CHAPTER 1
INTRODUCTION AND NEW DEVELOPMENTS

I. INTRODUCTION

Welcome. This is the Fourth Edition of *A Guide to the Whistleblower Protection Act and Whistleblower Protection Enhancement Act*. The previous 2020 edition noted the many changes following the 2012 Whistleblower Protection Enhancement Act. Since that time, the Board (except for the period January 7, 2017 to March 3, 2022, when it was without a quorum) and courts have been busy interpreting the WPA and the Whistleblower Protection Enhancement Act. The numerous trends, expansions, and changes include, in the following categories:

Attorney Fees — *Coffman v. Office of Special Counsel and DHS,* 2022 MSPB 18 (2022); *Edenfield v. VA,* 54 F.4th 1357 (Fed. Cir. 2022).

Compensatory Damages — *Gilewicz v. DHS*, 2024 MSPB 7 (2024); *Perlick v. VA*, 104 F.4th 1326 (Fed. Cir. 2024).

Exhaustion — *Black v. SBA*, DC-1221-21-0644-W-1 (NP 1/2/2024); *Chambers v. DHS,* 2022 MSPB 8 (2022); *Chin-Young v. MSPB* (Fed. Cir. No. 2023-1590 2023 NP).

Jurisdiction — *Abernathy v. Dept. of Army*, 2022 MSPB 37 (2022); *Covington v. Dept. of Interior*, 2023 MSPB 5 (2023); *Knapp v. MSPB* (Fed. Cir. No. 2020-2122 2021 NP); *Lehr v. MSPB*, 803 F. App'x 389 (Fed. Cir. 2020 NP); *Miranne v. Dept. of Navy* (Fed. Cir. No. 2021-1497 2021 NP); *Smolinski v. MSPB*, 23 F.4th 1345 (Fed. Cir. 2022); *Turner v. USDA*, 2023 MSPB 25 (2023); *Williams v. DOD,* 2023 MSPB 23 (2023).

Other Circuit Jurisdiction — *Abrahamsen v. VA* (11th Cir. No. 20-14771 2021 NP); *Delgado v. DOJ*, 977 F.3d 1295 (7th Cir. 2020); *Huang v. DHS*, 844 F. App'x 942 (9th Cir. 2021 NP); *Jones v. MSPB* (4th Cir. No. 23-1328 2024 NP).

Perceived Whistleblower — *Delgado v. DOJ*, 977 F.3d 1295 (7th Cir. 2020); *Huang v. DHS*, 844 F. App'x 942 (9th Cir. 2021 NP); *Standley v. Dept. of Energy,* 26 F.4th 937 (Fed. Cir. 2022).

Personnel Actions — *Curtis-Hunter v. MSPB* (Fed. Cir. No. 2023-1426 2023 NP); *Doyle v. VA,* 855 F. App'x 753 (Fed. Cir. 2021 NP); *Essoe, III v. Dept. of Army*, DC-1221-18-0313-W-1 (NP 11/16/2023); *Hanuschik v. Dept. of Army,* SF-1221-16-0236-W-1 (NP 6/15/2023); *McCray v. VA,* CH-1221-16-0553-W-1 (NP 7/27/2023); *Savage v. Dept. of Army,* AT-0752-11-0634-B-1 (NP 10/31/2022); *Skarada v. VA*, 2022 MSPB 17 (2022); *Spivey v. DOJ*, 2022 MSPB 24 (2022); *Stern v. VA* (Fed. Cir. No. 2020-2192 2021 NP).

***Prima Facie* Case; Contributing Factor** — *Covington v. VA*, AT-1221-18-0560-W-1 (NP 1/31/2024); *Karnes v. DOJ,* 2023 MSPB 12 (2023); *Potter v. VA* (Fed. Cir. No. 2021-1460 2021 NP); *Simpson v. VA*, PH-0714-18-0410-I-1 (NP 3/13/2024).

Proof and Clarification of the *Carr* Factors — *Ginsberg v. VA* (Fed. Cir. No. 2022-1900 2023 NP); *Godby v. VA*, CH-1221-21-0147-W-1 (NP 8/14/2023); *Hiller v. DHS*, 767 F. App'x 957 (Fed. Cir. 2019 NP); *Kreipke v. VA,* CH-1221-15-0284-W-1 (NP 5/16/2023); *Marcato v. USAID*, 11 F.4th 781 (DC Cir. 2021); *Murray v. Dept. of Army* (Fed. Cir. No. 2021-1560 2021 NP); *Potter v. VA* (Fed. Cir. No. 2021-1460 2021 NP); *Skrettas v. VA* (Fed. Cir. No. 2022-2075 2023 NP); *Staley v. VA* (Fed. Cir. No. 2020-2127 2021 NP).

Protected Activity [i.e. (b)(9) cases] — *Black v. SBA*, DC-1221-21-0644-W-1 (NP 1/2/2024); *Fisher v. Dept. of Interior,* 2023 MSPB 11 (2023); *McCray v. Dept. of Army,* 2023 MSPB 10 (2023); *Smolinski v. MSPB*, 23 F.4th 1345 (Fed. Cir. 2022).

Protected Disclosures — *Abernathy v. Dept. of Army*, 2022 MSPB 37 (2022); *Abrahamsen v. VA* (11th Cir. No. 20-14771 2021 NP); *Edenfield v. VA*, 54 F.4th 1357 (Fed. Cir. 2022); *Giachetti v. VA,* DC-1221-19-0101-W-3 (NP 8/18/2023); *Harry v. Dept. of Interior,* DE-1221-20-0383-W-1 (NP 8/30/2023); *Pridgen v. OMB*, 2022 MSPB 31 (2022); *Potter v. VA* (Fed. Cir. No. 2021-1460 2021 NP); *Salazar v. VA*, 2022 MSPB 42 (2022); *Smolinski v. MSPB*, 23 F.4th 1345 (Fed. Cir. 2022); *Turner v. USDA*, 2023 MSPB 25 (2023); *Yomi v. Dept. of Navy*, SF-1221-17-0580-W-1 (NP 1/24/2024).

