CHAPTER 1
INTRODUCTION AND NEW DEVELOPMENTS

I. INTRODUCTION

This is the Third Edition of *A Guide to the Whistleblower Protection Act and Whistleblower Protection Enhancement Act*. The earlier edition gave us the opportunity to review and analyze the case law concerning the 2012 Whistleblower Protection Enhancement Act. Many of the trends that we had observed in our Second Edition introduction continue with current circuit and Board (at least up until 2016) case law. Those trends include the following: the efforts to interpret the new IRA under Section 2302(b)(9) and applicable burden of proof (see, e.g., *Elder*); the paucity of case law to explain the heightened burden of proof in connection with disclosures made in the normal course of duties (see, e.g., *Scoggins*); the effort to analyze retaliatory investigations for purposes of relief (*Nasuti, Sistek*); the scope of the whistleblower protection laws (*Parkinson*); the ongoing impact of all-Circuit review (*Daniels, Lucchetti*); the continuing effort to define the clear and convincing agency burden under the *Carr* factors (*SSA v. Butler, Campbell*); th rejection by recent case law of the "hypertechnical" OSC exhaustion requirements applied by the Board (*Mount, Delgado*); the continuing tension between protection and "policy decision" disclosures (*Hansen, Daniels*); and, the different standards for attorney fees under the whistleblower protection laws (*Rumsey*).

II. NEW CASE LAW

And, while this edition is written against the background of a Merit Systems Protection Board that is without the authority to issue decisions at the appellate level because of a lack of a Board majority, there have been a number of recent significant circuit and initial decisions, to include the following, by category:

A. ALL-CIRCUIT REVIEW

Daniels v. MSPB, 832 F.3d 1049 (9th Cir. 2016) (in *Daniels*, a decision issued by the U.S. Court of Appeals for the Ninth Circuit pursuant to the "All-Circuit Review" provision of the Whistleblower Protection Enhancement Act of 2012 (WPEA), the court affirmed the Board's decision, which held that an agency ruling or adjudication (a decision favorable to a claimant in a Social Security disability case) even if erroneous, cannot reasonably be construed as the type of wrongdoing specified in 5 USC 2302(b)(8)(A); in its decision, the Ninth Circuit agreed with a Federal Circuit decision which reached the same result (*Meuwissen v. Dept. of Interior*, 234 F.3d 9 (Fed. Cir. 2000)) and found that the passage of the WPEA did not supersede *Meuwissen* in this regard; the Ninth Circuit determined that the WPEA affected only the holding from *Meuwissen* that disclosures of information already known are not protected).

Delgado v. MSPB, 880 F.3d 913 (7th Cir. 2018) (the 7th Circuit Court of Appeals recently found that the Office of Special Counsel and the Merit Systems Protection Board applied unduly stringent and arbitrary requirements on an alleged whistleblower and erred in finding that he failed to exhaust administrative remedies with OSC; the MSPB had dismissed the Bureau of Alcohol, Tobacco, Firearms and Explosives special agent's individual right of action appeal because he did not include a copy of his complaint to OSC; in the past, the Federal Circuit has upheld MSPB decisions in which IRA appeals were dismissed because the appellant failed to submit his OSC complaint, e.g., *Malone v. MSPB*, No. 2012-3036, 112 LRP 40760 (Fed. Cir. 2012 NP); *Cooper v. MSPB*, No. 2011-3240, 112 LRP 13470 (Fed. Cir. 2012 NP); *Baney v. MSPB*, No. 2010-3184, 111 LRP 11119 (Fed. Cir. 2011 NP); in each of these decisions, the appellants failed to provide other evidence that could establish that they exhausted their remedies with OSC).

