



U.S. OFFICE OF SPECIAL COUNSEL

Report of Prohibited Personnel Practices
OSC File Nos. MA-10-0764 (William Zwicharowski),
MA-10-1699 (Mary Ellen Spera), MA-10-3819 (James Parsons), and
MA-10-3820 (David Vance)

[REDACTED]

January 30, 2012*

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* This report was amended on March 14, 2012 to reflect new information that the U.S. Department of the Air Force provided to the U.S. Office of Special Counsel after January 30, 2012.

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REPORT OF PROHIBITED PERSONNEL PRACTICES

OSC CASE NOS. MA-10-0764, MA-10-1699, MA-10-3819, and MA-10-3820

I. INTRODUCTION

This Prohibited Personnel Practices Report (Report) contains the investigative findings in Office of Special Counsel (OSC)¹ File Nos. MA-10-0764, MA-10-1699, MA-10-3819, and MA-10-3820, filed by four employees of the Department of the Air Force (Air Force): William Zwicharowski, Mary Ellen Spera, James Parsons and David Vance, respectively. Messrs. Parsons, Vance and Zwicharowski and Ms. Spera (complainants) are employees at the Dover Air Force Base (AFB), Air Force Mortuary Affairs Operations (AFMAO) Port Mortuary (Port Mortuary). These complainants allege that Port Mortuary management retaliated against them between April 2009 and September 2010 for their actual or perceived whistleblowing and engagement in other protected activity. OSC's investigation uncovered strong evidence of retaliation warranting disciplinary action. These four prohibited personnel practice (PPP) retaliation cases stem, in part, from three OSC Disclosure Unit (Disclosure Unit) cases² regarding wrongdoing at the Port Mortuary.

Under 5 U.S.C. § 1213, in appropriate cases, the Special Counsel must refer such disclosures to the head of the involved agency. The agency head is then required to conduct an investigation and submit a written report on the investigative findings to the Special Counsel. In May and July of 2010, OSC referred three Disclosure Unit cases involving several allegations of wrongdoing to then-Secretary of Defense Robert M. Gates to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). These disclosures, made by Mr. Parsons, Ms. Spera and Mr. Zwicharowski, involved serious allegations concerning the improper handling, processing, and transport of human remains of deceased personnel and military dependents. The complainants also made several disclosures unrelated to the allegations referred by the Disclosure Unit.³

In addition to the work of the Disclosure Unit, pursuant to 5 U.S.C. §§ 1214 and 1215, OSC is charged with independently investigating PPP retaliation cases and, if warranted, seeking appropriate corrective and disciplinary action. This investigation concerns two types of PPPs: whistleblower retaliation (5 U.S.C. § 2302(b)(8)) and retaliation for cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, or for filing a grievance (5 U.S.C. § 2302(b)(9)) (collectively, protected activity).

¹ OSC investigates allegations of prohibited personnel practices and is authorized to seek corrective action from the Merit Systems Protection Board to remedy abuses of the merit system, and to initiate disciplinary action against civilian government officials who commit prohibited personnel practices. In establishing the OSC, Congress emphasized OSC's mandate to protect whistleblowers. S. Rep. 95-969, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2746.

² OSC File Nos. DI-10-2151, DI-10-2538, and DI-10-2734.

³ These disclosures included reports concerning: (1) Port Mortuary equipment improperly furnished to a private entity; (2) undocumented civilian remains designated for cremation without the proper medical examiner's release or cremation authorization from the family; (3) Privacy Act violations; and (4) 180 medical disposal portions not timely cremated and that lacked required releases and authorizations.

The Civil Service Reform Act of 1978 (CSRA) prohibits using a personnel action to retaliate against an employee because of the individual's disclosure of a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. As noted in a recent report of the Merit Systems Protection Board (MSPB or the Board),⁴ it is a merit system principle⁵ that all employees should maintain high standards of integrity, conduct, and concern for the public interest. Indeed, the complainants in this matter should be commended for their courage and persistence in disclosing gross mismanagement and malfeasance at the Port Mortuary.

While the Air Force has agreed to take appropriate corrective action to remedy the acts of retaliation discussed herein, the willful retaliation in this case warrants additional actions to discipline the wrongdoers and deter future retaliation. Managers or agency officials at every level must understand that they can be held accountable for committing prohibited personnel practices, especially reprisal for whistleblowing.

This Report addresses the four above-referenced PPP retaliation cases and summarizes OSC's investigative and legal findings in these cases. The Air Force has already imposed a measure of discipline related to the wrongdoing uncovered in the Disclosure Unit referrals. OSC provides this Report to assist the Air Force in determining whether further disciplinary action should be taken in this matter due to retaliation. OSC is not waiving any protections or privileges that may apply to the information included in this Report or the sources of that information.

Management at Port Mortuary knew of many of the complainants' numerous disclosures concerning potential violations of law, rule or regulation, gross mismanagement and a substantial and specific danger to public health. As detailed below, several of these disclosures resulted in official investigations, including an investigation of the Disclosure Unit cases referred by OSC to the Secretary of Defense, an investigation by the Air Force Office of Inspector General (OIG)⁶, an investigation by the Air Force Office of Special Investigations (AFOSI), and an AFMAO Port Mortuary Command Directed Investigation.

Based on the nature and substance of the disclosures, management had cause to believe that each of the complainants made one or more of the disclosures, or associated with the individual(s) who made one or more of the disclosures. In some instances, management had direct knowledge that the complainants had engaged in protected activity. During the pertinent time period, there were nine employees in the position of either Mortuary Specialist or Autopsy and Embalming Technician, including the complainants. Of those nine, the four complainants were the only ones who suffered any formal disciplinary actions during the relevant period. In several of those instances, AFMAO management did not investigate or discipline similarly situated employees. In nearly every instance, the action taken or proposed against the complainants was disproportionate to the employee's alleged infraction.

⁴ See *Blowing The Whistle: Barriers to Federal Employees Making Disclosures* (Nov. 2011), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475&application=ACROBAT>.

⁵The merit principles are nine basic standards governing the management of the executive branch workforce. The principles are part of the Civil Service Reform Act of 1978, and can be found at 5 U.S.C. § 2301(b).

⁶ For purposes of this Report, OIG will refer to both the Air Force OIG and the local Dover AFB OIG.

Notably, Air Force senior attorney [REDACTED] vehemently disagreed with management's taken and proposed personnel actions against Mr. Zwicharowski.⁷ [REDACTED] testified that it was clear to him that management "had it in" for Mr. Zwicharowski. He stated that management singled out Mr. Zwicharowski and imposed much more severe disciplinary action on him than his alleged infractions warranted. [REDACTED] questioned the motives of management and, in reviewing the proposed termination of Mr. Zwicharowski's employment, concluded in an August 27, 2010 memorandum, "when viewing the complete set of circumstances, it is almost certain that any reviewing authority would conclude any such discipline was reprisal/retaliation."

Similarly, the documentary and testimonial evidence reveals that management engaged in a campaign of retaliation against whistleblowers who disclosed management's malfeasance in operating the Port Mortuary. The evidence of retaliatory motive is especially strong, including: (1) Colonel Edmondson's expressed animus towards those going outside the chain of command, including his characterization of Mr. Zwicharowski as an "antagonist," an "agitator," and a "non-conformist"; (2) use of a retaliatory investigation as a means to find a basis to discipline a whistleblower and reliance on substandard, results-driven investigations that disregarded exculpatory evidence favoring the complainants; (3) close temporal proximity between many of the adverse actions and the protected activity, including actions taken within days of the protected activity; and (4) clear evidence that management singled out the complainants for extraordinary or unusually harsh disciplinary action.

There were three layers of management involved in most of the personnel actions discussed herein. Although their titles and roles have since changed, for all times pertinent to the events described in the Report, they are as follows: Quinton Randall Keel, then-AFMAO Port Mortuary Director; Trevor Dean, then-Deputy Director, AFMAO; and Colonel Robert G. Edmondson, then-Commander, AFMAO, the most senior subject official involved. OSC has concluded that disciplinary action is appropriate for each of these three officials. However, as they had varying levels of involvement, OSC analyzes each one's culpability separately in Section IV below. The evidence overwhelmingly indicates that Colonel Edmondson set the tone for retaliation and was the primary force behind the majority of the disciplinary actions taken or proposed.

Section II sets forth the relevant facts gathered in OSC's investigation. Section III provides a legal analysis of the alleged prohibited personnel practices in this matter. Section IV sets forth OSC's recommendations regarding the respective culpability of the three subject officials. Finally, Section V is the conclusion.

II. SUMMARY OF RELEVANT FACTS

A. Background

Colonel Edmonson was the AFMAO Commander from January 2009 until October 2010. During that time, his employees went outside the chain of command on numerous occasions to

⁷ [REDACTED] did not review any of the personnel actions taken or proposed against the other three complainants. Accordingly, only his conclusions with respect to the actions taken or proposed against Mr. Zwicharowski are included.

report what they perceived to be violations of law, rule or regulation, incidents of gross mismanagement and substantial and specific dangers to public health. The testimonial evidence makes clear that Colonel Edmondson disapproved of employees reporting problems outside the chain of command, and questioned the motives of those who did. Witness statements indicate that the workplace—which consisted of three Autopsy and Embalming Technicians and six embalmers, or Mortuary Specialists, including Mr. Zwicharowski, who was the Branch Chief⁸—was fractured with respect to relations with management. In particular, there was tension between those who aligned themselves with management and those who questioned management. There were a few, too, who stayed neutral. As detailed below, only the employees deemed to be oppositional to management suffered adverse personnel actions at times relevant to this Report.

Witness statements also indicate that the four complainants were perceived to be in the category of those who questioned management. Indeed, as detailed below, management was aware that Ms. Spera, Mr. Zwicharowski and Mr. Parsons all disagreed with or disputed various actions or lack of action by management. All four complainants also filed Disclosures of Information with OSC. Although OSC closed Mr. Vance’s disclosure matter and did not alert the Air Force to his OSC complaint prior to the disciplinary action taken against him, he had vocally disagreed with management’s decisions on a regular basis. Additionally, as described below, he alerted Mr. Zwicharowski to a Privacy Act violation about which Mr. Zwicharowski ultimately filed a complaint. Management learned of Mr. Vance’s communication to Mr. Zwicharowski on the Privacy Act violation. Accordingly, Mr. Vance contends that AFMAO Port Mortuary management perceived him as a whistleblower or associated him with the other actual whistleblowers in his department.

Colonel Edmondson, in his OSC interview, described Mr. Zwicharowski as an “antagonist,” a “non-conformist,” and an “agitator.” Colonel Edmondson added that he based that opinion on Mr. Keel and Mr. Dean’s statements to him, claiming that he, himself, had an amiable relationship himself with Mr. Zwicharowski. At all times relevant to this Report, Mr. Keel was Mr. Zwicharowski’s first level supervisor; Mr. Dean, who reported directly to Colonel Edmondson, was Mr. Zwicharowski’s second level supervisor and Mr. Keel’s first level supervisor.

Following the OIG investigation resulting from OSC’s referral of the complainants’ disclosures, the Department of the Air Force took significant corrective action to address the issues raised by the complainants and improve the accountability of remains. The Air Force also acknowledged that the OIG substantiated many of the complainants’ allegations of violations of law, rule or regulation and gross mismanagement.

B. Disclosures, Complaints and Adverse Actions

Given that these cases involve four separate complainants, numerous disclosures and many personnel actions, this section provides only the most significant facts relating to the reprisal allegations, arranged in approximate chronological order. Included in this section is a

⁸ On temporary rotations, deployed military service members would also work with the technicians and embalmers described here.

brief description of the disclosures the complainants made to the Disclosure Unit. For a more detailed discussion of these Disclosure Unit matters, we incorporate by reference OSC's November 8, 2011 Analysis of Disclosures, Agency Investigation and Reports, and Whistleblower Comments for OSC File Nos. DI-10-2151; DI-10-2538; and DI-10-2734.⁹

Prior to May 2009, none of the complainants had been subject to any formal disciplinary action. However, between May 2009 and September 2010, the complainants were the targets of many formal disciplinary actions. In contrast, the other five embalmers or technicians in the department who were not whistleblowers, perceived whistleblowers or associated with whistleblowers received no formal disciplinary action between May 2009 and September 2010.¹⁰

1. May 2009 Command Directed Investigation

On or about April 21, 2009, Ms. Spera reported to Mr. Dean and Mr. Zwicharowski that she discovered a portion of human remains was missing. The same day, she also reported this discovery to Army Liaisons [REDACTED] and [REDACTED]. [REDACTED] is the [REDACTED] and [REDACTED] is a Mortuary Specialist in the Army. Both are outside Ms. Spera's chain of command.

The next day, Ms. Spera memorialized the problem in an e-mail to both Mr. Dean and Mr. Zwicharowski. On April 23, 2009, Colonel Edmondson initiated a Command Directed Investigation (CDI) into the incident. During the course of the CDI, numerous employees at AFMAO Port Mortuary were interviewed, including Ms. Spera and Mr. Zwicharowski. Ms. Spera's testimony provided the pertinent facts regarding the missing portions incident. Mr. Zwicharowski testified to problems with the chain of custody of portions. He indicated that although he had previously made recommendations for a written policy to ensure proper transfer of remains from [REDACTED] custody to the Port Mortuary, no such written policy exists and there were not enough safeguards in place to ensure the protection of remains. The findings of the CDI were documented in a May 6, 2009 report. The report, including the testimony of Mr. Zwicharowski and Ms. Spera, was shared with Colonel Edmondson, Mr. Dean and Mr. Keel. Notably, the Air Force's May 2011 Report heavily cites both Ms. Spera and Mr. Zwicharowski's testimony from that May 6, 2009 CDI report.

