

**REPORT OF PROHIBITED PERSONNEL PRACTICE
OSC CASE NO. MA-13-4085**

I. INTRODUCTION

This report contains the investigative findings in OSC Case Number MA-13-4085, a complaint of prohibited personnel practices filed by Bradie Frink. Frink is a disabled Army veteran and former probationary employee in the Baltimore Regional Office (“BRO”) of the Veterans Benefits Administration of the U.S. Department of Veterans Affairs (“VA”).

Shortly after commencing employment at the BRO, Frink tried unsuccessfully for months to obtain information about the whereabouts of his VA claims folder. Frink ultimately requested assistance from Senator Barbara Mikulski, informing her that the BRO had ostensibly lost his claims folder and that the VA was therefore unable to make certain payments to Frink and his family as a result of his service-connected disability. Shortly after Frink enlisted Sen. Mikulski’s assistance, the VA cited unsupported charges to terminate Frink.

OSC has concluded that the VA terminated Frink because he contacted Congress for assistance during his employment, a prohibited personnel practice under 5 U.S.C. § 2302(b)(12). As of the date of this report, Frink remains unemployed.

II. STATEMENT OF FACTS

Bradie Frink worked as a GS-5 Time and Leave Clerk at the VA from February to July 2013. Frink worked under the immediate supervision of [REDACTED] A, a GS-15 employee. At the time [REDACTED] A was performing two different roles – BRO [REDACTED] and [REDACTED]. Frink’s second-level supervisor was BRO [REDACTED] B, who was in the Senior Executive Service.¹

A. Frink Searched for His Claims Folder and Then Contacted Congress for Assistance

A “claims folder” is the place where the VA stores all documents pertaining to a veteran’s benefits claim, including sensitive and private information. Significantly, if a claims folder is lost, the VA’s policy dictates that it must first attempt to locate the folder, and if unsuccessful, reconstruct the folder. When a veteran is hired at the same VA facility where his or her claims folder is stored, the folder must be shipped to another regional office. According to the VA, this policy protects the veteran’s private information from being viewed by coworkers, ensures that the veteran’s claim is handled by an objective reviewer, and prevents the veteran from being able to exercise influence over his or her claim.

When the VA hired Frink in February 2013, he had a pending benefits claim regarding years of potential missing payments for him and his two dependents. At that time, the VA’s computer system showed that Frink’s claims folder was stored at the BRO. According to the

¹ [REDACTED]

VA's policy, the BRO was required to ship the folder to another VA facility after Frink was hired. Frink soon discovered, however, that the VA had lost his folder. This caused Frink serious concern since the VA could not begin work on his claim until his folder was transferred to another facility, and even after it was finally transferred, he might still face a long wait for the retroactive payments to be processed and distributed.

Soon after starting his new job, Frink mentioned his claim to his supervisor, [A]. He continued to raise the issue to [A] on a regular basis because the BRO could not locate his claims folder. Frink also sought help from the Disabled American Veterans ("DAV"), a veterans' service organization that helps veterans with their VA benefits claims. The DAV unsuccessfully tried to help Frink find his folder.

Frink also raised the issue to others at the BRO during March and April 2013. He confided in coworkers, who tried to give him guidance as to who might be able to help locate his claims folder. A supervisory Veterans Service Representative ("supervisory VSR") looked up Frink's folder in the computer system and saw that it was apparently still located at the BRO but its precise location was unknown. This supervisory VSR ("supervisory VSR 1")² thought he saw Frink's folder in [REDACTED] [C]'s office. Still, Frink's folder could not be found. Another supervisory VSR ("supervisory VSR 2") told Frink that his folder was at the BRO. Yet neither supervisory VSR could physically locate the folder. Based on these interactions, Frink surmised that his folder was somewhere within the BRO but that its exact location was unclear.

Frustrated with the situation, Frink again brought the issue to [A], who told him to speak to [D], the [REDACTED]. In his position, [D] was responsible for ensuring veterans' claims were appropriately processed. He was also responsible for ensuring Frink's claims folder was located and transferred to another regional office. Frink followed [A]'s instructions and emailed [D] on May 6 requesting information about his folder. A few days later, Frink and [D] spoke in person and [D] agreed to assist Frink. [D] asked Frink to check back with him every Friday to see if the issue had been resolved. [D] also directed a supervisory VSR ("supervisory VSR 3") to help Frink. On May 24, supervisory VSR 3 informed Frink that the BRO was still looking for the folder. On June 3, she followed up with Frink and told him the BRO still had not located the folder but that she had asked the St. Paul Regional Office to search for the folder there as well.

After getting no results, on June 5, Frink asked Senator Barbara Mikulski to help him. Frink's written complaint told the Senator that he had not received certain payments for him and his dependents, and that he had been actively searching for his claims folder for four months. On the same day, Frink emailed supervisory VSR 3, [D], and others to notify them that he had requested assistance from Sen. Mikulski.

During its investigation, OSC learned that Frink's complaint to Sen. Mikulski occurred during a time when the BRO faced many challenges, including public scrutiny for its poor performance in processing veterans' claims, for its high turnover rate, and for the many changes in BRO leadership. The heightened scrutiny began after *The Baltimore Sun* published an article

² This report does not identify supervisory VSRs by name to protect their identities.

with Frink occurred, she was surprised because she thought [B] had already removed VA employees' badge access to the DAV office based on previous incidents.

2. *Frink's Alleged Failure to Follow Supervisory Instructions Regarding His Search for His Claims Folder*

The VA stated that Frink failed to follow supervisory instructions, including using inappropriate methods to search for his claims folder when he was employed at the BRO. According to [A], Frink asked too many questions about his folder, and on one occasion, he improperly asked a nonsupervisory employee about it. [A], however, offered contradictory testimony regarding whether Frink's search for his folder was a reason for his termination. [A] first testified the termination letter's reference to "failing to follow supervisory instructions" encompassed Frink's failure to follow the proper procedures for asking about his folder. Subsequently, [A] nevertheless stated that he did not consider the claims folder issue in Frink's termination because the issue had become moot by the time Frink was terminated (Frink's folder was located shortly after receiving Sen. Mikulski's June 10 inquiry). [A] also said he did not consider the folder issue in Frink's termination because he understood why Frink was concerned about his folder and thought they "could work through" the issue.

a. No Clear Claims Folder Policy at the BRO

The VA had no written claims folder policy. [A] and [B], however, testified that Frink's search for his folder violated VA policy. Neither provided OSC with any written policy prohibiting an employee from asking about a folder's whereabouts. They were also unable to provide any written policy prohibiting employees from speaking to coworkers, whether in supervisory or nonsupervisory positions, about their folders. Other management officials who were interviewed knew of no such written policies either. Witnesses described an unwritten policy that generally discouraged discussions with nonsupervisory employees about the *contents*, not the *location*, of a folder or claims-related information. However, even testimony about this unwritten policy varied widely and indicated that employees lacked a common understanding of any such policy.