Johnen v. MSPB and Dept. of Army, 882 F.3d 1171 (9th Cir. 2018) (as to the merits of the appeal, the court found that the IG complaint constituted a protected disclosure and that both the termination and the decision to bar the petitioner from the base were personnel actions; it then concluded that substantial evidence supported the Board's finding that the petitioner failed to establish that his IG complaint was a contributing factor to the two personnel actions; there, the Court wrote that: "Substantial evidence supports the Board's determination that the DODIG complaint did not motivate the Army's decision to terminate and exclude Petitioner. The Board relied on the administrative judge's finding that the two decision-makers did not know about Petitioner's DODIG complaint when they terminated and excluded Petitioner. The Board also relied on the finding that the decision-makers lacked constructive knowledge, in that no one who was aware of the DODIG complaint influenced the decision-makers. Nor was the timing of the termination and exclusion close enough to the time when the DODIG complaint was filed so as to imply a connection. Finally, the Board relied on other factors, including the Army officials' lack of a retaliatory motive and the administrative judge's credibility conclusions. The administrative judge found the Army's witnesses to be 'highly credible, noting that each clearly and concisely answered the questions posed to them,' whereas Petitioner testified to 'unsupported assumptions and engage[d] in unwarranted speculation. Petitioner argues that the Board ignored certain items of circumstantial evidence that, he claims, show that the decision-makers did know about his DODIG complaint. But it is evident from the Board's lengthy and detailed opinion that the Board considered all the evidence and simply found it wanting.') (In an unpublished Memorandum issued the same day as this published Opinion, the court determined that a fair reading of the petitioner's OSC complaint encompassed his disclosure in July 2013 concerning nepotism within the agency. Accordingly, the court found that the petitioner exhausted this claim, vacated the Board's contrary finding, and remanded the appeal to the Board for adjudication.").

Lucchetti v. Dept. of Interior, 754 Fed. Appx. 542 (9th Cir. 2018 NP) (court agreed with the Board's analysis of the three factors set forth in *Carr v. SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); the court stated that it "would have been aided by a more detailed discussion from the Board" regarding the second *Carr* factor, which concerns the agency's motive to retaliate; court also found that the relevant inquiry for the third *Carr* factor, which concerns the agency's treatment of similarly situated employees, is not whether other whistleblowers faced adverse personnel actions for making similar disclosures; although it found it instructive that the agency did not discipline others who made similar disclosures, the court observed that the relevant inquiry is whether the agency took action against any similarly situated probationary employees who were not whistleblowers).

Mount v. DHS, 937 F.3d 37 (1st Cir. 2019) (the 1st Circuit, as had the 7th Circuit in *Delgado v. MSPB*, 880 F.3d 913, 915–22 (7th Cir. 2018) (i.e., "bureaucratic rigidity to a dysfunctional level"), rejected hypertechnical application by MSPB of OSC exhaustion requirements; Mount's supervisor provided him an email to give to a coworker that the supervisor thought would aid that coworker's whistleblower case; the circumstances of the procurement and transmittal of the email were investigated, Mount was found innocent of any wrongdoing, but Mount believed he'd been retaliated against through nonpromotion and a lowered performance appraisal; after going first to OSC, Mount then appealed to the Board, contending that he was the victim of reprisal for aiding a whistleblower and for being perceived as having aided a whistleblower; the Board's AJ declined to consider the "perception" assertion because it was not first raised with OSC, and the AJ ruled that the assistance (carrying a copy of an email to the appellant's colleague) was too minimal to constitute protected assistance; on the "perception" claim, the court sent the case back to the Board, finding that its construction of the statutory exhaustion requirement was hypertechnical, incorrect (the statute does not dictate a stringent exhaustion requirement—it just states that the employee will seek corrective action from OSC and does not require presentation to OSC of a "perfectly packaged case ready for litigation."); in the court's view, the legislative history of the statute did not show congress intended to impose a legally technical exhaustion requirement; a requirement of technically exact pleading to OSC imposes too great a burden on employees without counsel and the burden is unrealistic because the full scope of reprisals is not exposed until the complaint is investigated or otherwise pursued, the court opined; the allegations of Mount's OSC complaint, although not specifying a "perception" claim, supported the core element that management appeared to believe he engaged in whistleblowing activity; rejecting "MSPB's hypertechnical application of the exhaustion requirement," the court remanded the case for Board reconsideration).