2. July 2009 OIG Complaint

On or about July 17, 2009, Mr. Zwicharowski contacted the OIG with numerous concerns. He alleged that AFMAO leadership mismanaged the CDI and that he suffered retaliation for statements he made during the CDI. He advised the OIG that he believed he received an unjust letter of counseling. He also raised issues regarding safety, hiring practices and contracting practices at AFMAO, as well as an alleged lack of licensed mental health providers at AFMAO.

⁹ This report is available online at:

<http://www.osc.gov/FY2012/Scanned/10-04%20DI-10-2151,%20DI-10-2138%20and%20DI-10-2734/Analysis.pdf>

¹⁰ In addition to the absence of any formal discipline taken against the five other employees, there was only one instance of informal discipline—a January 14, 2010 verbal counseling of [REDACTED] for failing to conduct adequate quality assurance checks.

3. August 2009 OIG/AFOSI Complaint

On or about August 26, 2009, Ms. Spera notified Mr. Zwicharowski that Port Mortuary equipment was being loaded into a private funeral home van without proper authorization. Mr. Zwicharowski promptly contacted the OIG, who then put him in contact with the AFOSI. The AFOSI opened a formal investigation and asked Mr. Zwicharowski to use invisible ink to mark Port Mortuary equipment located in the back of the facility with the number "971." Although OSC's investigation uncovered no direct testimony that management knew of Mr. Zwicharowski's AFOSI complaint, there is evidence that someone at the Port Mortuary knew about the complaint. Specifically, Mr. Zwicharowski stated that in or around August 2009, after he had made the OIG complaint, he found a post-it note on his car window with the number "971" written on it – the number that the AFOSI asked Mr. Zwicharowski to use when marking Port Mortuary equipment in conjunction with its investigation.

4. September 2009 Disclosure Regarding Human Remains

On or about September 8, 2009, Ms. Spera informed her first-level supervisor, Mr. Zwicharowski, of undocumented civilian remains that she came across in the Port Mortuary refrigeration unit number 4 (Reefer 4) in the course of her duties. The remains did not have a Mortuary Operations Management System (MOMS) tracking number or other appropriate documentation. According to Ms. Spera, each set of remains or portion of remains stored in the Port Mortuary is required to have a MOMS number. In addition, civilian human remains designated for cremation must have a state medical examiner's release and a cremation authorization from the family. She stated that the remains in Reefer 4 did not have either a medical examiner's release or a valid cremation authorization.¹¹

Mr. Zwicharowski did not know why the civilian remains were at the Port Mortuary and told her to contact the Medical Examiner's office for more information. Ms. Spera then contacted [REDACTED] and [REDACTED]. Both were unfamiliar with the issue. While Ms. Spera was in his office, [REDACTED] called [REDACTED]. Ms. Spera stated that [REDACTED] had remembered hearing about a test cremation several months earlier but did not know any of the details. She described the conversation as tense, primarily because she was emotional during the call.

The following day, on September 9, 2009, Mr. Dean called Ms. Spera to his office to discuss the call to [REDACTED]. Mr. Keel was also present for the meeting. During the meeting, Mr. Dean told Ms. Spera that [REDACTED] had called him to discuss his phone call with Ms. Spera. Mr. Keel testified that Mr. Dean was "concerned" that Ms. Spera had called [REDACTED] and seemed "confused and perplexed" about her going outside the chain of command, as well as "slightly annoyed."

¹¹ The cremation authorization of the remains only authorized cremation in Maryland. The documentation did not include family authorization for the remains to be transported or cremated in Delaware or, more specifically, the Port Mortuary.

5. September 2009 Letter of Counseling (Ms. Spera)

On September 10, 2009, one day after Ms. Spera discussed the undocumented case of civilian remains with [REDACTED] Mr. Keel issued Ms. Spera a Letter of Counseling (LOC).¹² The LOC advised Ms. Spera that she was being disciplined for being “abusive and accusatory” during a phone call with [REDACTED] concerning remains that were not in his jurisdiction. The LOC went on to state that: (1) Ms. Spera denied calling [REDACTED] (2) [REDACTED] had already explained to Ms. Spera the reason the remains were in Reefer 4; and (3) the remains were clearly marked, and were listed and annotated in MOMS. The LOC concluded that Ms. Spera’s purpose for calling [REDACTED] was to malign AFMAO. In a September 10, 2009, Memorandum for the Record, Mr. Dean expanded on his perception of Ms. Spera’s motive, stating: “The only logical conclusion that can be reached as to Ms. Spera’s motives is that, fueled by her resentment of the new organizational structure, she willingly sought to malign the AFMAO by contacting an outside agency in hopes of creating cross organizational discord.”

The cited reasons for issuing Ms. Spera the September 10, 2009 LOC are not supported by the weight of the evidence. First, Ms. Spera did not deny calling or speaking with [REDACTED]. She explained that she contacted [REDACTED] who then called [REDACTED] from his office. Second, although Ms. Spera did speak briefly with [REDACTED] he did not provide Ms. Spera with information beyond the fact that another set of remains had arrived and they were going to cremate them the following day. [REDACTED] did not explain the reason that the remains were being stored in Reefer 4, or that the remains were to be used for the crematory certification process. Finally, Ms. Spera, who was responsible for inventory and tracking, stated that the remains she observed did not have a MOMS number. The testimony of Mr. Dean, Mr. Keel, and Colonel Edmondson conflicts as to whether the remains were given MOMS numbers.

The weight of the evidence indicates that Mr. Dean directed Mr. Keel to discipline Ms. Spera for her call to [REDACTED]. Mr. Dean testified that he was “surprised” and “upset” that Ms. Spera discussed the issue with [REDACTED] before first speaking with him, and that her decision to go outside her chain of command may have further strained the Port Mortuary’s relationship with the Medical Examiner’s Office. He further testified that he was extensively involved in the crematory certification process. He admitted that the civilian remains did not have inherent eligibility for cremation at the Port Mortuary, but claimed that he received legal advice that approved the process under a theory of “mutual benefit.” Although Mr. Keel issued the LOC to Ms. Spera, he was only peripherally involved with the crematory certification process and was not an active participant in the meeting with Ms. Spera concerning the call to [REDACTED].

6. September 2009 Non-Selection (Ms. Spera)

Ms. Spera was initially hired at the Port Mortuary under a term-limited appointment. In or around September 2009, her term appointment was reclassified as a permanent position. Ms. Spera had initially been named as a “fill request,” meaning that if she made the certificate of

¹² The Report includes adverse employment actions here that may not rise individually to the statutory level of personnel action, but were taken against the complainants shortly after a disclosure was made and provide additional evidence of a pattern of retaliation.

eligibles,¹³ she would be placed in the position. However, on September 11, 2009, just two days after her disclosure to [REDACTED] Mr. Keel sent an e-mail to [REDACTED] requesting that Ms. Spera be removed as a “fill request” for the permanent position to which she had applied. On September 24, 2009, Mr. Keel prepared a memorandum for the record stating “...we have determined that [Ms. Spera] is not a suitable candidate for permanent employment.”¹⁴

Mr. Keel testified that Ms. Spera’s conversation with [REDACTED] was a factor in the decision to not select her for a permanent position at the Port Mortuary. Mr. Keel additionally stated that he believed that Ms. Spera had performance issues but, when asked for specifics, was unable to identify any. He testified that Mr. Dean informed him of the alleged performance issues but, to his knowledge, there was no documentation concerning poor performance or misconduct. Ms. Spera had, in fact, previously received excellent performance evaluations.

Although Mr. Keel removed Ms. Spera as a “fill request,” he testified that he was too new of a manager to make this determination and that the action was taken at the direction of Mr. Dean or Colonel Edmondson. Colonel Edmondson testified that he was aware of the action; however the evidence does not show that Colonel Edmondson was involved with the decision. Rather, the evidence indicates that Mr. Dean directed that Ms. Spera be denied the position because Ms. Spera went outside the chain of command to voice her concerns about the cremation of civilian human remains at the Port Mortuary. In a September 17, 2009, e-mail to Mr. Keel regarding Ms. Spera’s non-selection for the permanent position, Mr. Dean stated, “[u]nfortunately, it went beyond speaking her mind, and while she clearly had an avenue for that she chose to circumvent the process.”

7. November 2009 Five-Day Suspension (Mr. Zwicharowski)

On November 6, 2009, Mr. Zwicharowski requested overtime approval for himself and his employees to assist with the anticipated surge of remains from the November 5, 2009, mass casualty shootings at the Ft. Hood military installation. Mr. Keel approved the overtime request for all of Mr. Zwicharowski’s staff other than Ms. Spera and Mr. Zwicharowski. Mr. Keel claimed that he had denied Mr. Zwicharowski and Ms. Spera’s overtime requests because they worked the previous weekend, and he “thought they needed some time off.” Many of the other employees under Mr. Zwicharowski’s supervision also worked the previous weekend, however, and were given permission to work overtime on November 7, 2009. Several witnesses testified that, typically, the Mortuary Branch Chief, i.e., supervisory embalmer, would be present during a mass casualty. However, Mr. Keel denied this and stated there was nothing unusual about Mr. Zwicharowski’s absence. Instead of permitting Mr. Zwicharowski to work overtime, Mr. Keel asked [REDACTED] to work on November 7, 2009.

¹³ A certificate of eligibles is a list of all the applicants for appointment or promotion who meet the minimum qualification requirements, ranked according to applicable regulations and referred for appointment or promotion consideration. 5 C.F.R. § 332.

¹⁴ Ms. Spera’s Veteran’s Preference ultimately prevented management from bypassing her for the position and she was placed in the position.

██████████ testified that Mr. Keel asked him to work that day presumably because Mr. Keel was short-staffed.

Nonetheless, on November 7, Mr. Zwicharowski went to the Port Mortuary for one hour, intending to work without pay in order to assist the newly hired embalmers during the stressful mass casualty. As their supervisor, he felt it appropriate to assist in any way that he could. In addition, Mr. Zwicharowski stated that it was typical for employees who were not scheduled to work to assist with mass casualties at the Port Mortuary. Mr. Keel testified that when he learned of Mr. Zwicharowski's presence at the Port Mortuary, he asked him to leave three or four times and that his orders were clear. However, Mr. Zwicharowski did not find Mr. Keel's directions to be clear. According to Mr. Zwicharowski, Mr. Keel initially asked Mr. Zwicharowski what he was doing there, and Mr. Zwicharowski told him that he had a free hour while his son was at basketball practice. Mr. Keel told him that he was not needed. Mr. Zwicharowski explained that he wanted to be there, that he was not seeking compensation for his work, and that he was happy to help. Mr. Keel then told him that he should go home and spend the day with his family. Mr. Zwicharowski again said that he would just be there for an hour while his son was at practice. At that point, Mr. Keel told Mr. Zwicharowski that if he did not leave immediately, he would call Dover AFB security forces and have him forcibly removed. When Mr. Zwicharowski received this clear instruction, he left.

Although Mr. Zwicharowski did leave the premises on his own, security forces were nonetheless called. Colonel Edmondson testified that ██████████ told him that Mr. Zwicharowski was acting erratically. However, numerous witnesses testified that Mr. Zwicharowski was extremely helpful that day and did not behave in an erratic or inappropriate manner. ██████████ who was present for the incident, testified that, in his opinion, calling security was not necessary. In addition to calling security forces, someone had placed a photo of Mr. Zwicharowski with the words "mentally unstable" at the Dover AFB entrance gate. Due to this photo, Mr. Zwicharowski was unable to enter the premises until an official in the OIG office intervened. Although none of the witnesses OSC interviewed admitted to directing that this photo be placed at the entrance gate, Mr. Keel testified that Colonel Edmondson wanted to make sure that Mr. Zwicharowski did not come in over the weekend because of "the sensitive nature of the Fort Hood shootings." Colonel Edmondson and Mr. Keel denied contacting security forces.

As documented in a Memorandum for Record prepared by Mr. Keel, dated November 7, 2009 (November 7, 2009 MFR),¹⁵ Mr. Keel called Mr. Zwicharowski on the night of the incident and advised him that he was disappointed in Mr. Zwicharowski's actions. Mr. Keel further advised Mr. Zwicharowski that he "was not to return to the facility until his regularly scheduled hours on Monday morning and that he would be restricted from operational areas until further notice." Mr. Keel also advised him that he was going to take over the direct supervision of all division civilian personnel—employees whom Mr. Zwicharowski had supervised until that point. The November 7, 2009 MFR further states that Mr. Keel met with Mr. Zwicharowski on Monday, November 9, 2009, and reiterated what he had communicated over the telephone the

¹⁵ Although the memorandum is dated November 7, 2009, it describes events from November 9, 2009 and thus appears to have been finalized on or after November 9, 2009.

night of November 7, 2009. Additionally, he advised Mr. Zwicharowski that he was considering disciplinary action.

On or around November 17, 2009, Mr. Keel issued Mr. Zwicharowski a Notice of Proposal to Suspend for Five Calendar Days (Suspension Proposal). Although Mr. Keel signed the Suspension Proposal, Mr. Keel testified that he was not very involved in the decision; rather, it came from Colonel Edmondson and Mr. Dean.¹⁶ However, Mr. Dean testified that although he was the “appeal authority,” the decision to propose the suspension was made by either Colonel Edmondson or Mr. Keel and not by Mr. Dean. The Suspension Proposal was based on alleged insubordination, namely, Mr. Zwicharowski’s alleged refusal to leave the Port Mortuary on November 7, 2009, at Mr. Keel’s request. Mr. Dean issued Mr. Zwicharowski a Notice of Decision to Suspend for Five Days (Suspension Decision) on December 29, 2009.

