WB 's cell phone that sounded like a recording of a conversation among WB , J , and an unknown woman.[62] B further testified that Supervisor shared his belief with B and C that the recording exposed WB 's effort to conceal his January 24 loafing. OSC finds, however, that Supervisor likely exaggerated the importance of the recording. Indeed, Supervisor did not furnish the actual recording to support his accusation and only supplied an alleged transcript, which OSC finds less than reliable.[63] It is replete with speculation about seemingly inaudible words and with incoherent statements (see the complete transcript below). Significantly, Agency never produced the recording despite OSC's formal request to Agency for *all* records and information "related to [Agency's] internal investigation of WB ," a failure from which an adverse inference may be drawn.[64]

Moreover, the transcript fails to support Supervisor 's accusation that WB was caught planning a cover-up. If anything, it supports WB 's statement that he attempted to drive to his worksite before his audiogram, only to be stopped at the gate that did not open, causing him to photograph the gate to protect himself against false charges, as discussed earlier. The entire alleged transcript Supervisor emailed to B and C consists of the following:[65]

[62] *See* Exh. 13.
[63] *Id.*
[64] Exh. 14 at 019.
[65] OSC added the highlights and the underlining to the original transcript to easily distinguish the parts we analyze on the next page. Please see Exhibit 13 for the original, unadorned version.

This transcript demonstrates (and I confirmed in his interview with OSC) that WB showed I the photo he took at the Post #2 gate ("that's why I got those pictures of the odometer"). This is clearly a reference to the photo WB supplied to OSC to demonstrate that he did not loaf before his audiogram on January 24. The transcript thus not only confirms WB 's statement that he had a sound reason for being unable to get to his worksite before his audiogram, it indicates that Supervisor 's explanation distorts the meaning of the transcript to show that WB had somehow acknowledged concealing his loafing. This constitutes further evidence of the weakness of the charges of loafing that Supervisor leveled against WB .

To buttress Agency 's claim that it threatened termination for loafing, Supervisor asserted that he had repeatedly counseled WB about the latter's alleged history of loafing. This history, as related by Supervisor , was intended to provide context for Agency 's decision. But OSC was unable to corroborate it.

First, Supervisor 's assertion lacks sufficient logical consistency to meet the pertinent high burden of proof. Although he claimed that he had repeatedly counseled WB about loafing, he never documented any prior counselings. In fact, the first documented counseling did not surface until January 23, 2019, which was after WB had made protected disclosures and had been working for Supervisor for about a year.[66] The alleged history of WB 's loafing was also inconsistent with his superior performance rating and four merit-based awards.[67] And, notably, Supervisor acknowledged to OSC that WB was a productive employee, even as he emphasized WB 's supposed history of loafing.

[66] Exh. 3.
[67] Exh. 4 at 007; Exh. 5.

Supervisor's summary of his purported counseling of WB on January 23 also fails to reference repeated counselings on WB's history of loafing.[68] This omission is itself significant as it is inconsistent with Supervisor's further claim that in counseling WB on the 23rd, he simply wanted to address WB's loafing rather than to retaliate against him for disclosing safety issues. A reasonable supervisor would have mentioned past counselings about the same misconduct if the intent was to impress on that employee the seriousness of continuing misconduct. I, who was counseled along with WB on January 23, confirmed that Supervisor did not mention any past counseling of WB. Indeed, if WB had a history of loafing, it is difficult to understand why Supervisor counseled him in the same meeting with another employee, who apparently lacked such a history. Presumably, the nature of the counseling for the two employees would have been different if one was a recidivist, as Supervisor claimed.

Equally muddy is Supervisor's assertion that he had complained several times to A and B about WB's past loafing. As noted, Supervisor did not document any such infractions and neither did A nor B. Moreover, A's testimony was neither clear nor convincing on this issue. For example, A could only recall Supervisor expressing frustration at WB's failure to follow instructions, not loafing, which seems to fall into a different category of conduct. And A could not recall the nature of the alleged unfollowed instructions. Nor could he confirm that Supervisor complained "several times" about WB; he recalled only that Supervisor complained "at least once."