Protected Disclosures in Normal Course of Duties Involving an Extra Proof Requirement — *Harry v. Dept. of Interior,* DE-1221-20-0383-W-1 (NP 8/30/2023); *Williams v. DOD,* 2023 MSPB 23 (2023).

Reassignment to New AJ — *Tao v. MSPB,* 855 F. App'x 716 (Fed. Cir. 2021 NP).

Threatened Personnel Actions — *Cooper v. VA,* 2023 MSPB 24 (2023).

The above-cited cases are summarized below, in the New Case Law Section.

II. LEGISLATIVE CHANGE

On December 23, 2022, the James. M. Inhofe NDAA for FY 2023 (Pub. L. 117-263 was enacted into law, providing an avenue for FBI employees to make whistleblower reprisal claims to MSPB, which previously were exclusively subject to an internal FBI appeals process. Section 5304 of the NDAA provides an FBI employee who alleges reprisal for protected whistleblower activities with the right to appeal a final determination or corrective action order to MSPB under 5 USC 1221. It also allows for an appeal to MSPB under § 1221 if no final determination or corrective action order has been made or issued within one-hundred eighty (180) days of the FBI being notified of the allegation of reprisal. By expanding MSPB's whistleblowing jurisdiction to include employees not previously eligible to file appeals under 5 USC 1221, this change likely will increase the number of complex cases adjudicated by the Board.

III. NEW CASE LAW

A. ATTORNEY FEES

Coffman v. Office of Special Counsel and DHS, 2022 MSPB 18 (2022) (Board awards $517,506.19 in attorney fees for representation; defense of an employee in an OSC disciplinary action; fees in such cases are awardable against the employing agency and not OSC due to changes made in the Whistleblower Protection Enhancement Act of 2012; OSC filed a disciplinary action against the petitioner, a deputy assistant commissioner for human resources management employed by the Department of Homeland Security, alleging violation of 5 USC 2302 (b)(1)(E) and 5 USC 2302 (b)(6), based on her participation in the Customs and Border Protection's efforts to employ three candidates preferred by the CBP Commissioner; after a six-day hearing, an ALJ failed to sustain any of the eight counts brought against the petitioner and the Board affirmed; in the attorney fee proceeding, the ALJ awarded $490,503.58 in attorney fees against OSC; the Board on review sustained the ALJ's finding that the petitioner was the prevailing party (fees and expenses was warranted in the interest of justice because the petitioner was substantially innocent of the charges (*Allen* factor 2) and OSC knew or should have known that it would not prevail on the merits (*Allen* factor 5), raised the fees and expenses to $517,506.19 (apparently for the additional fees and expenses in pursuing the review petition) but reversed the ALJ's decision as to the responsible party to pay the fees and expenses, relying on the changes in the Whistleblower Protection Enhancement Act of 2012);

Edenfield v. VA, 54 F.4th 1357 (Fed. Cir. 2022) (Whistleblower Protection Act, 5 USC 1221(g), only authorizes the MSPB, not the Federal Circuit, to award attorney fees in appeals from the Board; appellant filed an individual right of action appeal with the MSPB; the Board found that certain disclosures of the appellant were not protected under 5 USC 2302(b)(8) and dismissed his request for corrective action; the U.S. Court of Appeals, Federal Circuit reversed and remanded the decision; the appellant requested appellate attorney fees and costs under the Whistleblower Protection Act, 5 USC 1221(g)(3); in denying the appellant's application for appellate attorney fees and costs, the Federal Circuit strictly construed 5 USC 1221(g) and found that such statute only authorizes the Board to award attorney fees, not the Federal Circuit; please note the court's footnote, which provides that "We express no opinion as to whether Dr. Edenfield is entitled to an award of attorney fees from the Board for this appeal.").

B. *CARR* FACTORS

Bennett v. USDA, DE-1221-15-0461-W-1 (NP 11/21/2022) (the AJ erred in his analysis of *Carr* factor 3 by finding that "the appellant failed to provide credible evidence that the agency took similar actions against employees who were not whistleblowers but who were otherwise similarly situated"; the appellant worked as a GS-9 Air Tanker Base Manager; after he complained about the failure to install an arsenic water filter and other matters, he was informed that he would no longer be allowed to jump or to participate in smoke jumper refresher training; he filed an IRA; the AJ determined that he made protected disclosures concerning a violation of law, rule, or regulation or a substantial and specific danger to public health or safety and that the disclosures were a contributing factor but that the agency proved its defense by clear and convincing evidence; the Board affirmed the AJ's decision but clarified as to the AJ's analysis of *Carr* factor 3; the AJ noted that "In the initial decision, the administrative judge concluded that 'the appellant failed to provide credible evidence' that the agency took similar actions against employees who were not whistleblowers but who were otherwise similarly situated"; but as the Board noted, consistent with *Rickel*, "Nonetheless, the Board does not view the *Carr* factors as discrete elements, each of which the agency must prove

by clear and convincing evidence, but rather weighs the factors to determine whether the evidence is clear and convincing as a whole. *See Soto*, 2022 MSPB 6, ¶ 13. On the whole, we find that the strength of the agency's evidence in support of the action outweighs the very slight evidence of motive to retaliate on the part of the agency officials involved in the action and the dearth of evidence regarding how the agency treats similarly situated employees who were not whistleblowers. As such, we ultimately agree with the administrative judge's conclusion that the agency proved by clear and convincing evidence that it would have rescinded the appellant's base jumping collateral duties even in the absence of his disclosures.");