8. November 2009 Significant Change in Duties (Mr. Zwicharowski)

On or about November 18, 2009, the day after issuing the Suspension Proposal, management detailed Mr. Zwicharowski for one year to a special project under the supervision of [REDACTED]. The special project involved a Chairman of the Joint Chiefs of Staff (CJCS) initiative for DNA Family Reference Sample that was being handled by the AFMAO Mortuary Affairs, Past Conflict Contingency Response Branch (Past Conflict Branch). This assignment required Mr. Zwicharowski to perform primarily administrative office work rather than embalming and restoration work. In addition, Mr. Zwicharowski was denied access to the Port Mortuary area.

[REDACTED] testified that he was not involved in the decision to place Mr. Zwicharowski on this detail. He stated that Mr. Dean signed a November 19, 2009 memorandum placing Mr. Zwicharowski on the detail, and that [REDACTED] did not know the basis for the decision. Mr. Dean testified that he, along with other members of management, including Colonel Edmondson and Mr. Keel, was involved with the decision to place Mr. Zwicharowski on the detail, but he did not recall precisely who made the decision. However, he did recall that Colonel Edmondson directed him to “work through” the detail. He further stated that he was not involved with the decision to deny Mr. Zwicharowski access to the Port Mortuary. He testified that Colonel Edmondson would have made the decision to deny Mr. Zwicharowski’s access to the Port Mortuary.

Mr. Keel denied involvement in the decision to place Mr. Zwicharowski on a detail. He also denied making the decision to restrict Mr. Zwicharowski’s access to the Port Mortuary. However, in the November 7, 2009 MFR, Mr. Keel expresses his disappointment in Mr. Zwicharowski’s conduct and restricts his access to the facility indefinitely, indicating greater involvement in the decision than his testimony provides. A November 18, 2009, e-mail chain between Colonel Edmondson and Mr. Dean shows that Colonel Edmondson was significantly involved with the decision to place Mr. Zwicharowski on the detail.

Mr. Dean testified that Mr. Zwicharowski was placed on this detail because it was a project for which Mr. Zwicharowski had the skills. This explanation appears to be pretextual, as

¹⁶ Mr. Keel testified that he was not involved in the Suspension Proposal “because he was tied up with a lot of other things” and that “Mr. Zwicharowski wasn’t [his] sole reason for coming to work each day.”

it does not fully explain the basis for placing Mr. Zwicharowski, a Branch Chief, into a non-supervisory position which could be performed by an employee with far less experience. Additionally, the position involved primarily administrative work and did not require embalming or restoration expertise, which is the experience that Mr. Zwicharowski offered. Moreover, this explanation does not adequately explain the reason for restricting Mr. Zwicharowski's access to the Port Mortuary. According to Mr. Zwicharowski, restricting his access to the Port Mortuary was an unnecessary and unprecedented measure.

9. January 2010 Union Grievance (Mr. Zwicharowski)

On January 18, 2010, Mr. Zwicharowski filed a formal grievance over the five-day suspension he had received for alleged insubordination. In the grievance, Mr. Zwicharowski notes that he made disclosures to the OIG in August 2009 and argues that the five-day suspension was in reprisal for those disclosures, as well as for testimony he provided in May 2009 in connection with the CDI. Notwithstanding this direct notice of Mr. Zwicharowski's OIG disclosures, in his OSC interview, Colonel Edmondson denied knowing that Mr. Zwicharowski had complained to the OIG, claiming that he did not believe Mr. Zwicharowski's assertion about having gone to the OIG. In fact, in response to the reprisal allegations in Mr. Zwicharowski's grievance, Colonel Edmondson testified that he had initiated an inquiry to determine whether Mr. Zwicharowski actually had filed a complaint with the OIG.

10. March 2010 Complaint of Privacy Act Violation (Mr. Zwicharowski)

On or about February 19, 2010, Mr. Vance notified Mr. Zwicharowski that Mr. Zwicharowski's personally identifiable information (PII), including disciplinary action records and his social security number, were accessible on the AFMAO shared drive. Upon hearing this information, Mr. Zwicharowski searched for and located his PII in a folder assigned to Mr. Dean on the shared drive. Mr. Zwicharowski then contacted the OIG. The OIG recommended filing a complaint with the 436th Communications Squadron. Upon receiving this advice, Mr. Zwicharowski prepared and submitted a complaint to the 436th Communications Squadron, requesting that his identity be kept confidential, and downloaded the file containing his PII as evidence for his complaint.

On or around March 5, 2010, Colonel Edmondson learned of the anonymous complaint and notified ██████████ of a potential Privacy Act violation. ██████████ testified that, following this conversation, he locked access to the AFMAO folders and reviewed each folder to determine who had permission to access the various folders. During this investigation, he found that, due to an IT oversight, the "AFMAO users group was in the server's users group." As a result, many unauthorized people had access to Mr. Dean's folder, which was located on the AFMAO shared drive. ██████████ further testified that once it was determined that the violation involved Mr. Dean's folder, Colonel Edmondson directed a review of the information that was compromised. Colonel Edmondson testified that the review of Mr. Dean's folder found that the information of nine individuals was compromised. He stated that he ordered a search of those individuals' computers to determine whether any information was further compromised. He testified that he learned that Mr. Zwicharowski had copied Mr. Dean's folder onto his computer hard drive.

Colonel Edmondson testified that he did not know it was Mr. Zwicharowski who had filed the complaint with the 436th Communications Squadron. However, [REDACTED] testified that Colonel Edmondson likely identified Mr. Zwicharowski by process of elimination. He testified that Colonel Edmondson questioned why Mr. Zwicharowski did not come to him or [REDACTED] first, and instead went outside his chain of command to file a complaint.

11. March 2010—November 2011 Administrative Leave (Mr. Zwicharowski)

On or around March 11, 2010, just over a week after Mr. Zwicharowski made his complaint to the 436th Communications Squadron about a Privacy Act violation, [REDACTED] testified that he placed Mr. Zwicharowski on indefinite Administrative Leave at Colonel Edmondson's direction.¹⁷

Colonel Edmondson placed Mr. Zwicharowski on indefinite Administrative Leave upon receiving notification that a copy of Mr. Dean's folder was on Mr. Zwicharowski's computer. After placing Mr. Zwicharowski on Administrative Leave, Colonel Edmondson commenced an investigation into whether Mr. Zwicharowski himself had violated the Privacy Act. He first directed [REDACTED] to seize Mr. Zwicharowski's computer. He then directed that a forensic analysis be performed on Mr. Zwicharowski's hard drive. Colonel Edmondson testified that, because no other groups were available, he worked with the Air Force Network Warfare Squadron in San Antonio, Texas. He ordered that an employee fly the hard drive to San Antonio for the forensic analysis to be performed.

[REDACTED] tasked with performing the forensic analysis, testified that the AFMAO managers believed that an employee had downloaded software to circumvent security measures, i.e., that an employee had illegally accessed restricted information located on the shared drive. He testified that they specifically wanted to know if the individual downloaded the information and whether he sent it anywhere.¹⁸ [REDACTED] testified that this was such an unusual request, he contacted the legal office and AFOSI before proceeding. Air Force Legal Operations (AFLO), [REDACTED] Senior Litigation Attorney [REDACTED] testified that the degree of intensive forensic analysis performed on Mr. Zwicharowski's hard drive is reserved for allegations of serious criminal activity such as espionage or child pornography, not for a mundane workplace Privacy Act violation allegation or any of the other infractions alleged here. [REDACTED] testified that Colonel Edmondson likely had to "call in some favors or something" to have this kind of testing performed for such a minor matter.

[REDACTED] testified that his analysis found that permissions were not assigned to Mr. Dean's folder on the shared drive, so the files were not properly protected and Mr. Zwicharowski had not done anything out of the ordinary to access them. He further testified that there was no evidence that Mr. Zwicharowski burned any information to a disk or placed the information on a thumb drive. He found that Mr. Zwicharowski had access to Mr. Dean's

¹⁷ Although the Memorandum documenting the Administrative Leave is dated March 12, 2010, [REDACTED] testified that Mr. Zwicharowski was advised via telephone on March 11, 2010, that he was being placed on Administrative Leave effective immediately.

¹⁸ [REDACTED] testified that he communicated with [REDACTED] and [REDACTED]. He did not know who ordered the search.

folders, which had information unrelated to Mr. Zwicharowski. He testified that “[f]here was only one instance of Mr. Zwicharowski looking at something that wasn’t his.” [REDACTED] submitted a report of his findings to AFMAO management on or around March 31, 2010. [REDACTED] further testified that once AFMAO management received his report showing that the information was not copied to a disk or a thumb drive, the focus of the investigation shifted to whether Mr. Zwicharowski and other individuals accessed certain files. [REDACTED] testified that management wanted to determine whether disciplinary action could be taken against Mr. Zwicharowski, and that the basis for the actions was possibly in retaliation for Mr. Zwicharowski’s filing of the complaint with the 436th Communications Squadron.

In addition to searching Mr. Zwicharowski’s computer for potential unlawful activity, AFMAO management used the opportunity to gather evidence and information concerning other issues. For example, on April 2, 2010, [REDACTED] sent an e-mail to [REDACTED] asking him (1) to find out the name of the individual who alerted Mr. Zwicharowski to the privacy breach; and (2) to provide all communications Mr. Zwicharowski had with a third party concerning Mr. Zwicharowski presenting at a conference. Later that day, [REDACTED] advised [REDACTED] that Mr. Vance had informed Mr. Zwicharowski via e-mail that Mr. Zwicharowski’s personal information was on the shared drive. [REDACTED] forwarded the information to Colonel Edmondson and Mr. Dean, with a copy to [REDACTED] and [REDACTED]. The search also produced one or more e-mails exchanged between Mr. Zwicharowski and his friends outside of AFMAO Port Mortuary, wherein Mr. Zwicharowski expressed negative opinions of his supervisor.

Colonel Edmondson testified that he directed Mr. Zwicharowski to be placed on Administrative Leave upon advice of Air Force, District of Washington (AFDW) and counsel. [REDACTED] AFDW Supervisory HR Specialist, testified that Administrative Leave was presented as an option after consultation with AFMAO management. She further stated that the basis for the action was a “lack of trust.” She believed, in part, that disciplinary action was proposed against Mr. Zwicharowski because he did not first report the privacy issues to AFMAO management, and because he viewed information to which he should not have had access. She explained that her advice was based on AFMAO management’s representation of the facts.

Mr. Zwicharowski was not given a reason for being placed on Administrative Leave. Rather, he was simply told to call [REDACTED] each morning that he would normally be scheduled to work and to be prepared to report back to work at any time. In addition to the general distress caused by involuntary placement on indefinite Administrative Leave, this action posed a real hardship for Mr. Zwicharowski, as he was effectively always on call. Mr. Zwicharowski remained on Administrative Leave until November 3, 2010, a period of over eight months. [REDACTED] testified that he was not involved in the decision and was surprised that Mr. Zwicharowski was placed on such a long period of Administrative Leave. [REDACTED] further testified that he had no knowledge of Mr. Zwicharowski’s engagement in protected activity.

12. April 2010 Disclosure to Union Concerning Failure to Timely Cremate (Ms. Spera)

On or about December 30, 2009, Mr. Keel instructed Ms. Spera to prepare approximately 180 medical disposal portions for cremation. The following day, with the understanding that the portions would be cremated within the week, Ms. Spera packaged each portion in plastic bags

and placed them in a cardboard cremation container. The remains were prepared in accordance with the Port Mortuary's Standard Operating Procedures (SOPs) drafted by Mr. Keel. Once she completed the preparation of the portions, Ms. Spera provided Mr. Keel with paperwork to be processed prior to cremation. Because the portions could be traced back to multiple deceased service members, there were approximately 43 separate Armed Forces Medical Examiner releases associated with the 180 portions packed in the container. As the Crematory Officer, Mr. Keel was responsible for processing [REDACTED] releases and entering authorizations and other data into MOMS.

When Ms. Spera returned to work two to three days later, she found the 43 unsigned Medical Examiner releases at her workstation. Mr. Keel told her that he was waiting for a "master" MOMS number to be created so that the portions could be cremated under a single tracking number rather than under 43 separate Medical Examiner releases.

Over the next three months, Ms. Spera sent Mr. Keel several e-mails reminding him that the portions he had asked her to prepare were still awaiting cremation. Mr. Keel did not respond to these e-mails. Ms. Spera also verbally informed Mr. Keel at least two times that the portions needed to be cremated. Because the portions were not timely cremated, the cardboard container holding the portions leaked onto the floor. Ms. Spera cleaned the blood from the floor on several occasions. There is witness testimony that the container would not have leaked were it not for the delay of the cremation of the portions.

On April 9, 2010, Ms. Spera verbally complained to her union about Mr. Keel's failure to timely cremate the medical disposal portions that she had prepared four months earlier. Three days later, on April 12, 2010, Ms. Spera submitted a written complaint to the union. In her written complaint she raised three issues: (1) portions she had prepared for cremation in December 2009 had still not been cremated and were leaking on the floor of Reefer 4; (2) human remains were being improperly stored; and (3) she faced reprisal for questioning why mortuary benefits were being extended to persons not entitled to such benefits.¹⁹

Later that day, [REDACTED] e-mailed [REDACTED] concerning Ms. Spera's complaint. [REDACTED] testified that she took these issues very seriously. Shortly after receiving the e-mail, she forwarded it to [REDACTED] and spoke with her by telephone concerning the issues raised regarding the Port Mortuary. On April 13, 2010, [REDACTED] e-mailed [REDACTED] SES AF/A1, Colonel Edmondson's second-level supervisor, for an update on issues at the Port Mortuary. She stated that she was particularly concerned about the retaliation allegation and reported the issues to the OIG.

Colonel Edmondson testified that his supervisor, [REDACTED] informed him of the union complaint on or about April 13, 2010. He stated that, when he first learned of the complaint, he

¹⁹ Here, Ms. Spera was referring to her non-selection for the permanent Mortuary Specialist position following her September 2009 call to [REDACTED] discussed, *supra*.

was concerned that the issues had been elevated. He asserted that his response to the complaint was, "why aren't these issues vetted at a lower level?" Further, in a portion of an August 9, 2010 e-mail that was produced to OSC by the Air Force (the August 9, 2010 e-mail),²⁰ Colonel Edmondson wrote: "Let me start by making a couple points about how this was reported. 1. This issue was never reported to AFMAO Management. 2. This issue was shared with the Union."