B claimed that Supervisor complained to him at least thrice about WB's past loafing—but his recollection was equally spotty and unspecific. He could not recall any details of the alleged complaints. He made no notes. And he admitted that he did not advise Supervisor about what, if any, steps Supervisor should take to deal with WB's alleged loafing, despite his role as Agency's chief human resources official. B's explanation for his apparent inaction was that Supervisor's "general frustration" did not seem to rise to the level warranting the provision of advice, suggesting he believed that whatever Supervisor complained about was insignificant. In short, neither A nor B provided clear and convincing evidence to overcome the weaknesses in Supervisor's own testimony about WB's alleged history of loafing.

Statements from WB's former co-workers also cast doubt on Agency's essential claim that WB habitually loafed. All of WB's former co-workers whom OSC interviewed, including ex-foremen, characterized him as an exemplary employee. Many of these witnesses specified that WB's superior rating, which was one level below the highest rating, was significant because it was rarely achieved.[69] This is not the record of an employee with a history of loafing, much less one who Agency would seek to fire in the absence of whistleblowing.

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[68] Exh. 3.

[69] Exh. 4 at 007. Significantly, after becoming WB's supervisor in January 2018, Supervisor did not document any of WB's alleged past loafing, even in his July 2018 evaluation, even though the evaluation form allowed the evaluator to provide a narrative. *E.g.*, *id.* at 014.

b. Agency also failed to substantiate the charge of insubordination.

In addition to loafing, Supervisor alleged that WB failed to meet a deadline to answer questions about his whereabouts on January 24.[70] While Supervisor claimed that the questions were needed because of WB's failure to inform the appropriate authority—namely, Supervisor himself—of his audiogram, the merits of Supervisor's claim are not substantiated.[71] WB had given his foreman, H, advance notice of his audiogram, as standard procedure dictated. Indeed, H confirmed that fact to Supervisor himself during the latter's investigation of WB's whereabouts.[72] H's statement was consistent with the reality that Agency crews took direction from their foremen during the workdays. Yet all three subject officials—Supervisor, A, and B—insist that, regardless, WB should have directly informed Supervisor of his scheduled absence from the worksite because Supervisor, not H, was his official first-level supervisor. Their insistence is not persuasive, however, because it is not grounded on any written policy that supports their draconian understanding of a "correct" reporting mechanism. That Supervisor did not know what H knew cannot excuse the lack of evidence to sustain Agency's heavy burden. As such, OSC finds no reason to change its position that Agency justified the threat to terminate WB's appointment based on his failure to meet a deadline to answer questions about actions Agency knew to be legitimate.

Nevertheless, Supervisor defended his charge against WB by distinguishing the legitimacy of WB's conduct, as established by his investigation, from WB's insubordinate failure to cooperate in his investigation. Yet his evidence of WB's failure does not support that distinction. Supervisor emailed his investigative questions to WB on January 24 (Thursday) at 2:07 p.m. and demanded answers by the day's close of business.[73] In response, WB quickly contacted a union steward. The steward instructed him not to answer the questions until he heard back from the steward, who emailed Supervisor at 4:40 p.m. the same day, stating, "I have advised [WB] not to write a statement until I have a chance to talk more about it with him and our union leadership as I feel that a statement could lead to discipline for further action[.]"[74] Supervisor read this email immediately upon receipt and forwarded it to B that same day at 4:48 p.m. with the message "FYI."[75] Supervisor did not advise WB that he should disregard the steward's instructions likely because Supervisor knew it was reasonable for WB to seek input from his union steward. At 7:13 a.m. on January 28 (Monday), WB emailed Supervisor his answers to the questions.[76] In the totality of circumstances, a reasonable supervisor would not have considered WB's actions to be insubordination. He responded to Supervisor's questions in a reasonable manner that did not warrant a disciplinary action. Thus, OSC can infer that Supervisor attempted to manufacture grounds to retaliate against WB in another "gotcha" moment.

