

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

██████████,
Appellant,

DOCKET NUMBER
SF-0752-07-0228-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: April 30, 2007

Clayton C. Ikei, Esquire, Honolulu, Hawaii, for the appellant.

Jonathan A. Swanson, Esquire, Fort Shafter, Hawaii, for the agency.

BEFORE
Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely filed an appeal challenging an agency decision to remove him from the permanent, competitive service position of Logistics Management Officer, GS-0346-14, effective December 15, 2006. Initial Appeal File (IAF), Tab 1; *id.*, Tab 5 (“Agency File”), Subtab 4b. It is undisputed that when the decision was issued he had occupied the position continuously for more than one year. Though he retired before the action could take effect, the Board retains jurisdiction to review its merits. 5 U.S.C. §§ 7511(a)(1)(A), 7513(d), 7701(a) and 7701(j); *Krawchuk v. Department of Veterans Affairs*, 94 M.S.P.R. 641, 644 (2003). A hearing was held on April 20, 2007.

For reasons explained below, the agency’s decision is REVERSED.

ANALYSIS AND FINDINGS

At the time of his removal the appellant was employed by the agency's U.S. Army Garrison Hawaii in East Range, Hawaii, where he served as Director of the Directorate of Logistics (DOL). Agency File, Subtab 1, at 1. He had approximately 35 years of prior federal service, 30 of which were spent with the agency. Official Hearing Recording (HR), testimony of appellant. He previously worked for the agency in Europe, where he was suspended for 7 days effective July 13, 2003, for failure to follow proper time and attendance procedures and conduct unbecoming a supervisor. Agency File, Subtab 4m. According to the appellant, the charge arose out of a misunderstanding concerning "unofficial compensatory time" that he earned while on assignment handling logistics for Kosovo and Bosnia, at a forward base where the normal work shifts lasted "twelve hours a day, seven days a week." Though he disagreed with the decision it was appealable only to the same person who rendered it, and he chose not to contest the matter.¹ HR, testimony of appellant; *see* Agency File, Subtab 4m.

Sometime in early 2006 a confidential informant reported that the appellant was committing "time card fraud" at his new duty station in Hawaii. In May and June 2006 Special Agent ("SA") Ramon Roman of the agency's Criminal Investigation Command, commonly known as "CID", conducted surveillance of the appellant, and observed what seemed to be discrepancies between the times that the appellant arrived at work, and the arrival times that he recorded on his daily "sign-in/sign-out" sheets, which are used to generate biweekly time and

¹ Normally the Board would lack jurisdiction to consider the reasons for the prior suspension. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). However, there is an exception to this rule where the employee had no right to challenge a prior disciplinary action before a higher level of authority than the one that imposed the discipline. *Id.* In any event, I describe these events for purposes of background only, and do not reach any conclusion as to whether the prior suspension was warranted.

attendance reports (“time cards”). HR, testimony of Roman; Agency File, Subtab 4L.

Based on this information Bryson Jung, Deputy Commander, U.S. Army Garrison Hawaii, issued a notice of proposed removal dated September 28, 2006, charging the appellant with “providing inaccurate and false information on your payroll documents.” Specifically, he alleged that on five occasions the appellant entered a time of arrival on his sign-in/sign-out sheet that was earlier than the time he actually arrived at work; and on a sixth, he was missing from the workplace in mid-afternoon, and apparently for the rest of the day; and as a result of these inaccuracies, he received pay or compensatory time for approximately 11 ½ hours that he did not work. *Id.*, Subtab 4k.

While the proposal was pending, a representative of the agency’s Office of Inspector General (IG) contacted him about another matter; specifically, a report that DOL misused federal funds to pay moving expenses for a military officer under the command of COL Killian, allegedly in violation of federal travel regulations. On October 26, 2006, the appellant gave a sworn statement to the IG describing his involvement in the incident, which occurred in late 2005, stating that it took place because “COL Killian said to make it happen.” He also provided copies of e-mail messages related to the incident, that suggested that COL Killian was at fault in the matter. IAF, Tab 1, attachments.