[A] had difficulty articulating his understanding of the BRO's claims folder policy to OSC. He stated that the proper way for Frink to address claims folder issues was to go through his supervisor. [A] could then refer Frink to other agency officials who could help him, such as the Service Center Manager. When asked if an employee-veteran is prohibited from asking other employees about the location of his claims folder, [A] at first responded that there is no such prohibition. He later changed his answer and stated that employee-veterans may not ask the location of a folder unless they are speaking to a management official. He explained that asking nonsupervisory employees the location of a folder is prohibited because it requires the nonsupervisory employee to access private information, including the employee-veteran's social security number. On the other hand, asking a supervisor about a folder is acceptable because those officials have a "higher level of trust built into [their positions]." Contrary to [A]'s testimony, OSC's investigation revealed that employees already assigned to work on Frink's folder, such as the nonsupervisory VSR who spoke to Frink, could provide information about the folder's location without actually looking up the social security number. For example, if the

in January 2013, exposing serious deficiencies at the BRO.³ The article, titled “Baltimore VA office worst in nation for processing disability claims,” revealed that the BRO had the highest percentage of backlogged veterans’ claims in the country as well as the country’s highest error rate. The article also described other problems at the BRO and the difficulties veterans face when they cannot get timely benefits. It attracted national attention and triggered subsequent news articles, as well as site visits from Sen. Mikulski in February 2013, White House Chief of Staff Denis McDonough in May 2013, and Sen. Ben Cardin in June 2013.⁴

On June 10, Sen. Mikulski’s office forwarded Frink’s complaint to the BRO and asked it to respond. The BRO received Sen. Mikulski’s letter on June 11, and A and B became aware of it soon thereafter.⁵ On June 13, D informed A that Frink had filed a congressional complaint even though D had been trying to work with Frink internally to locate his claims folder. D expressed anger and hostility with Frink’s decision to file a complaint with Sen. Mikulski. Immediately after the conversation, D forwarded to A the email he had received from Frink notifying him he had filed a congressional complaint. Around this same time period in June 2013, B had just learned that the Senator would be visiting the BRO later that month and holding a press conference to speak about the BRO’s deficiencies in processing veterans’ claims and ways to make improvements.⁶

B. After Learning of Frink’s Congressional Complaint, the VA Began Monitoring His Leave Use and Gave Him a Negative Performance Review

On June 14, 2013 – within days of learning of Frink’s congressional complaint – A placed Frink in an absent without leave (“AWOL”) status for .75 hours. It was the first time A took a negative action against Frink regarding his time and attendance, even though Frink had used – and A had approved – Frink’s use of leave without pay (“LWOP”) in the past.

Shortly thereafter, on June 24, A also gave Frink negative feedback about his performance. Prior to this time, Frink had not received a performance plan setting forth the expectations for his position. During the June 24 discussion, A gave Frink his performance plan for the first time as well as a verbal, negative evaluation of his performance.

³ Yvonne Wenger, *Baltimore VA office worst in nation for processing disability claims*, The Baltimore Sun (Jan. 26, 2013), http://articles.baltimoresun.com/2013-01-26/news/bs-md-veterans-benefit-backlog-20130126_1_disability-claims-baltimore-va-disability-benefits.

⁴ See, e.g., Steve Vogel, *Veterans in Maryland seeking disability benefits can face a perilous wait*, The Washington Post (Feb. 3, 2013), http://www.washingtonpost.com/politics/veterans-in-maryland-seeking-disability-benefits-can-face-a-perilous-wait/2013/02/03/720ca10a-5e6b-11e2-9940-6fc488f3fecf_story.html; Rick Maze, *Mikulski to VA: Draft a plan to fix Baltimore claims office*, Army Times (Sep. 17, 2013), <http://www.armytimes.com/article/20130917/BENEFITS04/309170010/Mikulski-VA-Draft-plan-fix-Baltimore-claims-office>.

⁵ Although both B and A were involved with preparing a response to Sen. Mikulski’s letter, the VA did not maintain a record of the response and was unable to provide a copy of the response to OSC.

⁶ The Senator’s visit was preplanned and does not appear to have been linked with Frink’s complaint.

According to Frink, [A] said he was not pleased with Frink's performance, and that he had a feeling they would be having another, less pleasant conversation about it before long. During his OSC interview, [A] initially could not recall much of the conversation. After some prodding from a VA agency attorney, [A] indicated that they discussed leave issues: "we discussed anything that he felt like was a hindrance," "[his] tour of duty, whether he felt like, you know there is anything else, leave, I discussed my concerns about the way he took leave, you know what can I do to better support him on you know getting his leave issues straightened out, and I think we straightened that out" [A] said he could not remember if they discussed Frink's AWOL status during the conversation. Based on Frink's account, the subject of Frink's claims folder came up during the discussion, and Frink mentioned he had filed a congressional complaint. [A] told Frink that it was his right to go to Congress, but that he needed to stop asking about his folder. He told Frink that if he had questions about his folder, he should talk to [D].

Sometime between June 10 and the June 24 performance discussion with Frink, [A] discussed terminating Frink's employment with both [B] and [E], a Human Resources ("HR") Specialist. After this conversation with [A], [E] prepared either an initial draft or a template for the probationary termination and emailed it to [A].⁷ [A] testified, however, that he gave Frink no indication during the June 24 discussion that Frink was doing anything that could lead to termination. On the contrary, [A] described their conversation as a friendly exchange during which [A] went out of his way to ask how he could accommodate Frink's needs and make him successful. [A] specifically stated: "At that point Mr. Frink was not doing anything performance-wise I felt like was unsatisfactory," and "I had no problem with his performance of his duties."