Delgado v. DOJ, 977 F.3d 1295 (7th Cir. 2020) (amending its July 16, 2020 decision in this matter, *Delgado v. MSPB*, 966 F.3d 556 (2020); the court set forth more detailed reasoning for finding that the agency failed to meet its rebuttal burden; the court applied the Federal Circuit's decision in *Whitmore v. Dept. of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), and weighed the evidence as a whole; in these individual right of action (IRA) appeals, the petitioner sought corrective action for retaliation based on alleged protected disclosures; the Board dismissed the first appeal for lack of jurisdiction, finding that the petitioner had not exhausted his administrative remedies; the Seventh Circuit found that the petitioner had proven exhaustion; the court therefore remanded the appeal to the Board for further adjudication; in remanding the appeal, the court also indicated that the petitioner's allegations to the Office of Special Counsel and the Board were sufficient to allege that he made protected disclosures regarding possible perjury by one of his coworkers; around the same time the Seventh Circuit issued its remand decision, the petitioner filed a second IRA appeal with the Board, alleging additional acts of retaliation for the same or similar disclosures alleged in the first appeal; after holding a consolidated hearing in the two pending appeals, the administrative judge issued separate initial decisions denying the petitioner's requests for corrective action in both cases; the administrative judge found that the petitioner's disclosures were a contributing factor in at least some of the challenged personnel actions; however, she found that the petitioner's disclosures were not protected because he did not have a reasonable belief that the coworker committed perjury; she therefore found that the appellant had not established a *prima facie* case of whistleblower reprisal; the petitioner sought review of both decisions; on review, the court vacated the Board's decisions in both appeals, found that the petitioner was entitled to corrective action, and remanded the appeal for further proceedings regarding the appropriate remedy; the agency filed a petition for panel rehearing; the court granted the agency's petition only as to its request for the court to correct an error and consider in more detail its arguments pertaining to its affirmative defense; the court denied the petition in all other respects; in this amended decision, the court expanded its analysis of the agency's clear and convincing burden, but still found that the petitioner was entitled to corrective action; the following holdings were largely unchanged from the court's July 16, 2020 opinion: a. The court determined that in light of its prior decision and the evidence submitted on remand, the Board was bound by the law of the case doctrine to find that the petitioner's disclosures of alleged perjury were protected. b. The court agreed with the administrative judge that the petitioner proved that his disclosures were a contributing factor in several nonselections; the court also found that, contrary to the administrative judge's findings, the petitioner established that his disclosures were a contributing factor in two additional nonselections; as before, the court found that the administrative judge did not address whether the agency met its burden to prove by clear and convincing evidence that it would have taken the same actions in the absence of the petitioner's disclosures; although the court normally would remand the case to the Board to consider that issue in the first instance, it determined that remand was not necessary because the record was fully developed and the agency failed as a matter of law to meet its burden; on this latter issue, the court amended its July 16, 2020 opinion and set forth more detailed reasoning for finding that the agency failed to meet its rebuttal burden; the court applied the Federal Circuit's decision in *Whitmore v. Dept. of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), and weighed the evidence as a whole; the court found ample evidence that members of the selection panels harbored animus towards the petitioner because of his disclosures and took decisive actions that prevented the petitioner's selection for several promotions; the court further found the agency's evidence to be "highly subjective" and "so inconsistent with the record that it could support a finding of pretext"; the court again "strongly urge[d]" the Board to assign a new administrative judge to the appeal on remand);

Eoff v. Dept. of Interior, DE-0752-17-0015-I-1 (NP 1/30/2023) (appellant, a research geologist was removed for failing to follow an instruction to limit her interaction with her former supervisor; she filed an IRA; Board AJ sustained the charge and the removal; AJ found that the appellant failed to prove by preponderant evidence that she made a protected disclosure under 5 USC 2302(b)(8) because she failed to explain in detail what wrongdoing she purportedly disclosed; as to a (b)(9) claim, Board set out elements but agrees with AJ that "In reaching his decision, the administrative judge found highly credible the proposing and deciding officials' testimony explicitly denying retaliation and providing compelling nonretaliatory reasons for removing the appellant. *Id*. The administrative

judge found that the officials involved in the removal action had little motive to retaliate against the appellant for her having grieved a letter of reprimand that did not involve them and occurred 1 years before her removal. *Id*. The administrative judge also found no evidence of retaliation in the actions that preceded the removal action, including the appellant's reprimand, reassignment, and instruction limiting her interaction her former supervisor. *Id*. We have considered the appellant's arguments on review challenging the administrative judge's weighing of evidence, and we conclude that the administrative judge's demeanor-based credibility findings deserve deference from the Board.");

Flynn v. MSPB and Dept. of Army (9th Cir. No. 17-70617 2019 NP) (circuit affirmed the Board's decision in this individual right of action (IRA) appeal that found that the agency proved by clear and convincing evidence that it would have taken the same personnel actions in the absence of the petitioner's protected disclosures; the court also dismissed the Board as a respondent, agreeing with the Board's position that it lacked jurisdiction, in the context of an IRA appeal, to consider the petitioner's claims that the agency took personnel actions against her in retaliation for filing an equal employment opportunity complaint);