Thereafter the appellant’s attorney made a partial response to the proposed removal, stating that the appellant “has worked an extraordinary amount of overtime, sometimes unclaimed, to oversee the deployment of service personnel” and “would acknowledge that his time and energy were consumed” with this effort “rather than the administrative detail involved in filling out his time cards, often done after the fact when [the appellant] was required to recall his arrival and departure times. However, [the appellant] would adamantly deny that any of his mistakes on his timecard were made with the intent to fraudulently secure payment for his time and services.” Counsel went on to address only one of the

specific dates charged in the proposal, stating as to the others, "Owing to the lack of access to his electronic calendar, [the appellant] has been unable to reconstruct his whereabouts" on the remaining dates. He also stated that the appellant "recently provided documentation and testimony in a Command Directed Investigation into the actions of the Commander[,]" i.e., COL Killian, and asked "that the matter of this removal be decided by another individual." Agency File, Subtab 4d.

On December 12, 2006, COL Killian issued a decision that summarily sustained the proposal and carried out the appellant's removal effective December 15, 2006. The issue of his recusal was not addressed. *Id.*, Subtab 4b.

On appeal the appellant disputes the charge, arguing that SA Roman's observations were either incorrect or misinterpreted, and though he had made mistakes in his recording his times of arrival and departure from work, they were inadvertent and did not amount to falsification. HR, testimony of appellant. He also raises an affirmative defense of whistleblowing, based on the statement that he gave to the IG after the agency had proposed his removal, *see* IAF, Tab 1, Part 2, block 18; *see also id.*, MSPB Form 185, Page 7, block 30, and attachments to appeal; and another of harmful procedural error. IAF, Tab 11 (appellant's motion dated March 7, 2007), at 6-7.

The charge of "providing inaccurate and false information on... payroll documents" is not sustained.

The agency bears the burden of proof by preponderant evidence with respect to the reason for the action, and its choice of penalty. 5 C.F.R. § 1201.56(a). Preponderant evidence is defined as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c).

To prove a charge of “providing inaccurate and false information on... payroll documents” the agency must show not only that the information provided was “inaccurate” but also that it was “false.” *Cf. Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, 9-10 (2006), and cases cited therein. Such a charge is tantamount to a charge of falsification. *See, e.g., Skinner v. Department of the Army*, 32 M.S.P.R. 586, 587 (1987) (falsification of time cards, including claims for overtime); *Dogar v. Department of Defense*, 95 M.S.P.R. 52, 55 (2003), *aff’d*, 128 F. App’x 156 (Fed.Cir., 2005). To prove such a charge, the agency must establish by a preponderance of the evidence that the appellant (1) supplied incorrect information and (2) knowingly did so with the intention of defrauding, deceiving, or misleading the agency. *Haebe v. Department of Justice*, 288 F.3d 1288, 1305 (Fed.Cir., 2002), *citing Naekel v. Department of Transportation*, 782 F.2d 975, 977-78 (Fed.Cir.1986).

Falsification and fraud cases often turn on proof of the element of intent. Whether intent has been proven must be resolved from the totality of the circumstances. *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). Although circumstantial evidence generally is used to establish intent, *Riggin v. Department of Health & Human Services*, 11 MSPB 331, 13 M.S.P.R. 50, 52 (1982), the Board must also consider the appellant’s plausible explanation as an element of the totality of the circumstances. *Nelson v. U.S. Postal Service*, 79 M.S.P.R. 314, ¶¶ 6-7 (1998). Indeed, it is the lack of any other plausible explanation that gives circumstantial evidence its probative effect. *Scott v. Department of Justice*, 69 M.S.P.R. 211, 226 (1995), *aff’d*, 99 F.3d 1160 (Fed.Cir.1996).

Although an appellant’s intent may be inferred from evidence of his reckless disregard for the truth or for ascertaining the truth, the falsity of his statements alone is not enough to sustain a charge of falsification or fraud. *See Mooney v. Department of Defense*, 44 M.S.P.R. 524, 526-27 (1990). For example, an appellant’s negligent misstatement – even his recklessly negligent

misstatement – without other evidence does not establish that he has given an intentionally false statement. *Kumferman v. Department of the Navy*, 785 F.2d 286, 290 (Fed.Cir.1986). In addition, to prove wrongful intent the agency must show that the appellant's misrepresentation or reckless disregard for the truth pertained to facts material to the amount that he was paid. If the appellant did not receive a sum greater than the amount to which he would have been entitled had he submitted accurate information, his misrepresentation was not material. *Dogar*, 95 M.S.P.R. at 56, citing *Bradley v. Veterans Administration*, 900 F.2d 233, 237 (Fed.Cir.1990).