B. ATTORNEY FEES

Hickey v. DHS, 766 Fed. Appx. 970 (Fed. Cir. 2019 NP) (after the appellant prevailed in his individual right of action appeal, he requested damages and attorney fees; in an initial decision that became the final decision of the Board after neither party petitioned for review, the administrative judge awarded the appellant $122,132.47 in attorney fees and costs and $10,000 in compensatory damages but found that he was not entitled to consequential damages; on appeal, the court affirmed the administrative judge's compensatory and consequential damages denial; however, the court found that the administrative judge abused his discretion by capping the hourly rate for the appellant's attorneys at a rate established in an unrelated case from a different jurisdiction, without providing any explanation for such a determination, rather than applying the hourly rate agreed to in the retainer agreement; the court vacated the attorney fees determination and remanded the matter for further adjudication).

Rumsey v. DOJ, 123 MSPR 502 (2016) (this case highlights the differences in analyzing attorney fees cases dealing with whistleblower issues and those decided under 5 USC 7701; unlike fees under section 7701, fees under section 1221 in whistleblowing cases are payable directly to the appellant and there is no "interest of justice" requirement; while one of the appellant's attorneys agreed to represent the appellant for free, the appellant still remained eligible for an award; that the attorney had never before litigated a Board case was considered, and the lodestar was adjusted down for the appellant's limited success (only two of the several claims of retaliation made were supported) but the Board, agreeing with the administrative judge, held that an award of fees for challenging whistleblower retaliation was in the public interest).

C. COMPENSATORY AND CONSEQUENTIAL DAMAGES

Hayes v. VA, SF-0714-19-0128-I-, 119 LRP 14513 (Western Reg'l Office 4/12/2019) (agency removed a GS-0640-08, Health Technician in surgical services at the Veterans Health Administration's Loma Linda, CA Medical Center for one charge of AWOL with two specifications related to absences on September 24 and 27, 2018, one charge of failure to follow proper leave requesting procedures, with one specification related to the appellant's absence on September 27, 2018, and one charge of negligent workmanship with four specifications; the Board had jurisdiction under the provisions of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, 38 USC 714; the AJ found the AWOL charge unproven (it principally concerned annual leave for a court appearance), the failure to follow charge unproven and sustained one of the four negligent workmanship specifications; importantly, the AJ found that the agency committed whistleblower reprisal discrimination, concluding that "I find that the agency has not proven by clear and convincing evidence that it would have taken the same action if the appellant had not reported his concerns about patient care in Orthopedics to the agency director and other managers. There is ample evidence that the appellant's removal was contrived, and the agency failed to meet the high burden of proof required to demonstrate that it would have taken the same action even if the appellant had not engaged in the protected activity identified herein."; in a subsequent decision, the appellant was awarded $4,000 in nonpecuniary compensatory damages but did not prove entitlement to consequential damages. 119 LRP 24451; numerous defenses rejected: due process, disability discrimination, race and gender discrimination, EEO reprisal, and, whistleblower reprisal).

Hickey v. DHS, 766 Fed. Appx. 970 (Fed. Cir. 2019 NP) (after the appellant prevailed in his individual right of action appeal, he requested damages and attorney fees; in an initial decision that became the final decision of the Board after neither party petitioned for review, the administrative judge awarded the appellant $122,132.47 in attorney fees and costs and $10,000 in compensatory damages but found that he was not entitled to consequential damages; on appeal, the court affirmed the administrative judge's compensatory and consequential damages denial; however, the court found that the administrative judge abused his discretion by capping the hourly rate for the appellant's attorneys at a rate established in an unrelated case from a different jurisdiction, without providing any explanation for such a determination, rather than applying the hourly rate agreed to in the retainer agreement; the court vacated the attorney fees determination and remanded the matter for further adjudication).