C. The VA Terminated Frink during His Probationary Period

The VA terminated Frink on July 12, 2013.⁸ As a probationary employee only five months into his appointment, Frink had no right to appeal the termination decision to the U.S. Merit Systems Protection Board ("MSPB"). The VA therefore gave him a short termination letter with only a brief explanation for the decision. The July 12 letter stated: "Your termination is due to your unacceptable conduct, to include using your Personal Identity Verification (PIV) badge to enter areas of the facility into which you are not authorized to gain access, failing to follow supervisory instructions, failing to follow leave procedures and making a threatening statement to an employee."

1. Frink's Alleged Misuse of His PIV Badge

According to the VA, on June 20, 2013, Frink allegedly misused his PIV badge to enter the DAV office, which is located in the same building as the BRO. Working on a lead from

⁷ [E] [REDACTED], and the VA was unable to produce a copy of this initial draft termination letter or template regarding Frink.

⁸ As a veteran with a 100% disability rating, Frink has certain limitations on his ability to perform particular jobs. Following his termination, he has applied for many permanent positions but remains unemployed.

supervisory VSR 1, who thought he saw Frink's claims folder in [C]'s office, Frink visited the DAV before it opened to the public. Frink wanted the DAV to know his folder might be in [C]'s office, and to help him find it. Knowing that sometimes employees were working at the DAV even though the office doors were not open to the public, Frink tried his badge on the door to see if it would let him inside. His badge worked, and he went inside, where several DAV employees were working. When he was asked to leave, Frink immediately complied.

Although the incident happened June 20, it only came to BRO management's attention on June 27, while [A] was on leave. That morning [B] received an email from a DAV Assistant Supervisor who informed him that Frink had successfully used his badge to access the DAV office. According to both the DAV Assistant Supervisor and [B], they did not discuss this issue further after this email. Neither [B] nor [A] asked for more information about Frink's visit to the DAV. [B] and [A] did not know what time of day Frink accessed the office or what he discussed with the DAV employees.

According to [A] and [B], Frink's behavior was tantamount to a serious security breach because he accessed the DAV when it was closed. Because the DAV has veterans' private information stored inside, [A] and [B] stated that information was at risk when Frink entered the DAV office. Yet according to three DAV employees (including the employee who asked Frink to leave) and Frink, employees were present when Frink visited the DAV on June 20, and Frink was not trying to access any files – he simply asked questions about the whereabouts of his claims folder.

One DAV employee testified he understood why Frink tried to visit the DAV early in the morning because it was difficult for VA employee-veterans to find time during their work day to get help from the DAV. Employee-veterans were not permitted to work on their veterans' claims during work hours, so they had to visit the DAV during their scheduled break times.

Frink said he believed his badge authorized his access to the DAV office. When the VA first hired him, he was instructed that the badge would work if he had access to a particular area. Frink's understanding was confirmed by other employees, including the employee responsible for issuing badges and controlling badge access. According to that employee, she gave individuals badge access if they were permitted to enter a specific space; otherwise, she did not give them access.

One DAV Supervisor stated that he was aware of six to eight other instances when VA employees used their badges to access the DAV office. This Supervisor said most of these incidents were not a cause for great concern because, as was the case with Frink's incident, DAV employees were present in the office when the VA employees used their badges to enter. One incident caused greater concern than others because a claims folder actually went missing, and the VA employee accessed the DAV office outside work hours when no one was present. The VA employee took the file to work on a claim to which he was assigned; however, he did not inform anyone or account for the file in the computer system. Witnesses recalled the missing file incident and indicated that it led to further discussions with [B] about the security of information stored at the DAV. According to the DAV Assistant Supervisor, when the incident

nonsupervisory VSR had just put the folder in someone else's office, he could easily inform Frink without looking up the folder in the system.

OSC interviewed the current Service Center Manager about the BRO's claims folder policy. She stated there is no prohibition on asking the location of a folder. She agreed that employee-veterans could go through their chain of command to find out certain information about their folders, but she also said, in general, inquiries would go through a call center or public contact unit. She agreed there is a difference between asking a supervisory VSR for help versus a nonsupervisory VSR, and that asking a nonsupervisory VSR is discouraged. She did not know of any written policy at the BRO explaining this desired approach. In her opinion a verbal or written counseling would generally be the appropriate response if an employee-veteran spoke to another employee about his or her claim.

Supervisory and nonsupervisory VSRs interviewed by OSC had a different understanding of the claims folder policy. One supervisory VSR stated that it is a common practice for fellow employees to offer limited assistance with an employee-veteran's claims folder, as long as only general information is provided. Like the supervisory VSR, nonsupervisory VSRs generally understood that discussing the specifics of a claim or trying to influence an employee handling a claim is not permissible. However, they believed that asking the location of a folder or asking for general advice about a claim is permissible.

b. Frink's June 10 Visit to the Service Center

A referred to a June 10 incident with a nonsupervisory VSR in the Service Center as a basis for the termination. Specifically, **A** said Frink was "chased out" of the Service Center by **C** when she saw Frink asking one of her employees about his claim. **A**'s characterization of the event as a serious problem, however, is at odds with what was described by eye witnesses. For example, the nonsupervisory VSR who spoke to Frink on June 10 testified that Frink asked him if his claims folder had been located. The VSR tried to help Frink since he had recently worked on Frink's folder. Their conversation was very short because **C** overheard them and immediately asked Frink to leave because he should not be asking another employee questions about his claim. Based on the VSR's account, Frink did not try to exert undue influence over his claim or put pressure on the VSR – he simply asked if his folder had been located.