Shortly after receiving the complaint, Colonel Edmondson communicated with Mr. Dean and Mr. Keel. He testified that he directed his staff to investigate the issues raised in the complaint and report back to him. He specifically tasked Mr. Keel with investigating the allegation that portions prepared for cremation in December 2009 had still not been cremated and were leaking onto the floor of Reefer 4.

Mr. Dean and Mr. Keel each testified that they did not know who submitted the union complaint. However, they knew that Ms. Spera was responsible for portions management and that one of her primary duties was to package and prepare portions for cremation. Mr. Keel testified that another employee would handle these duties only if Ms. Spera were on leave. Mr. Keel further stated that Ms. Spera did not take an unusual amount of leave. Moreover, Colonel Edmondson and Mr. Keel testified that they believed only Ms. Spera accessed Reefer 4. Accordingly, it would seem that Ms. Spera would have been one of the few individuals, if not the only one, to be in a position to have made this complaint. Indeed, in a June 11, 2010 memorandum with the subject, "Deliberation of Response to Notice of Proposed Reprimand," Mr. Keel wrote, "[t]o my knowledge, Ms. Spera was the only individual aware to [sic] the situation [of the leakage] yet failed to report it." When questioned whether he assumed that Ms. Spera had made the complaint, Colonel Edmondson acknowledged that, knowing the facts given her job duties, one would conclude Ms. Spera made the complaint.²¹

13. April 2010 Significant Change in Duties and May 2010 Letter of Reprimand (Ms. Spera)

Mr. Keel removed Ms. Spera's duties regarding portions management and shipping and departures duties within several weeks of the April 2010 union complaint, citing as the basis the very incident that Ms. Spera reported in the union complaint. Although Colonel Edmondson, Mr. Dean and Mr. Keel denied knowing that Ms. Spera made the complaint, as discussed, *supra*, Ms. Spera was the most likely suspect, given her job duties. Colonel Edmondson testified that he approved of this decision and, although he initially testified that the decision was Mr. Keel's, he later acknowledged that he made the decision to remove Ms. Spera's management and shipping duties because he had lost confidence in her ability to hold those additional responsibilities. Ms. Spera was left only with embalming duties.

²⁰ This e-mail, printed out from [REDACTED] computer, appears to be from Colonel Edmondson, but has "unknown" in both the "To" and "From" fields. Colonel Edmondson admitted during his OSC interview to having written the e-mail, but he stated that the document was incomplete.

²¹ Although management did believe Ms. Spera was the only employee who regularly accessed Reefers 4, and thus likely concluded that she had made the union complaint, there actually is witness testimony that other employees regularly entered Reefer 4 every few weeks. There is also witness testimony that clean-up duties are shared among Port Mortuary employees, and that any employee who noticed blood on the floor would be responsible for cleaning it.

On May 6, 2010, Mr. Keel issued Ms. Spera a Notice of Proposed Reprimand. The notice cited two reasons for issuing the reprimand: (1) blood leaked from the container that Ms. Spera had prepared; and (2) Ms. Spera had not cleaned the blood from the floor for over three months. In his June 11, 2010, Deliberation of Response to Notice of Proposed Reprimand, Mr. Keel affirmed the decision to reprimand Ms. Spera. In part, he based this decision on the fact that Ms. Spera was the only employee who accessed Reefers 3 and 4, and would have been the only employee who could have noticed the leakage. He stated that she should have alerted her supervisor to the leakage, and maintained that the leakage would not have occurred had she properly packaged the portions for cremation.

Mr. Keel testified that Colonel Edmondson and Mr. Dean had an obvious expectation that disciplinary action would be taken against Ms. Spera for the leaking container, and that they were all involved in the decision to take disciplinary action against her. He stated that Colonel Edmondson thought Ms. Spera's actions were completely unacceptable and that immediate action needed to be taken. He additionally testified that Colonel Edmondson wanted significant disciplinary action taken, but that the AFDW Human Resource Specialists advised that a reprimand was the most appropriate action based on the severity of the alleged offense.

14. April – June 2010 OSC Disclosures

On April 23, 2010, Mr. Parsons filed a disclosure of information with the Disclosure Unit alleging that Mr. Keel violated Department of Defense (DoD) regulations by directing that a deceased Marine's humerus bone be sawed off so that the Marine could be placed in a uniform.²²

On May 25 and June 10, 2010, Ms. Spera and Mr. Zwicharowski disclosed to OSC allegations concerning two incidents in which the Port Mortuary lost "portions" of remains of deceased service members. Mr. Zwicharowski and Ms. Spera alleged that Port Mortuary officials failed to properly resolve those cases and failed to notify the appropriate military components or the families of the deceased service members that these portions were lost. Mr. Zwicharowski and Ms. Spera contended that the actions of Port Mortuary leadership did not comport with the requirements of agency policies and regulations and did not afford the requisite reverence, care, and dignity owed to these service members.

Ms. Spera also disclosed to OSC allegations concerning the improper handling and transport of possibly contagious remains, as well as the improper transport and cremation of fetal remains of military dependents.

On May 27, 2010, OSC referred Mr. Parsons' allegations to then-Secretary of Defense Robert M. Gates to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). Ms. Spera and Mr. Zwicharowski's allegations were jointly referred to Secretary Gates on July 8, 2010. Secretary Gates delegated responsibility for investigating and responding to these matters to Secretary of the Air Force Michael B. Donley, who tasked the OIG with investigating. The allegations of improper transport and processing of remains of military dependents were referred to the Department of the Army OIG and the AFOSI for investigation. On May 11, 2011, OSC

²² DoD Directive 1300.22, *Mortuary Affairs Policy*, February 3, 2000 (certified as current as of November 21, 2003), paragraph 4.2, requires that "[r]emains will be handled with the reverence, care, and dignity befitting them and the circumstances."

received the Air Force's report signed by Secretary Donley, which is a compilation of all the investigative findings (May 11, 2011 Report). The Air Force provided OSC a supplemental report on August 30, 2011.

Colonel Edmondson, Mr. Dean and Mr. Keel learned of the OIG investigations in or around June 2010, if not earlier. The OIG conducted interviews of AFMAO Port Mortuary staff from June to August 2010 and Colonel Edmondson, Mr. Dean and Mr. Keel were all aware that these interviews were taking place.

15. June 2010 Complaint to the Office of the Commandant

In or around early June 2010, the Office of the Commandant of the Marine Corps (Office of the Commandant) received an anonymous complaint concerning the removal of the deceased Marine's humerus bone. This incident was one of the allegations discussed above that was forwarded by OSC to the Department of Defense for investigation. Mr. Keel learned of the complaint to the Office of the Commandant on or about June 5, 2010. [REDACTED]

[REDACTED] verbally informed him that an anonymous source had submitted a complaint concerning the mutilation of a deceased Marine. Mr. Keel relayed this information to Colonel Edmondson, who directed him to prepare an e-mail detailing the facts of the incident so that he could inform his supervisor, [REDACTED]. Mr. Keel testified that Colonel Edmondson was concerned that the issue had been elevated to a higher level. Colonel Edmondson himself stated that he "question[ed] the motive" of the person who made the complaint "to go completely outside of the chain of command [and to] not even go to General Schwartz but to go to the Commandant of the Marine Corps." Mr. Keel sent the e-mail to Colonel Edmondson and gathered additional facts for Colonel Edmondson concerning the incident.

Mr. Keel spoke with [REDACTED] and [REDACTED] who were both involved with the embalming and preparation of the deceased Marine's remains. Mr. Keel testified that he learned during one of these conversations that Mr. Parsons was uncomfortable with the decision to remove the Marine's humerus bone and did not think the removal was appropriate. He further testified that he would have informed Colonel Edmondson and Mr. Dean of Mr. Parsons' discomfort. Colonel Edmondson denies knowing of Mr. Parsons' discomfort. However, he did testify that employees generally should work through the chain of command to resolve issues.

Both Colonel Edmondson and Mr. Keel not only denied knowing who brought the complaint to the Office of the Commandant, but testified that it could have been any one of a very broad group of people. Colonel Edmondson suggested that it would have likely come from the approximately 15-18 embalmers. Mr. Keel offered an even larger group: one of the four technicians; any number of deployed military members supporting the technicians; licensed funeral directors and embalmers that would have had contact with the remains; or Marine Corps liaisons. Colonel Edmondson testified he would not have thought that Mr. Parsons, an embalming assistant, would have raised the issue. However, Mr. Parsons contends that AFMAO management, knowing of his discomfort with the removal of the bone, assumed it was he who made the complaint.

16. June 2010 Proposed Termination and Agency Attorney Review (Mr. Zwicharowski)

In or about June 2010, AFMAO Port Mortuary management sought to terminate Mr. Zwicharowski's employment. [REDACTED] General Law Attorney for the 11th Wing, Bolling Air Force Base, testified that she and [REDACTED] Human Resource Specialist, AFDW, together prepared a draft proposed termination for Mr. Zwicharowski. The draft listed the following reasons for termination: (1) engaging in conduct unbecoming a federal employee by making negative statements about his supervisors to a third party in the October 27, 2009 e-mail described above; (2) failing to follow orders by agreeing to give a lecture to outside parties without following the proper protocol for getting supervisory permission; and (3) accessing and downloading Mr. Dean's personnel file.

Pursuant to protocol, after her own review, [REDACTED] sought the opinion of the AFLOA/JACL on the legal sufficiency of the charges to support a termination. Initially, attorney [REDACTED] subordinate, was assigned to review the proposed action, but [REDACTED] eventually took over because it seemed that AFMAO management was "stonewalling" [REDACTED] and not providing him with the documentation he was requesting. [REDACTED] testified that management delayed significantly in providing [REDACTED] with the documentation he requested to support the proposed termination.

Once [REDACTED] received and reviewed the evidence that AFMAO Port Mortuary management was relying on for the personnel action, he deemed it entirely insufficient to support a termination. In fact, he found the actions taken against Mr. Zwicharowski to be so disproportionate to the alleged infractions that he concluded that management "had it in for him" for some reason. [REDACTED] testified that it was clear that management was treating Mr. Zwicharowski differently than other AFMAO employees. In particular, he noted that although many employees had access to Mr. Dean's file on the shared drive, most of the other employees' computers were not searched and Mr. Zwicharowski was the only employee whose computer was immediately confiscated and who was placed on Administrative Leave. He additionally testified that it was highly unusual to place an employee on Administrative Leave for a suspected Privacy Act violation. He concluded that the alleged concern about Mr. Zwicharowski violating the Privacy Act "was just a subterfuge for [management] to grab his hard drive to try to scour it for other information on this other misconduct that they wanted to pin on him."

[REDACTED] further testified that the treatment of Mr. Zwicharowski the weekend of the Fort Hood mass casualty—from forbidding him to work, to calling security, to issuing him a five-day suspension—"just did not make any sense." He stated, "that you would suspend someone because they heard the unit was busy and they came in to help? That is more evidence that made me say, 'they are out to get this guy for some reason.'"

With respect to the actual charges in the proposed termination, [REDACTED] said that the first charge was baseless because the disparaging remarks were made to a third party, not directly to the supervisor or in a group meeting. He also expressed concern with the manner in which management obtained the e-mail: namely, by scouring Mr. Zwicharowski's computer on the Privacy Act issue, while really looking for any other evidence to use against him.

██████████ was baffled by the second charge. AFMAO did not have a written policy regarding outside presentations; rather, there was purportedly a verbal policy requiring employees to obtain permission before giving presentations to outside parties. Mr. Zwicharowski appropriately requested permission and ultimately did not give the presentation. Accordingly, ██████████ queried, "if [Mr. Zwicharowski] didn't make the presentation, and the policy is don't make presentations any more, what did [Mr. Zwicharowski] violate?" He concluded that Mr. Zwicharowski could not have violated the policy because he did not give the presentation.

Finally, as to the third charge, ██████████ repeatedly stated, for the reasons cited above, that it "did not pass the smell test." Moreover, even if the Privacy Act violation charges could stand, in his opinion they would not merit termination.

██████████ testified that he had a conference call with ██████████ and ██████████ on or about July 2, 2010. During that call, he advised ██████████ that there was insufficient evidence to support the charges. ██████████ testified that she asked him, "[w]hat would it take to get a termination?" He stated that she said something to the effect of, "they want to get rid of him because he's filing an OIG complaint or he's going to file another OIG complaint." ██████████ testified that he was "flabbergasted" by her comment.

██████████ documented this conversation with ██████████ as well as his legal conclusions, in an August 27, 2010 memorandum to Colonel Edmondson. ██████████ testified that in his tenure at the Air Force he had never before felt compelled to draft a memorandum of this kind. However, he believed it was necessary to do so here to convey to AFMAO management his strong opinion that no action should be taken against Mr. Zwicharowski. He wrote:

It is almost certain that any responsible higher reviewing authority would conclude that any discipline imposed on Mr. Zwicharowski in this case would be reprisal/retaliation for his [OIG] and/or whistleblower activity. Therefore, taking into account all of the facts and circumstances of the case, it is the strong final recommendation of this office that no discipline be imposed. While this is my analysis, it also reflects that of the Air Force General Litigation leadership as well.

After his conversation with ██████████ ██████████ spoke with Colonel Edmondson and asked him if "the fact that [Mr. Zwicharowski] is or may have engaged in [sic] any [OIG] activity" had anything to do with Colonel Edmondson's decision to discipline him. Colonel Edmondson told him that it did not. ██████████ testified, "I thought he was lying then; now I [still] think he was lying to me."