Giachetti v. VA, DC-1221-19-0101-W-3 (NP 8/18/2023) (whistleblower reprisal, IRA, and protected disclosure (three of four disclosures not protected), mostly because they involved policy disputes; whistleblower reprisal and protected disclosure proven as to executive director violating fiscal and acquisition laws and the Federal Acquisitions Regulations by approving the ratification of unauthorized commitments; whistleblower reprisal, IRA, and *Carr* factors Board agreed with AJ as to a 2015 appraisal and concluded that "[t]he agency proved by clear and convincing evidence that it would have given the appellant the same performance appraisal rating in 2015 even in the absence of her protected disclosure"; the Board noted the first (*Carr*) factor "warrants significant weight, particularly given the detailed narrative provided for that year's performance appraisal. Moreover, by the appellant's own admission, nearly half of agency employees receive ratings lower than 'Outstanding,' and it is unrealistic to assume that those half are all whistleblowers, suggesting that other similarly situated employees who are not whistleblowers also received ratings below 'Outstanding.' Although the Executive Director may have had a motive to retaliate, we nonetheless find that the agency met its burden to show by clear and convincing evidence that the appellant would have received the same rating in her 2015 performance appraisal even in the absence of her disclosure."; however as to a 2016 performance appraisal, clear and convincing evidence not proven; agency failed to prove, by clear and convincing evidence, that it would have given her the same 2016 performance rating absent the appellant's protected disclosure alleging that her first-level supervisor unlawfully ratified unauthorized commitments; there was no evidence as to *Carr* factor 3 and therefore it was neutral; as to the other *Carr* factors, the Board noted "However, the agency's near-complete lack of evidence to support the appellant's 2016 performance appraisal is concerning. Additionally, the fact that the agency rated the appellant at a higher level just the year prior forecloses any hypothetical justification that the appellant's 2016 rating was consistent with prior ratings. Indeed, the appellant dropped a performance level in nearly every element from 2015 to 2016. The Board has held that, when an agency fails to provide any narrative evidence to support a performance rating and there is no reason to believe that the performance rating is consistent with other ratings, the agency fails to meet its burden to show by clear and convincing evidence that it would have given an appellant the same performance rating even in the absence of a protected disclosure. *See Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶¶ 35–38 (2013). This, combined with the Executive Director's potential motive to retaliate against the appellant, leads us to find that the agency failed to prove by clear and convincing evidence that it would have given the appellant the same performance rating in 2016 even in the absence of her protected disclosure."; appellant, a director of logistics, was previously employed by the Department of Veterans Affairs as the director of acquisition business service; during this previous employment, the appellant's first level and second-level supervisors were executive director of the Office of Acquisition Operations and the acting chief acquisition officer, respectively: the appellant filed an Office of Special Counsel complaint, alleging that the agency took personnel actions against her in reprisal for disclosures she had made about the executive director; OSC closed its file; the appellant filed an individual right of action appeal with the MSPB; she alleged that she disclosed: 1) that the executive director violated fiscal and acquisition laws and the Federal Acquisitions Regulations by approving the ratification of unauthorized commitments; 2) that the agency issued orders without proper review; 3) that the executive director and the director of strategic acquisition center provided false information in a Congressional inquiry response; and 4) the "unlawful approval of an improper acquisition"; the appellant claimed that in reprisal, the agency denied her a promotion in 2015, failed to select her for two positions in 2016, gave her low evaluations in 2015 and 2016, denied a grievance of her 2015 performance evaluation, denied her the chance to complete the Senior Executive Service Candidate Development Program, and subjected her to a hostile work environment; the administrative judge found that the appellant did not establish a

prima facie case of whistleblower reprisal; the appellant challenged the decision; the Board reversed the AJ's decision to find that the appellant established a *prima face* case of whistleblower reprisal and ordered corrective action as to the appellant's 2016 performance appraisal; the Board found that the appellant's disclosure about the unlawful ratification of the UCs is protected under 5 USC 2302(b)(8); certain agency actions, including the appellant's 2015 and 2016 performance evaluations, are personnel actions; the appellant's protected disclosure was a contributing factor to her 2015 and 2016 lower appraisals and significant change in working conditions; the agency showed clear and convincing evidence that it would have given the appellant the same 2015 performance rating and changed her working conditions absent the protected disclosure, considering the *Carr* factors; and the agency did not show that it would have given the appellant the same 2016 performance rating absent the protected disclosure, noting "the agency's near-complete lack of evidence" supporting such performance appraisal as "concerning.");

Ginsberg v. VA (Fed. Cir. No. 2022-1900 2023 NP) (petitioner was employed by the VA as a research health scientist in the research department of the Dorn VA Medical Center; concurrently, he was also appointed to a clinical psychologist-neuropsychologist position in the Transition and Management Service at the same medical center; the VA removed the petitioner from his clinical position for "(1) failure to enter patient progress notes into the Computerized Patient Reporting System and (2) failure to perform acceptable standard of practice. dr. Ginsberg appealed his removal to the Merit Systems Protection Board, asserting that (1) he had regularly made protected disclosures and complaints to the VA regarding issues with the credentialing and performance review standards and the reporting system; and (2) his removal was retaliation for his protected disclosures."; the Board denied his appeal; the petitioner filed an individual right of action appeal "to the Board under the Whistleblower Protection Act, asserting that the agency retaliated against him for (1) disclosing that the agency's credentialing and performance review standards for its clinical practice were improper; (2) filing a complaint with the Office of Special Counsel regarding removal from his Clinical Psychologist position; and (3) appealing to the Board, challenging the removal from his Clinical Psychologist position."; the Board found that the petitioner had established a *prima facie* case of whistleblower reprisal, but that the VA demonstrated by clear and convincing evidence that it would have taken the same actions even in the absence of protected disclosures and activity; the Federal Circuit affirmed the removal; the court found that substantial evidence supports the Board's findings on all three *Carr* factors that the VA would have removed the petitioner even in the absence of his protected disclosures and activity. (i.e., *Carr* factor 1: evidence supports the Board's finding that the "agency's evidence in support of the personnel actions was strong"; *Carr* factor 2: substantial evidence supports the Board's finding that "any motive to retaliate, if it existed here, was minimal"; and, *Carr* factor 3: "The Board found the third *Carr* factor neutral. The VA 'failed to present evidence of nonwhistleblower comparator employees,' asserting that there were no comparator employees. *Board Decision,* 2022 WL 1144886 (citation omitted). As the Board acknowledged, we stated in *Whitmore* that 'the absence of any evidence concerning *Carr* factor three may well cause the agency to fail to prove its case overall.' *Whitmore v. Dep't. of Labor,* 680 F.3d 1353 (Fed. Cir. 2012). But here, the agency presented testimony that "there have not been any individuals with suspended clinical privileges who are/were allowed to be a PI or Co-PI and access patients and [personal health information] data for the research project." Further, Dr. Ginsberg did not dispute the VA's assertion that there were 'no similarly situated doctors who lost their clinical privileges and their Veterans Affairs (VA) appointments.' *Board Decision,* 2022 WL 1144886. Thus, we conclude that the Board's finding that this factor is neutral is reasonable.");