C's account was consistent with those of Frink and the nonsupervisory VSR. She testified she was walking by the VSR's cubicle when she overheard a discussion between him and Frink involving Frink's claims folder. She informed Frink that he could not ask the VSR to look up any information about his claim and instructed Frink to return to his work station. According to **C**, Frink was "very cordial about the whole thing" and promptly left the Service Center. Immediately after the incident, **C** emailed **A** to inform him about what had happened. In her sworn testimony, **C** described the incident as "insignificant" and not even worthy of a letter of counseling. She testified that she would be surprised if the incident was considered in the decision to terminate Frink. **C**'s testimony was corroborated by those of other BRO management officials who indicated that asking another employee about the location of a claims folder would not be a serious infraction.

c. Claims that Frink Accessed his Electronic Claims Folder

On June 10, immediately following the incident with [C], Frink sent an email to [C] and cc'ed [D]. In the email, Frink gave his account of what had happened with the nonsupervisory VSR to clarify that he had done nothing wrong. He wrote that he had greeted the VSR because Frink knew he was the last person who handled his claims folder. The subject of his folder then came up in conversation, but Frink insisted that he did not ask anything improper or try to influence the VSR in any way. After receiving this email, both [D] and [C] forwarded it to [A]. [A] later alleged that this June 10 email from Frink proved Frink had inappropriately accessed electronic information about his claim. According to [A], Frink would not have known who last handled his folder unless he improperly accessed the computer system. [A] maintained that employees should not use the computer system to find information about their own claims.

Frink denied having ever looked up his electronic claims folder in the computer system. He said it was supervisory VSR 2 who told him the nonsupervisory VSR was the last person to handle his folder. Supervisory VSR 2 corroborated Frink's account: she testified that she may indeed have given this information to Frink during one of her attempts to help him find his folder. Frink's account was further supported by the then-Acting Information Security Officer ("Acting ISO"), who monitored access to electronic claims folders during the time Frink worked at the BRO. The Acting ISO confirmed that Frink did not access his electronic claims folder. [A] and [B] did not provide any contrary evidence.

d. Testimony That Frink Was Near the File Bank in the Service Center

Both [A] and [D] claimed they saw Frink near the claims folder file bank in the Service Center. Both asserted that Frink should not have been anywhere near the file bank because it contained private veterans' information and Frink had no business in that area. Their testimonies contradicted those of other employees, including a BRO supervisor, who said Frink had to go to the Service Center frequently to work with employees on their time and attendance. The supervisor testified that timekeepers, like Frink, have historically visited the Service Center to conduct business, and that it would be nearly impossible for the timekeeper to perform his duties without ever going to the Service Center.

In addition, [A] and [D]'s testimonies are at odds with those of other witnesses who told OSC that claims folders and file cabinets were located all over the Service Center and employees were always near them. A site visit by OSC confirmed that the file bank was in the middle of the Service Center. Employee work stations surrounded the file bank. Yet [A] indicated that he expected Frink to avoid the file bank when conducting business or speaking to employees in the Service Center.

In any event, Frink denied having ever looked for his claims folder near the file bank in the Service Center. Neither [A] nor [D] ever documented in writing that they found Frink inappropriately near a file bank, nor could they refer to any other witnesses who saw Frink looking for his folder in the Service Center.

3. Frink's Alleged Failure to Follow Leave Procedures

The VA also stated that Frink's termination was based in part on his use of significant amounts of leave and failure to properly request leave. Frink used leave because he had frequent medical appointments due to his service-connected disability. At times he requested leave or LWOP due to other issues, such as registering his child in kindergarten, getting his vehicle repaired, attending his child's graduation, and other personal matters. As a new employee, Frink did not have any leave accrued when he was first hired, so he had to accrue it gradually. [A] accommodated his requests, granting him annual leave, sick leave, or LWOP depending on the circumstances.

According to [A], Frink also would often request leave at the last minute. [A] said he responded to such requests by telling Frink to give "as much notice in as far advance as possible." [A] would also tell Frink he would approve the leave because he understood that emergencies happen; however, he asked that they work together on this issue and "make the arrangements so that everybody is on the same page." On occasions when Frink had run out of leave, [A] approved Frink's use of LWOP.

There was only one occasion where [A] did not approve Frink's leave request or grant him approved LWOP. On June 14, 2013, about three days after learning of Frink's complaint to Sen. Mikulski, [A] sent Frink an email documenting that he was placing him on AWOL status for .75 hours of leave taken on June 3 and threatening him with discipline. Before going to work that June 3 morning, Frink sent [A] an email from his personal email account asking to leave work early that day to take care of setting up utilities at his new home. [A]'s testimony indicated that he approved the leave. Frink submitted his time and attendance towards the end of that pay period, reflecting that he had used 3.25 hours of annual leave the afternoon of June 3. However, he only had accrued 2.5 hours of annual leave, so the system then indicated he had a negative annual leave balance of .75 hours. When [A] caught this issue, he decided not to approve LWOP for Frink as he had done in the past.

4. Frink's Alleged Threat to A Coworker

The VA's final reason for Frink's termination was that he allegedly made a threat to a coworker. Between June and July 2013, it became clear to Frink that his working relationship with [A] had changed significantly. According to Frink, he and [A] had a positive working relationship and got along well until he filed the complaint with Sen. Mikulski. By the beginning of July, Frink believed he would be facing an adverse action in the near future.

On July 9, Frink was in the office talking to some coworkers. At this point he had not yet been informed he would be terminated, but based on [A]'s behavior towards him, he believed he might be. During the conversation, an HR Specialist walked by. According to the HR Specialist, she asked Frink if he was "off today" because he was dressed differently from his usual attire, and Frink replied, "Oh I'm off alright." He then said, "It's just a matter of when I go off." Frink did not say anything else. The HR Specialist reported Frink's statement to [A]. [A] asked her to prepare an email documenting exactly what she had told him. She sent the

email to [A] the same day. In the email, she described the exchange she had with Frink. She also wrote in the email:

I brought this to the attention of [Frink's] supervisor, [A], due to the fact that I had knowledge that [Frink] was being considered for removal and statements to that affect [sic] could be viewed as a threat. Many times, employees who are stressed make comments that are less than desirable; however, they are not considered an immediate threat. I did not feel an immediate threat by Mr. Frink, but knowing that he may be removed in the near future, I felt compelled to say something about his statement, not knowing how he will react to his removal.

The HR Specialist testified that she would not always report a comment like the one Frink made because sometimes employees make such comments as a way of simply “blowing off steam.” In this case, because she was already aware that the VA planned to terminate Frink, she decided to report it to [A].