When OSC interviewed ██████████ she stated that she did not know if AFMAO management knew of or suspected Mr. Zwicharowski's OIG activity. She testified that management was concerned with the appearance of reprisal for Mr. Zwicharowski's prior EEO complaints, but not for any OIG complaints. When confronted with Mr. Zwicharowski's January 2010 grievance that specifically referenced his OIG complaint, ██████████ denied that she had knowledge of it at the time of the proposed removal decision. She also stated that ██████████ description in his August 27, 2010 memorandum of her raising the OIG

complaints to him was inaccurate; she said that she did not discuss management's concerns about Mr. Zwicharowski's OIG complaints. OSC asked her whether she attempted to correct the record and she stated that she had not. Given the severity of [REDACTED] written allegation—that [REDACTED] was knowingly supporting impermissible reprisal—it seems incredible that she would not respond and correct the record if the statement were, in fact, false.

17. August 2010 Proposed Five-Day Suspension (Ms. Spera)

On or around August 11, 2010, Mr. Keel issued Ms. Spera a Notice of Proposal to Suspend for Five Calendar Days (Proposed Suspension). The three bases cited for issuing the proposal to suspend were: (1) pushing a co-worker; (2) refusing to meet with Mr. Keel to discuss her Civilian Rating of Record; and (3) failing to follow AFMAO security procedures.

The August 11, 2010 Proposed Suspension alleged that Ms. Spera pushed a co-worker, [REDACTED] during a discussion concerning the upcoming cremation of a fallen soldier. Ms. Spera denied [REDACTED] allegation. The only third party to witness the event—[REDACTED] similarly denied [REDACTED] claims and testified that Ms. Spera gently placed her hand on [REDACTED] shoulder to get her attention. He testified that Ms. Spera did not push [REDACTED] and that she was in no way threatening towards [REDACTED]. He testified that Mr. Keel asked him twice to provide a written statement, and that he felt pressured to do so. [REDACTED] testified that he had the sense that Mr. Keel “was out to get” Ms. Spera.

In his analysis of the event, Mr. Keel ignored [REDACTED] witness statement and description of the incident, which supported Ms. Spera's statements, and relied only on [REDACTED] account of the incident. Mr. Keel stated that [REDACTED] had not witnessed the incident because [REDACTED] back was turned—an assertion that contradicts [REDACTED] testimony. Mr. Keel further testified that he gave more weight to [REDACTED] testimony because Ms. Spera had a history of being aggressive, but he was unable to identify any evidence of Ms. Spera's prior physical aggression.

The second reason cited in the August 11, 2010 Proposed Suspension was that Ms. Spera refused to meet with Mr. Keel to discuss her Civilian Rating of Record. Ms. Spera denied refusing to meet with Mr. Keel. Rather, because her ratings were so low, she believed an adverse action might be proposed against her at the meeting and she requested union representation. She stated that Mr. Keel told her that she did not need representation, and he walked away from her. Mr. Keel denied that Ms. Spera requested union representation, and testified that she simply refused to meet with him to discuss her rating.

Third, the Proposed Suspension cites Ms. Spera for allowing unauthorized individuals access to the Port Mortuary. Ms. Spera stated that she used her security badge to swipe several high level 436th Communication Squadron officials into the Port Mortuary. She explained that they told her they were there to fix the air conditioning system, which had been broken, and she believed they were authorized to enter the Port Mortuary. Although she admitted that her actions violated Colonel Edmondson's new security procedures, she claimed that employees regularly swiped unauthorized individuals into the Port Mortuary and that she was being singled out. Mr. Keel testified that swiping unauthorized individuals was not a common practice, and that Ms. Spera was the only one he was aware of who violated these AFMAO security procedures.

Mr. Keel testified that Colonel Edmondson, Mr. Dean, and ██████████ were all involved in the decision to suspend Ms. Spera. He stated that AFDW recommended the five-day suspension, and that he felt this level of disciplinary action was appropriate. He testified that Colonel Edmondson had expected even greater disciplinary action against Ms. Spera.

18. September 2010 Terminations (Mr. Vance and Mr. Parsons)

On September 9, 2010, Mr. Keel terminated Mr. Parsons and Mr. Vance during their probationary periods, effective September 17, 2010. The Notice of Termination cited two reasons for the terminations: (1) negative comments concerning a co-worker's ethnic origin; and (2) watching a movie with strong sexuality and nudity in the Mortuary Specialists' office.²³

On or about May 24, 2010, ██████████, Mortuary Specialist, advised Mr. Dean that Mr. Parsons and Mr. Vance made a negative comment about their co-worker ██████████ ethnicity. Mr. Dean approached ██████████ and requested that he provide a written statement of what occurred, which ██████████ ultimately provided to Mr. Keel. On or about June 1, 2010, Mr. Keel met with Mr. Vance and Mr. Parsons to discuss the allegations that they made negative comments about ██████████ ethnic origin.²⁴ During this meeting, Mr. Vance and Mr. Parsons stated that they did not remember making any ethnic or negative statements about ██████████, but if they had, it would have been in a joking manner. Later that day, Mr. Vance and Mr. Parsons sent e-mails to ██████████ apologizing for anything they said to him that may have been offensive. Mr. Keel sent Mr. Vance and Mr. Parsons an e-mail on June 10, 2010, notifying them that they could submit a written statement concerning the incident by June 16, 2010. Believing that the issue had been resolved, neither Mr. Vance nor Mr. Parsons chose to provide a written response. Mr. Keel did not inform them that documentation concerning the alleged ethnic statements would be retained in their employee supervisory folders, or that management was considering disciplinary action against them for this issue.

Sometime between August 17 and August 24, 2010, ██████████ informed Mr. Keel of a conversation with ██████████, concerning Mr. Vance and Mr. Parsons supposedly having watched an X-rated movie in the Mortuary Specialists' office. Mr. Keel approached ██████████ about this issue on August 24, 2010 and requested that she provide a written statement. Following this conversation, on August 24, 2010, Mr. Keel drafted a "Memorandum for the Record: Report of Violation of AFMAO/CC Sexual Harassment Policy" and e-mailed it to ██████████ and ██████████, Civilian Human Resources Specialists ██████████. In this memorandum, Mr. Keel stated that Mr. Vance and Mr. Parsons were watching a "fully nude female and male engaged in sexual intercourse" in the Mortuary Specialists' office, and that no other individuals were present.²⁵ The following day, on August 25, 2010, ██████████ replied to Mr. Keel's e-mail

²³ The Air Force instructed Mr. Parsons and Mr. Vance to return to their positions on September 11, 2010, after the Disclosure Unit contacted the Air Force General Counsel's office for Fiscal, Ethics, and Administrative Law. Mr. Parsons' termination was officially rescinded on December 21, 2010. Mr. Vance's termination was officially rescinded on November 1, 2010.

²⁴ ██████████ brought these comments to the attention of Mr. Keel. Notably, ██████████ colleagues have described him as someone who often brought issues among the workers to Mr. Keel. It is unclear whether Mr. Keel instructed ██████████ to gather such information or if ██████████ took it upon himself to do such reporting.

²⁵ Colonel Edmondson testified that Mr. Keel characterized the movie at issue as a "porno."

stating that she would “include the new incident in Mr. Vance’s termination letter,” and that they were in the process of verifying Mr. Parsons’ probationary period status. Mr. Keel forwarded this e-mail chain to Colonel Edmondson later that day, who responded “this is wholly inappropriate...you need to work this issue closely with AFDW, but swiftly.” Mr. Keel testified that he understood that Colonel Edmondson expected him to take the “strongest most appropriate action” against Mr. Vance and Mr. Parsons.

However, the factual allegations were incorrect. The movie was R-rated, not X-rated. The movie belonged to ██████████ who was also watching the movie when ██████████ entered the room. ██████████ testified that Mr. Keel asked her a total of three times for the written statement. On August 27, 2010, ██████████ provided a written statement to Mr. Keel that only implicated Mr. Vance and Mr. Parsons.

On September 8, 2010, Mr. Keel met with Mr. Parsons, Mr. Vance, Mary Ellen Spera and ██████████ Ms. Spera and ██████████ attended the meeting as union representatives. Ms. Spera took detailed minutes during the meeting. The minutes confirm Mr. Vance and Mr. Parsons’ testimony that they told Mr. Keel that the movie belonged to ██████████ and that ██████████ was also in the Mortuary Specialists’ office watching the movie when ██████████ entered. Mr. Vance additionally told Mr. Keel that he was working at his desk with his back to the screen while the movie was playing, and did not even know what the movie was about.

The next day, Mr. Keel issued Notices of Termination During Probationary Period to Mr. Vance and Mr. Parsons. Mr. Keel testified that he did not feel it was necessary to interview ██████████ because the fact that it was his movie was not relevant. He denied knowing that ██████████ also watched the video, and claimed that he chose not to interview additional employees so as not to further embarrass ██████████ Mr. Vance or Mr. Parsons. This statement contradicted his previous testimony that he would speak with all individuals involved when conducting an investigation and try to get as much information as possible. He further testified that there is neither a policy against watching videos at work, nor one banning R-rated movies. In fact, Colonel Edmondson testified that because of AFMAO’s difficult mission, he did not mind movie watching on the job as a stress-relieving activity for employees.

III. LEGAL ANALYSIS

There is compelling evidence of whistleblower retaliation warranting disciplinary action against Colonel Edmondson, Mr. Keel and Mr. Dean.

A. Legal Standard: 5 U.S.C. §§ 2302(b)(8) and (b)(9):

It is a prohibited personnel practice to take, threaten to take, or fail to take a personnel action against an employee because of any disclosure of information that the employee “reasonably believes” evidences a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). It is also a prohibited personnel practice to take, threaten to take, or fail to take a personnel action against any employee or applicant for employment

²⁶ Several witnesses, including Mr. Keel, testified that, due to the layout of the Mortuary Specialists office, ██████████ would have seen ██████████ if he were in the room.

because of: (1) the filing of an appeal, complaint, or grievance right granted by law, rule, or regulation; (2) testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation; or (3) cooperating with or disclosing information to the Inspector General of an agency or the Special Counsel. 5 U.S.C. § 2302(b)(9).

B. Burden of Proof for Disciplinary Action

To prove violations of the Whistleblower Protection Act (WPA) warranting disciplinary action, OSC must demonstrate with preponderant evidence that: (1) a protected disclosure of information was made or the employee engaged in protected activity; (2) the proposing or deciding officials had actual or constructive knowledge of the protected activity; (3) official(s) with authority to take, recommend or approve a personnel action took or threatened to take personnel actions;²⁷ and (4) the protected activity was a significant factor in the personnel action(s) at issue. *See generally Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994). In determining whether the protected activity was a significant factor, the motivation for the allegedly retaliatory action is considered. *Id.*

C. Significant Factor-Mosaic of Retaliation

OSC's investigation uncovered compelling evidence of a pattern of retaliation against the complainants for whistleblowing, perceived whistleblowing and engaging in protected activity. Evidence showing a pattern or "convincing mosaic" of retaliation can be used to prove the significant factor element in a retaliation case. Such mosaic includes pieces of evidence that "[w]hen taken as a whole, provide strong support if all [pieces] point in the same direction...." *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-230 (2010). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Marshall v. Dep't of Veterans Affairs*,²⁸ 111 M.S.P.R. 5, 13 (2008) (quoting *Sylvester v. SOS Children's Vill. Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

Here, the evidence paints a clear picture of retaliation. The record is replete with direct²⁹ and circumstantial evidence of the subject officials' animosity towards the complainants based on the complainants' disclosures. In particular, there is compelling evidence of management's motive to retaliate against the four complainants, including a strong incentive to conceal

²⁷ Colonel Edmondson, Mr. Dean and Mr. Keel all exercised the personnel action authority required under 5 U.S.C. §§ 2302(b)(8) and (b)(9).

²⁸ In a corrective action case under 5 U.S.C. § 2302(b)(9), the Board found that factors showing a "mosaic of retaliation" satisfied the significant factor element. *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 9-10 (2008).

²⁹ It is important to note that "direct evidence"—in the context of retaliation and discrimination cases—is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (referring to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) (citing *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997)).

management's gross malfeasance and to deter any future whistleblowing about the handling of remains at the Port Mortuary. There is also close timing between many of the adverse actions and the protected activity—including actions taken within days of the protected activity—giving rise to a strong inference of retaliation.

Moreover, there is considerable evidence of retaliatory animus for going outside the “chain of command” in disclosing malfeasance at Port Mortuary, including Colonel Edmondson labeling one of the complainants an “antagonist,” an “agitator,” and a “non-conformist.” The record also reveals management's improper use of investigations in its campaign of retaliation against the complainants. Finally, the record demonstrates that similarly situated employees were treated far better than the complainants.

1. Protected Activity

It is undisputed that the complainants engaged in protected activity.³⁰ Specifically, between April 2009 and August 2010, the complainants disclosed several substantial lapses in Port Mortuary practices as well as other violations of law, rule or regulation. The complainants disclosed serious allegations concerning the improper handling, processing, and transport of human remains of deceased personnel and military dependents. Many of the allegations were corroborated by the Air Force in the May 11, 2011 Report. The Air Force took significant corrective action to address the issues raised by the complainants and improve the tracking and handling of remains. The Air Force also acknowledged that the OIG substantiated many of the complainants' allegations of violations of law, rule or regulation and gross mismanagement.

