



U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel
Report of Prohibited Personnel Practices
OSC File No. MA-16-1931 ([REDACTED] WB)

[REDACTED]
Attorney

October 12, 2017

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I. INTRODUCTION

This report contains the investigative findings in OSC File Number MA-16-1931, a complaint filed by [redacted] WB, an employee of the Department of Interior (DOI), Bureau of Safety and Environmental Enforcement (BSEE). [redacted] WB alleged that DOI officials violated 5 U.S.C. § 2302(b)(8) and (b)(9)(C) by reassigning him, investigating his alleged misconduct, and removing him in retaliation for making protected whistleblower disclosures and disclosures to the DOI Office of Inspector General (OIG). [redacted] WB has returned to his position pursuant to a stay of the Merit Systems Protection Board (Board). [redacted] WB seeks full *status quo ante* relief.

As described in this report, the preponderant evidence demonstrates that DOI improperly removed [redacted] WB from his employment in retaliation for his protected disclosures and/or protected activity, in violation of 5 U.S.C. § 2302(b)(8) and (b)(9)(C). In accordance with 5 U.S.C. § 1214(b)(2)(B)-(C), OSC recommends that DOI provide appropriate corrective action to [redacted] WB. OSC further requests that DOI consider disciplinary action in this matter.

II. FACTUAL AND LEGAL ANALYSIS

A. The *Prima Facie* Case of Retaliation

As relevant here, section 2302(b)(8) prohibits taking a personnel action because an employee has made a protected disclosure of a violation of any law, rule, or regulation. Section 2302(b)(9)(C), as relevant here, prohibits taking a personnel action because an employee has cooperated with or disclosed information to the Inspector General. A *prima facie* case of whistleblower retaliation requires a showing by a preponderance of the evidence that [redacted] WB made a protected disclosure, a subsequent personnel action was taken against him, and the disclosure was a contributing factor in the personnel action. The preponderance of the evidence establishes each of these elements.

1. General factual background

BSEE hired [redacted] WB as the [redacted] official [redacted] for BSEE's [redacted] Regional Office in March 2012. Previously, [redacted] WB had worked for DOI Fish and Wildlife Service since July 2009. With BSEE, [redacted] WB was stationed in [redacted], but for most of the relevant time period, he reported to the [redacted] Senior Official of the BSEE Environmental Enforcement Division (EED), [redacted] A, in the BSEE headquarters. [redacted] A in turn reported to BSEE [redacted] Senior Official [redacted] B. EED had only one other employee in [redacted] at the time, who was junior to [redacted] WB. As part of a bureau-wide reorganization, [redacted] B and other EED employees located in the three regional offices were placed under the regional leadership. As a result, starting on March 8, 2015, [redacted] WB reported to [redacted] C, the [redacted] Region [redacted] Senior Official, and his second-level supervisor became [redacted] D, the Regional [redacted] Senior Official.

Among other duties, [WB]'s responsibilities included environmental oversight in the [REDACTED]; compliance with the National Environmental Protection Act (NEPA) regarding the permitting, development, production, and monitoring of oil, gas, and other resources in the [REDACTED]; and coordination with federal, state, and local agencies, including BSEE's sister bureau in DOI, the Bureau of Ocean Energy Management (BOEM).

2. [WB] repeatedly made protected disclosures

a. Background related to the disclosures

To evaluate [WB]'s disclosures, it is necessary to understand the complex regulatory framework pertaining to them.

A decision to lease areas of the [REDACTED] for oil production triggers requirements under NEPA, the [REDACTED] Act [REDACTED], and numerous other intertwined statutes, and related rules and regulations. Under the [REDACTED] Act [REDACTED] there are four distinct statutory stages for developing offshore energy production: a five-year leasing plan; lease sales; exploration by the lessees, for which an approved exploration plan (EP) is required; and development and production, for which an approved development and production plan (DPP) and subsequently a successful application for a permit to drill (APD) is required. *See* 43 U.S.C. §§ 1337-1351; 30 C.F.R. §§ 250.410, 550.232; *Sec'y of the Interior v. California*, 464 U.S. 312, 337-40 (1984).

NEPA requires environmental review at each stage. An Environmental Impact Statement (EIS) is at least necessary for the lease sale, while a less rigorous environmental assessment (EA) based on the lease sale EIS may be appropriate to review subsequent stages. *See* 42 U.S.C. § 4332(2)(C); 30 C.F.R. § 550.232(c); 40 C.F.R. §§ 1501.4(b), 1508.28; *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 511-12 (D.C. Cir. 2010).

[WB]'s disclosures are described here. Federal regulations provide requirements for an EIS. A few of those most relevant to [WB]'s disclosures are described here. An EIS should identify the agency's preferred action, but must rigorously explore and objectively evaluate all reasonable alternatives, including taking no action. 40 C.F.R. § 1502.14. This analysis must be done "before decisions are made and before actions are taken" so that the analysis may "help public officials make decisions that are based on understanding of environmental consequences[.]" *Id.* § 1500.1(b)-(c). The EIS should be used as part of the "decisionmaking process and [] not be used to rationalize or justify decisions already made." *Id.* § 1502.5. While an EIS is in process, federal agencies may not take any major federal action requiring NEPA review that would be covered by the EIS, unless the interim action is independently justified, accompanied by its own EIS, and will not prejudice the ultimate decision on the other EIS. *Id.* § 1506.1(c). No party may take any action that would have adverse environmental impact or limit the choice of reasonable alternatives during EIS preparation. *Id.* § 1506.1(a).

Pursuant to its five-year leasing plan, in 2007, the Minerals Management Service (MMS) published an EIS examining a potential lease sale, Lease Sale [REDACTED], for oil and gas development in the [REDACTED] Sea of the [REDACTED] Ocean off the [REDACTED] Coast of [REDACTED]. In 2008, MMS held Lease Sale [REDACTED], which generated \$2.6 billion in high bids. The EIS reviewing Lease Sale [REDACTED] was challenged in court, and several years and rounds of litigation ensued. While that litigation was ongoing, MMS was renamed and subsequently divided into three separate offices as part of the reforms following the Deepwater Horizon oil spill: BOEM, responsible (as relevant here) for development and leasing of offshore resources; BSEE, responsible for permitting; and the Office of Natural Resource Revenue.

In 2014, the Ninth Circuit Court of Appeals held that BOEM's Supplemental Environmental Impact Statement (SEIS) for Lease Sale [REDACTED] arbitrarily used the lowest possible amount of oil that was economical to produce as the basis for its analysis, rather than the full range of likely production, skewing the analysis toward fewer environmental impacts. *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 502-505 (9th Cir. 2014). However, the Ninth Circuit rejected the plaintiffs' argument that BOEM's SEIS was based on incomplete information because BOEM recognized "the requirement under NEPA to provide site-specific analyses at later stages of development," such as "when a project proponent actually submits a[n exploration] plan." *Id.* at 496, 498-99.