MacLean v. DHS, 754 Fed. Appx. 950 (Fed. Cir. 2018) (the court affirmed the Board's rulings regarding the appellant's request for consequential damages, a retroactive promotion, and an evidentiary hearing following his reinstatement; court held that it was not unreasonable for the Board to require the appellant to file receipts or doctors' notes to substantiate his claim for consequential damages (medical and dental expenses); court rejected the appellant's request that it overrule its precedent requiring reinstated whistleblowers to clearly establish an entitlement to a promotion and instead rule that he need only demonstrate that it was more likely than not that he would have been promoted had he not been wrongfully removed; to overrule precedent, the court must rule *en banc*; finally, the court held that the Board did not abuse its discretion in not convening an evidentiary hearing regarding the appellant's petition for enforcement when it afforded the parties ample opportunity to submit substantial information into the record.

Bradley v. DHS, 123 MSPR 547 (2016) (appellant is a Deputy Regional Director with the Federal Protective Service; appellant made a nonfrivolous allegation that his protected disclosures were a contributing factor in his nonselection for the Director position; at this jurisdictional stage, the appellant can meet his burden of proof without specifically identifying which management officials were responsible for the reprisal).

Potter v. VA, 949 F.3d 1376 (Fed. Cir. 2020) (Federal Circuit vacated the AJ's determination that the petitioner did not make a *prima facie* case that her whistleblowing was a contributing factor to the agency's nonselection of her for Chief Nurse IV and remanded to the MSPB; the court determined that the AJ's fact finding was not supported by substantial evidence because he incorrectly found that the Chief of Staff who withdrew the vacancy did not have knowledge of the petitioner's second protected disclosure; evidence showed that the Chief of Staff not only had knowledge of the petitioner's email, but he also responded to it).

Cahill v. MSPB, 821 F.3d 1370 (Fed. Cir. 2016) (court reversed the Board's finding that Cahill failed to make a nonfrivolous allegation that his protected disclosures were a contributing factor in covered personnel actions and remanded the case for adjudication on the merits; Under 5 USC 1221(e), the contributing factor element of a whistleblowing claim can be established "through circumstantial evidence, such as evidence that (A) the official taking the personnel action knew of the disclosure…; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure…was a contributing factor in the personnel action."; circumstantial evidence of knowledge by three management officials).

D. CLEAR AND CONVINCING EVIDENCE

Campbell v. Dept. of Army, 123 MSPR 674 (2016) (demotion of GS-15 Director of the agency's Directorate of Plans, Training, Mobilization, and Security, which included the Range Operations Branch, responsible for establishing and maintaining effective internal controls for protecting agency resources; after several employees of the Range Operations Branch were arrested and charged with theft of government property, and after an investigation and an audit, the agency concluded that the appellant did not adequately monitor the GPC program, he did not clearly understand or communicate agency policy regarding the GPC program, and the lack of management controls for the GPC program had led to misuse of the program; based on the results of the investigation, the agency proposed the appellant's removal based on a charge of negligent performance of duty; the deciding official mitigated the penalty to a demotion to a GS-12 Workforce Development Specialist position; on appeal, the administrative judge affirmed the appellant's demotion, finding that the agency proved its charge of negligent performance of duties and the appellant failed to prove his whistleblower reprisal affirmative defense; on review, Board affirmed the initial decision, but modified the administrative judge's analysis of the appellant's whistleblower reprisal claim; the Board supplemented the administrative judge's analysis to address *Carr* factors 1 and 3; regarding the first factor, the Board found that the agency's evidence in support of its action was strong based on testimony of agency officials concerning how the details of the investigation showed that the appellant failed to perform his duties of ensuring that management controls were in place to prevent misuse of the GPC program and theft of government property; the Board found that the third *Carr* factor was insignificant due to the lack of evidence regarding how the agency treated similarly situated employees who were not whistleblowers: the appellant alleged that the proposing official was similarly situated because he was also aware of property accountability issues within his own directorate, but no action was taken against him but the Board rejected this argument finding that, unlike the appellant, the proposing official had addressed the accountability issues in his directorate immediately upon becoming aware of them).