In addition to the above-referenced disclosures, in or around May 2009, both Ms. Spera and Mr. Zwicharowski made disclosures during the course of the CDI. Ms. Spera provided the pertinent facts regarding the missing portions incident and Mr. Zwicharowski testified to on-going problems with the chain of custody of portions. He also stated he had previously raised these concerns to management and management had failed to act on them. The fact that Ms. Spera and Mr. Zwicharowski made disclosures in response to the CDI investigation initiated by Colonel Edmondson does not affect the ‘protected’ nature of their activity. *Tullis v. Dep't of the Navy*, Docket No. DC-1221-10-0614-W-1, (M.S.P.B, Jan. 18, 2012) (finding that appellant's failure to come forward on his own initiative was not dispositive, or even relevant, in determining whether his disclosure was protected). Indeed, the WPA makes no distinction based

³⁰ Mr. Vance was, at a minimum, a perceived whistleblower and the record shows that management associated him with the other complainants who all engaged in protected activity. Retaliation against an individual who is associated with other whistleblowers is prohibited. See *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 617 (2000) (finding that employee made a non-frivolous allegation that the agency retaliated against him because it perceived him to be a whistleblower, or because of his association with a whistleblower), *overruled on other grounds by Covarrubias v. Social Sec. Admin.*, 113 M.S.P.R. 583, 587 (2010). In perceived whistleblower cases, “the Board will focus its analysis on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302 (b)(8). In those cases, the issue of whether the appellant actually made protected disclosures is immaterial; the issue of whether the agency perceived the appellant as a whistleblower will essentially stand in for that portion of the Board's analysis in both the jurisdictional and merits stages of the appeal.” *King v. Dep't of the Army*, 116 M.S.P.R. 689, 696-97 (2011). Witness statements confirm that Mr. Vance openly challenged what he viewed as Mr. Keel's improper instructions, for instance, regarding the viewability of remains, and he was associated with the other complainants.

on who initiated the conversation that led to the disclosures. *Id.* Here, because the disclosures concerned violations of law, rule or regulation or gross mismanagement, they meet the statutory standard for protected disclosure. *Id.*

Ms. Spera also reported several instances of the mishandling and/or misidentifying of human remains. For instance, on September 9, 2009, she disclosed to [REDACTED] that a civilian human remain in Reefer 4 did not have a required MOMS tracking number or appropriate documentation, nor did it have a state medical examiner's release or a cremation authorization from the family. Also, on April 12, 2010, Ms. Spera submitted a written complaint to the union reporting, in part, that portions deemed ready for cremation in December 2009 still had not been cremated as of April 2010.

With respect to Mr. Zwicharowski, in addition to his CDI, OIG and OSC disclosures, he also filed a grievance on January 18, 2010, concerning his five-day suspension, and he filed a complaint in or about early March 2010 with the 436th Communications Squadron, disclosing that an improper release of his PII had occurred in violation of the Privacy Act. Shortly thereafter, Colonel Edmondson was made aware of the alleged PII violation and he initiated an investigation into the complaint.

Lastly, three of the complainants filed separate OIG complaints, all participated in the OIG investigations and all filed OSC Disclosure Unit complaints, activities expressly protected under 5 U.S.C. § 2302(b)(9)(C).

As for their disclosures, OSC need only prove that the complainants "reasonably believed" that their allegations satisfied the statutory conditions of protected whistleblowing. *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Here, the evidence exceeds that standard. The Air Force corroborated the underlying allegations and concluded that a number of the disclosures, in fact, evidenced violations of laws, rules or regulations and gross mismanagement. *Schnell v. Dep't of the Army*, 114 M.S.P.R. 83, 92 (2010) (finding that reasonableness of whistleblower's belief at time of his disclosure was validated by report issued after disclosure).

2. Knowledge

The record demonstrates that, at the relevant times, the subject officials had actual or constructive knowledge of the complainants' protected activities. Constructive knowledge is present where an official with actual knowledge influenced the deciding official. *See McClelland v. Dep't of Defense*, 53 M.S.P.R. 139 (1994). Even where the subject officials did not know which specific employees had engaged in the protected activity, they suspected one or more of the complainants, placing those complainants in the category of perceived whistleblowers.

While the subject officials deny knowledge of the complainants' protected activities, OSC finds their denials unconvincing and lacking in candor. The record contains ample evidence of knowledge, including the following:

- As far back as May 2009, Colonel Edmondson admits to reading the witness statements in the CDI concerning a missing portion. Included among these were Mr. Zwicharowski and Ms. Spera's statements. Mr. Zwicharowski and Ms. Spera's testimony stand out for the following reasons.
 - First, it was Ms. Spera's initial report that set the investigation in motion and the similarity between her initial report and her CDI testimony underscores

that point. Second, Mr. Zwicharowski's CDI statement served to alert management to changes in practices and procedures that he believed should have occurred and would serve to prevent future missing portions. Third, and most significantly, the May 2011 OIG report heavily cites Ms. Spera and Mr. Zwicharowski's testimony and ultimately concludes that wrongdoing occurred. Thus, management was aware of this protected activity.

- Additionally, based on Ms. Spera and Mr. Zwicharowski's May 2009 CDI statements, management perceived them to be whistleblowers. The Board has held in instances like this that the issue of whether a perceived whistleblower "made a protected disclosure is immaterial." *King v. Dep't of the Army*, 116 M.S.P.R. 689, 696 (2011). Instead, the focus is whether the agency *perceived* the employee as a whistleblower, i.e., did agency officials appear to believe that the employee engaged or intended to engage in whistleblowing activity. *Id.* At 695-96. Here, the pertinent content of the CDI statements forewarned management of Ms. Spera and Mr. Zwicharowski's proclivity, and intent, to disclose malfeasance at the Port Mortuary.
- In September 2009, all three of the subject officials were aware of Ms. Spera's report to ██████████ concerning the cremation of human remains. The record contains strong evidence establishing the subject officials' visceral reaction to Ms. Spera's disclosures and resentment towards her for making disclosures outside of the chain of command.
- In January 2010, Colonel Edmondson knew of Mr. Zwicharowski's August 2009 contact with the OIG. Colonel Edmondson acknowledged receiving Mr. Zwicharowski's January 18, 2010 formal union grievance, which contained this information. Although Colonel Edmondson claims to have discredited Mr. Zwicharowski's statement, and even went so far as to make inquiries with the Dover OIG to determine whether Mr. Zwicharowski filed a complaint, he cannot disclaim knowledge merely by purporting to have disbelieved Mr. Zwicharowski's statement. *Hamilton v. Dep't of Veterans Affairs*, 115 M.S.P.R. 673, 685-86 (2011) (finding that administrative judge erred in determining that a deciding official had no knowledge of the employee's disclosures when the employee explicitly referenced his disclosure in responding to his proposed termination). Moreover, Mr. Zwicharowski's filing of the January 2010 union grievance was in and of itself a protected activity under 5 U.S.C. § 2302(b)(9)(A). By acknowledging receipt of the grievance, Colonel Edmondson also admits knowledge of that activity.
- There is compelling evidence demonstrating that Colonel Edmondson knew or suspected that Mr. Zwicharowski filed a Privacy Act complaint with the 436th Command Squadron in or around March 2010, alleging that his own PII was compromised. While the command squadron maintained the anonymity of the complaint, two credible witnesses, ██████████ and ██████████ testified that it was their belief that management knew or suspected that Mr. Zwicharowski had filed the complaint and that the investigation into Mr. Zwicharowski was retaliatory. Colonel Edmondson learned about the complaint soon after it was filed and he

immediately initiated an investigation focused almost exclusively on Mr. Zwicharowski. Significantly, ██████████ testified that the seizing of Mr. Zwicharowski's computer appeared to be a "subterfuge" to grab his hard drive and gather evidence of misconduct they wanted to "pin on" Mr. Zwicharowski. ██████████ also testified that the level of forensic analysis performed on Mr. Zwicharowski's computer was of a kind reserved for serious criminal offenses, such as cases involving espionage or child pornography. This is further evidence that Colonel Edmondson was motivated by something other than an alleged Privacy Act Violation.

- On or about April 13, 2010, Colonel Edmondson and Mr. Keel learned of an anonymous union complaint disclosing, in part, that there was a prolonged delay in cremating portions and leakage of blood in Reefer 4. Colonel Edmondson acknowledged in his testimony that one could conclude that Ms. Spera was the individual who filed the complaint after Mr. Keel reported to him his belief that Ms. Spera was culpable for the failures highlighted in the complaint. Although Mr. Keel and Mr. Dean testified that they did not know who filed the complaint, the rest of their testimony on this issue, as well as documentary evidence, indicate that they knew Ms. Spera was primarily responsible for Reefer 4 and, thus, was one of the only individuals with the necessary knowledge to file the complaint.
- On or about June 5, 2010, Colonel Edmondson, Mr. Keel and Mr. Dean were made aware of an anonymous complaint filed with the Office of the Commandant concerning the February 2010 incident in which a portion of a Marine's arm was sawed off in order to dress the remains in uniform. Although Colonel Edmondson and Mr. Keel both deny knowing the identity of the whistleblower, OSC finds that find their testimony is not credible. Mr. Keel testified that he was advised that Mr. Parsons disagreed with removing the bone and believed he would have informed Colonel Edmondson and Mr. Dean of Mr. Parsons' concerns. Colonel Edmondson testified that he was not aware of Mr. Parsons' disagreement with removal of the bone. Given that Colonel Edmondson directed Mr. Keel to investigate this matter and report back to him his findings, OSC finds it more likely that Mr. Keel did report Mr. Parsons' discomfort to Colonel Edmondson. Thus, the evidence suggests that Colonel Edmondson denied knowledge of Mr. Parsons' discomfort to support his testimony that he did not suspect Mr. Parsons of filing the complaint.
- In or about June 2010, Colonel Edmondson, Mr. Keel and Mr. Dean learned of an OIG investigation into the Port Mortuary. All denied knowing who filed the complaint, despite evidence of Mr. Zwicharowski's January 18, 2010 grievance alerting management to his OIG complaint. Their testimony simply is not credible. The record confirms that Ms. Spera, Mr. Zwicharowski, and Mr. Parsons had filed multiple complaints and made several disclosures regarding the subject matter of the investigation, making each of them a plausible suspect in management's eyes.
- In addition, even assuming that the record did not reflect knowledge of each of the complainants' protected activities, the evidence demonstrates that all four complainants were outspoken and directly challenged Mr. Keel regarding what they

identified as his improper directions concerning the handling of remains and the tracking of portions. Thus, in addition to engaging in protected activities, the complainants were also perceived whistleblowers.

- Finally, and most significantly, ██████████ testified that in an early July 2010 conference call that included ██████████ and ██████████ told ██████████ that management wanted to remove Mr. Zwicharowski because he was filing an OIG complaint or he was going to file another OIG complaint. ██████████ memorialized his conversation with ██████████ in a memorandum finalized on August 27, 2010. ██████████ denied under oath any knowledge that Mr. Zwicharowski's OIG activities, or the fact that he identified himself as someone who had filed an OIG complaint, factored into management's decision to propose his termination. However, the evidence strongly calls into question the veracity of ██████████ testimony. ██████████ gave clear, confident testimony and had a detailed memory of the events, whereas ██████████ hedged in her account and attempted to qualify her statements about Mr. Zwicharowski's OIG activity. Moreover, after receiving a copy of ██████████ memorandum documenting her alleged assertion about management's reasons for wanting to remove Mr. Zwicharowski, ██████████ failed to challenge ██████████ characterization of her statements.

In sum, Colonel Edmondson, Mr. Keel and Mr. Dean knew of the complainants' protected activities and/or perceived the complainants as whistleblowers.

3. Personnel Actions

The evidence makes clear that the complainants' protected activities significantly factored into the respective personnel actions management took against them. In some instances, the timing and demonstrated animus make this clear; in others, there is testimonial or documentary evidence establishing the connection. In almost every case, the action taken against the complainants was disproportionate to the alleged infraction, rendering management's motive for taking the personnel action suspect.

The acts of retaliation began in the Fall of 2009, within months of the disclosures made by Mr. Zwicharowski and Ms. Spera in the May 2009 CDI report, and continued regularly and unabated until approximately mid-September of 2010. Two intervening events appear to have constrained the subject officials from taking additional, formal retaliatory actions after September 2010: (1) OSC's intervention into the terminations of Mr. Parsons and Mr. Vance, terminations that the agency ultimately agreed were unsupported and thus rescinded; and, (2) ██████████ August 27, 2010, memorandum noting that "[a]ny discipline imposed on Mr. Zwicharowski in this case would be [viewed as] reprisal/retaliation for his [OIG] and/or whistleblowing activity [by any responsible reviewing authority]." The subject officials appear to have been influenced by the fact that entities outside of Dover AFB were questioning the pattern of retaliation. Here, the Report discusses only the more significant personnel actions.

a. Ms. Spera—Letter of Counseling and Non-Selection

On September 10, 2009, two days after Ms. Spera reported to ██████████ that there were undocumented civilian remains at the Port Mortuary that did not contain the required MOMS number, Mr. Keel issued her a letter of counseling. Not only does the letter of counseling refer to Ms. Spera's protected activity stating, "The purpose of [the] call to ██████████ was an attempt to malign AFMAO....," but Mr. Dean's September 17, 2009 email to Mr. Keel reveals his animus towards Ms. Spera's protected activity. In the email, he states, "[u]nfortunately it [Ms. Spera's report to ██████████] went beyond speaking her mind, and while she clearly had an avenue for that she chose to circumvent the process." Just two days after her disclosure to ██████████ Mr. Keel removed Ms. Spera as a "fill request" for the permanent position to which she had applied. The weight of the evidence indicates that Ms. Spera's conversation with ██████████ was a factor in the decision to not select her for a permanent position at the Port Mortuary. Indeed, Mr. Keel admitted that the call was a factor. Moreover, Mr. Dean had a motive to retaliate against Ms. Spera for making him look bad when she went out of the chain of command concerning an issue related to the crematory certification process.