On June 20, 2014, BOEM published a Notice of Intent to prepare a second SEIS for Lease Sale [REDACTED]. *See* 79 Fed. Reg. 35378. BOEM released its draft SEIS for public comment on October 31, 2014, and the final 1600-page SEIS on February 12, 2015. DOI subsequently affirmed Lease Sale [REDACTED] on March 31, 2015. *See* [REDACTED] Sea Oil and Gas Lease Sale [REDACTED], at [https://www.boem.gov/\[REDACTED\]](https://www.boem.gov/[REDACTED]).

b. Internal disclosures

[REDACTED] WB repeatedly disclosed internally his belief that BSEE and BOEM were violating the statutory and regulatory environmental review requirements to allow [REDACTED] Oil Co. to proceed with [REDACTED] Ocean drilling. Some of these disclosures are described below, but this summary does not exhaustively catalog every disclosure [REDACTED] WB made that may be protected under section 2302(b)(8).

In August 2012, [REDACTED] WB sent an email to [REDACTED] D and [REDACTED] A expressing concern that BSEE was "getting ahead of ourselves in pushing [REDACTED] Oil Co.'s] permit [to drill] through" because [REDACTED] WB still needed to review the entire APD and rectify discrepancies with the exploration plan before he could make a determination of NEPA adequacy. He expressed concern with "continued activities, such as the drilling of the pilot hole and mud cellars, in the lease area by

industry without proper approval,” and he stated similar activities are not done in other BSEE regions until after an APD is approved.¹

After the Ninth Circuit invalidated the SEIS for Lease Sale [REDACTED], [REDACTED] WB repeatedly disclosed his belief that BSEE and BOEM were taking actions based on an inappropriate “pre-decision” or pre-determination that Lease Sale [REDACTED] would be affirmed after the second SEIS was issued. More specifically, [REDACTED] WB repeatedly raised concerns about BOEM’s handling of the second SEIS, on which BSEE would later need to rely. On September 12, 2014, after being asked to participate in the completeness review of [REDACTED] Oil Co.’s exploration plan for drilling in the [REDACTED] Sea, [REDACTED] WB emailed [REDACTED] A, his first-line supervisor, requesting that they contact the DOI Solicitor for an opinion on the propriety of moving forward. [REDACTED] WB disclosed his belief that the “decisions cannot be made on these activities until the Lease [REDACTED] EIS is completed” but “[b]y conducting a ‘completeness review’ we are making decisions on an EP that is based upon a Lease . . . [with] no approved NEPA [EIS] associated to it . . . [which] is not the intent of NEPA[.]” [REDACTED] A requested that [REDACTED] WB move forward with the review, but he acknowledged that he saw “the merit in [REDACTED] WB’s logic and concern,” and he noted that [REDACTED] WB had disclosed his concerns “several times prior to now.” [REDACTED] A copied attorney [REDACTED] E in the DOI Solicitor’s office to request the Solicitor’s views on the subject. That same day, [REDACTED] WB sent an EED weekly report to [REDACTED] A, the REOs for the [REDACTED] and the [REDACTED], and others stating that he had “re-expressed his concerns to the EED Chief [REDACTED] A” regarding “pre-decisional” actions on Lease Sale [REDACTED] since its “EIS has not yet been completed and a ROD [Record of Decision] signed.”

On September 22, [REDACTED] WB emailed [REDACTED] A and [REDACTED] E stating that he was invited to a meeting to discuss “how to allow [REDACTED] Oil Co. to proceed [to] drilling in 2015,” which he believed was inappropriately “predecisional as it pertains to NEPA since the lease [REDACTED] EIS is not yet complete” (emphasis omitted). [REDACTED] E responded that “there is no legal risk in discussing the process . . . as long as you don’t commit BSEE to any particular decisions later” and [REDACTED] A responded similarly. [REDACTED] WB then wrote, “With all due respect, the things that are occurring up here [in [REDACTED]] regarding Lease [REDACTED] and related documents (the EP and APDs) go well beyond simply discussing the process.” [REDACTED] WB and [REDACTED] E discussed the issue on the telephone the next day. [REDACTED] E then consulted her supervisor, after which she advised [REDACTED] A who in turn advised [REDACTED] WB, that “BOEM gathering all the necessary environmental data to conduct NEPA analysis is a good thing and as no NEPA decision has been rendered, it cannot be considered ‘pre-decisional.’” [REDACTED] WB’s October 5, 2014, weekly report to [REDACTED] A and other EED contacts stated that he had participated in email and telephone conversations with [REDACTED] A and [REDACTED] E “regarding his concerns with the ongoing and parallel work on the Lease [REDACTED] EIS, [REDACTED] Oil Co. EP and [REDACTED] Oil Co. APDs.”

¹ Neither [REDACTED] WB’s email nor [REDACTED] D’s email to which he was responding state whether they are discussing a permit under Lease Sale [REDACTED] or a different [REDACTED] Oil Co. lease. Nonetheless, the substance of the concerns [REDACTED] WB raises is the same as his later disclosures.

WB and A exchanged numerous additional emails related to WB's concerns. In these emails, W disclosed his belief that "while the Lease EIS is being completed, we are not permitted to take action on any other major federal action under the Lease EIS (for BOEM this means the EP, for BSEE this means the APD) By accepting, and subsequently reviewing, the EP and speaking with the applicant about the ADP's, BOEM and BSEE have undertaken interim actions on subsequent major federal actions prior to the original EIS being completed." Additionally, WB stated that Oil Co. was "committing a large amount of resources in signing contracts for drilling rigs, vessels, facilities, etc[.] in anticipation of being permitted to drill in 2015." He sent A Council on Environmental Quality guidance indicating that allowing an applicant to "prematurely commit money or other resources" may limit the choice of reasonable alternatives contrary to NEPA requirements. A advised WB that he believed Oil Co.'s commitment of resources would be a problem only if they have "specific knowledge that Oil Co. is committing money . . . that cannot be reallocated to do something else."

In separate emails, A also told WB that regulations pertaining to "BOEM's action [are] not an issue for BSEE," "we cannot be the BOEM NEPA police," and "only a judge" can say if BOEM violated NEPA. Similarly, in October 2014, E advised WB that "BOEM's actions would be judged by a court" and WB's "concerns about the effect of BOEM's NEPA process on BSEE's subsequent NEPA analysis are premature."

When Oil Co. submitted applications for permits to drill in February 2015 (shortly after the final SEIS was published but before BOEM issued a decision to affirm Lease Sale), WB asked A by email to revisit the conversation about whether DOI was violating NEPA with respect to Lease Sale . He also stated that he had filed a complaint with the OIG. WB requested to recuse himself from BSEE's environmental review of the APDs because he felt he could not in good faith rely on BOEM's SEIS given his concerns that the review process had violated NEPA. His supervisor told him that since the DOI Solicitor disagreed with WB's view, it was not productive to revisit the issue.