Clay v. Dept. of Army, SF-0752-15-0456-B-1 (NP 12/19/2016) (on remand; Board rejects whistleblower reprisal claim; proof by clear and convincing evidence proven; case involved removal for offensive language, failure to follow instructions, and inappropriate conduct; "Because the record therefore shows that none of these officials were involved in the appellant's first removal or the resulting appeal, such that the appellant's exercise of his appeal rights did not affect them in any way, and about 3 years had passed since the appellant filed that appeal, the administrative judge was 'left with the firm belief that, even in the absence of the appellant's protected activity, the agency would have removed him.'…We agree.").

Duggan v. DOD, 883 F.3d 842 (9th Cir. 2018) (substantial evidence supported the Board's conclusion that the agency proved by clear and convincing evidence that it would have taken the challenged personnel actions in the absence of those protected disclosures; in analyzing the agency's burden, the 9th Circuit adopted the U.S. Court of Appeals for the Federal Circuit's test as set forth in *Carr v. SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Elder v. Dept. of Air Force, 124 MSPR 12 (2016) (MSPB affirmed, as modified, an initial decision that reversed the appellant's removal and granted corrective action; Air Force failed to show that the appellant's alleged absences were unauthorized; in addition, the Board concluded that the AJ appropriately weighed the evidence and found that the appellant's statement regarding the alleged inappropriate misconduct was credible; the MSPB further determined that the agency did not prove by clear and convincing evidence that it would have removed the appellant absent his protected activity of filing a prior Board appeal seeking to remedy a violation of 5 USC 2302(b)(8) and the subsequent compliance actions).

Higgins v. VA, 955 F.3d 1347 (Fed. Cir. 2020) (court considered Mr. Higgins's argument that the AJ abused his discretion by excluding the testimony of two agency officials regarding an institutional motive to retaliate against him, but it concluded that the AJ did not abuse his discretion; As to the first witness, Mr. Higgins conceded that this witness "likely possessed no retaliatory motive," and he did not proffer this witness to testify about an institutional motive to retaliate; likewise he did not proffer the testimony of other individuals who had allegedly spoken with the witness who could have provided first-hand testimony regarding an institutional motive to retaliate; regarding the second witness, the court noted that some of the proffered topics of testimony of the second witness overlapped with the 11 additional witnesses that Mr. Higgins was permitted to call at the hearing, and thus, the AJ did not abuse his discretion by excluding the second witness's testimony as irrelevant or redundant).

Ingram v. Dept. of Army, 777 Fed. Appx. 980 (Fed Cir. 2019) (the court affirmed the administrative judge's initial decision denying on the merits the petitioner's request for corrective action in this individual right of action appeal; the administrative judge found that the petitioner made a *prima facie* case of whistleblower reprisal for a letter of reprimand, but that the agency proved by clear and convincing evidence that it would have issued the letter notwithstanding the petitioner's protected activity; the court found that substantial evidence supported the

administrative judge's findings that the agency's reasons for the reprimand were strong and that the responsible agency officials had little retaliatory motive; although the administrative judge appeared to have misallocated the burden of proof with respect to similarly situated non-whistleblowers, this error did not affect the outcome of the decision; the court declined to disturb the administrative judge's credibility determinations).

Knowles v. VA, 796 Fed. Appx. 1026 (Fed. Cir. 2020 NP) (the court affirmed the administrative judge's initial decision denying the appellant's request for corrective action under the Whistleblower Protection Act; appellant challenged several personnel actions, including two suspensions and a notice of proposed removal; appellant made protected disclosures that were contributing factors in the personnel actions, but the agency proved by clear and convincing evidence that it would have taken the same actions notwithstanding the appellant's protected; court found substantial evidence to support the administrative judge's application of the *Carr* factors, i.e. that the agency presented strong evidence in support of its actions, there was little to no retaliatory motive on the part of the responsible officials, and there was no evidence concerning the agency's treatment of similarly situated non-whistleblowers).