Agency's Evidence

SA Roman testified that he personally conducted surveillance of the appellant, and with the exception of one sighting on May 25, 2006, he made each of the observations described below. He identified the appellant from a photograph that he obtained from agency records, and at hearing he confirmed that the appellant, who was present, is the same individual that he saw on those dates. He testified further that he made his observations from vehicles near the locations in question, took times from his wristwatch and made contemporaneous, handwritten notes that he transcribed into a computer when he returned to the office, either the same day or the next. For purposes of comparison the information was also compiled in a spreadsheet, together with the appellant's entries on his sign-in/sign-out sheets for the same dates. HR, testimony of Roman; IAF, Tab 19 (agency's prehearing submissions), Agency Exhibit 1 (notes); Agency File, Subtabs 4h, at 2-11 (sign-in/sign-out sheets); *id.*, Subtab 4L (spreadsheet).

SA Roman testified further that on May 2, 2006, he saw the appellant leave his residence at 0935 and arrive at DOL at 0950, whereas the appellant's sign-in/sign-out sheet shows arrival and departure times of 0830 and 1800 respectively, all as alleged in specification a. He also testified that there were

similar discrepancies between the time that he saw the appellant arrive at work, and the appellant's claimed time of arrival on the sign-in/sign-out sheets for May 17, June 7 and June 30, 2006, as alleged in specifications b, e and f, respectively. HR, testimony of Roman; *see* Agency File, Subtab 4k, at 1-2.

SA Roman also testified that on May 25, 2006, he personally saw the appellant's privately-owned vehicle (POV), which he identified from agency records as a white pickup truck, at the appellant's residence at 0815, and some months later a witness told him that she saw the appellant at a Costco store at 1000 the same morning, as alleged in specification c. HR, testimony of Roman.

Finally, SA Roman testified that he personally observed that the appellant's white pickup truck was not at the DOL Building at 1400; that it was at the appellant's residence at 1427; and at 1520 he telephoned DOL and an unidentified female told him that the appellant was "not available", as alleged in specification d. *Id.*

Appellant's Rebuttal

The appellant testified that based solely on current recollection, he is unable to say where he was at the times and dates specified in the charge, which are almost a year in the past. However, he completed his sign-in/sign-out sheets in good faith, and to the extent that they contradict the testimony of SA Roman he "disputes" that testimony. HR, testimony of appellant on direct examination by the agency.

At the same time, the appellant acknowledged that his entries on the sign-in/sign-out sheets could be in error, for he was "remiss in keeping daily up-to-date" records and frequently completed the whole sheet at once, on the day before biweekly time and attendance reports were due. When he did so, he testified, he would ask his secretary or deputy to help him recall his times of arrival and departure, and "go with the best recollection at the time." He did keep track of the total number of hours that he worked each day, and when it exceeded eight

duty hours he would “drop a note” in his secretary’s in-box at the end of the day, as a reminder to claim the additional time. Hence, he is confident that the number of duty hours claimed each day is “accurate,” though “not necessarily the times” of arrival and departure on the sign-in/sign-out sheets. HR, testimony of appellant.

With regard to specification c, pertaining to May 25, 2006: The appellant’s sign-in/sign-out sheet for that date shows arrival and departure times of 0730 and 1900, respectively. Agency File, Subtab 4h, at 4. His calendar shows that he was scheduled to attend a “LOGSA” meeting at Fort Shafter, Hawaii beginning at 9:00 a.m. on that date, and his sign-in/sign-out sheet states that he attended the meeting. *Id.*; IAF, Tab 19, Agency Exhibit 5, at 4. The appellant submits copies of e-mail messages dated May 24, 2006, in which a colleague at Fort Shafter reminded him of the LOGSA meeting to take place the next morning, and the appellant replied, “Plan to leave around 730 – think this will be enough time for the traffic... Right??? or do I need to leave earlier. I will leave from home – Kunia.” IAF, Tab 21, Appellant’s Exhibit CCC. The appellant also submits a subsequent exchange of e-mail messages with the same colleague, who is now posted in Europe, that took place after the agency had proposed his removal, in which his colleague confirms the appellant’s recollection of the LOGSA meeting. *Id.*, Appellant’s Exhibit DDD.²

