UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

RODNEY M. WALLS,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
PH-0752-11-0287-I-1

DATE: August 1, 2011

Debra A. D'Agostino, Esquire, Alexandria, Virginia, for the appellant.

Jeannette L. Bisson, Esquire, Landover, Maryland, for the agency.

BEFORE
Michael H. Garrety
Administrative Judge

INITIAL DECISION

INTRODUCTION

By appeal received April 8, 2011, Rodney M. Walls challenged the March 18, 2011 decision of the U.S. Postal Service, Baltimore, Maryland, reducing him in grade, effective April 9, 2011. The Merit Systems Protection Board (Board) has jurisdiction over this appeal. 39 U.S.C. § 1005(a). A hearing was held on June 27, 2011, closing arguments were presented on July 12, 2011, and the record closed on July 12, 2011. For the reasons set forth below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

Background

The appellant held the position of Manager, Maintenance Operations, EAS-23, at the Baltimore Processing and Distribution Center (P&DC). In June 2010, a mail handler at the P&DC was detailed to the position of Acting Supervisor, Maintenance, reporting to the appellant (for privacy reasons, I will hereinafter refer to the mail handler as the complainant). On July 23, 2010, another manager at the P&DC informed Wayne Griffith, Manager of Maintenance (Lead) that the complainant had reported to her that the appellant had sexually harassed her and had otherwise engaged in inappropriate conduct towards her. Griffith conducted an initial inquiry into the allegations. He interviewed the complainant on July 23, 2010, and she provided an unsworn, handwritten statement that date. He then notified the appellant of the allegations and interviewed him on July 26, 2010. Initial Appeal File (IAF), Tab 5, Subtab 4h. Griffith reported his findings to Tom Keefe, Manager, Human Resources, who convened a formal investigation into the allegations. Two agency management employees from outside the Baltimore area were assigned to conduct the investigation. Numerous employees were interviewed during the investigation, including the appellant and the complainant, sworn statements were obtained, and a fact finding report (FFR) was prepared. *Id.*, Subtab 4g.

On December 9, 2010, upon receipt of the FFR, Griffith conducted a pre-disciplinary interview with the appellant. *Id.*, Subtab 4e. On January 14, 2011, Griffith informed him that he proposed to reduce him in grade to a nonsupervisory position based on the general charge of "misconduct," comprising several specifications. The narrative in support of the charge stated that his actions were in violation of the agency's policy on sexual harassment and several provisions of the Employee and Labor Relations Manual (ELM). Initial Appeal File (IAF), Tab 5, Subtab 4d. He responded in writing to the charge. *Id.*, Subtab 4c. Gregory P. Incontro, Senior Plant Manager, Mail Processing and

Distribution, Baltimore District, found that the evidence supported each of the specifications of the charge and demoted him to the position of part-time flexible mail handler. *Id.*, Subtab 4b.

Burden of proof

The Board may uphold the decision of an agency to take adverse action against an employee only if a charge brought against him is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii) (2011). Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2011). Where, as here, more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990).

Specifications one and two

The specifications of the charge are not numbered, but for ease of reference I will number them here. They quote directly from the sworn statement the complainant provided on August 3, 2010 during the investigation. IAF, Tab 5, Subtab 4g. Specifications one and two refer to inappropriate sexual comments made to the complainant, specifications three, four, five, six, and seven refer to touching the complainant in an unprofessional manner, and specification eight refers to looking at the complainant in a sexual manner. I will address the specifications as grouped by the agency. Grammar, punctuation, and spelling appear as in the original. Specifications one and two state as follows:

> [Complainant] states that Rodney Walls has made inappropriate sexual comments to her. Specifically, she states the following:
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> "Mr. Walls expressed interest in me almost four years ago when he approached me and asked me out. At that time, I told Mr. Walls I was married and not interested in him. There were no other incidences until June 2010, when I inquired with Mr. Griffith about the opportunity to train in management. After the initial inquiry about training in Management, Mr. Walls came to my work