Kuriakose v. VA, No. 2019-1274, 120 LRP 1734 (Fed. Cir. 2020 NP) (the court affirmed the administrative judge's initial decision denying the appellant's request for corrective action under the Whistleblower Protection Enhancement Act; the appellant made one protected disclosure that was a contributing factor in a personnel action, i.e., reduction in professional development time; however, the agency proved by clear and convincing evidence that it would have taken the same personnel action notwithstanding the disclosure largely because the limit on professional development time applied to all physicians).

Lucchetti v. Dept. of Interior, 754 Fed. Appx. 542 (9th Cir. 2018 NP) (MSPB SF-1221-16-0091-W-3) (court agreed with the Board's analysis of the three factors set forth in *Carr v. SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); the court stated that it "would have been aided by a more detailed discussion from the Board" regarding the second *Carr* factor, which concerns the agency's motive to retaliate; court also found that the relevant inquiry for the third *Carr* factor, which concerns the agency's treatment of similarly situated employees, is not whether other whistleblowers faced adverse personnel actions for making similar disclosures; although it found it instructive that the agency did not discipline others who made similar disclosures, the court observed that the relevant inquiry is whether the agency took action against any similarly situated probationary employees who were not whistleblowers).

Miller v. DOJ, 842 F.3d 1252 (Fed. Cir. 2016) (regarding the *Carr* factors: (a) a reasonable fact finder could not conclude that the government introduced strong evidence in support of the reassignment. The only evidence of the basis for the reassignment was the supervisor's testimony that OIG directed it out of fear that the petitioner might interfere with the investigation. There was no explanation as to why or how it was feared that the petitioner might interfere, and there was no evidence as to what individual at OIG the petitioner's supervisor spoke with. This explanation is further undermined by the petitioner's outstanding character and reputation. Moreover, there is no documentation of any of the petitioner's multiple reassignments or the reasons therefor; (b) substantial evidence supported the Board's finding that the petitioner's supervisor's retaliatory motive was slight at best. However, the Board should also have examined OIG's motive to retaliate because it was purportedly the office that directed the petitioner's reassignment. Nevertheless, substantial evidence supported the Board's finding that this factor weighed in the Government's favor; (c) although the Board correctly found that there was no evidence as to how the agency treats similarly-situated non-whistleblowers, the court disagreed that this factor was thereby irrelevant. The Government bears the burden of proof on this issue, and it could and should have introduced evidence on whether it often reassigns employees pending OIG investigations. This factors cuts slightly against the Government; weighing these factors together, the court concluded that substantial evidence did not support the Board's finding that the agency carried its burden to prove independent causation by clear and convincing evidence).

Pamintuan v. Dept. of Navy, No. 2019-2232, 120 LRP 3799 (Fed. Cir. 2020 NP) (the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the disclosure; while the appellant argued that his retirement was involuntary and constituted another relevant personnel action, he failed to prove the same; the court confirmed that the strength of any retaliatory motive is a proper consideration in determining whether the agency met its burden, despite the appellant's suggestion to the contrary).

Redmond v. VA, 759 Fed. Appx. 966 (Fed. Cir. 2019 NP) (the court affirmed the administrative judge's findings that the petitioner established a *prima facie* case of retaliation based on a protected disclosure of erroneous invoicing but that the employer showed by clear and convincing evidence that it would have reprimanded the petitioner notwithstanding his protected disclosure; in the court's view, applying the *Carr* factors, "The Board concluded that the VA 'demonstrated clearly and convincingly that it would have reprimanded the appellant notwithstanding his protected activity.' The Board correctly found that the evidence that Mr. Redmond engaged in several instances of misconduct was clear and convincing."),