On March 12, 2015, WB discussed his NEPA concerns and his OIG complaint with C, who had just become WB's supervisor pursuant to the reorganization described *supra* at 1. On April 13, 2015, C and WB again discussed WB's beliefs regarding BOEM's NEPA review at length, as well as his OIG complaint.

WB also repeatedly disclosed the same concerns about possible NEPA violations to various other DOI employees, discussing the concerns at meetings, by email, and during informal conversations.

c. OIG complaint

When his internal complaints failed to gain traction, in October 2014, WB submitted a complaint to the DOI OIG disclosing his belief that the Department was violating environmental laws with respect to Lease Sale . He also disclosed his belief that BOEM managers were

rushing the NEPA process and changing scientific analyses to support a predetermined outcome in favor of moving forward. According to the OIG's file, [WB] did not request anonymity because he had been openly expressing his concerns for weeks previously. The OIG initially referred the complaint to the DOI Solicitor's Office, with [WB]'s name included as the complainant, on November 5, 2014. However, the OIG ultimately opened an investigation into [WB]'s allegations and issued a report, which is described in the next section because it directly pertains to [WB]'s reasonable belief.

d. [WB]'s disclosures were protected under both § 2302(b)(8) and (b)(9)(C)

[WB] made protected disclosures that he reasonably believed evidenced a violation of law, rule, or regulation, protected under 5 U.S.C. § 2302(b)(8)(A)(i).² It is not necessary to consider whether [WB] accurately reported violations of law, rule, or regulation to conclude that his disclosures are protected. Rather, they are protected so long as “a disinterested observer with knowledge of the essential facts known to and readily ascertainable by [WB] could reasonably conclude that the actions of the Government evidence such violations[.]” See 5 U.S.C. § 2302(b); see also *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (adopting an objective reasonableness standard); *Stiles v. Dep't of Homeland Sec.*, 116 M.S.P.R. 263, ¶ 17 (2011) (employee need not prove actual violation to establish that he had reasonable belief that his disclosure met statutory criteria).

The fact that [WB]'s disclosures were weighty enough to spur an OIG investigation and report, as well as review by the Solicitor's office, and for his supervisor to see the merit and logic in his concerns, all support a conclusion that his beliefs were reasonable. The OIG's December 2015 report further demonstrates [WB]'s reasonable belief, because it confirms that many analysts who were writing the SEIS believed that the Department had made the decision to affirm Lease Sale [redacted] prior to the environmental review. See *Investigative Report of Management Interference with Lease [redacted] EIS* (hereinafter “OIG report”), available at [www.doi.gov/sites/doi.gov/files/WebRedacted_MgmtInterference\[redacted\]EIS.pdf](http://www.doi.gov/sites/doi.gov/files/WebRedacted_MgmtInterference[redacted]EIS.pdf).³ For example, a BOEM regional manager informed the OIG “that she understood the driving factor behind the aggressive timeline was DOI's desire to complete the SEIS and issue a Record of Decision in March 2015 to allow the leaseholder, [Oil Co.], to drill during the spring and summer of 2015 . . . [E]veryone working on the SEIS knew it to be the case.” *Id.* at 9. Similarly, a former BOEM regional supervisor, who ultimately left BOEM because of how the SEIS was handled, informed the OIG that the “SEIS team members mostly believed that DOI would confirm Lease Sale [redacted] regardless of the findings of the SEIS.” *Id.* at 8. Numerous witnesses who worked on the SEIS provided similar testimony. *Id.* at 5, 6, 11, 12. Indeed, DOI's stated reason for setting an expedited timeline for the SEIS was “to protect DOI from blame if the leaseholder [Oil Co.]

² His disclosures may fit into one or more additional categories for protection under section 2302(b)(8), but our analysis focuses on the “law, rule, or regulation” prong.

³ The report did not directly address or draw any conclusions about whether the review violated environmental laws or regulations.

missed the 2015 drilling season,” *id.* at 1, 16-17, an objective consistent with a pre-determined outcome of affirming Lease Sale [REDACTED]. [REDACTED] WB reasonably could believe that an inappropriate pre-determination had been made based on his knowledge of the views of people directly working on the SEIS in [REDACTED], as well as his observations of preparations for [REDACTED] Oil Co. to begin drilling.

Relatedly, the OIG report makes clear that the SEIS timeline was unusually expedited. One regional supervisor informed the OIG, “Typically [] creating a new EIS takes approximately 2 to 3 years, not 7 months.” Another former regional manager described the timeline as “unreasonable,” and believed that “the overall quality of the draft SEIS was compromised due to [DOI’s] aggressive timeline.” *Id.* at 8. A long-time oceanographer informed the OIG “that she had never worked on an SEIS with such a short timeline in her 26-year career.” *Id.* at 6. Even the DOI official responsible for setting the timeline characterized it as aggressive, and he acknowledged that he had learned that as many as six employees in the [REDACTED] Region resigned or retired early as a result of their concerns with the timeline and the resulting SEIS. *Id.* at 16, 18.

Witness testimony further demonstrates the reasonableness of [REDACTED] WB’s disclosures expressing concern about working on [REDACTED] Oil Co.’s EP and APD while the lease sale NEPA review was ongoing. The long-time BSEE [REDACTED] Official in the [REDACTED] Region, [REDACTED] F, testified to OSC that the review of [REDACTED] Oil Co.’s exploration plan while the lease sale NEPA review was ongoing was “completely out of the norm.” According to [REDACTED] F, he had reviewed hundreds if not thousands of exploration plans and permits since 1999, and he had never reviewed a draft exploration plan prior to a decision affirming a lease sale. [REDACTED] F testified that [REDACTED] WB had sought his guidance, and [REDACTED] F informed [REDACTED] WB that he had never seen a situation where agency officials “were working on an APD before a [n exploration] plan was even submitted officially, before a lease was even issued officially, before the lease sale NEPA document was done[.]” According to [REDACTED] F, this is so because NEPA requires a step-by-step process to inform *decision-making*; “the point isn’t to make documents.” [REDACTED] F testified that this process is followed even where a court invalidates and remands a lease sale EIS. Whether or not the activities [REDACTED] WB disclosed are inappropriate under NEPA regulations and [REDACTED], in this context [REDACTED] WB could reasonably believe that they were.