SA Roman’s notes reflect that on May 25, 2006, he saw the appellant’s POV parked at the appellant’s residence at 0815; and that he conducted surveillance for 30 minutes (“0:30 INV”). He does not report having seen the appellant. *See* IAF, Tab 19, Agency Exhibit 1, at 000202. SA Roman testified that he was aware of only one POV owned by the appellant, which was the white

² The appellant’s original message is incomplete, and it is therefore unclear what his colleague is confirming, other than the fact that the appellant attended the meeting. *Id.*, Appellant’s Exhibit DDD.

pickup truck. HR, testimony of Roman. The appellant testified that he left home at 0730 as stated in his e-mail message of the previous day, and as he recalls, he drove the truck to the LOGSA meeting. He also testified that he and his wife own two vehicles, one of which is his truck and the other a Lexus sedan; and while he usually drives the truck to work he sometimes drives the Lexus instead. HR, testimony of appellant.

The sighting at Costco later that morning was not made by SA Roman, but was reported to him by another witness about six weeks later, who stated that "about 1000, 25 May 06, while she was on leave she saw [the appellant] at COSTCO, Waipio, HI." IAF, Tab 13 (appellant's motion dated March 16, 2007), Exhibit C, at 000200; HR, testimony of Roman. The appellant testified that the meeting at Fort Shafter ended at about 1015 on that date, whereupon he visited with a co-worker until about 1030 then drove back to his office. On the way he stopped at Costco to buy gasoline, and completed the transaction shortly before 1100. He then shopped for personal items and bought a hot dog, also at Costco, all within the one-hour period that he is permitted for lunch. HR, testimony of appellant. By way of corroboration he submits a cash register receipt from Costco evidencing a purchase of groceries at the Waipio warehouse at 11:43 on May 25, 2006. IAF, Tab 26, Appellant's Exhibit JJJ.

With regard to specification d, pertaining to June 6, 2006: The appellant agrees that SA Roman could have seen his white pickup truck parked at his residence during the afternoon, and upon telephoning DOL, could have been told that the appellant was "not available." He explained that he never takes time off during the afternoon, and while he is not sure, he guesses that he drove the Lexus to work on that date and left his truck at home. The appellant testified further that when he first came to Hawaii he found that DOL staff members were giving out unnecessary information over the telephone, and therefore instituted a policy whereby they were not to tell callers why he was unable to take a call – e.g., because he was in a meeting, or on another call – but to say simply that he was

“not available.” His former secretary, Jennifer Branam, worked at DOL from May 2004 until May 18, 2006, and confirms that this is how she was told to handle such calls. HR, testimony of appellant, Branam.

With regard to specification f, pertaining to June 30, 2006: The appellant testified that in this instance he made a mistake in recording his time of arrival that favored the agency rather than himself. His sign-in/sign-out sheet shows arrival and departure times of 0830 and 1830, respectively. *Id.*; Agency File, Subtab 4h, at 10. However, his appointment calendar for that date shows that he was scheduled to attend a “Pre-proposal Dry run” from 0700 to 0800 at DOL. *See* IAF, Tab 19, Agency Exhibit 5, at 9. The appellant testified that he recalls attending the “dry run,” which amounted to a rehearsal for a presentation to potential contractors that began immediately thereafter, at approximately 0800; that he arrived at about 0700, the “dry run” began at about 0715 and lasted until 0800, and he “left at 0830 after I gave my section” of the presentation to the contractors; and he later attended a 10:30 meeting at the same location, as reflected in his calendar. *Id.*; HR, testimony of appellant.

SA Roman’s notes of his surveillance read:

Between 0830-0925, 30 Jun, [the appellant]’s POV was parked in front of his residence.

About 0925, 30 Jun 06, [the appellant] departed his residence.

About 0935, 30 Jun 06, [the appellant] arrived at the DOL building.

IAF, Tab 19, Agency Exhibit 1, at 1. The appellant agrees that the estimated arrival time of 0935 could be correct, “but not from home.” He disputes the other entries just quoted, stating that he was on duty. HR, testimony of appellant.