Godby v. VA, CH-1221-21-0147-W-1 (NP 8/14/2023) (reprisal demonstrated as to nonselection; agency failed to prove by clear and convincing evidence that it would have taken the same action in the absence of the appellant's whistleblowing; "as the administrative judge observed, the agency made no attempt below to show by clear and convincing evidence that, in the absence of the appellant's whistleblowing, it still would not have selected him for the Operations Manager in 2017. Rather than acknowledge its burden of proof, the agency instead contended that the burden of proof was on the appellant to show that his qualifications were 'plainly superior' to that of the selectee. In effect, the agency waived its opportunity to rebut the appellant's *prima facie* case of retaliation."; this case involved an IRA claim, resulting from the appellant's nonselection for an Operations Manager position in 2017; as noted by the Board, the agency failed to provide evidence as to the *Carr* factors, arguing unsuccessfully that Title VII standards applied and that the burden of proof was on the appellant to show that his qualifications were "plainly superior" to that of the selectee; the AJ and Board disagreed);

Hiller v. DHS, 767 F. App'x 957 (Fed. Cir. 2019 NP) (the court affirmed the Board's decision in this individual right of action appeal; the court found that the administrative judge did not abuse his discretion by denying the petitioner's requested witnesses or by declining to postpone the hearing; on the merits, the court found that substantial

evidence supported the administrative judge's finding, based on the *Carr* factors, that the agency showed by clear and convincing evidence that it would have reassigned the petitioner even absent her whistleblowing activity);

Huang v. DHS, 844 F. App'x 942 (9th Cir. 2021 NP) (in this individual right of action appeal, the court affirmed the Board's decision that while the appellant established a *prima facie* case of reprisal based on the agency's perception of her as a whistleblower, the agency proved by clear and convincing evidence that it would have suspended her regardless of this perception; the appellant sought review in the Ninth Circuit Court of Appeals under the All Circuit Review Act; the court affirmed the Board's decision, finding: (1) the Board did not err in assessing the strength of the agency's evidence in support of the suspension; (2) the Board did not commit an error in finding insufficient evidence of retaliatory animus; (3) the third *Carr* factor played no role in the analysis because the agency did not set forth a similarly-situated comparator who was not a whistleblower but still received the same discipline; and (4) the Board's conclusion that the agency met its clear and convincing standard is supported by substantial evidence);

Ingram v. Dept. of Army, 776 F. App'x 687 (Fed. Cir. 2019 NP) (court affirmed the administrative judge's initial decision denying corrective action in this individual right of action (IRA) appeal, in which the appellant, a computer/systems engineer, argued that the agency retaliated against him for his protected whistleblowing activity by giving him unfairly low performance appraisals in 2014 and 2015 and by moving him from his position as a lead engineer to a non-lead engineer on a different project; the court found no error in the administrative judge's determinations that the appellant failed to show that his transfer to a different position constituted a covered personnel action under the Whistleblower Protection Act (WPA) and failed to show that his prior protected activity contributed to his 2014 performance appraisal; the court further found no error in the administrative judge's determination that the agency established by clear and convincing evidence that it would have issued the appellant the same 2015 performance appraisal in the absence of his prior protected activity);

Karnes v. DOJ, 2023 MSPB 12 (2023) (cat's paw analysis supported the knowledge; contributing factor element; AJ erred in *Carr* analysis but *Carr* factor 2, the strength and existence of a motive to retaliate on the part of the officials involved in the decision, strongly weighed against the agency and was sufficient to support a corrective action award; appellant disclosed to the agency's Sex Offenses Investigation Coordinator that her first-level supervisor improperly sold government property for scrap metal and used the money for a coffee and water fund, and had fabricated timecards by certifying that he was on duty during periods that he was absent without corresponding leave; the investigation coordinator contacted the Office of Special Counsel (OSC) on the appellant's behalf, and the appellant later filed an anonymous OSC complaint regarding the same matters; OSC contacted the agency; this resulted in an internal affairs investigation that determined that the district was divided between two factions of employees and recommended the reassignment of the appellant; after her directed reassignment she filed an OSC complaint alleging that she was reassigned in retaliation for her prior complaint to OSC disclosing wrongdoing by her supervisor; following OSC's close out, the appellant filed an IRA appeal and the AJ determined that she was entitled to corrective action; on review, the Board addressed two principal issues and while modifying the AJ's decision, the Board upheld the AJ's ruling; one appeal issue involved knowledge and contributing factor; while the Board found that the AJ erred in imputing actual knowledge to the appellant's supervisor, it found constructive knowledge based on a cat's paw analysis; also, the Board disagreed with the AJ's *Carr* analysis, determining that although the AJ improperly analyzed the first and third *Carr* factors, the second *Carr* factor, the strength and existence of a motive to retaliate on the part of the officials involved in the decision, strongly weighed against the agency; the AJ had incorrectly determined that *Carr* factor 1 cut in favor of the Agency; as to *Carr* factor 3, which the AJ concluded weighed in favor of the agency, the Board disagreed, finding that "Here, the agency failed to produce any comparator evidence, but it also has not identified whether any similarly situated non-whistleblower comparators exist, and there is no discussion in the record regarding the existence of potential comparators. Given the complete absence of evidence on the issue, we conclude that *Carr* factor 3 is removed from consideration and is a neutral factor."; the Board concluded that "After reweighing the *Carr* factors, we still agree with the administrative judge's finding that the agency failed to meet its burden of proving by clear and convincing evidence that it would have reassigned the appellant absent her protected activity. Although the agency may have had valid reasons for reassigning the appellant out of the district based on her role in contributing to a tense and toxic work environment, that fact is outweighed by the significant evidence that the reassignment decision was influenced by the appellant's first-level supervisor's retaliatory motive. For the above-stated reasons, the agency's petition for review is denied and the administrative judge's initial decision ordering corrective action is affirmed.");

Keys v. DHUD (Fed. Cir. No. 2021-2072 2022 NP) (in this IRA appeal, the circuit, applying *Carr,* agreed with the Board that even if the lying accusation was a protected disclosure that contributed to the reassignment, the agency

proved by clear and convincing evidence that it would have reassigned Mr. Keys even if the lying accusation had not been made; *Carr* factor 1 weighed in the agency's favor; there was strong evidence of HUD's reason for the reassignment—namely, a broad reorganization consolidating certain functions in the EEO of HUD—independent of the disclosure at issue; *Carr* factor 2, weighed in favor of the agency; there was insufficient evidence of a motive to retaliate; *Carr* factor 3, there was an absence of relevant comparator evidence);