> area on June 2, 2010 at approximately 3:30 pm, and began explaining the responsibilities associated with the job. At the end of Mr. Walls' explanation of the job, Mr. Walls said me wanting to supervise would mess up his opportunity to take me out. I told Mr. Walls I was not interested, I was married and I had told him this before. Mr. Walls said he did not recall me telling him this before."
>
> "On July 7, 2010 I was in the supervisor's office with Michelle Liberty and Sue Hensley. Mr. Walls came into the office and pulled up a chair and stared at me. At approximately 3:50 pm, I started walking towards the elevator and Mr. Walls followed me. On the way to the elevator, Mr. Walls commented, "I want to date you; I want to go out with you." I told Mr. Walls, "I am married; I don't want to date outside my marriage." As I got on the elevator, Mr. Walls proceeded to get on with me as well. He made me feel very uncomfortable, but he did not touch me. While on the elevator, Mr. Walls told me that he wanted to go out with me and what we did outside of the post office would stay outside of the post office." Mr. Walls asked me to call him on my way home so we could continue the conversation we were having in the elevator and I told him there was no need."

According to the notice of proposed reduction in grade, the agency's policy on sexual harassment states that the agency is committed to providing a work environment free of sexual harassment, and it defines sexual harassment as unlawful and improper conduct, which undermines the employment relationship as well as employee morale, to include:

> Making or threatening to make employment decisions based on an employee's submission to or rejection of sexual advances or requests for sexual favors.
>
> Deliberate or repeated unsolicited remarks with a sexual connotation or physical contacts of a sexual nature that is unwelcome to the recipient.
>
> A sustained hostile and abusive work environment so severe that it changes the terms and conditions of one's employment.

The notice recites that the policy further states that the agency will not tolerate the presence of sexual harassment in the workplace, that employees who are found to have engaged in sexual harassment should expect serious disciplinary action, including removal, and that employees who believe that they are the victims of sexual harassment should bring the situation to the attention of an impartial supervisor or manager at the appropriate organizational level. *Id.*, Subtab 4d.

On July 23, 2010, after learning about the complainant's allegations of sexual harassment from Jackie Conway, Manager, Distribution Operations, Mr.

Griffith met with the complainant, and she provided an unsworn, handwritten statement. The allegations in the statement are similar to those in the sworn statement she later provided, although somewhat less detailed. *Id.*, Subtabs 4g, 4h. A few days later Griffith interviewed the appellant. He informed Griffith that on June 2, 2010 he spoke to the complainant in passing about the detail, but he denied that he said anything to her about taking her out, and he stated that the alleged elevator incident on July 7, 2010 never happened. *Id.*, Subtab 4h.

The FFR sets out the excerpts from the complainant's statement forming the basis for specifications one and two and summarizes the statements of other employees that contain information the investigators deemed relevant to the alleged incidents on June 2 and July 7, 2010. Terry Dorsey, Supervisor, Maintenance Operation Support, stated that the appellant had falsely told other employees in March 2008 that he had slept with her, she filed an EEO complaint against him in response, he retaliated by making changes to her work schedule and assignments, and he is a very manipulative person. Joseph Garten, Electronic Technician, stated that the appellant had commented to him that the complainant was spending too much time with her trainer, Cornell Jackson, the complainant had asked male employees to escort her to her car because the appellant was trying to catch her walking to her car, the appellant has a tremendous ego that must be constantly fed, and he seemed to recruit a lot of women to act as maintenance supervisors who had no maintenance experience. Kenneth Miller, MPE, averred that the appellant had said to him that Cornell Jackson was spending too much time with the complainant, Jackson later told him that the appellant had told him to stay away from her, and the appellant is very vindictive, is a liar, and fabricates things. Ms. Conway stated that the complainant told her a few weeks ago that the appellant had asked her out and informed her that he could get her a position in maintenance, and she also told her that the appellant had cornered her in an elevator on her way home. Mr. Griffith stated that a former manager at the Baltimore P&DC told him that the appellant had asked her