The fact that [REDACTED] E and [REDACTED] A disagreed with [REDACTED] WB does not show that his belief was objectively unreasonable. Much of their input was premised primarily on a different view of the underlying factual context—that the meetings on [REDACTED] Oil Co.’s ADP merely constituted “discussing the process,” that BOEM was “gathering all the necessary environmental data,” and that “no NEPA decision had been rendered.” But [REDACTED] WB alleged the activities went “well beyond simply discussing the process” and fact-gathering, which accords with internal documents related to the NEPA review, the OIG’s report, and [REDACTED] F’s testimony. [REDACTED] WB was working in [REDACTED] where he frequently interacted with BOEM analysts conducting the SEIS review, and he attended meetings during which the EP and APD were discussed, while [REDACTED] A and [REDACTED] E were analyzing the facts from headquarters. In light of that context, [REDACTED] WB’s view of the situation,

and the conclusions that he drew from this view, are objectively reasonable. Additionally, some of [A]'s and [E]'s statements indicate that they objected to [WB]'s role in whistleblowing rather than the substance of his disclosures. For example, [E] stated that a court must determine if BOEM violated the law, and [A] stated that BSEE is not the "NEPA police." These statements do not address the substance of [WB]'s disclosures and have no bearing on his reasonable belief.

In sum, in light of the unusual NEPA process [WB] observed, his belief that he was disclosing violations of NEPA, other statutes, and/or implementing rules and regulations to agency officials was reasonable, and therefore his disclosures were protected under section 2302(b)(8).

Additionally, it is clear from the OIG's files that [WB] disclosed information to the OIG. He was the initial source of the OIG complaint that led to the report described above. OIG investigators interviewed [WB] at least twice, and he supplied the OIG extensive background information as well as witness names. Thus, [WB] made disclosures protected under section 2302(b)(9)(C).

3. *Within hours of learning of the OIG's investigation, BSEE officials initiated an investigation of [WB] that led to his removal*

On December 3, 2014, an OIG investigator interviewed [WB] in connection with his allegations regarding Lease Sale [redacted]. During that interview [WB] provided names of other witnesses the OIG might want to interview. Most were BOEM employees because BOEM was undertaking the SEIS review, but [WB] did provide the name of one BSEE headquarters official [redacted], [G]. On December 9, 2014, the OIG investigator contacted [G] to set up an interview about Lease Sale [redacted]. [G] had been an EED employee, but she recently had been reassigned under [H], who was then the Senior Official [redacted] who in turn reported to [redacted] Senior Official [redacted]. [G] sent an email (at 8:42 a.m. EST) informing [H] that the OIG had contacted her regarding Lease Sale [redacted] in [redacted]. [G] set up a meeting with the OIG, but informed the investigator "I really know very little about the [redacted] Lease Sale."

Less than three hours later (11:37 a.m.), [H] emailed [I], [redacted] to Senior Official [B], stating, "[WB] called me on this number [below] and he did have his name in the voice mail when I called it back in July. But it is registered to [another individual] per the reverse look up." The email then provided a telephone number, but no additional information. The telephone number was [WB]'s unlisted home landline, which he often used during telework because of poor cellular telephone coverage in his rural [redacted].

home.⁴ According to [H], [I] advised [H] to forward the information to the BSEE Investigations and Review Unit (IRU).⁵ A few hours later (2:13 p.m.), [H] forwarded the 11:37 email to [J], an [WB], adding only “Just for the record, he called me from this number on July 3rd at 11:59 am and left me a voice mail on my private call phone that I still have. Since I was on the [WB] coast, it was probably 10:49 (sic)⁶ [WB] time.”

Neither of [H]'s two emails indicates the significance of the information he was providing about [WB]'s message or phone number, or what he believed IRU needed to investigate. To the contrary, the plain language of [H]'s emails indicate only that [WB]'s name was provided on an answering system when [H] called, and that a “reverse look up” associated an individual other than [WB] with the telephone number. How this would suggest potential wrongdoing that merited an investigation of [WB] is difficult to conceive. Yet, IRU began an investigation, and indicated vaguely that it was investigating “alleged employee misconduct.” Not even [J], the IRU investigator, could shed light on what [H] suspected or what her basis was to open the investigation. According to her testimony, IRU initiated the investigation because the “phone number that Mr. [WB] gave [H] to call was not his cell phone number and [H] thought that was odd because [WB] had been given a BSEE-issued cell phone. And [WB] was teleworking quite frequently and [H] could not get ahold of him, so he asked me to look into it.” Significantly, the information [J] provided in her explanation for the IRU investigation appears nowhere in [H]'s email to her—that [WB] had a BSEE cell phone, that [WB] frequently teleworked, or that [H] had difficulty contacting [WB].

⁴ [WB] does not know the person to whom [H] stated the telephone number was registered. It appears likely that he was simply the former owner of the number prior to [WB] and the publicly-available directory [H] used was out of date.

⁵ IRU is now known as the Integrity and Professional Responsibility Advisor (IPRA). The Government Accountability Office (GAO) has highlighted concerns about IPRA's reporting structure. According to GAO, during the timeframe GAO reviewed, the Deputy Director's office initiated more than 20 percent of the investigations. This does not include investigations initiated by her senior staff, such as [H] or [I]. She then has a formal role in deciding whether IPRA will refer the allegation to the OIG, investigate it, or close it. IPRA reports to the Director and Deputy Director of BSEE. Some BSEE regional employees informed GAO “that the uncertainty of how the IPRA reports allegations to the OIG as well as its reporting structure led them to question the independence of IPRA activities and [they] expressed concern that the IPRA could be used to retaliate against employees[.]” See GAO, *Oil and Gas Management: Stronger Leadership Commitment Needed at Interior to Improve Offshore Oversight and Internal Management* (March 2017), at 30-32, available at www.gao.gov/assets/690/683485.pdf. Several witnesses OSC interview expressed overlapping concerns.

⁶ It appears this should be 10:59 rather than 10:49, *i.e.*, one hour earlier than [WB] time.

In any event, [J] initially determined that [H]'s information about [WB] using a telephone associated with someone else was wrong; rather the telephone number was a landline associated with [WB]. However, [J] went on to determine that a private business had the same physical address as [WB]'s home, with a separate telephone number. On that purported basis, IRU expanded its investigation of [WB] beyond the initial task of determining the origins of his telephone call to [H] to include monitoring of [WB]'s Internet usage over a period of several months, searches of his emails, and review of his private business social media accounts. On December 10, [J]'s file notes that [A] had just added [WB] to employees who must file an Office of Government Ethics (OGE) disclosure form annually. In January 2015, emails between [J] and [A] indicate that an unnamed individual told [A] to continue allowing [WB] to telework "to let things play out on your [IRU's] end prior to doing anything on my end." [WB] was not informed of the investigation, and he was never interviewed for it.

Ultimately, the IRU investigation determined that [WB] had accessed non-governmental websites related to his private business during government time and using government IT systems, and that he failed to report his business on his OGE disclosure form. On April 29, 2015, [J] completed a report of her investigation. On October 8, 2015, [D] proposed [WB]'s removal based on the information in [J]'s report, plus a charge alleging that [WB] failed to report a previous termination of a probationary appointment on his suitability determination form. BSEE [Senior Official] [K] approved [WB]'s removal on January 14, 2016, effective the same day.