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[70] Exh. 2 at 004.
[71] *Id.* at 003.
[72] Exh. 15.
[73] Exh. 16.
[74] Exh. 17.
[75] *Id.*
[76] Exh. 16.

c. Agency failed to substantiate the charge of policy violation.

Supervisor claimed that on January 24, 2019, he witnessed WB driving a Agency vehicle from his worksite to take his 9:00 a.m. break.[77] This action supposedly violated a policy prohibiting the use of a Agency vehicle "for the purpose of a rest period," where the rest period includes "all time going to/from the work activity."[78] He also asserted that WB 's conduct from January 23 to 24, 2019, did not comply with the Pacific Northwest Regional Office's core value of being "Results-Oriented."[79]

In making these charges, OSC has found that Supervisor again overreached. He made the charges, even though at the time he could not have known why WB used the vehicle. In fact, Supervisor 's initial written account about WB 's use of the vehicle did not offer an explanation for why WB used the vehicle.[80] In contrast, WB explained without contradiction that he used the vehicle to drive to the to locate electricians who could help him with a work issue at the Dam. When he was done, he took his 9:00 a.m. break at the and then drove back to the Dam. This action did not conflict with the Agency policy regarding the use of a vehicle for a break, and Supervisor lacked a reasonable basis to claim otherwise.

In sum, the first *Carr* factor, the strength of the evidence against WB to support the charges, fails to support Agency 's affirmative defense by clear and convincing evidence.

2. Agency demonstrated a strong motive to retaliate.

The second *Carr* factor, the strength of the motive to retaliate against WB , also undermines a successful defense. WB 's whistleblowing disclosures criticized Agency management's initiatives and might have been perceived as undermining management's authority. For instance, after WB disclosed the ladder safety issue, he heard from Supervisor that A spearheaded the new ladder policy that was the subject of the disclosure. Case law holds that public questioning of the wisdom of management provides reason to infer animus.[81] Similarly, WB 's disclosure of his own supervisor's violation of a safety protocol supports the inference of retaliatory animus against him by that supervisor (Supervisor).

Significant evidence of negative reactions from Agency officials to WB 's whistleblowing disclosures also supports the inference of animus. WB and G stated that Supervisor became "visibly angry" in response to WB 's first disclosure about ladder safety and made statements like, "I can do whatever I want when it comes to safety policy" and "You [WB] are comparing apples and oranges." G observed that

[77] Exh. 2 at 004.
[78] *Id.*
[79] *Id.*
[80] Exh. 18.
[81] *See Fritz v. Dep't of Health & Human Serv.*, 87 M.S.P.R. 287, 293 n.2 (2000) (nature of the disclosures themselves relevant to likelihood of retaliatory motive).

Supervisor's treatment of WB noticeably worsened after this whistleblowing. According to WB and F, Supervisor responded negatively to WB's second disclosure about the absence of five-gas monitors. They recalled Supervisor saying that he would not order the monitors simply because WB "d[id] not want to do the work." Similarly, when WB disclosed the dangers associated with lifting the 275-ton gate, WB recalled that A stated he did not want WB to halt another Agency initiative for an "OSHA gotcha."

In addition, Supervisor's strong retaliatory motive can be inferred from the manner he investigated WB's alleged misconduct on January 24, 2019. In that investigation, Supervisor did not attempt to fairly ascertain whether WB committed misconduct. Rather, as has been discussed previously, he single-mindedly sought to develop evidence to incriminate WB and achieve a predetermined result. As such, the investigation lacked indicia of fairness and objectivity, the hallmarks of a legitimate investigation.