The appellant testified further that he may have made similar mistakes in recording his times of departure on some or all of the dates in question. Again, he cannot recall precisely when he left work on those dates. However, he testified that whenever a military unit was being “deployed” or “redeployed” from Oahu – i.e., transported away from, or returned to its base – he would work

side by side with his subordinate Chief of the Transportation Division, James Jefferson, who was in charge of these operations, and provide assistance until the mission was completed. HR, testimony of appellant.

Mr. Jefferson confirmed that whenever a deployment or redeployment took place, the appellant was invariably present and helped him throughout the operation, and did not leave the office until shortly before Mr. Jefferson did. Referring to his own time and work records, Mr. Jefferson testified that this took place on May 2, 2006, when his own work day ended at 2100; May 17, 2006, when his day ended at 1830; and June 6 and 7, 2006, when his work ended at 1930 each day. *Id.*, testimony of Jefferson; *see* IAF, Tab 28, Appellant's Exhibits KKK, LLL (week 1, day 4), MMM.

Analysis

Based on the foregoing evidence I accept SA Roman's specific account of his observations on May 2, May 17 and June 7, 2006, over the appellant's general denial as to those dates, because the appellant's position is not grounded on current recollection, but is based solely on sign-in/sign-out sheets that he wrote after the fact, which he agrees may be in error. Preponderant evidence therefore shows, and I find, that he provided incorrect information regarding his time of arrival at work on those dates, as alleged in specifications a, b and e.

Based on the testimony of Mr. Jefferson, I find further that the appellant probably stayed at the office until nearly 2100 on May 2, 2006, which is 3 hours later than the departure time of 1800 claimed on his sign-in/sign-out sheet for that date. This is more than enough to offset the fact that he arrived at work that morning 1 hour and 20 minutes after his stated time of arrival, as alleged in specification a, and render this incorrect entry immaterial. *See Dogar*, 95 M.S.P.R. at 56. Likewise, on June 7, 2006, he seems to have helped Mr. Jefferson until shortly before 1930, or approximately 1 ½ hours after his claimed departure time of 1800, which is more than enough to offset the fact that he

arrived at work 45 minutes late that morning, as alleged in specification e. *Id.* The agency has therefore failed to show that either of these errors was material.

By contrast, preponderant evidence shows that the appellant left work on May 17, 2006 at 1830, as stated on his sign-in/sign-out sheet and corroborated by Mr. Jefferson. HR, testimony of Jefferson; *see* IAF, Tab 28, Exhibit LLL (week 1, day 4). Therefore he did overstate his time in pay status by one hour and 25 minutes, as alleged in specification b, and the mistake was material in that it caused him to be overpaid.

With regard to May 25, 2006: While SA Roman reportedly saw the appellant's truck at home at 0815, he did not see the appellant either at that time or for the rest of the 30 minutes that he conducted surveillance. Based on the appellant's e-mail message of the previous afternoon, which shows that he was quite concerned about leaving home early enough to avoid rush hour traffic, I am inclined to believe that he left for Fort Shafter at 0730, and did not wait until after 0815 – perhaps long after that hour, depending on when SA Roman's 30 minutes of surveillance ended – to begin his journey.³ While the appellant recalls driving his truck to Fort Shafter, he sometimes drove the Lexus as well, which could explain SA Roman's observation. On this record, I find that the agency has failed to show by preponderant evidence that the appellant began work sometime after he was seen at Costco in mid-morning, and therefore misstated his start time for that date as alleged in specification c.

Likewise, the presence of the appellant's truck at home in mid-afternoon on June 6, 2006, does not necessarily mean that he was there with it, for he drove two cars; nor is there a great deal of evidentiary weight in the fact that SA Roman telephoned the appellant's office sometime later and was told that he was “not

³ The agency has neither alleged nor shown that the appellant was not entitled to include travel time from home to Fort Shafter, which was not his regular duty station, as part of his duty hours. On this record I assume that the agency permitted him to do so.

available,” since this scripted response could mean that he was present but unable to take the call. Moreover, based on the testimony and time records of Mr. Jefferson, the record shows that the appellant was fully engaged that afternoon and evening, helping with the deployment of a brigade-strength unit bound for Iraq until nearly 1930. See IAF, Tab 28, Appellant’s Exhibit MMM, third page (“6 June 06 – 45th Sustainment Brigade Deployment (OIF)”; HR, testimony of Jefferson (“OIF” means “Operation Iraqi Freedom”). The agency therefore failed to show by preponderant evidence that the appellant’s “claim to have worked from 1400 to 1830 is inaccurate[,]” as charged in specification d.