A removal is a covered personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii). We do not analyze the IRU investigation of [WB]'s conduct as a distinct personnel action, but as part of the chain of events in his removal. Because Mr. [WB]'s removal was the direct result of the IRU investigation, the origins of the investigation must be analyzed. If the evidence establishes a *prima facie* case that the investigation was a pretext for retaliation, DOI will be required to show by clear and convincing evidence that it would have gathered the evidence used to justify [WB]'s termination absent [WB]'s protected disclosures. *See Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323-324 (1997); *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1325 (Fed. Cir. 1999); *Mangano v. Dep't of Veterans Affairs*, 109 M.S.P.R. 658, 674 (2008).⁷

3. [WB]'s disclosures contributed to his investigation and resulting removal

[H]'s immediate referral of [WB] for internal investigation for unspecified "misconduct" within hours of hearing about the OIG's inquiry is sufficient evidence, standing alone, to infer a causal connection between [WB]'s disclosures and the investigation. Five

⁷ [WB] additionally experienced two reassignments, which are personnel actions under 5 U.S.C. § 2302(a)(2)(A)(iv), and may have experienced other personnel actions. OSC's analysis focuses on [WB]'s removal since remedying his removal would correct all or nearly all of the harm from prior personnel actions. This Report does not analyze the causal connection between [WB]'s disclosures and prior personnel actions.

months had passed since [WB] called [H] from his home telephone, but [H] only reported it the very same day he learned about the OIG's review. As discussed in more detail below, [H] explained that he coincidentally remembered [WB]'s call that day because [I] mentioned that [WB] was difficult to reach. It strains credulity to believe that the subject of supposed difficulties in reaching [WB] while he was teleworking happened to arise in casual conversation between two BSEE headquarters employees who did not work closely with [WB] on the very day that the same two employees learned of the OIG's inquiry, unless a causal connection existed between the events. It is far more straightforward to conclude that [H] and [I] believed that [WB] was responsible for the OIG's review and that this belief contributed to their discussion of referring him for investigation.

Additionally, the evidence satisfies the "knowledge/timing test," under which a contributing factor is established when an agency official involved in a personnel action knew about the protected disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *See* 5 U.S.C. § 1221(e)(1). More specifically, the weight of the evidence shows that when [H] and [I] learned from [G] that the OIG wanted to interview her about Lease Sale [], they would have inferred that the investigation concerned [WB]'s long-standing protected disclosures about the impropriety of the agency's actions in connection with that sale. And, within just a few hours, they initiated the IRU investigation of [WB], which generated [WB]'s removal. Thus, the knowledge/timing test is met.

[H]'s and [I]'s claim that they did not know or infer the source of the OIG interest in interviewing [G] about Lease Sale [] is not credible. BSEE management officials concede "that [WB] had long raised issues about Lease [], and that these were widely known by management officials prior to" the time the OIG contacted [G]. Indeed, the OIG's file reflects that [WB] did not request anonymity in his complaint because he had raised the issue so publicly. During her OIG interview, [G] stated that [WB] was the only person from whom she had heard concerns with Lease Sale []. [WB] additionally disclosed his concerns in meetings and on weekly check-in calls with environmental enforcement officials. Moreover, [WB] had repeatedly disclosed concerns to [A], who, as a management-level employee in BSEE headquarters, interacted frequently with [I] and [H]. The Board has held that knowledge may be inferred in similar circumstances. *See Swinford v. Dep't of Transp.*, 107 M.S.P.R. 433, 439 (2007) (knowledge may be inferred where disclosures are widely known and the subject official knew of the OIG investigation that resulted from the disclosures).

The evidence in the record also shows directly that [I] and [H] knew about [WB]'s disclosures and thus would have attributed the OIG's investigation to [WB]'s protected disclosures. As to [I], [A] testified that [WB]'s NEPA concerns were discussed several times at biweekly meetings regarding EED with BSEE [Senior Official] [B], which [I] almost always attended. Documents in the record confirm this testimony. Emails from September 15, September 22, and October 2, 2014, reference such discussions. Additionally, on October 27, [A] sent [B] and [I] an email with an agenda for their bi-weekly

meeting, which stated that they were “Finalizing the ‘completeness review’ for BOEM on the recently submitted Oil Co. EP on Lease [redacted]. [redacted] D [redacted] was involved in the ‘completeness review’ and is aware of [redacted] WB [redacted]’s concerns.” The reference to “[redacted] WB [redacted]’s concerns” without explanation suggests a background understanding of those concerns by the recipients, [redacted] I [redacted] and [redacted] B [redacted]. Both [redacted] A [redacted] and [redacted] J [redacted] described [redacted] I [redacted] as very involved in EED and stated that [redacted] I [redacted] and [redacted] A [redacted] talked nearly every day. [redacted] A [redacted] had “no doubt” that [redacted] I [redacted] had been part of discussions about the concerns [redacted] WB [redacted] raised with Lease Sale [redacted]. Indeed, [redacted] A [redacted] testified that [redacted] WB [redacted] had told [redacted] A [redacted] that he wanted to contact the OIG, and [redacted] A [redacted] reported that to [redacted] I [redacted] and [redacted] B [redacted].

The evidence likewise demonstrates that [redacted] H [redacted] would have understood that the OIG investigation stemmed from [redacted] WB [redacted]’s disclosures. Leaving aside that [redacted] H [redacted] spoke with [redacted] I [redacted], who knew about [redacted] WB [redacted]’s concerns with Lease Sale [redacted], on the very day that he learned about the OIG investigation, [redacted] H [redacted] had previously conducted an administrative review of a hostile work allegation [redacted] WB [redacted] had made against [redacted] A [redacted]. [redacted] H [redacted]’s investigative report to [redacted] B [redacted] (which he also sent to [redacted] I [redacted]) describes the August 2012 email discussed *supra* at 3-4, stating that [redacted] WB [redacted] had sent “an email to [redacted] D [redacted] expressing his concerns about taking shortcuts in approving the Oil Co. APD in short timeframe.” [redacted] H [redacted]’s report additionally notes that in February 2014, [redacted] A [redacted] had removed [redacted] WB [redacted]’s EED decision-making authority “due to disagreement over the National Environmental Protection Act requirements and procedures.” [redacted] H [redacted]’s notes from interviewing [redacted] WB [redacted] for the administrative review indicate that [redacted] WB [redacted] told [redacted] H [redacted] about NEPA process disagreements that [redacted] WB [redacted] had with [redacted] A [redacted]. [redacted] H [redacted]’s notes state that [redacted] WB [redacted] had not been told to work on Lease Sale [redacted], and [redacted] WB [redacted] believed that [redacted] G [redacted] was the contact for it. In a July 8, 2014, email to [redacted] H [redacted], [redacted] WB [redacted] elaborated that he, as the [redacted] official [redacted] for [redacted] A [redacted], “is responsible for regional NEPA processes” but with the Lease Sale [redacted] EIS revision [redacted] G [redacted] “will not allow me to participate in the process and has instead identified [redacted] G [redacted] as the EED POC [Point of Contact].” [redacted] H [redacted] acknowledged during an OSC interview that he had discussed Lease Sale [redacted] with [redacted] WB [redacted], although he stated that his focus was on “tussle of who was going to make the decision and what procedures were going to be followed” and not on the substance of [redacted] WB [redacted]’s concerns. According to [redacted] H [redacted]’s testimony, he was not aware of any details related to the SEIS for Lease Sale [redacted].