Although the September 10 letter of counseling may not meet the definition of a personnel action for purposes of section 2302(a)(2) of Title 5, the failure to select Ms. Spera for a permanent position at the Port Mortuary indisputably does. While management attempted to use Ms. Spera's allegedly heated conversation with ██████████ as the basis to discipline and not select her for the permanent position, protection under the WPA is not lost "when protected subject matter is stated in a blunt manner." *Hamilton*, 115 M.S.P.R. at 679 (citing *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1299 (Fed. Cir. 2006)). Viewed together, these two adverse actions demonstrate that Mr. Keel and Mr. Dean retaliated against Ms. Spera because of her protected activity.

b. Mr. Zwicharowski—Five-day Suspension and Detail

On November 17, 2009, Mr. Keel proposed suspending Mr. Zwicharowski for five days for insubordination during what has been described as the Fort Hood incident.³¹ This proposal was issued approximately six months after Mr. Zwicharowski alerted management to Ms. Spera's allegation regarding a missing portion and provided testimony to the CDI highlighting management's failure to establish a chain of custody for remains. The insubordination charge is weak and disregards exculpatory evidence in Mr. Zwicharowski's favor, such as witness testimony that Mr. Zwicharowski was not acting erratically and testimony that Mr. Zwicharowski's presence was helpful to his less experienced colleagues. The evidence demonstrates that Mr. Keel overreacted to Mr. Zwicharowski's several offers to stay and provide assistance, and Mr. Keel imposed a disproportionately harsh penalty for this conduct.

The Air Force's counsel, ██████████ reviewed the agency's five-day suspension during his legal review of the later proposed termination of Mr. Zwicharowski. Not only did he believe that the basis for the five-day suspension was extremely weak, he viewed the disproportionately harsh penalty as further evidence that AFMAO management was "out to get" Mr. Zwicharowski.

³¹ The suspension was issued on December 29, 2009.

One day after his suspension, Mr. Zwicharowski was detailed to a one-year special project involving largely administrative work and his access to the Port Mortuary was restricted. The timing of his removal from embalming duties, the absence of a legitimate reason to detail Mr. Zwicharowski away from the Port Mortuary, and Mr. Keel's testimony that Colonel Edmondson did not want Mr. Zwicharowski present because of "the sensitive nature of the Fort Hood shootings" together support the conclusion that Mr. Zwicharowski was detailed in retaliation for his protected activity and to impede his ability to make future disclosures about the Port Mortuary.

c. Mr. Zwicharowski—Proposed Termination and Administrative Leave

On March 11, 2010, approximately one week after Mr. Zwicharowski filed a Privacy Act complaint regarding the compromise of his PII, Colonel Edmondson placed him on indefinite Administrative Leave and directed that his computer be seized and searched. This incident culminated in an attempt by Colonel Edmondson to terminate Mr. Zwicharowski. The record contains compelling evidence demonstrating that Colonel Edmondson was motivated by Mr. Zwicharowski's actual or perceived protected activity. ██████████ who was charged with legal review of the sufficiency of the charges for Air Force, testified that even assuming one could prove that the misconduct occurred, the charges simply did not support termination. Moreover, ██████████ set forth in his August 27, 2010 memorandum that management's proposed termination was likely retaliation for Mr. Zwicharowski's OIG and/or whistleblowing activity.

With respect to the draft charges, ██████████ testified to the following: (1) the overall weaknesses of the charges; (2) the complete disregard of any exculpatory evidence in Mr. Zwicharowski's favor, including the fact that a computer error gave Mr. Zwicharowski and others access to the PII information and that the majority of the information he downloaded involved his own Privacy Act protected information; and (3) that management treated Mr. Zwicharowski differently than the other individuals who also had PII information compromised.

Of significant note, ██████████ pointed out numerous anomalies in the way in which this action was handled. For instance, he testified that it was very unusual to place an employee on Administrative Leave for a suspected Privacy Act violation. He also noted it was extremely unusual, given the nature of Mr. Zwicharowski's alleged infractions, to seize his computer and send it to a specialized unit for a forensic scrub—activities usually reserved for serious criminal allegations, such as child pornography or espionage.

Here, the retaliatory picture painted by the separate pieces of evidence is striking. First, there is evidence of extremely close timing between the anonymous PII complaint and the unfounded investigation targeting Mr. Zwicharowski. Second, there is compelling, direct evidence of Colonel Edmondson's motive to terminate Mr. Zwicharowski because of his OIG activity. In addition, the evidence strongly suggests that Mr. Zwicharowski's proposed termination was motivated by an intense desire to prevent him from filing future complaints. Finally, there is evidence of disparate treatment coupled with insupportable charges. There is no other conclusion to reach: The proposed termination of Mr. Zwicharowski's employment was a mere pretext to veil Colonel Edmondson's retaliatory motive and chill future whistleblowing.

d. Ms. Spera—Removal of Duties and Letter of Reprimand

Within weeks of Ms. Spera's April 12, 2010 union complaint on or about, Mr. Keel and Colonel Edmondson significantly changed her duties, removing her portions management duties and shipping and departure duties. Colonel Edmondson contradicts his own testimony on the subject of who was responsible for removing Ms. Spera's duties. At different times in his testimony to OSC, Colonel Edmondson appears to identify Mr. Keel as the responsible official, but at other times he claims responsibility himself.

Additionally, using essentially the same bases for the removal of her duties, Mr. Keel issued Ms. Spera a proposed letter of reprimand on May 6, 2010, citing her for actions with respect to the leaking container.³² Ms. Spera had sent Mr. Keel several e-mails and verbally advised him that the portions in that container needed to be cremated. In addition, there is witness testimony that the container would not have leaked were it not for the delay in cremating the portions. Ms. Spera reported her concerns about the delay, evidenced by her e-mails to Mr. Keel.

In sum, the weight of the testimony strongly suggests that Ms. Spera's version of the events is accurate. In addition, the evidence suggests that Mr. Keel had a strong motive to assign blame to Ms. Spera, in part, to distract from his own culpability and, in part, to retaliate against Ms. Spera for raising the issues to the union. OSC notes that the Air Force has already concluded that Mr. Keel demonstrated a lack of candor with regard to his sworn testimony to the OIG regarding the underlying disclosures. Here, OSC finds the same lack of candor with respect to his alleged basis for taking the personnel actions against Ms. Spera. Moreover, the evidence demonstrates extremely close timing between the union complaint and the personnel actions at issue. *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 16 (2008) (finding temporal proximity to suggest reprisal).

e. Ms. Spera—Proposed Five-day Suspension

On August 11, 2010, Mr. Keel issued Ms. Spera a proposed five-day suspension. The timing is very close between Ms. Spera's protected activity and the proposed suspension. Specifically, the proposed suspension was issued within months of management being notified of the OIG investigation and shortly after her several interviews with the OIG between June and August 2010.

In addition to temporal proximity, the conflicting evidence concerning the underlying charges supports a finding that the five-day suspension was retaliatory. For instance, with respect to the charge that Ms. Spera physically pushed ██████████ Mr. Keel disregarded the exculpatory witness testimony from ██████████ corroborating Ms. Spera's assertion that she merely placed her hand on ██████████ shoulder. Mr. Keel's testimony directly conflicts with ██████████ testimony. Mr. Keel testified that ██████████ told him that he did not see the incident. Again, given Mr. Keel's history of lack of candor and his self-interest in defending his suspension action, his testimony to OSC does not appear truthful. Additionally, Mr. Keel's proffered reason for crediting ██████████ statement over Ms. Spera's, namely, that

³² Mr. Keel issued the final reprimand on June 11, 2010.

Ms. Spera had a history of being aggressive, is undermined by his own testimony that he did not recall any evidence of Ms. Spera being physically aggressive. Notably, Mr. Keel testified that Colonel Edmondson believed that stronger discipline should have been taken against Ms. Spera.

f. Mr. Parsons and Mr. Vance—Terminations

On September 9, 2010, Mr. Keel terminated Mr. Parsons and Mr. Vance from their federal positions. This termination occurred approximately three months after the commencement of the OIG investigation.³³ Here again, Mr. Keel disregarded exculpatory evidence and failed to conduct a diligent investigation into the charges. “If the agency fails to investigate a charge sufficiently before bringing an action, such a failure might indicate an improper motive.” *Chambers v. Dep’t of the Interior*, 116 M.S.P.R. 17, 34 (2011) (citing *Social Sec. Admin. v. Carr*, 78 M.S.P.R. 313, 335 (1998)). Accordingly, this evidence calls into question management’s motive for terminating these employees.

With respect to the “movie watching” charge, there is testimonial and documentary evidence supporting Mr. Parsons and Mr. Vance’s assertions that ██████ placed the movie in the DVD and watched the movie with Mr. Parsons. When confronted with this evidence, Mr. Keel acknowledged that he did not inquire to determine whether anyone else had watched the movie on the day in question and denied knowing that ██████ also watched the movie.

Either Mr. Keel was not honest in testifying that he did not know ██████ also watched the movie, or he conducted a subpar investigation. He also failed to consider exculpatory evidence—such as (1) the fact that Mr. Vance did not watch the movie and (2) the absence of a prohibition on watching R-rated movies in the work place. Lastly, Mr. Keel demonstrated his retaliatory motive by treating Mr. Parsons and Mr. Vance differently from other non-whistleblowers. Specifically, he terminated Mr. Parsons and Mr. Vance for their movie watching conduct and failed to discipline other similarly situated non-whistleblowers for engaging in the same or similar conduct.

With respect to the “ethnic origin comment” charge, there is evidence that: (1) Mr. Parsons and Mr. Vance apologized to ██████ for making any inappropriate statements; (2) they were counseled regarding the matter; and (3) they believed the incident was closed. Further, the evidence shows that Mr. Keel did not terminate these employees for the May 2010 incident until almost four months after the incident occurred. The evidence strongly suggests that Mr. Keel seized upon this incident, along with the movie watching charge as a pretext to terminate Mr. Parsons and Mr. Vance.

In sum, the mosaic of retaliation is evident with management’s repeated retaliatory adverse actions and personnel actions. The evidence demonstrates numerous instances of questionable and unsupportable charges filed against the complainants, primarily by Mr. Keel with Colonel Edmondson’s full assent and approval, if not at his direction. In contrast, the other employees under Mr. Keel’s supervisory chain were issued no formal disciplinary actions during the same time period. Such striking disparate treatment is compelling evidence of retaliatory motive. The record is replete with evidence showing that the subject officials, especially Colonel

³³ The effective date of the terminations was September 17, 2010, and as set forth above, after intervention by OSC, the terminations were never effected.

Edmondson and Mr. Keel, were motivated to retaliate against employees who filed complaints about the Port Mortuary or were perceived to be whistleblowers.

4. Retaliatory Motive

These cases must be viewed with an understanding of the pressures under which management and employees operated at the Port Mortuary during the pertinent time period. It is clear that the Port Mortuary's mission is both critical and highly sensitive. Above and beyond the stressful job responsibilities of the embalmers and embalming technicians, managers and staff alike at the Port Mortuary were subjected to heightened public scrutiny and all were conscious of the possible ramifications of making mistakes or missteps. This environment was coupled with pressure exerted by a forceful, autocratic manager at the top—Colonel Edmondson—who believed in a strict chain of command. Additionally, Mr. Keel was a manager who, according to the Air Force, engaged in a pattern of misconduct and whose actions suggested a failure of leadership. These factors set the stage for an extremely charged work environment where disclosures of wrongdoing were met with resistance and hostility, especially where such disclosures exposed management's malfeasance.

The following are just some of the examples of the compelling evidence showing that complainants' whistleblowing and engagement in other protected activity were a significant factor in the personnel actions at issue:

a. Colonel Edmondson's Animus

The record contains consistent evidence of Colonel Edmondson's acrimony towards employees who circumvented the chain of command. In his testimony to OSC, Colonel Edmondson acknowledged his frustration with employees raising concerns to entities outside of his authority. For instance, in response to OSC questions regarding the identity of the individual who filed the June 2010 complaint with the Office of the Commandant, he "questioned the motive" of the individual who circumvented the chain of command, testifying that this person did "[n]ot even go to General Schwartz but to the Commandant of the Marine Corps." Again, in response to the April 9, 2010 union complaint, he questioned, "[w]hy aren't these issues vetted at a lower level?"

Moreover, [REDACTED] testified that in an early July 2010 conference call that included [REDACTED] and [REDACTED] directly told him that management wanted to remove Mr. Zwicharowski because he was filing an OIG complaint or he was going to file another OIG complaint. Clearly, Colonel Edmondson resented Mr. Zwicharowski's whistleblowing and was motivated to punish him.

OSC also has documentary evidence capturing Colonel Edmondson's displeasure with the manner in which employees filed complaints. In the August 9, 2010 e-mail, discussed *supra*, Colonel Edmondson expressly raised the issue of a complaint being made to the union and not within the chain of command. This animus towards whistleblowers was also overt. In particular, Colonel Edmondson described Mr. Zwicharowski as an "antagonist," a "non-conformist," and an "agitator." In context, these are synonyms for "whistleblower." Colonel Edmondson tried to downplay his testimony by stating that he had an amiable relationship with Mr. Zwicharowski and that his characterizations of Mr. Zwicharowski were based strictly on Mr. Keel and Mr.

Dean's statements. Again, his testimony lacks credibility. While it is certainly possible, and even likely, that Mr. Keel labeled Mr. Zwicharowski as an agitator, Colonel Edmondson's animus was clear.