Finally, as to June 30, 2006: Based on the appellant’s detailed testimony and forthright demeanor while describing the “Pre-proposal dry run”, which is corroborated by the entry on his calendar, I find that more likely than not he attended the meeting, and therefore began work at approximately 0700 rather than 0830, as reflected on his sign-in/sign-out sheet. See *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Thus, while he misstated his start time for that date, as alleged, the error was in the agency’s favor. Assuming *arguendo* that he went home after the meeting, and remained there until 0925 as SA Roman reports; and that this did not amount to his lunch hour for the day; nonetheless, his early start time would be more than enough to offset the absence in question. The agency has therefore failed to show by preponderant evidence that the appellant made any material misstatement on his sign-in/sign-out sheet for this date, as alleged in specification f.

In sum, the agency has proven some, but not all of the inaccuracies alleged in its proposal, and only in one instance – specification b – did it show that the appellant claimed more hours than he actually worked on the day in question. It has also shown that the appellant was negligent to the point of recklessness in the way that he handled timekeeping. While the daily sign-in/sign-out sheets were a locally-generated “management tool,” their purpose was official, in that the arrival and departure times entered thereon were used by the timekeeper to

compute the number of hours worked each day, that was entered on the time and attendance report for each pay period. HR, testimony of appellant, Jhung. To wait until long after the fact to complete his sign-in/sign-out sheets invited mistakes, which he admittedly made.

Nonetheless, an employee's negligence – even his reckless negligence – without other evidence does not establish that he acted with intent to defraud. *Kumferman*, 785 F.2d at 290. Here, the appellant's errors favored the agency as often as they did himself. This is strongly inconsistent with intent to defraud. Moreover, his explanation for his actions is quite plausible. He testified that in May and June 2006 the atmosphere at DOL was "chaotic," due in large part to the demands of moving large military units to and from training sites and overseas theaters of war. Such moves generally took place at night, and as a result he frequently had to work later than normal duty hours, sometimes without compensation, since higher management discouraged the use of overtime or compensatory time and asked him to "adjust his hours" to meet operational needs; i.e., to arrive later if he expected to stay late. HR, testimony of appellant; *see also* IAF, Tab 25, Appellant's Exhibits FFF, GGG, HHH. I find it quite plausible that he could have been so harassed that he failed to keep track of his comings and goings from the workplace, which varied from day to day, and foolishly depended on others to do so.

Viewing the evidence as a whole, and in light of the appellant's long service and considerable achievements as a federal manager, *see* Agency File, Subtab 4d, at 2; as well as his high salary and the relatively small amount of pay at issue, I am not convinced that he knowingly made any of the proven misstatements for the purpose of personal gain. With the exception of the inaccurate time of arrival charged in specification b, I also am not convinced that these inaccuracies were material; i.e., that he received more pay than the amount to which he would have been entitled had he submitted accurate information. *See Dogar*, 95 M.S.P.R. at 56.

The agency therefore failed to show by preponderant evidence that the appellant knowingly provided incorrect information with intent to defraud, as to any specification underlying its charge. *See Haebe*, 288 F.3d at 1305. The charge of “providing inaccurate and false information on... payroll documents” is not sustained.

The appellant’s whistleblowing defense is not sustained.

The appellant bears the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a).

The appellant contends that he was removed because of disclosures covered under 5 U.S.C. § 2302(b)(8), commonly known as whistleblowing; specifically, because of the statement that he made to an IG investigator on October 26, 2006, after the agency had proposed his removal. *See* IAF, Tab 1, appeal form, part 2, block 18; *see also id.*, MSPB Form 185, Page 7, block 30, and attachments to appeal; IAF, Tab 22, at 4.