Robinson v. VA, 923 F.3d 1004 (Fed. Cir. 2019) (concerning the whistleblower reprisal claim, the court made the following findings: (1) evidence supported the Board's conclusion that the VA met its burden of proving by clear and convincing evidence that it would have removed the petitioner absent his protected disclosures; (2) evidence strongly supported the agency's decision to remove the petitioner; this factor favored the VA; (3) although the administrative judge found that the deciding official did not have a motive to retaliate because the petitioner's disclosures did not target him personally, the administrative judge failed to consider whether the deciding official nonetheless had a "professional retaliatory motive"; appellant's disclosures implicated the capabilities, performance, and veracity of VA managers and employees and implied that the VA had deceived a Senate Committee; the court has held that those responsible for the agency's performance overall may be motivated to retaliate even if they are not directly implicated by the disclosures as the criticism reflects on them in their capacities as managers and employees; (4) nonetheless, the Board's conclusion that the deciding official lacked a motive to retaliate was not unreasonable based on testimony of the deciding official, which the administrative judge found credible; the court concluded that this factor slightly favored the VA; and, (5) the record contained mixed evidence concerning whether the VA treated the appellant the same as similarly situated nonwhistleblowers; the VA removed similarly situated individuals, including the petitioner's direct supervisor, the Director of the Phoenix VA, as well as the petitioner's direct subordinate, the Chief of HAS; the administrative judge properly weighed this evidence against the petitioner's evidence that individuals at other VA centers were not removed despite their scheduling improprieties; the administrative judge's conclusion that this factor was neutral was not unreasonable).

Scoggins v. Dept. of Army, 123 MSPR 592, 2016 MSPB 32 (2016) ("In sum, we agree with the administrative judge that the evidence presented

by the agency in support of the appellant's proposed removal was weak, the agency had a motive to retaliate against the appellant, and there is no evidence that the agency took similar actions against similarly situated employees who were not whistleblowers. Accordingly, we find no reason to disturb the administrative judge's finding that the agency failed to prove by clear and convincing evidence that it would have proposed the appellant's removal and postponed his 2012 performance evaluation in the absence of his protected whistleblowing.").

Siler v. EPA, 908 F.3d 1291 (Fed. Cir. 2018) (the petitioner argued that the administrative judge misapplied *Carr* factors 2 and 3; the court determined that the administrative judge erred in assessing *Carr* factor 3; first, the court found that the agency's treatment of other whistleblowers was not relevant to *Carr* factor 3, which is specifically limited to the treatment of similarly situated non-whistleblowers; the court also found that the administrative judge failed to sufficiently explain its conclusion that the petitioner and another employee were not sufficiently similar to make a "meaningful comparison"; as to *Carr* factor 2, the court found that the administrative judge failed to address the agency's mild treatment of the petitioner's second-line supervisor (who was the subject of his disclosures); the court directed the Board to consider on remand whether that mild treatment was evidence that the supervisor was sufficiently well-liked to provide a motive to retaliate against the petitioner; the court directed the Board on remand to reassess the penalty as appropriate in light of its findings; on remand at *Siler v. EPA*, CH-0752-16-0564-M-1, 119 LRP 27866 (Central Reg'l Office 7/26/2019), AJ seeking to correct the analysis on remand, still reached the same decision, finding that reprisal was unproven but determined that removal was not reasonable and concluded that a 14 day suspension was reasonable).

Simon v. DOJ, No. 2019-1982, 120 LRP 4227 (Fed. Cir. 2020 NP) (court affirmed the administrative judge's initial decision, which denied the appellant's request for corrective action under the Whistleblower Protection Enhancement Act; although the appellant presented a *prima facie* case of reprisal concerning his prior Board appeals and a nonselection that followed, the agency proved by clear and convincing evidence that it would have taken the same action in the absence of the appellant's protected activities; the record established that, while the agency posted its vacancy announcement for two geographic locations, it had a strong preference for filling the vacancy at the location for which the appellant chose not to apply; the agency offered the position to an individual who both applied to the preferred location and previously represented the appellant in his prior Board appeal, which suggested that the agency did not harbor strong retaliatory animus).