The HR Specialist stressed she did not feel Frink's comment constituted a threat and that she made clear in her email that she did not feel a direct threat. She added that she “felt bad” when she discovered her email was considered in Frink's termination and that “I didn't want it to be a factor in his removal because I didn't feel like he was threatening anybody.” Other employees also witnessed Frink's statements and testified they did not feel threatened. They recalled that they were having a normal conversation with Frink at the time, and they were all discussing frustrating situations. But BRO management conducted no inquiry into whether any of these employees with first-hand knowledge, including the HR Specialist who reported Frink's statement, felt threatened by Frink.

IV. LEGAL ANALYSIS

A. Appropriate Legal Standard for Section 2302(b)(12) Claim

Under 5 U.S.C. § 2302(b)(12), it is a prohibited personnel practice to take or fail to take a personnel action if doing so would violate any law, rule, or regulation implementing or directly concerning a merit system principle. *See* 5 U.S.C. § 2302(b)(12); 5 U.S.C. § 2301 (listing merit system principles). The VA took a personnel action when it terminated Frink's employment. *See* 5 U.S.C. § 2302(a)(2)(A). Frink's termination violated two laws implementing or directly concerning the merit system principle that “[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management ... with proper regard for their privacy and constitutional rights.” 5 U.S.C. § 2301(b)(2). First, the VA violated 5 U.S.C. § 7211, which states: “[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.” Second, the VA violated Frink's First Amendment right to “petition the Government for a redress of grievances.” Thus, when the VA terminated Frink based on his communication to Congress, it

violated section 2302(b)(12). The VA has proffered several ostensibly legitimate reasons for Frink's termination.

The MSPB has not yet decided a section 2302(b)(12) case involving the termination of an employee for, among other things, petitioning Congress. If such a case were brought before the MSPB, it would likely apply the analytical framework outlined by the Supreme Court in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the Supreme Court articulated a standard for determining the legitimacy of a personnel decision that appeared to have been taken for both unconstitutional and legitimate reasons. Under that standard, an employee must first establish by a preponderance of the evidence that the constitutionally-protected conduct was a substantial or motivating factor in the personnel decision. Once the employee has made this showing, the burden shifts to the employer to show, also by a preponderance of the evidence, that it would have made the same personnel decision in the absence of the protected conduct. *See Mt. Healthy*, 429 U.S. at 287.

The *Mt. Healthy* standard was originally adopted in a case involving constitutionally-protected conduct, but it has since been applied in cases of alleged discrimination and retaliation. Under the Civil Service Reform Act of 1978, the MSPB applied the *Mt. Healthy* standard to cases involving retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8) as well as retaliation for activity protected under 5 U.S.C. § 2302(b)(9). *See, e.g., Gerlach v. Fed. Trade Comm'n*, 9 M.S.P.R. 268, 276 (1981) (retaliation for filing a grievance); *Ireland v. Dep't of Health and Human Servs.*, 34 M.S.P.R. 614, 619 (1987) (retaliation for engaging in union activities). When Congress passed the Whistleblower Protection Act in 1989, it lowered the standard for proving retaliation for whistleblowing under section 2302(b)(8), but the *Mt. Healthy* standard continued to apply to section 2302(b)(9) cases. *See, e.g., Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Special Counsel v. Santella*, 65 M.S.P.R. 452, 457 (1994). This changed with the passage of the Whistleblower Protection Enhancement Act of 2012; now, the *Mt. Healthy* standard no longer applies to many section 2302(b)(9) cases, including allegations of retaliation for filing an OSC or Office of Inspector General complaint.⁹ *See* 5 U.S.C. § 1214(b)(4)(A).

OSC believes that the above-cited dual-motivation cases, particularly those involving retaliation for making protected disclosures or engaging in protected activity, are instructive to the legal analysis here. Indeed, the *Mt. Healthy* standard is likely the appropriate one for section 2302(b)(12) cases involving personnel actions based on communications with Congress because: (1) the right to petition Congress is a First Amendment right (later codified in 5 U.S.C. § 7211) that is analogous to the First Amendment right at issue in *Mt. Healthy*; (2) the Supreme Court determined that *Mt. Healthy* was the correct standard for dual-motivation cases involving retaliation based on the exercise of constitutional rights; and (3) Congress explicitly articulated a lower evidentiary burden than *Mt. Healthy* for cases involving retaliation for whistleblowing or for engaging in certain protected activities but did not do so with respect to other types of retaliation claims. Therefore, we conclude that *Mt. Healthy* is the appropriate standard for Frink's case, and it is the standard applied in this report.

⁹ In cases brought under section 2302(b)(8) and certain provisions of section 2302(b)(9), the agency must show with *clear and convincing evidence* – rather than a preponderance of the evidence – that it would have taken the same personnel action in the absence of the protected disclosure or activity. *See* 5 U.S.C. § 1214(b)(4)(B)(ii); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012).

B. OSC Established a Prima Facie Violation of Section 2302(b)(12)

To establish a prima facie violation of section 2302(b)(12) under *Mt. Healthy*, OSC must show that Frink's complaint to Congress was a substantial or motivating factor in the decision to terminate his employment. See *Gerlach*, 9 M.S.P.R. at 275. The MSPB has clarified that the meaning of a "substantial or motivating" factor, also referred to by the MSPB as a "significant" factor, is different in Special Counsel corrective action and disciplinary action cases. *Santella*, 65 M.S.P.R. at 457. In corrective action cases, an employee's protected activity may be a "substantial factor" even though the allegedly retaliatory action would have been taken in the absence of any retaliatory motive." *Id.* (citing *Gerlach*, 9 M.S.P.R. at 275 n.7).¹⁰ In other words, a substantial or motivating factor need not be the "primary" or "dominant" motive in the personnel decision. *Id.* at 459, n.3.

In analogous section 2302(b)(9) cases involving an agency's termination of an employee, the MSPB has articulated the relevant factors it would consider in determining whether the protected activity was a significant factor in the agency's personnel action. For example, in *Ireland*, the MSPB found that the employee satisfied the significant factor test when considering "the temporal sequence of the chain of events preceding the appellant's removal, the fact that many of the specifications cited in support of the removal action [could not] be sustained, and the determination that the agency held the appellant to an unreasonable standard." 34 M.S.P.R. at 619. In *Gerlach*, the MSPB again found the significant factor test was met after it considered "the extreme disparity between the minor nature of the sustained specifications and the penalty of removal," "a comparison between this action and the agency's record of disciplinary actions taken during the year preceding this action," "the fact that there was no attempt to utilize progressive discipline to remedy appellant's legitimate deficiencies," and management's lack of credibility. 9 M.S.P.R. at 273. Thus, OSC considered the factors in both of these cases and determined that Frink's congressional complaint was a substantial or motivating factor in his termination.