While [redacted] H [redacted] was not told the specific subject of the OIG investigation on December 9, when [redacted] G [redacted] advised him that the OIG wanted to speak to her, the fact that the OIG had reached out to [redacted] G [redacted] would have led [redacted] H [redacted] to conclude that the OIG was investigating information [redacted] WB [redacted] furnished. [redacted] WB [redacted], as the [redacted] official [redacted] for [redacted], was the lead on NEPA issues in [redacted], and there were only two BSEE environmental division employees in [redacted]. Few BSEE employees were working on Lease Sale [redacted] at the time, since BOEM was still in the process of drafting the SEIS. BSEE weekly [redacted] Sen Official [redacted] staff meeting notes, which [redacted] H [redacted] and [redacted] I [redacted] received by email, from several dates around that time note [redacted] WB [redacted]’s activities related to Lease Sale [redacted]. [redacted] G [redacted] was not actually working substantively on Lease Sale [redacted], which [redacted] H [redacted] as her supervisor would have known, yet [redacted] WB [redacted] had complained to [redacted] H [redacted] about [redacted] A [redacted] designating her as the EED point of contact for the process. No one else but the person

with the mistaken belief [G] was involved in Lease Sale [redacted], *i.e.*, [WB], would have had any reason to suggest the OIG contact her. Even if [H] inferred only that [WB] had suggested that the OIG contact [G], rather than that he was the source of the underlying complaint, his disclosure to the OIG is protected under section 2302(b)(9)(C).

Regarding the “timing” prong of the knowledge/timing test, the fact that [H] and [I] referred [WB] for investigation almost immediately after learning of the OIG investigation readily satisfies the timing element. Moreover, [H] and [I] initiated the investigation approximately five months after being informed that [WB] raised concerns with the NEPA process for approving [Oil Co.] drilling in the [redacted] and within two to three months of meetings [I] attended at which [WB]’s concerns were discussed. This evidence, too, establishes that the referral for investigation occurred well within a time period such that a reasonable person could conclude that protected disclosures were a contributing factor in these actions. *See, e.g., Redschlag v. Dep’t of the Army*, 89 M.S.P.R. 589, 635 (2001); *Russell*, 76 M.S.P.R. at 322. This timing establishes a *prima facie* case that BSEE investigated and subsequently removed [WB] in retaliation for his protected disclosures, in violation of 5 U.S.C. § 2302(b)(8) and (b)(9)(C). *See* 5 U.S.C. § 1221(e)(1).

B. The Agency is Unable to Sustain a Defense

Congress has provided only one defense to the foregoing showing. Unless the agency can prove under the high evidentiary standard of clear and convincing evidence that it would have taken the same actions against [WB] even in the absence of his protected disclosures, [WB] is entitled to corrective action. 5 U.S.C. § 1214(b)(4)(B)(ii). Where, as here, an investigation is so closely related to the personnel action that it could have been a pretext to gather evidence to retaliate, corrective action must be provided unless the agency shows by clear and convincing evidence that the evidence used to justify the personnel action would have been gathered absent the protected disclosure. *See Russell*, 76 M.S.P.R. at 324. In evaluating whether clear and convincing evidence exists, the Board examines the *Carr* factors: the strength of the evidence upon which the investigation was initiated; the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and any evidence that DOI investigates similarly-situated employees who are not whistleblowers. *See Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). The agency cannot meet its burden here.⁸

⁸ Because OSC concludes that DOI cannot meet the burden of showing by clear and convincing evidence that it would have gathered the evidence against [WB] in the absence of his protected disclosures, we do not analyze the subsequent steps that led to [WB]’s removal. We note, however, that the evidence establishes that each other agency official involved in [WB]’s removal was aware of his protected disclosures and OIG activity prior to the role each played in the removal, which would establish a *prima facie* case under 5 U.S.C. § 1221(e)(1).

1. *The evidence supporting the investigation was weak*

As noted, a *prima facie* case exists that [H] initiated the investigation of [WB] to retaliate against him for protected disclosures. [H] offered an alternative explanation in OSC testimony and a Board filing. During his first OSC interview, [H] stated that when he returned [WB]'s July 2014 call, the outgoing voicemail "didn't say [WB], it sounded like a private business enterprise." [H] also stated that he made his return call to [WB] from his cell phone missed call log, which according to [H] was not the number [WB] left in his voicemail message. According to [H], he found it "curious" that his return call to [WB] was seemingly to a business, but he added that at the time he did not have any reason to believe it warranted further inquiry. However, [H] claims, the day he was informed about the OIG's inquiry, he ran into [I] coincidentally. [I] then related to [H] that he had been unable to get in touch with [WB] during telework. [H] maintains that this comment reminded him that other people had expressed similar frustrations, which prompted [WB]'s July call to come to mind. [H] then wondered if [I] had difficulty reaching [WB] for the same reason that [WB] called him from a strange number—he said he "wouldn't be surprised if" [WB] was working for a private business when he was supposed to be teleworking. Significantly, [H] claimed that he made all these deductions, although he denied all knowledge that [WB] was operating a private business at the time. The foregoing testimony provides the only alleged non-retaliatory explanation for why he and [I] decided to initiate IRU's investigation.

[H]'s testimony is not credible for a variety of reasons, however. In the first place, the elaborateness of the reasoning process by which [H] arrived at an alleged concern that [WB] may be guilty of misconduct, supplemented with recovered memory of events months earlier, is not on its face plausible. The actual information of potential wrongdoing in [H]'s possession was trivial by any standard and would not have caused a reasonable official without a retaliatory animus to initiate an investigation.

Moreover, [H]'s testimony is in crucial respects inconsistent with the evidence. He told OSC that he found it "curious" that he returned [WB]'s call to a seemingly business number; yet, the email [H] sent to IRU initiating the investigation of [WB] states the opposite, that [WB]'s message on his answering machine "did have his name," not a business. Moreover, [H]'s email initiating the investigation states that he had performed a reverse search of the phone number at which he called [WB], and he found a different *individual's* name, not a business entry. Thus, [H]'s efforts to suggest through his testimony that there was a reason to investigate [WB] because he might be involved in a private business during work hours is inconsistent the very email [H] wrote to IRU, which fails to mention any concern whatsoever that [WB] was connected to a business. In sum, [H] has provided no rational explanation for reporting to IRU a potential need to investigate [WB], much less a clear and convincing explanation.