Smith v. GSA, 930 F.3d 1359 (Fed. Cir. 2019) (the court found that the administrative judge erred in finding the appellant's misconduct alone justified the agency's action because the merits of a whistleblower defense do not turn on the strength of the agency's evidence alone; the proper inquiry, it stated, is whether the agency would have acted in the same way in the absence of the whistleblowing; the court noted that the administrative judge did not analyze the second and third factors described in *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999), in the clear and convincing analysis; in particular, the court noted the following evidence, among other evidence, which relates to these factors, including the appellant's large number of disclosures of management failures, some of which embarrassed agency managers, the communication restrictions and other actions imposed against him by his managers, and his punishment for working over a weekend when the record did not show whether another employee working on that same weekend was punished; the court accordingly vacated the administrative judge's whistleblower analysis and remanded for application of the proper standard and consideration of relevant evidence).

E. CONTRIBUTING FACTOR

Eluhu v. VA, No. 18-4243, 120 LRP 7637 (6th Cir. 2020 NP) (the court affirmed the administrative judge's finding that the appellant did not prove that the February 6, 2017 letter was a contributing factor in the agency's decision to remove him because the appellant failed to provide evidence that the proposing or deciding officials knew about the letter).

Ingram v. Navy, SF-0752-18-0391-I-1, 119 LRP 28816 (Western Reg'l Office 8/1/2019) (agency removed a pipefitter for failure to follow instructions and unauthorized absence; AJ sustained both charges (but not all specifications) but reversed the action, concluding that the agency retaliated against the appellant, a union steward, for engaging in union activities; AJ applied the *Carr* factors, typically used to analyze whistleblower reprisal cases, *Carr* factor 2—retaliatory animus—weighed heavily against the agency, in a cat's paw analysis; as to *Carr* factor 1—strength of the agency's case—the AJ noted that numerous specifications were unsustained).

Kerrigan v. MSPB, 833 F.3d 1349 (Fed. Cir. 2016) (appellant failed to nonfrivolously allege that his alleged disclosures were a contributing factor in the agency's action; in addition to closeness in timing, the statute (5 USC 1221(e)(1)) contains a knowledge component; nowhere in appellant's pleadings did he allege that his November 2001 letter was known to the OWCP persons who referred him to vocational training and terminated his benefits for failure to attend; at most, Kerrigan showed that *someone* within OWCP was aware of his letter on the same day he was referred to vocational training).

Musselman v. Dept. of Army, DA-1221-14-0499-W-3 (NP 6/17/2016) ("Although we find that (c) and (e) were protected activities, the appellant failed to prove that either was a contributing factor in the removal of his 'acting' duties or the denial of his temporary promotion. An appellant can establish contributing factor by showing that the official responsible for the personnel action knew of the protected activity and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). In this case, the administrative judge determined that even if (c) and (e) were protected, the appellant failed to show that K.N., the individual responsible for removing his 'acting' duties, had any knowledge of the same. In his petition, the appellant asserts that K.N. was copied on emails 'detailing EEOC and sexual assault cases in which the appellant provided sworn testimony.' However, he failed to identify any evidence that shows K.N. knew of the appellant's involvement, and we are aware of none. *See id*.; *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992) (finding that a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record); *Weaver v. Department of the Navy,* 2 M.S.P.R. 129, 133 (1980) (determining that, before the Board will undertake a complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error), *review denied,* 669 F.2d 613 (9th Cir. 1982) (*per curiam*). Similarly, to the extent that individuals other than K.N. were responsible for the denial of the appellant's temporary promotion, which the agency attributes to a hiring freeze stemming from sequestration, the appellant failed to show that such individuals had any knowledge of (c) or (e). Accordingly, we find that the appellant failed to prove, by preponderant evidence, that activities (c) or (e) were a contributing factor to the agency removing his 'acting' duties or denying his temporary promotion.").