1. Close Timing Between Frink's Congressional Complaint and His Termination

As in *Ireland*, the "temporal sequence of the chain of events" strongly suggests that Frink's congressional complaint triggered his termination. 34 M.S.P.R. at 619. A and B learned about Frink's complaint to Sen. Mikulski around June 11, 2013, when the VA received Sen. Mikulski's letter with a copy of Frink's complaint attached.¹¹ D shared his concerns about the congressional complaint with A on June 13. On June 14, A marked Frink AWOL for the first time. Sometime between June 10 and 21, A asked E to prepare a draft termination letter or template for Frink.

¹⁰ By contrast, in Special Counsel disciplinary cases, the significant factor test cannot be met "if a respondent would have taken the allegedly retaliatory actions in the absence of any protected disclosures." *Santella*, 65 M.S.P.R. at 458-59.

¹¹ D knew about Frink's congressional complaint on June 5, 2013, when he received an email from Frink stating he had filed a complaint with Sen. Mikulski. Since the evidence indicates that D and A discussed Frink, A may have known about the congressional complaint as early as June 5.

The initial plans to terminate Frink were therefore motivated either by his earlier unscheduled leave requests, his .75 hours of AWOL, his visit to the Service Center on June 10, his earlier search for his claims folder, his congressional complaint, or a combination of these reasons. The PIV badge incident and alleged threat to a coworker had not yet occurred (management learned about the PIV badge incident June 27, and the alleged threat occurred July 9). **A** testified that he had resolved Frink's leave issues by the time they had the June 24 performance discussion, so Frink's leave requests and AWOL status could not have been motivating factors in the termination decision. **A** also testified that the June 10 incident with the nonsupervisory VSR in the Service Center and Frink's previous attempts to locate his claims folder were not included in the termination letter because that issue had become moot, and because he felt he could work with Frink to resolve it. Therefore, the June 10 incident and Frink's earlier attempts to find his folder were not motivating factors in the termination decision either. The only remaining plausible explanation is that Frink's congressional complaint motivated the VA's termination decision.

This conclusion is supported by evidence that **A** and **D** discussed Frink's congressional complaint on June 13 and that immediately thereafter, **A** began carefully documenting Frink's alleged deficiencies when he had never done so before. Although OSC found no direct evidence that **D** influenced **A**'s decision to terminate Frink, the timing of their conversation, together with **D**'s statements of animus and the lack of credibility in both their testimonies, suggest the June 13 conversation was on **A**'s mind when he began his efforts to terminate Frink.

2. The VA's Lack of Support for the Specifications in Frink's Termination Letter

According to the VA's termination letter, Frink was terminated for misusing his PIV badge, failing to follow supervisory instructions, failing to follow leave procedures, and making a threatening statement to a coworker. OSC investigated the charges in the termination letter and determined that they lacked evidentiary support. Furthermore, the penalty of termination was excessive for the alleged conduct involved. The VA also held Frink to an unreasonable standard and failed to use progressive discipline to give him notice of any alleged deficiencies, as it did with other employees. Finally, **A**, **B**, and **D**'s testimonies about Frink's behavior also lacked credibility. Similar to the MSPB's analysis and findings in *Ireland* and *Gerlach*, OSC analyzed the relevant factors and concludes that Frink satisfied the significant factor test.

a. The PIV Badge Incident

With respect to the PIV badge incident, OSC's investigation revealed that VA officials overstated Frink's level of culpability and held him to an unreasonable standard. For example, the termination letter was misleading and inaccurate when it stated that Frink used his badge "to enter areas of the facility into which [he was] not authorized to gain access." Frink did not access unauthorized portions of the VA – he accessed an independent veterans' service organization that exists specifically for the purpose of helping veterans with their claims. Frink went to the DAV to get help when his schedule permitted it, but the DAV office was still closed when he arrived.

On the issue of badge access, it is significant that the BRO employee responsible for PIV badges specifically told Frink that his badge would not work if he did not have access to a particular office. Since his badge worked at the DAV office, it was reasonable for him to conclude that he could go inside. To accuse a veteran of a serious security breach when he only asked for help with a claim suggests animus. Furthermore, [B] and [A] jumped to the conclusion that a serious security breach had occurred without conducting any inquiry into the circumstances of Frink's visit to the DAV.

Frink was also blamed for the VA's own failures. [B] was already on notice that VA employees had used their badges to access the DAV office, and that on at least one occasion, a file had gone missing. As a result, the DAV was under the impression that [B] had addressed the issue. But [B] had not. Badge access was only turned off after the incident involving Frink. Unlike [B], Frink had no notice that his badge might work in locations he was not supposed to access. This incident was the first time that Frink used his badge to access the DAV office, and he immediately followed instructions to leave the location. The VA held Frink to an unreasonable standard when it terminated him the first time he used his badge to get help from the DAV.

b. Failure to Follow Supervisory Instructions

The VA did not produce sufficient evidence to support its allegation that Frink failed to follow supervisory instructions, including using inappropriate methods to inquire about his claims folder. Notably, [A] did not document a single occasion where he gave specific instructions to Frink regarding folders and Frink violated those instructions. Furthermore, the VA could not produce any evidence that Frink ever accessed his electronic claims folder, or that he received training or guidance not to speak to nonsupervisory employees about his folder prior to his first and only time speaking to the nonsupervisory VSR on June 10, 2013. VA officials also testified that a verbal counseling or simple discussion would have been sufficient for addressing Frink's behavior, not termination.

The VA also failed to show that Frink violated any written policy pertaining to claims folder inquiries. While there may have been an unwritten policy discouraging discussions about folders among nonsupervisory employees, any such policy was unclear, widely misunderstood by BRO employees, and applied arbitrarily. The BRO could not reasonably expect Frink, a GS-5 employee, to understand that he was violating the policy when even high-level officials like [A] had trouble articulating it.