To prove an affirmative defense of reprisal for whistleblowing, an appellant must show that (1) he or she made, was perceived to have made, or was closely associated with someone who made a disclosure protected under 5 U.S.C. § 2302(b)(8), i.e., a disclosure of information that was reasonably believed to evidence a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; and (2) the disclosure was a contributing factor in the agency’s personnel action. *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 113 (1998). If the appellant establishes a prima facie case, then the burden of proof shifts to the agency to show, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the disclosure. *Id.*, at 114.

As the Board has noted, “There is nothing in 5 U.S.C. § 2302(b)(8) that requires a supervisor to change a decision once he learns that the employee has

engaged in whistleblowing.” *Dean v. Department of the Army*, 57 M.S.P.R. 296, 303 (1993). In *Dean* the employee failed to show that the proposing official was aware of his disclosure when the action was proposed, or that the deciding official was aware of it until the employee responded to the proposed action. On that basis the Board found that he failed to prove that his whistleblowing was a contributing factor in the adverse action. *Id.*, at 303-04.

Assuming *arguendo* that the appellant’s statement to the IG was protected under section 2302(b)(8), proposing official Jhung cannot have known about it when he proposed the appellant’s removal, because the statement was made more than a month later. As in *Dean*, when replying to the proposed action the appellant informed the deciding official, COL Killian, that he had made such a statement, but he did not say what, if anything, he disclosed. See Agency File, Subtab 4d, at 4. The record contains no evidence that IG investigators conveyed any information about the appellant’s statement of October 26, 2006, either to COL Killian or to anyone else involved in his removal. COL Killian testified that he assumed that the IG would speak with the appellant, as well as himself, since both were implicated in the matter under investigation; however, he knows nothing about the appellant’s interactions with the IG, and at hearing he seemed startled to learn that the appellant gave the investigator copies of e-mail messages relating to the matter. HR, testimony of Killian. Based on the foregoing, I find that the appellant failed to show that either the fact or the substance of his statements to the IG contributed to the removal under appeal. *Cf. Dean*, 57 M.S.P.R. at 303.

I find further that the record shows by clear and convincing evidence that the agency would have taken the same action regardless. To determine whether the agency has met this burden, the Board considers the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated,

and the strength of the evidence in support of the personnel action. *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996). Though COL Killian might have had a motive to retaliate, had he known what the appellant told the IG, the appellant failed to show that he had such knowledge. Indeed, COL Killian is more likely to have perceived the appellant as a friend and supporter in the controversy, since that is the way that the appellant acted while it was unfolding. *See, e.g.*, IAF, Tab 17, Appellant's Exhibits EE – JJ. Moreover, when COL Killian made his decision to remove, the appellant had presented virtually none of the rebuttal evidence discussed above. Based on SA Roman's surveillance, which seemed to show a clear pattern of late arrivals, as well as the appellant's prior discipline for alleged timekeeping abuse, the evidence in support of removal was quite strong at the agency level. *See Geyer v. Department of Justice*, 70 M.S.P.R. 682, 694 (1996), *aff'd*, 116 F.3d 1497 (Fed.Cir.) (Table), *cert. denied*, 522 U.S. 1032 (1997) (strength of the agency's evidence is judged by "the evidence that the agency had before it" when the action was taken). The appellant has not identified any non-whistleblower who faced similar charges, under similar circumstances, but was not removed. Clear and convincing evidence therefore shows, and I find, that the agency would have taken the same action in the absence of the appellant's presumed whistleblowing. *Shaw*, 80 M.S.P.R. at 114.

The appellant's whistleblowing defense is not sustained.

The appellant's defense of harmful procedural error is not sustained.

The appellant maintains that the agency committed harmful procedural error in two ways. First, he argues that Mr. Jung proposed his removal after reading SA Roman's investigative report, which included witness statements that were not provided to the appellant while the proposal was pending, allegedly in violation of 5 C.F.R. § 752.404(b). IAF, Tab 11 (appellant's motion to dismiss

dated March 7, 2007), at 6-7; *see also id.*, Tab 13 (appellant's motion dated March 16, 2007), Exhibit B (CID report). He also alleges that the agency erred by allowing COL Killian to continue serving as the deciding official on his removal, after the appellant gave a statement concerning COL Killian to the IG. *Id.*, Tab 1, appeal form, part 2, block 18; *see also id.*, MSPB Form 185, Page 7, block 30, and attachments to appeal; *id.*, Tab 22, at 4.