out, she wanted him to stop, and that when he asked the appellant about the matter, he stated that he had not asked the employee out. Charlene Whitfield, Mailhandler, averred that the appellant asked her out once while she was working in maintenance, but she told him no and he did not ask her out again. Cornell Jackson, Supervisor, Maintenance Operations, stated that the appellant questioned him about the time he was spending with the complainant and instructed him to stay away from her, when he was partnered with Michele Liberty he spent as much time with her and the appellant said nothing about it, the appellant made statements to other employees that he was spending too much time with the complainant, she asked him to stay with her because she was afraid of the appellant, she told him that the appellant had asked her out but she declined, she wanted him to walk her to her car, and she informed him that the appellant had followed her to the elevator at the end of the day. Ricardo Singletary, Supervisor, Maintenance Operations, stated that Jackson told him that the complainant was uncomfortable with the appellant, that he had walked her to her car on a few occasions, that she was afraid of the appellant, and that he had touched her. Michelle Liberty, Supervisor, Maintenance Operations, and Sue Hershey, Supervisor, Maintenance Operations, stated that they had not witnessed the appellant's acting in an unprofessional manner towards the complainant. The FFR also noted that, with the exception of Ms. Liberty and Ms. Hershey, all employees interviewed stated that the appellant ruled by intimidation, and several were reluctant to speak due to fear of harassment. *Id.*, Subtab 4g.

In the sworn statement he provided to the investigators, the appellant stated that that he had never made any comments of a sexual nature to the complainant and had never asked her out. He accused the complainant of not keeping an accurate account of her work hours and doing personal work on an agency computer. He stated that the complainant and Mr. Jackson seemed to be "joined at the hip" and that he had questioned whether something was going on between them. He notified the complainant that he planned to send her back to her regular

position, and he believed that her accusations against him were designed to secure a position for herself in the maintenance section. *Id.* During the pre-disciplinary interview Mr. Griffith conducted on December 9, 2010, the appellant responded to a series of written questions and denied the complainant's assertions concerning the alleged incidents on June 2 and July 7, 2010. *Id.*, Subtab 4e. When he replied in writing to the charge, he stated that the complaint's allegations were fabrications, and he denied that he had violated the agency's policy on sexual harassment. *Id.*, Subtab 4c.

Griffith testified about his involvement in the matter but not about the allegations he made in his sworn statement. He testified that the appellant had no role in the decision to select the complainant for a detail in the maintenance section, but he voiced no concerns at the time. The complainant was paid at a higher rate of pay during the detail. He did not recall any performance problems she was experiencing while on detail, but the appellant did mention to him an issue concerning her work hours.

The appellant testified that prior to the start of the complainant's detail, he had no personal relationship with her and had never asked her for a date or inquired about her marital status. When he was informed about the detail, he stated to Mr. Griffith that he was not interested in having her work in his unit due to an issue that had arisen earlier about the accuracy of her reports when she was serving temporarily as an acting 204B supervisor. Ms. Conway, who also attended the meeting, told him that if the detail was not authorized, the complainant would file an EEO complaint against him.

With respect to the allegations of specification one of the charge concerning the events of June 2, 2010, the appellant testified that it was his recollection that as of that date the complainant had not yet begun her detail. He did not meet with her that afternoon as alleged, because at 3:30 p.m. he would have been attending the one-to-three hour staff meeting that Mr. Incontro held every afternoon with the senior managers. He recalled that he did see the

complainant one day in her regular work area, and she asked him about the detail. This was when he became aware that she was being assigned to the detail. When she later informed him of the starting date, he told her to meet him in the managers' office at 7:00 a.m. the following day. He again denied that he had ever asked her out.