Finally, while [A] and [D] claimed that Frink often went to the Service Center to ask about his claims folder or look for his folder, they could not provide evidence to support their claims. Also, [A] lacked credibility since he first testified that he considered Frink's improper search for his folder in the termination decision, and then later asserted that he did not consider it because the issue had become moot. These contradictions suggest that [A]'s concerns about Frink's search for his folder were a pretext to justify Frink's termination.

c. Failure to Follow Leave Procedures

The penalty for Frink's alleged failure to follow leave procedures is grossly disproportionate to the infraction. According to the VA, Frink's only documented instance of failing to follow leave procedures was his AWOL charge on June 14, 2013, for .75 hours. On the occasion at issue, Frink did not miss work without warning as the termination letter and AWOL charge suggest – he notified [A] in advance of his need to use leave and [A] gave him permission. Frink simply miscalculated the amount of leave he had available by less than an hour. Thus, the penalty of termination is overly harsh. Furthermore, [A] testified inconsistently, first stating that Frink's leave issues had been resolved by the time they had their performance discussion on June 24, then attesting to the exact opposite and included this charge in the termination letter. [A] therefore lacked candor in his testimony to OSC.

d. The Alleged Threat to a Coworker

The VA failed to conduct any proper investigation and thus reached several unsupported conclusions about Frink's alleged threatening comment to a coworker. For instance, contrary to [A]'s testimony, none of the witnesses involved in the incident said they felt threatened by Frink's statement. As with the PIV badge incident, agency officials did not attempt to determine the truth; instead, they rushed to add the incident to Frink's already existing draft termination letter. Moreover, Frink made this statement shortly after his intimidating conversation with [A] where [A] implied Frink could lose his job after months of trying to locate his claims folder. It was reasonable for Frink to express frustration and stress under the circumstances. The VA's reaction, however, was disproportionate to the behavior and showed animus.

3. *Similarly-Situated VA Employees Were Not Treated as Harshly as Frink*

In *Gerlach*, the MSPB considered the “agency’s record of disciplinary actions taken during the year preceding [the] action” to determine whether the employee satisfied the significant factor test. 9 M.S.P.R. at 273. OSC broadened its search to more than one year and evaluated disciplinary actions against BRO employees similarly situated to Frink between 2011 and 2014. Although it is difficult to make an exact comparison due to the unique circumstances of each case, the large disparities between the penalty given to Frink and those given to other similarly-situated employees who engaged in comparable conduct suggest the VA would have a difficult time proving it would have taken the same personnel action against Frink in the absence of his congressional complaint.

In nearly every single instance involving similarly-situated employees, the penalties were much lower relative to the alleged misconduct than in Frink's case. An employee who was AWOL for two months received a suspension instead of a removal, employees who made coworkers feel threatened received admonishments, reprimands, or even no discipline, and others who accessed the DAV office apparently received no punishment at all. Furthermore, the level of care taken to counsel employees and document misconduct, as well as the amount of investigation done to confirm what truly happened, all contrasted sharply with how the VA handled Frink's case.

a. Other AWOL Employees Received Significantly Milder Penalties than Frink

Several VA employees were marked AWOL during the three-year period we examined. One employee was suspended for three calendar days after he failed to show up for work and failed to provide medical documentation for sick leave. Two employees received admonishments, the mildest possible disciplinary action, for being AWOL for, respectively, two work days and seven work days. An employee who was AWOL for almost two months only received a ten-day suspension, a much milder penalty than that imposed on Frink. The gross disparity between the penalties BRO management issued to its employees for the same conduct suggests Frink's termination was disparate and retaliatory.

b. Other Employees Who Engaged in Alleged Misconduct Received Lesser Penalties than Frink

Several VA employees who were disciplined for similar conduct received milder penalties than Frink. One employee who engaged in the same conduct as Frink, i.e., using his PIV badge to access the DAV office, received no discipline at all. Unlike Frink, this employee entered the DAV office when no DAV employees were present, and unlike Frink, he removed a file from the DAV office. This conduct is inarguably more egregious than Frink's, yet this employee was not disciplined.

Another case involved an employee who made a comment about his supervisor on the elevator, and the supervisor overheard the comment. The employee apparently stated to a coworker that he "came very close to hitting [his supervisor]." In contrast with the VA's practice in Frink's case, it conducted an investigation into the incident and took witness statements. The supervisor provided a statement saying that she considered the employee's comment a direct threat. Despite these facts, the employee only received a reprimand.

Two employees received only an admonishment for engaging in a heated confrontation that required the involvement of the Federal Protective Service. Again, unlike in Frink's case, the VA conducted an investigation to determine the facts, including taking statements from employees who witnessed the event. The investigator wrote a note stating she discussed her investigative findings with **B**. In the end, both employees received only an admonishment.

Finally, one employee asked during a meeting with several in attendance whether "the Director" was concerned about a possible "Navy Yard situation" at the BRO. The employee was alluding to the possibility that an employee might engage in workplace violence because of the stressful work environment at the BRO. He was sent home immediately after making the comment and was given two weeks of administrative leave as a "cooling off period." When he returned, he was assigned to a different supervisor with whom he got along better. The VA conducted a fact-finding into the incident, and one witness said in her statement that she felt threatened by this employee's comment; however, the employee was not disciplined.

c. Unlike Frink, Other Probationary Employees Received Proper Notice of, and Progressive Discipline for, Their Alleged Deficiencies

OSC also compared Frink with five other probationary employees who were terminated close to when Frink was terminated in 2013. These employees were terminated for a variety of reasons. In four of the five cases, the employee received at least one formal written counseling, signed and dated on a VA memorandum form, explaining to the employee what he or she had done wrong, and warning that continuing the behavior in the future could lead to further disciplinary action or termination during the probationary period. The fifth employee did not receive a written counseling; instead, his file contained several reports of contact on a standard VA form documenting each of the deficiencies later cited in that employee's termination letter. The reports of contact were signed and dated, they clearly explained the employee's deficiencies, and they documented several verbal counselings that were given to the employee, as well as the employee's response to the counselings. This employee was also warned that continuing the behavior could result in further disciplinary action. The evidence therefore indicates that the VA kept better documentation in the other probationary termination cases and also gave the other employees clearer warnings that they were engaging in inappropriate behavior.¹² The disparity in the way these cases were handled compared to Frink's suggests that the VA only became interested in discussing or documenting Frink's conduct after he complained to Sen. Mikulski.