For example, the investigation showed Supervisor obtained no evidence from either participant about the nature of the January 23 conversation before concluding the participants were loafing. Similarly, he did not ask WB about the January 24 incident, instead choosing to assume that there was no reasonable explanation for WB's workday travel time. And OSC learned that Supervisor predicted WB would fabricate his timesheet for January 24 (he did not) at the onset of the investigation.[82] Supervisor's actions and statements in investigating WB show strong retaliatory animus under the second *Carr* factor.

Importantly, Agency officials are legally prohibited from abusing their otherwise discretionary authority to investigate employees if used as an instrument of retaliation.[83] "When, as here, 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 will prevail on his [retaliation for whistleblowing claim]…To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations."[84] In short, the law prohibits personnel actions that result from retaliatory investigations.[85]

3. Agency cannot show it initiated similar actions under similar circumstances.

The third *Carr* factor compares the challenged action to similar actions taken against nonwhistleblowers under the clear and convincing standard. Until WB's protected disclosures and, indeed, until the incidents of January 23 and 24, 2019, Agency had no record suggesting that he had committed misconduct or performed poorly. Moreover, his performance

[82] Exh. 19.
[83] *See Russell*, 76 M.S.P.R. at 324–25.
[84] *Id.*
[85] *See Hollister v. Dep't of Justice*, 2016 M.S.P.B. LEXIS 2928, *71 (2016) ("Where an investigation is triggered by allegations made by a target of a whistleblowing disclosure, however, the disclosure may be deemed to be a contributing factor in the personnel action.") (citing *id.* at 323).

rating was exemplary.[86] Yet, after his whistleblowing, Agency extensively investigated and threatened WB with termination based on weak evidence of minor charges. Agency cannot fairly point to similarly situated nonwhistleblowing employees who were also mistreated.[87]

Also, the evidence shows Supervisor treated WB 's absence around his audiogram differently from absences of nonwhistleblowing coworkers, who also had audiograms. F stated that after WB 's resignation his entire six-member crew had to undergo an audiogram. Initially, everyone booked appointments for different time slots, so that some members would always be present at the worksite. However, Supervisor subsequently ordered the entire crew to go to the Administration Building together for their audiogram, causing all six members to be absent from their worksite for an estimated 2.5 hours as they waited for one another to complete the test. Supervisor 's acceptance of a large amount of downtime for these subordinates' audiograms undermines the legitimacy of his alleged concern about time-wasting during WB 's audiogram.

An analysis of the three *Carr* factors indicates that Agency cannot prove by clear and convincing evidence that it would have threatened to terminate WB 's appointment and coerced his resignation in the absence of his protected disclosures. Thus, Agency is unlikely to rebut the prima facie case that those personnel actions constituted retaliation against WB for his protected whistleblowing.

IV. CORRECTIVE AND DISCIPLINARY ACTIONS

The evidence demonstrates that the threat to terminate WB 's appointment and his coerced resignation violated section 2302(b)(8). As a result, WB is entitled to full corrective action, that is, placement, as nearly as possible, in the position he would have been in had the retaliatory actions not occurred.[88]

More specifically, WB is entitled to permanent reinstatement, back pay and related benefits, reimbursement for reasonable and foreseeable consequential damages, compensatory damages for any nonpecuniary harms he suffered, attorney's fees, and out-of-pocket expenses.[89] DOI must also ensure that all derogatory information is removed from WB 's record and that he is placed in an environment in which he can work free of any further retaliation. This may require facilitating a mutually agreeable transfer for WB .[90]

In addition, OSC asks that DOI consider whether disciplinary action against and remedial training for Agency officials are appropriate based on the revelations made by this report.

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[86] Exh. 4.
[87] Although Agency stated to OSC that "it would be able to produce ample evidence of similarly-situated non-whistleblower employees who were likewise removed for instances of relatively minor misconduct," it has not submitted such evidence to OSC to this date. Exh. 1 at 002.
[88] *See* 5 U.S.C. § 1214(g)(1).
[89] *See* 5 U.S.C. § 1214(g)(2).
[90] *See, e.g.*, 5 U.S.C. § 3352 (statutory preference in transfers for whistleblowers).