Colonel Edmondson's blatant resentment of whistleblowing is especially probative of retaliatory motive in this matter because as Commander of AFMAO, he set the tone for his managers. By ferreting out and punishing whistleblowers, he at least implicitly encouraged subordinates to retaliate against whistleblowers.

b. Suspicious Timing

There is remarkably close timing between many of the adverse actions and the complainants' protected activities. In many instances, management took action against the complainants within days of the protected activity. For example, within two days of her bringing concerns outside the chain of command to ██████████ Ms. Spera was issued a letter of counseling and was not selected for a permanent position. Likewise, Mr. Keel issued Ms. Spera a letter of reprimand and removed many of her duties within days of her filing a union complaint. Even in those instances in which the reprisal came months after the protected activity, there is still sufficiently close timing to demonstrate a causal connection. *Arauz v. Dep't of Justice*, 89 M.S.P.R. 529 (2001) (finding that where all the personnel actions occurred within a year of protected activity, proximity of time was sufficient to show nexus). Thus, the temporal proximity in these cases gives rise to a strong inference of retaliation.

c. Pretextual Investigation

"Retaliation by investigation," i.e., the selective use of an investigation to target a whistleblower, can be strong evidence of retaliatory motive. *See Russell v. Dep't of Justice*, 76 M.S.P.R. 317 (1997) (noting that the motivation of the initiator of a retaliatory investigation taints the investigation). When Colonel Edmondson learned that a Privacy Act complaint was filed with the 436th Command Squadron, he immediately initiated an investigation focused almost exclusively on Mr. Zwicharowski. The investigation included the unusual seizure of Mr. Zwicharowski's computer and needless comprehensive forensic analysis of the computer. No witness could offer a credible explanation for devoting significant resources to perform the type of forensic analysis reserved for serious criminal investigations. The transparent purpose of this thorough forensic analysis was for Colonel Edmondson to attempt to gather evidence of unrelated misconduct.

d. Disparate Treatment

Management singled out the complainants for extraordinary or unusually harsh disciplinary action whereas similarly situated employees who did not engage in protected conduct received better treatment. For example, Mr. Keel proposed suspending Mr. Zwicharowski for five days merely because Mr. Zwicharowski volunteered to work without pay to assist his less experienced colleagues during a mass casualty event. No witness could offer any example of similar discipline imposed for similar conduct. Indeed, such an example would be surprising. Volunteering to assist colleagues during an emergency situation is the type of conduct that is generally lauded, not punished. Likewise, Mr. Vance and Mr. Parsons were

terminated for watching a movie owned and played by ██████████ who was not even interviewed, let alone investigated or disciplined, for his involvement in the incident.

IV. CULPABILITY OF RESPONSIBLE OFFICIALS AND RECOMMENDATIONS

There is compelling evidence that management engaged in series of adverse actions against the complainants in retaliation for their protected activity and to chill future whistleblowing. The evidence shows that Colonel Edmondson was the primary force behind the majority of the retaliatory adverse actions. However, he did not—and could not— act alone. Without Mr. Keel routinely apprising Colonel Edmondson of the complainants' actions and conduct, and officially proposing or taking the adverse actions, Colonel Edmondson would not have had the bases to direct and/or approve the numerous, unsupported adverse actions.

Although there is inconsistent testimony regarding the involvement of each specific subject official in the numerous retaliatory adverse actions, the weight of the testimony and the documents demonstrates that Mr. Keel and Colonel Edmondson were heavily involved in the majority of the actions and, more significantly, they manifested the strongest motive to retaliate against the complainants.³⁴ Mr. Keel took responsibility for many of the personnel actions with Colonel Edmondson's encouragement and approval. Notably, Mr. Keel did not testify that Colonel Edmondson forced or directed him to take the actions at issue.³⁵

Mr. Keel's name alone existed on many of the documents formalizing the retaliatory personnel actions. Nevertheless, Mr. Keel often identified all three subject officials, including himself, as involved in the adverse actions. When directly questioned about details of the decision making process, his testimony reflected that Colonel Edmondson consistently advised him to take the strongest, most appropriate action. Moreover, even in instances in which Mr. Keel denies involvement in the retaliatory personnel action, the documents and testimony do not support his assertion. For instance, Mr. Keel's name appears on the Suspension Proposal for Mr. Zwicharowski. His testimony explaining his alleged lack of involvement in the suspension is not credible. Mr. Keel testified that he was not involved "because he was tied up with a lot of other things" and that "Mr. Zwicharowski wasn't [his] sole reason for coming to work each day." In addition to the adverse actions proposed and signed by Mr. Keel, numerous emails support the fact that Mr. Keel and Colonel Edmondson were primarily involved in the retaliatory adverse actions and were the officials who manifested retaliatory motives.

With respect to Mr. Dean, Colonel Edmondson and Mr. Keel provided consistent testimony regarding his management style. Colonel Edmondson and Mr. Keel testified that Mr. Dean was reluctant to take disciplinary actions against employees. In contrast, Mr. Keel and Colonel Edmondson showed no such reluctance. For instance, Colonel Edmondson commented on the

³⁴ While local Human Resources employees and local counsel approved many of the formal disciplinary actions discussed in this report, these "reviewing" employees based their advice on the information presented to them by management. ██████████ appears to be the only management official revealing a retaliatory motive to Human Resources personnel or counsel. The fact that management sought advice and approval regarding, for instance, the level of appropriate discipline, does not negate its culpability for initiating and/or taking the retaliatory personnel actions.

³⁵ In contrast, Mr. Dean did testify that Colonel Edmondson directed him, for example, to implement Mr. Zwicharowski's November 18, 2009 detail out of the Port Mortuary.

fact that Mr. Dean made the decision to grant Ms. Spera a performance award in or around the same time-period that both he and Mr. Keel were having issues with her performance. The complainants and other witnesses also expressed their belief that Colonel Edmondson and Mr. Keel were primarily responsible for the retaliatory actions. Moreover, even in the few actions in which Mr. Dean had limited involvement, the evidence did not demonstrate his motive to retaliate, with one exception: Mr. Dean was heavily involved in the decision not to select Ms. Spera for a permanent Port Mortuary position. The evidence demonstrates his motive to retaliate against her for her report to the Medical Examiner's office.³⁶

A. Colonel Edmondson³⁷

The record is replete with evidence establishing that Colonel Edmondson was significantly involved in the majority of the retaliatory personnel actions, including the most severe of personnel actions: two terminations and one threatened termination. There is compelling documentary and testimonial evidence demonstrating Colonel Edmondson's significant role in the actions at issue and his strong motive to retaliate. With respect to his role in the personnel actions, the record shows, for instance, that Colonel Edmondson acknowledged that he removed Ms. Spera's duties. Moreover, the record indicates that Colonel Edmondson was the primary official responsible for placing Mr. Zwicharowski on Administrative Leave and proposing his termination.

Examples of retaliatory evidence:

- Colonel Edmondson "questioned the motive" of employees who filed complaints alleging wrongdoing at the Port Mortuary;
- Colonel Edmondson repeatedly expressed his dismay over complainants going "outside of the chain of command" in reference to reports of wrongdoing or complaints filed with the various entities including, the union and the OIG;
- Colonel Edmondson described one of the complainants, Mr. Zwicharowski, as an "antagonist," a "non-conformist," and an "agitator";
- Air Force's own counsel described Colonel Edmondson's actions as reprisal for one complainant's OIG complaints and whistleblowing;
- Colonel Edmondson admitted to initiating an investigation into a complainant's protected activities, including his filing of OIG complaints;
- Colonel Edmondson initiated an improper investigation of a complainant, seizing his computer ostensibly to search for evidence of Privacy Act violations, but really as pretext for gathering evidence to take retaliatory action against the complainant.

It is significant to note that Colonel Edmondson demonstrated a lack of candor in his OSC interview. It is well established that once an official has been found not credible on one issue, this lack of credibility is a proper consideration in assessing the official's overall credibility. *McDaniel v. Dep't of Homeland Sec.*, 117 M.S.P.R. 83 (2011) (citing *Hawkins v. Smithsonian Inst.*, 73 M.S.P.R. 397, 404 (1997)). Here, the credibility of the entirety of Colonel

³⁶ This action is the letter of counseling issued to Ms. Spera on September 10, 2009, and the September 11, 2009, removal of Ms. Spera's name as a "fill request" for the permanent position at the Port Mortuary.

³⁷ Pursuant to 5 U.S.C. § 1215(c)(1), the Special Counsel's jurisdiction with respect to members of the uniformed services is limited to transmitting recommendations for disciplinary action to the head of the agency concerned.

Edmondson's testimony is called into question. OSC believes there is strong evidence for Air Force to take action against Colonel Edmondson for his lack of candor, in addition to action taken because of his retaliatory misconduct.

Lastly, the Air Force issued Colonel Edmondson a Letter of Reprimand on April 28, 2011, for failure in his leadership of the AFMAO Center "in one significant area" by not responding appropriately "to the loss of accountability of a portion of remains in two instances, and that failure rose to the level of gross mismanagement." This prior discipline should be considered when determining the appropriate level of disciplinary action for his retaliatory misconduct. Based on the preceding, OSC recommends that the Air Force take substantial disciplinary action against Colonel Edmondson.

B. Mr. Keel

The record is also replete with evidence establishing that Mr. Keel was significantly involved in the majority of the personnel actions at issue. Even crediting Mr. Keel's testimony that he was only marginally involved in not selecting Ms. Spera for the permanent Port Mortuary position, placing Mr. Zwicharowski on Administrative Leave or proposing Mr. Zwicharowski's termination, Mr. Keel was heavily involved in the remaining personnel actions. His retaliatory actions included terminating the employment of two employees—arguably the most serious retaliatory action possible. Additionally, Mr. Keel took responsibility for recommending and issuing the personnel actions at issue. Moreover, he did not assert to OSC that Colonel Edmondson or Mr. Dean pressured him into taking any of the personnel actions at issue.

In addition, there is compelling evidence of Mr. Keel's motive to retaliate against the complainants for their protected activity and his complicity with Colonel Edmondson's prejudiced view of the complainants. The record demonstrates that Mr. Keel misused his supervisory authority by imposing disproportionately harsh penalties against the complainants for relatively minor misconduct.³⁸ Further, the record contains ample evidence of Mr. Keel's habit of ignoring exculpatory evidence.

Examples of retaliatory evidence:

- Within weeks of Ms. Spera filing a union complaint, Mr. Keel issued her a letter of reprimand and was involved in removing a significant number of her duties because of her alleged failures with Reefer 4, while ignoring the fact that she advised Mr. Keel of the ongoing situation with Reefer 4 on more than one occasion;
- Mr. Keel ignored exculpatory evidence from an unbiased witness that Ms. Spera did not push [REDACTED] and issued her a disproportionately harsh proposed five-day suspension;
- Mr. Keel terminated Mr. Vance and Mr. Parsons' employment on the basis of a substandard investigation:

³⁸ Conduct, for instance, that would warrant at most a verbal counseling or no action.

- Mr. Keel failed to ascertain that another employee, ██████ placed the movie into the DVD player and was watching the movie at issue;
 - Mr. Keel ignored the fact that Mr. Vance's physical location in the office supported his assertion that he was not watching the movie; and
 - Mr. Keel failed to determine whether there were any policies on viewing R-rated movies in the workplace.
- Mr. Keel also demonstrated a lack of candor in response to OSC questions confronting him with both documentary and testimonial evidence that he was advised that ██████ had also watched the movie at issue, yet he only disciplined Mr. Parsons and Mr. Vance—the whistleblowers and/or perceived whistleblowers.

It is significant to note that although Air Force has already charged Mr. Keel with lack of candor, there is strong evidence suggesting that he also demonstrated a continued lack of candor in response to OSC's questions. His lack of candor ranged from knowledge of the identity of the complainants to the misconduct charges he leveled at the complainants. Here, as with Colonel Edmondson, the credibility of the entirety of Mr. Keel's testimony is called into question. OSC believes there is strong evidence for the Air Force to take action against Mr. Keel for his lack of candor, as well as for his retaliatory misconduct.

Lastly, Mr. Keel was a GS-13 supervisor during the relevant time period and has a record of prior disciplinary action. On May 10, 2011, Mr. Keel was reduced in grade by one level based on findings of gross mismanagement, lack of candor, violation of Air Force rule or regulation, and misrepresentation of government records. This prior discipline should be considered when determining the appropriate level of disciplinary action for his retaliatory misconduct. There is no dispute over the seriousness of the retaliation charges. Based on the preceding, OSC recommends that the Air Force take substantial disciplinary action against Mr. Keel.

C. Mr. Dean

The record indicates that Mr. Dean directed one personnel action: Ms. Spera's non-selection for a permanent position with the Port Mortuary. There is strong documentary evidence of Mr. Dean's animus towards Ms. Spera for her verbal report to ██████

- Mr. Dean criticized Ms. Spera's motive for contacting the Medical Examiner's office stating that she was, "[f]ueled by her resentment of the new organizational structure..." and that she "[w]illingly sought to malign the AFMAO by contacting an outside agency in hopes of creating cross organizational discord."

While Mr. Dean was copied on emails discussing many of the above-referenced personnel actions and was the deciding official in at least one of the actions, the documentary and testimonial evidence strongly suggest that he was not substantively involved in taking or initiating the other personnel actions. Equally significant, he did not appear to manifest retaliatory motive in any of the other personnel actions. Additionally, there was consistent testimony with respect to Mr. Dean's reluctance to take adverse personnel actions.

At the time of the personnel actions at issue, Mr. Dean held a high-level GS-15 position.

[REDACTED]

As to the appropriate penalty for Mr. Dean, although some additional discipline is warranted, OSC recommends that it be considerably less than the the discipline taken against Colonel Edmondson and Mr. Keel.

V. CONCLUSION

Congress included protection for whistleblowers in the Civil Service Reform to assure federal employees that "they will not suffer if they help uncover and correct administrative abuses." S. Rep. No. 95-969, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730. In this matter, OSC's investigation uncovered willful, concerted acts of retaliation that necessitate disciplinary action. Holding management accountable for engaging in prohibited personnel practices is essential to assuring employees that they can blow the whistle or engage in other protected activity without fear of reprisal.

Accordingly, and for the reasons set forth herein, the Air Force should take appropriate disciplinary action against Colonel Edmonson, Mr. Keel and Mr. Dean for their retaliatory actions in violation of 5 U.S.C. §§ 2302(b)(8) and (b)(9).