Kreipke v. VA, CH-1221-15-0284-W-1 (NP 5/16/2023) (the agency did not establish by clear and convincing evidence that it would have taken the same personnel actions even if the doctor had not engaged in whistleblowing because the evidence in support was weak, a motive to retaliate existed, and similar actions taken against non-whistleblowers were not shown; appellant worked as a part-time health science specialist for the Veterans Administration and held a dual appointment as an assistant professor at Wayne State University; the appellant allegedly disclosed agency and university grant fraud; the appellant alleged that in reprisal for the disclosures, the agency and university charged the appellant with research misconduct, which resulted in the university terminating him and the Department of Veterans Affairs terminating his active Merit Review Award, allowing expiration of his appointment, prohibiting him from receipt of agency research funds for 10 years, and seeking retraction of two of his published articles; the appellant also alleged that the agency engaged in other actions in reprisal for grievances he filed; the appellant filed an individual right of action appeal with the MSPB; the administrative judge granted the appellant's request for corrective action and ordered interim relief of rescission of the temporary appointment termination and the Merit Review Award; the AJ found, among other things, that the appellant's disclosures and protected activities contributed to the personnel actions and the agency failed to show it would have taken the same personnel actions even if the disclosures had not been made; the agency filed a petition for review but did not challenge the findings that the appellant's protected disclosures were a contributing factor in the actions; the appellant requested dismissal of the petition for review, alleging the agency failed to comply with the interim relief order; the Board denied the petition for review and affirmed the AJ's decision except as modified to find that the AJ should not have ordered interim relief; in addressing the *Carr* factors, the Board found that the agency did not establish by clear and convincing evidence that it would have taken the same personnel actions even if the appellant had not engaged in whistleblowing because the evidence in support was weak (i.e., evidence supporting a determination that he had engaged in research misconduct in the form of intentional, knowing, and willful falsification of research publications, articles, and grant applications), a motive to retaliate existed, and similar actions taken against non-whistleblowers were not shown);

Kuriakose v. VA, 800 F. App'x 889 (Fed. Cir. 2020 NP) (court affirmed the administrative judge's initial decision denying the appellant's request for corrective action under the Whistleblower Protection Enhancement Act; 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; appellant alleged other retaliatory personnel actions, including hostile work environment and constructive removal, but she failed to make a *prima facie* case for these claims; specifically, the appellant failed to show that her working conditions rose to the level of a hostile work environment, and she failed to show that her resignation was involuntary);

Marcato v. USAID, 11 F.4th 781 (DC Cir. 2021) (exercising its jurisdiction under 5 USC 7703(b)(1)(B) to review challenges regarding the Board's disposition of whistleblower retaliation claims, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reviewed the employee's removal for misconduct; the agency removed the employee from her position as a management analyst in the Office of the Inspector General based on charges of disclosing sensitive information about an ongoing investigation, violating the agency's security policy and communications protocol (i.e., recording a meeting with her supervisors to discuss the new protocol on her cell phone, despite a USAID security policy barring the unauthorized use, in restricted workspace, of any device that can transmit audio or video), and making false statements; on appeal to the Board, the petitioner alleged whistleblower retaliation; the AJ sustained the removal, finding in relevant part that although the petitioner had established a *prima facie* case of retaliation, the agency had shown by clear and convincing evidence that it would have taken the same action in the absence of the petitioner's protected disclosures; the petitioner sought review of the Board's disposition of her retaliation claim before the D.C. Circuit; the circuit found that the agency met its burden to prove by clear and convincing evidence that it would have removed the petitioner in the absence of her protected disclosures; in determining whether the agency met its burden by clear and convincing evidence, the court considered the factors set forth in *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999); as to the first *Carr* factor,

"the strength of the agency's evidence in support of its personnel action," the court agreed with the administrative judge that the agency presented strong evidence that the petitioner engaged in the charged misconduct; as to the second *Carr* factor, "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision," the court agreed with the AJ that there was not evidence of a substantial retaliatory motive on the part of the relevant agency officials; as to the third *Carr* factor, whether the agency has taken "similar actions against employees who are not whistleblowers but who are otherwise similarly situated," the court agreed with the AJ that the evidence on that question weighed in favor of the agency; weighing the *Carr* factors together, the court agreed with the AJ's determination that the agency proved by clear and convincing evidence that it would have removed the petitioner in the absence of her protected disclosures);

McIntosh v. DOD, 53 F.4th 630 (Fed. Cir. 2022) (circuit agrees with Board and sustained the employee's removal for inappropriate conduct, failure to follow supervisory instructions, absences without leave, and lack of candor charges, and rejected the whistleblower reprisal affirmative defense, concluding that even absent the petitioner's grievances, the agency would have removed the petitioner; petitioner was employed as a program and budget analyst with the DOD Education Authority; she was a contracting officer's representative, with the responsibility for approving travel expenses for two contracts; agency indicated that after the petitioner was promoted, she repeatedly refused to provide her coworkers with contract information, as directed, and to approve invoices and that she filed grievances alleging violation of federal contracting rules; she was removed based on inappropriate conduct, failure to follow supervisory instructions, absences without leave, and lack of candor charges; as to the whistleblower reprisal affirmative defense, the circuit determined, in balancing the *Carr* factors, that the first factor "strongly" supported removal; the second factor was neutral, the Federal Circuit determined, because the deciding official had not been the subject of a grievance of the petitioner and had not interacted with the petitioner; the Federal Circuit removed the third factor from the analysis because no individuals that were similarly situated had been identified in support of the remaining appellate claims);