Reversal of an agency's action is warranted where the appellant establishes that the agency committed a procedural error, whether regulatory or statutory, that likely had a harmful effect on the outcome of the case before the agency. 5 C.F.R. § 1201.56(c)(3); *Turner v. U.S. Postal Service*, 85 M.S.P.R. 565, ¶ 5 (2000). To show harmful error, an appellant must prove that any procedural error substantially prejudiced his rights by possibly affecting the agency's decision. *Id.*; *Salter v. Department of the Treasury*, 92 M.S.P.R. 355, 358-9 (2002).

The appellant did not identify any regulation or statute that required the agency to replace COL Killian as the deciding official under the circumstances presented here.⁴ Thus, he failed to show that error occurred. Moreover, for reasons analogous to those discussed above with respect to his defense of whistleblowing, he failed to show that the outcome of the case before the agency would likely have been different, had it been decided by someone other than COL Killian. This aspect of his harmful error defense therefore is not sustained. *Id.*

Section 752.404(b) requires agencies to provide a "right to review the material which is relied upon to support the reasons for action given in the notice" of proposed removal. *Id.* In its notice of proposed removal and before the Board, the agency based its action solely on the discrepancy between the observations of SA Roman on six specific dates, and the information that the

⁴ I note that such a rule would be all but unworkable since it would effectively permit the accused employee to disqualify the deciding official at will, and therefore engage in "judge shopping" at the agency level, by making a report to the IG after a proposal is issued.

appellant reported on his sign-in/sign-out sheets for those dates. All of this evidence was provided to the appellant while the proposal was still pending. HR, testimony of appellant; *see also* Agency File, Subtabs 4c – 4i. The appellant has not shown that the agency “relied upon” any of the witness statements in question, which discussed other matters, and were not submitted by the agency on appeal. *See* IAF, Tab 13 (appellant’s motion dated March 16, 2007), Exhibit B. COL Killian testified that he and proposing official Jhung did not discuss the CID report; and while he may have seen it, or some part of it, he relied only on two pieces of evidence that were attached thereto; i.e., the appellant’s sign-in/sign-out sheets for the dates in question, and the table in which SA Roman compiled his observations for those dates. HR, testimony of Killian; *see* Agency File, Subtab 4h, at 2-11; *id.*, Subtab 4L.

Again, the appellant failed to show that the agency erred in this regard, *compare Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1375 (Fed.Cir., 1999) (undisclosed, ex parte communications with deciding official on a material issue implicate employee’s right to due process); and even if the agency were obligated to show him this evidence when the action was pending, he also failed to show that it would have helped him to rebut SA Roman’s surveillance, or otherwise have affected the outcome of the case at the agency level. The appellant therefore failed to prove that this alleged error harmed his substantive rights. *Turner*, 85 M.S.P.R. 565, ¶ 5.

His defense of harmful procedural error is not sustained.

DECISION

The agency’s decision is REVERSED.

ORDER

I **ORDER** the agency to cancel the decision to remove and retroactively restore the appellant to full duty status effective **December 15, 2006**. This action

must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

INTERIM RELIEF

I find that interim relief is appropriate in this case, unless the appellant wishes to maintain his status as an annuitant while any petition for review is pending. See 5 U.S.C. § 7701(b)(2)(A)(i). Therefore, if a petition for review is filed by either party, I **ORDER** as follows:

Unless the agency receives notice from the appellant that he does not wish to receive interim relief, the agency shall provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Unless the agency receives notice from the appellant that he does not wish to receive interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:



Philip D. Reed
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on June 4, 2007, unless a petition for review is filed by that date or the Board reopens the case on its own motion.

This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that

you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail



Appellant Representative

U.S. Mail

Clayton C. Ikei, Esq.
Law Office of Clayton C. Ikei
1440 Kapiolani Boulevard
Suite 1203
Honolulu, HI 96814

Agency Representative

U.S. Mail

Jonathan A. Swanson, Esq.
Department of the Army
Labor Counselor
Office of the Staff Judge Advocate
ATTN: APVG-JAS
25th Infantry Division (Light) & U.S. Army, Hawaii
Fort Shafter, HI 96858-5000

April 30, 2007

(Date)

A handwritten signature in black ink that reads "Rebecca Huey".
Rebecca Huey
Paralegal Specialist