[H]'s testimony that [WB]'s outgoing voicemail appeared to be a business is also difficult to square with other facts in the record. The number [H] called in response to

WB's message is WB's home landline. WB testified to OSC that he uses a separate telephone number, and not his home telephone, for his business. This is consistent with IRU's investigative file, which shows that J did TLO⁹ searches and found that the number H reported was a landline associated with WB. Her TLO search revealed WB's business with the same physical address, but her TLO search for his business did not associate WB's home phone with the business. Her file contains telephone numbers for WB's business from the business website, business Facebook account, and a business license registration report, which do not match WB's home number. OSC additionally called WB's home number and confirmed that the outgoing voicemail contains no information about WB's business.¹⁰

Likewise, H's claim that I told him that I was having trouble reaching WB during WB's telework days is inherently implausible and does not accord with the evidence in the record. H and I each gave inconsistent testimony on this point, which detracts from the credibility of H's explanation. When OSC first interviewed H, he could not recall any substantive detail of his conversation with I. In response to a question regarding what prompted his email to IRU, H testified, "I really don't recall. I think we were just having a conversation and . . . talked about some of the challenges with that group." When pressed to articulate the connection between WB's earlier call and H's conversation with I, H stated, "I don't recall the conversation I had with I. I guess you better want to talk with him." And although I confirmed H's account in a Board filing, when OSC previously interviewed him, I denied having any recollection of the conversation, how it started, why WB's call seemed suspicious, or why H reported WB's call for investigation.

Moreover, the people who worked most closely with WB testified that they never had any problems reaching him. A testified that he had no trouble reaching WB when he teleworked, although he noted that D had complained to him about WB not being physically present in the office every day. Likewise, WB's counterpart in the testified that he had never had any problem reaching WB because WB routed office calls to his work cell phone when he was out of the office. WB independently confirmed that he did so. Moreover, WB's email signature included his work mobile telephone number. Furthermore, A testified that I had never approached him about being unable to reach WB during telework. Even if WB had been difficult to reach during telework, it would be odd for it to come up in conversation on a Tuesday, as reported. WB's telework days were Wednesdays and Fridays. If I had not been able to reach WB during his most recent telework day the previous Friday, he could have called him on Monday or Tuesday.

⁹ TLO is a paid search technology often used by law enforcement.

¹⁰ Of course, it is possible WB has changed his home voicemail since H's 2014 call. However, DOI did not provide WB IRU's investigative file, and his OSC complaint reflects that he was at the time unaware of the origins of IRU's investigation. OSC did not alert WB prior to calling. Thus, it is unlikely that WB would have changed his home outgoing voicemail because of IRU's or OSC's investigations.

Additionally, according to [WB], [I] never called him. [WB] did not recall ever speaking by telephone with [I] or even receiving a personal email from him, and they had met in person only two to three times with larger groups.

Finally, [H]'s testimony that his conversation with [I] led him to suspect [WB] for misconduct is implausible. It would be odd for [H] to connect the dots when [I] mentioned [WB] being hard to reach, if, as [H] testified, others had told him the same information closer in time to [WB]'s call. This is especially so if it were accurate, as [H] testified, that [WB]'s outgoing voicemail seemed to be a business. *That* information would have been far more direct evidence of [WB] allegedly working for a private business during telework than the stray remark about [WB] being difficult to reach that [H] claims led him to reach that conclusion. Yet, [H] sought no investigation of [WB] until after he learned of the OIG investigation.

Thus, there is not clear and convincing evidence that [H] would have started an investigation of [WB] if he had not learned of the OIG review. The evidence shows that [H], with [I]'s encouragement, reported [WB] for a misconduct investigation for simply calling him from his home telephone while working from home. [H]'s message to IRU includes no indication whatsoever of any misconduct. [H] now testifies that he thought that [WB] should be investigated based on information that he did not provide to IRU, *i.e.*, that he suspected [WB] of being unavailable during his work day because he was working on a private business. To leave that fact out would seem irrational, unless he had a reason not to implicate himself in charging [WB] with wrongdoing. Either [H] knew about [WB]'s business previously but omitted that information because he only acted upon it after learning about the OIG inquiry, or [H] did not know about [WB]'s business and initiated an IRU investigation as a pure fishing expedition. [H]'s explanation for why [WB]'s call was suspicious is implausible on its face, conflicts with evidence in the record, including [H]'s own report to IRU, and cannot be credited.

In any event, even if [H]'s testimony were to be fully credited, the basis for the investigation would remain weak. Given the tenuous evidence [H] had about [WB] operating a business, he would have made a reasonable inquiry before contacting an investigative entity. In particular, it would be unusual to refer an employee for a misconduct investigation without first broaching the issue with the employee's immediate supervisor. Yet, [A] testified that [H] did not ask him about [WB]'s unrecognized telephone number. Nor did he ask [WB] about the number. [A] testified that he believes that he called [WB] on his home telephone number when he knew [WB] was teleworking and that he had the number on an EED contact list. Thus, either [A] or [WB] likely could have told [H] that the July 3 call had been from [WB]'s home if [H] had asked. Moreover, according to [H]'s testimony, the one step he did take to test his theory, the reverse look-up, showed an individual rather than a business, yet he proceeded with the referral.

Additionally, the evidence suggests that [WB] was not even teleworking as reported when [H] returned his call. [H] reported [WB] for a missed call on Thursday, July 3, right

before the start of a long holiday weekend. H testified to OSC that he knew that WB was teleworking that day because WB had switched his telework day for their July 2 interview. But H did not check WB's schedule or consider whether WB might have taken leave that day, as in fact he did. According to H's email starting the investigation, WB called him at 11:59, which is 10:59 time. According to WB's time and attendance records, WB's hours are 6:00 a.m. to 2:30 p.m., and he took three hours of leave on July 3, 2014. If WB did not take lunch during his shortened work day, his five-hour day ended at 11:00 a.m. Thus, the record indicates that WB called H one minute before he finished teleworking. Even if H returned the call immediately, he probably called after WB's work day.

In sum, regardless of whether H's testimony is credited, the evidence for initiating the investigation was weak and the first Carr factor cuts sharply against the agency's clear and convincing evidence defense.

2. H's and I's senior positions provided motive to retaliate

In applying the second Carr factor, OSC considers both H's and I's motivations because both were involved in the decision to refer WB for investigation. See *Miller v. Dep't of Justice*, 842 F.3d 1252, 1262 (Fed. Cir. 2016); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1371 (Fed. Cir. 2012); *Carr*, 185 F.3d at 1326.