Murray v. Dept. of Army (Fed. Cir. No. 2021-1560 2021 NP) (under *Carr* factors—particularly *Carr* factor 1—agency proved by clear and convincing evidence that it would have taken the removal action even in the absence of protected activity; the appellant supervisor nurse was terminated during her probationary period for unprofessional conduct, (i.e., inappropriate, discourteous, and/or unprofessional behavior towards supervisors and coworkers, conduct which had caused disruption in the workplace and which had not improved after counseling); Board and circuit rejects whistleblower reprisal complaint, finding that under the *Carr* factors agency proved by clear and convincing evidence that it would have taken the removal action even in the absence of protected activity; both the circuit and the AJ determined that *Carr* factor 1—strength of the agency's case especially weighed in the agency's favor; the petitioner engaged in multiple hostile and unprofessional encounters with agency employees in public areas of the hospital; as to *Carr* factor 2, there were "only mild" or "only moderate" indications of retaliatory motive; there was no evidence of disparate treatment, as relevant under *Carr* factor 3);

Potter v. VA (Fed. Cir. No. 2021-1460 2021 NP) (Federal Circuit vacated in part the MSPB's denial of corrective action in the employee's IRA appeal; the court remanded the case to the Board for further consideration; in conducting its *Carr* analysis, the MSPB failed to consider certain evidence that may have detracted from its overall conclusion; in an earlier decision, *Potter v. VA,* 949 F.3d 1376 (Fed. Cir. 2020), the Federal Circuit vacated a portion of the MSPB's decision denying corrective action in the petitioner's IRA appeal because the Board relied on an erroneous finding—that Dr. Deering (who canceled the Chief Nurse IV vacancy in November 2015) did not know of the petitioner's email, which she alleged was a contributing factor to her nonselection for the position; the court remanded with instructions for the Board to consider whether, in view of the doctor's knowledge of the email, the employee presented evidence sufficient to satisfy the knowledge-timing test, or if the employee otherwise presented evidence sufficient to demonstrate a *prima facie* case of whistleblower reprisal, and if so, to consider whether the agency could meet its burden of showing that it would have taken the same personnel action regardless of the employee's protected disclosure; on remand, the AJ found that the email was a protected disclosure and that it was a contributing factor to the employee's nonselection; the AJ subsequently concluded that the first *Carr* factor weighed "heavily" in the agency's favor, that the second *Carr* factor weighed "modestly" in the employee's favor, and that the third *Carr* factor was neutral; as a result of its *Carr* analysis, the Board found that the agency demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure and denied corrective action; the Federal Circuit vacated the MSPB's remand decision in part and remanded for further proceedings; the court determined that in conducting its *Carr* analysis, the Board's decision failed to consider certain evidence that may have detracted from its overall conclusion; Dr. Deering had to testify before Congress about the

patient-care crisis at the Phoenix VA Health Care System, whereupon he was asked why he hadn't been fired; the doctor also had received death threats; the employee cited the doctor's testimony that he was "feeling frustrated because people were going to the [Inspector General]," and that he "just wished they would come to [him] and say here's what it is so we could tackle it together."; the court could not be assured this evidence was given the consideration and weight appropriate in a *Carr* analysis);

Rickel v. Dept. of Navy, 31 F.4th 1358 (Fed. Cir. 2022) (as to *Carr* factor 3, there is no obligation for the agency to "produce[ ] some evidence in support of *Carr* factor three" to meet its burden in removal cases where the Board finds that there is "some motivation to retaliate against the [removed] employee, and one or more [of the decision makers] has more than a 'weak' motive," as argued by the employee; the appellant worked as an assistant chief of training, who was removed for a failure to follow instructions over a several month period to update training records; the Board upheld the removal ("while the penalty the agency imposed was undoubtedly harsh, the primary basis for [Captain] Weiss's decision to impose the penalty of removal, [i.e., Mr. Rickel's] failure to demonstrate rehabilitative potential by acknowledging his misconduct, expressing contrition, or accepting any responsibility for his failure, [was] also well-supported by the record"); the Board had determined that while the appellant "had established that he had engaged in protected whistleblowing activity and that such activity was a contributing factor in the decision to remove him…the agency had proven 'by clear and convincing evidence that it would have removed [Mr. Rickel] even in the absence of his protected activity'"; on appeal to the Circuit the primary argument concerned *Carr* factor 3; as described by the circuit, "Mr. Rickel asserts that we 'should create a bright-line rule' requiring the agency to 'produce[ ] some evidence in support of *Carr* factor three' to meet its burden in removal cases where the Board finds that there is 'some motivation to retaliate against the [removed] employee, and one or more [of the decision makers] has more than a "weak" motive.'"; the circuit declined to do that and held that the agency had proven by clear and convincing evidence that it would have taken the removal action even in the absence of the protected disclosures; the court wrote, as follows: "While we have said that 'the Board cannot ignore record evidence relevant to the existence and strength of any motive to retaliate or the treatment of similar employees,' *Smith*, 930 F.3d at 1366, what Mr. Rickel requests—with his bright-line rule proposal—is that we enhance an agency's burden of production with respect to *Carr* factor three in all removal cases where *Carr* factor two nominally favors the employee. Mr. Rickel would have us review the Board's findings with respect to each *Carr* factor independently and then apply a different standard if the evidence for *Carr* factor two favors the employee and if there is no evidence pertinent to *Carr* factor three. But we have said that 'the absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis.' *Whitmore*, 680 F.3d at 1374; *see Ingram*, 777 F. App'x at 983–84 ('Though the absence of evidence regarding similarly situated employees cannot favor the government, "the absence of any evidence related to *Carr* factor three can effectively remove that factor from the analysis."' (citation omitted)). Because the agency need not prove every factor weighs in its favor, the absence of evidence related to *Carr* factor three is not fatal to the agency.");