4. *VA Officials Demonstrated Animus and Retaliatory Motive Toward Frink*

In whistleblower retaliation cases under section 2302(b)(8), the MSPB considers any relevant evidence that may establish a causal connection between the employee's protected disclosure and the personnel action taken against the employee, including evidence of animus and retaliatory motive. *See Dorney v. Dep't of the Army*, 117 M.S.P.R. 480, 486 (2012). In this case, evidence of animus and retaliatory motive is relevant to establish that Frink's congressional complaint was a significant factor in the decision to terminate his employment.

The evidence shows that VA officials, particularly **B** and **D**, had animus towards and a strong motive to retaliate against Frink. For example, **B** learned on June 10, 2013, that Sen. Mikulski would be holding another press conference at the BRO to discuss veterans' claims. Sen. Mikulski had been putting pressure on **B** in the preceding months to show he was making improvements, particularly with respect to claims processing. Frink's congressional complaint pertained to the very issue for which the BRO was under national scrutiny, and he submitted the complaint shortly before a scheduled visit from Sen. Mikulski. **A** also acknowledged that **B** was frustrated with the complaint.

In addition, **D**, who was not a subject of the investigation because he lacked personnel action authority over Frink, expressed animosity towards Frink because of his congressional complaint. **D**'s testimony is relevant because he was a high-level management official who spoke to **A** more than once about Frink. In particular, he spoke to **A** on June 13, immediately after VA management learned of Frink's congressional

¹² The written counselings and reports of contact pertaining to the five probationary employees were prepared by other managers, not **A**. **B**, however, signed off on the discipline or termination of other similarly-situated employees.

complaint, and immediately before VA management began carefully documenting Frink's alleged deficiencies. Although **D** and **A** specifically discussed Frink's congressional complaint, both offered vague testimony regarding what they discussed.

When asked about Frink's decision to file a congressional complaint with Sen. Mikulski, **D** expressed anger that Frink went behind his back and complained when **D** was already trying to assist with the issue:

Now, if you want to use the rights that you have that every other veteran has, that's fine, but don't—and don't come to me with a problem informally and waste my time and tell me to help you specifically if that's the route that you're gonna take . . . clearly the understanding, if you come to me and you know that's not the route that you're supposed to take and I say 'Okay, I'll handle that for you. I'll look for that for you,' um, certainly, um, I wouldn't, uh, think that that simultaneously that you would be seeking to get the congressional office involved—because if you are, then why did you come to me? That's that, that's my question: Why would you come to me and say 'Hey, will you help me with this?' . . . So, in my view, that was an end-around, um, from my perspective, um, because you never came back and say 'You know what? I, I don't think you're looking for it; I, I—you're not finding it fast enough for me. I'm not, I need to do something else. I, I don't think you're doing this good. I don't—I think you're incompetent,' whatever it was, that would be my expectation. Because you used our—your professional relationship with me to your benefit, but you never came back and closed that loop with me, professionally. In my view, professionally—not as a—not from his veterans—not from his rights as a citizen, but professionally, because we had a professional relationship, he was wrong. He was wrong.

D admitted that he expressed his opinion about Frink's congressional complaint to **A**, but could not recall **A**'s reaction to the conversation. Likewise, **A** said he could not recall what **D** said during their conversation.

C. The VA Would Likely Fail to Rebut OSC's Prima Facie Violation of Section 2302(b)(12)

Under the burden-shifting standard in *Mt. Healthy*, to overcome OSC's prima facie violation of section 2302(b)(12), the VA must prove by a preponderance of the evidence that it would have terminated Frink's employment even in the absence of his congressional complaint. It is unlikely the VA would be able to meet this low burden of proof.

As discussed, the MSPB has not yet decided a dual-motivation case under section 2302(b)(12) involving an employee's termination for petitioning Congress. Thus, guidance from analogous retaliation cases under sections 2302(b)(8) and (b)(9) are instructive. Indeed, OSC believes the same factors articulated in these cases would be considered to determine whether an agency has met its burden. Those factors include: (1) the strength of the agency's evidence in support of its personnel decision; (2) the existence and strength of any motive to retaliate on the part of agency officials responsible for the decision; and (3) evidence of similarly-situated employees who did not engage in protected activity. See *Smith v. Dep't of Agric.*, 64 M.S.P.R. 46, 66 (1994); *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 324 (1997).

Here, an evaluation of these factors shows that the VA would have difficulty meeting its burden in rebuttal. First, the VA's evidence in support of Frink's termination is weak. It did not adequately document Frink's alleged deficiencies, management's testimony about those deficiencies was inconsistent and lacked candor, and other witnesses did not corroborate the agency's version of the events. Second, the VA officials who terminated Frink also showed animus and a clear motive to retaliate. Frink complained to Sen. Mikulski, who was particularly interested in improving the BRO; that Senator was about to visit the BRO to discuss her concerns; and Frink's complaint pertained to the very issue that concerned the Senator – delays in the processing of veterans' claims. By terminating Frink, the VA avoided a difficult employee who was persistent in his search for his claims folder. Third, the evidence of similarly-situated employees also indicates that Frink was treated more harshly than others who did not engage in similar activity. Unlike other employees, Frink was not placed on notice of his violations or given an opportunity to improve, he received much worse punishment for similar conduct, and the VA did not bother conducting inquiries to find out what truly happened. Based on these findings, OSC concludes it would successfully establish that the VA violated section 2302(b)(12).

V. RECOMMENDATION

As a result of the section 2302(b)(12) violation, Frink is entitled to full corrective action. This consists of returning him to the *status quo ante*, or the position he would have been in were it not for the prohibited personnel practice. The *status quo ante* in this case includes an offer of reinstatement to a substantially similar position at the VA, back pay for the months he was not employed plus interest and restored benefits, removal of all derogatory information from Frink's personnel file, and compensatory damages for emotional distress he suffered as a result of the unlawful actions and his extended unemployment.

OSC also recommends that the VA train its BRO management officials on the prohibited personnel practices to ensure that the merit system principles are followed and that the VA creates a fair work environment for all of its employees. See 5 U.S.C. §§ 1214 (b)(2)(B) and (C); 1214(f); 2302(c). In addition, the VA should consider appropriate disciplinary action against

A and **B**.