Although neither H nor I were in WB's chain of command, they were senior BSEE officials with cross-cutting responsibilities, so they may have been motivated to protect BSEE's general institutional interests. See *Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17, 55 (2011) (finding motive to retaliate by high-level officials where the disclosures "reflected on both of them as representatives of the general institutional interests of the agency"); see also *Miller*, 842 F.3d at 1261-62; *Whitmore*, 680 F.3d at 1370-71; *Carr*, 185 F.3d at 1322-23.

Lease Sale was a high priority to DOI, which had already spent years, along with considerable effort and money, defending the lease sale from successful NEPA challenges. Lease Sale was a record-breaking lease sale generating billions of dollars in revenue. According to the Record of Decision affirming the Lease Sale:

In affirming Lease Sale, resulting exploration and development could lead to significant increases in domestic oil and gas production, and yield substantial Federal and state revenue from lease payments, taxes, and other fees associated with the increase in economic activity. In addition, the potential added production could lower reliance on imported oil. Under the Scenario where production of 4.3 billion barrels of oil occurs in the Sea, BOEM estimates that oil prices potentially could decline, thereby decreasing the Nation's outlays for imported oil and increasing the Nation's balance of trade.

Although **WB** had persistently disclosed internally concerns about the NEPA review of Lease Sale **■**, an OIG investigation substantially raised the stakes. DOI could no longer control the responses to **WB**'s queries. The OIG is independent, its reports are generally made public, and it has the authority to make recommendations to which the Department must respond. Any public information, in turn, has the potential to be used in litigation. In short, an OIG investigation of the Lease Sale **■** NEPA review could have threatened the progress of an important departmental priority.

Moreover, in July 2014, **D**, who became **WB**'s second-level supervisor soon after **H**'s referral for investigation, had explicitly told **H** that he "would have fired" **WB** for his August 2012 email about "taking shortcuts in approving the **Oil Co.** APD," and **H** relayed that information in his report to **Senior Official B**. It is reasonable to conclude that **D**'s view may have influenced **H**. *See Whitmore*, 680 F.3d at 1372 (finding that the officials responsible for a personnel action "might have developed or at least been influenced by retaliatory motives" of other officials).

Finally, although **H** did not supervise **WB**, the fact that his subordinate **G** was being asked to testify as a witness in the OIG inquiry could provide further motive to retaliate. This might be particularly so if **H** were working to tie up loose ends before his retirement.¹¹

Considered as a whole, the second *Carr* factor weighs against DOI's clear and convincing evidence defense.

3. *DOI cannot show it initiated misconduct investigations under similar circumstances*

DOI provided no evidence that BSEE officials have initiated misconduct investigations against employees who use their home or unknown telephones while working from home. But even if OSC were to credit **H**'s testimony regarding his reasons for referring **WB** for investigation, there was a much stronger basis for initiating an investigation in each of the comparable cases DOI provided.

The **L** case file (IRU-IA-13-001) is most directly relevant. As **L**'s supervisor, **H** initiated the IRU investigation in that case as well. In that case, according to information **H** provided IRU, **H** had become concerned about missed deadlines and lack of production by **L** in late 2012. Several other employees came forward to express concerns with his performance and failure to meet deadlines. On June 11, 2013, a BSEE employee reported that **L** had been directly observed working on his personal business at his work computer and also overheard on the telephone handling his personal business matters. This report noted that **L** ran a tax and business consulting company. **H** requested a scan of **L**'s internet

¹¹ According to witnesses, **H** retired approximately at the end of 2014, but he was rehired as an annuitant shortly thereafter.

activity, but a human resources official advised him that little information came back. On July 25, 2013, [H] himself witnessed [L]'s computer with non-BSEE work up on the screen and a non-government thumb drive in his computer. [H] went to [K], who authorized another scan of [L]'s computer. On August 1, 2013, [H] reported [L] to IRU. In sum, when provided direct evidence that [L] was working on personal business activities at the office and his performance was suffering as a result, [H] waited seven weeks and until he had personally observed suspect computer use to report [L] to IRU.

Both the [M] (IRU-IA-14-004) and [N] (IRU-IA-14-001) employee misconduct investigations were also initiated based on stronger evidence. In [M], a human resources specialist reported to IRU that, according to information received through [M], direct and second-level supervisor, [M] had provided a personal business card on a contact list for a government training, which was distributed to all in attendance. The person reporting the issue to IRU provided the contact list at issue. In [N], IRU received a tip that [N]'s coworker had informed another BSEE employee that [N] worked on private real estate matters all day and did no BSEE work, resulting in long delays in his cases. Both of these IRU complaints relied on information from someone who had directly observed evidence suggesting misconduct by the subjects of the investigation. In contrast, if one credits [H]'s OSC testimony, [H] reported [WB] to IRU within a few hours of [I] saying [WB] was difficult to reach during telework, acting on an unconfirmed suspicion without so much as reaching out to [WB]'s supervisor to ask a few basic questions prior to acting.

In short, OSC concludes that the final *Carr* factor weighs against DOI's clear and convincing evidence defense as well.

All three *Carr* factors fail to support DOI's clear and convincing evidence burden, and therefore DOI cannot sustain that rigorous burden of proof.

IV. Conclusions

The evidence demonstrates that [WB]'s removal violated 5 U.S.C. § 2302(b)(8) and 2302(b)(9)(C). Therefore, [WB] is entitled to full corrective action, placing him, as nearly as possible, in the position he would have been in had the prohibited practices not occurred. *See* 5 U.S.C. § 1214(g)(1). That "certain acts of misconduct [we]re discovered during the investigation, does not relieve an agency of" this burden. *Id.* Because "the agency cannot prove its affirmative defense" that it would have investigated [WB] absent his protected disclosures "no harm can come to the whistleblower." *See Russell*, 76 M.S.P.R. at 325, quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993).

More specifically, [WB] is entitled to permanent reinstatement; back pay and related benefits; reimbursement for reasonable and foreseeable consequential damages, including the penalty he paid for early withdrawal of his Thrift Saving Plan contributions and any other financial harms he suffered; compensatory damages for any nonpecuniary harms he suffered;

attorney's fees; and out-of-pocket expenses. 5 U.S.C. § 1214(g)(2). DOI must ensure that all derogatory information is removed from [WB]'s record and that he is placed in an environment in which he can work free of any further retaliation. Because the record makes clear that [D] and [WB] have long had a contentious relationship, that may require facilitating a mutually agreeable transfer for [WB]. *See, e.g.*, 5 U.S.C. § 3352 (stator preference in transfers for whistleblowers).

In addition, OSC requests that DOI consider whether disciplinary action is appropriate against [H] and [I] based on the evidence revealed in this report.