Rutila v. Dept. of Transp., 801 F. App'x 745 (Fed. Cir. 2020 NP) (court affirmed the administrative judge's decision, which denied the appellant's request for corrective action in an individual right of action appeal; administrative judge found that the appellant failed to prove that he engaged in protected whistleblowing activity; she further found that, even if the appellant had met that burden, the agency proved that it would have taken the same removal action in the absence of that activity; although the appellant argued that the administrative judge erred by relying on 5 USC 2302(b)(9)(A)(i) rather than section 2302(b)(8), the court found it unnecessary to rule on this issue; the court noted that the Board has jurisdiction over individual right of action appeals under both sections and that the appellant did not show how he was prejudiced by the administrative judge's reliance on § 2302(b)(9); the court also found it unnecessary to rule on whether the appellant's activity was protected; instead, the court agreed with the administrative judge's alternative conclusion—that the agency proved by clear and convincing evidence that it would have removed the appellant in the absence of the alleged protected activity; the court found the appellant's remaining arguments unavailing, including ones concerning additional alleged disclosures, discovery, and the right to a hearing);

Schmitt v. VA, 2022 MSPB 40 (2022) (due process violation; failure to provide proposal and decision until one week before effective date; Section 2302(b)(9)(C) claim proven; Interim relief not appropriate in section 714 action; the agency removed the appellant chief financial officer for AWOL under Section 714; on appeal, the Board AJ found a due process violation because the agency failed to provide its proposal and decision until one week before effective date; the AJ also determined that the appellant had engaged in protected activity under 5 USC 2302(b)(9)(C) by reporting potential fraud to the agency's IG; contributing factor standard satisfied through the knowledge/timing test (the deciding official knew of the appellant's protected activity and the removal action occurred approximately

13 months after the appellant's protected activity) and agency failed to prove that it would have taken the same action anyway; on review, the Board agreed with the due process and affirmative defense findings but reversed the interim relief ruling, finding that section 714 did not allow interim relief); as to the *Carr* factors 1 and 2, the Board agreed with the AJ that "the strength of the evidence in support of the removal action weighed only slightly in the agency's favor, because some evidence in support of its removal action was strong but some other aspects of the evidence was weak. She next found that the agency had a significant motive to retaliate, noting that the record showed that when the appellant told his supervisor, the medical center director, that he disclosed potential fraud to the IG, she was not pleased and instructed him not to go to the IG in the future without alerting her first. The administrative judge concluded that, given the significant public scrutiny that the agency has been under, it was plausible that the medical center director would be frustrated that a senior-level employee, such as the appellant, would involve the IG without first notifying her. The agency has pointed to nothing on review causing us to question the administrative judge's sound findings regarding the first two *Carr* factors."; as to *Carr* factor 3, the Board wrote, as follows: "The agency does not have an affirmative burden to produce evidence concerning each and every *Carr* factor, including *Carr* factor three, but the absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis, and may well cause the agency to fail to prove its case overall. *Id*. The agency has presented no evidence that there were no similarly situated nonwhistleblowers. Thus, given the lack of evidence presented by the agency, we find that *Carr* factor three does not weigh in favor of the agency.");

Shibuya v. USDA, DE-1221-09-0295-B-1 (NP 3/31/2022) (whistleblower reprisal proven; in weighing the *Carr* factors, Board agrees with AJ that "the strength of the agency's evidence in support of the demotion action was undermined by the surrounding circumstances. Further, we have affirmed the administrative judge's finding that both the proposing and deciding officials had a strong motive to retaliate against the appellant. Regarding the third *Carr* factor, we find that the agency's failure to present evidence as to its treatment of similarly situated non-whistleblowers tends to weigh against it."; appellant was a GS-14 Branch Chief with the Forest Service; he was investigated for alleged misconduct concerning his advice to agency officials to destroy emails that he believed were potentially discoverable in future litigation; prior to the investigation, he had disclosed alleged misconduct by the agency's CFO to OSC; he was demoted for two charges of poor judgment related to the matter investigated; the Board later remanded, reversing the AJ's determination that the agency failed to prove the charges and directing the AJ to reweigh the evidence as to the whistleblower reprisal claim; in a remand decision, the AJ sustained the demotion penalty but concluded that the agency failed to show by clear and convincing evidence that it would have removed the appellant's supervisory duties, investigated him, relocated his office, and proposed his demotion in the absence of his protected disclosure; the Board on review denied the agency's petition for review, except as to a modification to find that the CFO was not similarly situated to the appellant for purposes of the *Carr* factors inquiry; in sustaining the AJ's Whistleblower reprisal finding, the Board wrote, "The agency argues that, contrary to the administrative judge's determination, it established by clear and convincing evidence that it would have demoted the appellant absent his protected disclosure because his misconduct was egregious and serious.… As discussed above, however, we find no basis to disturb the administrative judge's determination that the strength of the agency's evidence in support of the demotion action was undermined by the surrounding circumstances. Further, we have affirmed the administrative judge's finding that both the proposing and deciding officials had a strong motive to retaliate against the appellant. Regarding the third *Carr* factor, we find that the agency's failure to present evidence as to its treatment of similarly situated non-whistleblowers tends to weigh against it." [Note: Compare the *Schmitt* case above, where as to *Carr* factor 3 Board stated that "given the lack of evidence presented by the agency, we find that *Carr* factor three does not weigh in favor of the agency."];

Skrettas v. VA (Fed. Cir. No. 2022-2075 2023 NP) (*Carr* factors, particularly *Carr* factor 3, appropriately considered; no disparate treatment; corrective action denied; petitioner, a Department of Veterans Affairs registered respiratory therapist, submitted whistleblower complaints that alleged a lack of appropriate policies and procedures in the respiratory department and other things to agency management and the agency's inspector general in July 2017 and July 2018, respectively; in November 2018, the Office of the Medical Inspector toured a facility and later partially substantiated the complaints; in January 2019, the petitioner filed a complaint with the Office of Special Counsel, alleging whistleblower retaliation and later supplemented his case with additional alleged retaliatory actions; OSC closed the case, and the petitioner appealed to the MSPB; the petitioner alleged that the agency retaliated against him by suspending him for 10 days, removing him from providing clinical care and subsequently detailing him to the social work unit, and again removing him from clinical work and assigning him to the social work unit on June 15, 2018, June 25, 2018, and July 26, 2019, respectively; as to these three personnel actions, the AJ determined that the complaints were protected disclosures, the petitioner had made a *prima facie* case, but the agency would have