Concerning specification two, he testified that he did not recall any such meeting or staring at the complainant during any meeting. He stated that at 1:00 p.m. on July 7, 2010, the local electric power company informed the agency that there would be a power curtailment that afternoon due to the excessive heat and demand for power. He had two hours to put the agency's operating plan in place for the curtailment, and he was working with Mr. Griffith on the matter. The Tour 2 managers and supervisors had to stay late that afternoon to brief their counterparts on Tour 3 about the curtailment. He recalled speaking with Ms. Liberty and Ms. Hershey about the curtailment, at which point the complainant interrupted them to ask him about a vacant supervisory position in which she was interested. He told her he was busy and that if she wanted to discuss the position with him, they would have to "walk and talk," *i.e.*, carry on the discussion while he was on the way to his next assignment in another part of the building. They then walked across the workroom floor and reached an elevator, which they boarded; at the conclusion of the elevator ride, she went her way and he went his way. There was no conversation during the ride about dating and he never told her to call him, contrary to the allegations in the specification. He was speaking on his radio during the elevator ride about the curtailment.

Ms. Hershey, called as a witness by the appellant, testified that the appellant was her first line supervisor and that she knew the complaint from her detail. She never observed the appellant harassing the complainant or staring at her. Regarding the alleged incident on July 10, 2010, she did not recall seeing the appellant stare at the complainant, but she did recall the complainant's asking him about a supervisory position in maintenance, which seemed to shock him.

They then walked away, discussing the position. On another occasion, she overheard the complainant telling someone on the telephone that the appellant was getting on her nerves. Regarding the reference in her sworn statement to an incident involving the complainant's blouse, she testified that the appellant had come to her office to speak with her and was sitting in front of her desk. She could see the complainant from her vantage point, but the appellant could not. She noticed that the complainant's blouse was undone and that she was fixing it. Ms. Liberty, also called as a witness by the appellant, testified that she, too, never saw the appellant harass or stare at the complainant. Ms. Whitfield, another witness called by the appellant, reiterated that the appellant had once asked her for a date, but he was not her supervisor at the time and he did not harass her.

I must first address an issue concerning the agency's policy on sexual harassment and the standard of proof to be employed here. The agency charged the appellant with violating that policy and did not additionally assert that his conduct constituted sexual harassment under Title VII of the Civil Rights Act of 1964. The Board has stated that "an agency taking an adverse action against an employee based on a charge of violating the agency's policy against sexual harassment need only address that policy and follow the appropriate procedures for taking an adverse action, not Title VII regulations and procedures." *Alsedek v. Department of the Army,* 58 M.S.P.R. 229, 234-35 (1993); *see also Carosella v. U.S. Postal Service*, 816 F.2d 638, 642 (Fed. Cir. 1987); *Campbell v. Department of the Air Force*, 72 M.S.P.R. 480, 484 (1996); *Hatch v. Department of the Air Force*, 40 M.S.P.R. 260, 266 (1989). Of course, if the agency's policy is essentially identical to Title VII regulations, the Title VII standard of proof applies. *Alsedek*, 58 M.S.P.R. at 234.

It is not clear to me whether the agency's policy differs from Title VII, and the principal reason for this is that it is not clear to me what constitutes the agency's policy in the first instance. The record contains a number of documents relating to the policy: (1) Poster 199, July 2003, Sexual Harassment; (2)

Publication 553, December 2008, Employee's Guide to Understanding, Preventing, and Reporting Sexual Harassment; (3) Publication 552, March 2010, Manager's Guide to Understanding, Investigating, and Preventing Harassment, (4) Postal Bulletin 21811, March 19, 1992, Joint Statement on Violence and Behavior in the Workplace; and (5) ELM, February 2010, § 673.222, Sexual Harassment. *Id.*, Subtab 4l. These documents describe the policy in different ways and with different degrees of detail. Moreover, while some of them describe the policy in terms very similar to those set out in the notice of proposed reduction in grade, none of them reference the specific language used in the notice. Thus, it is difficult to evaluate the agency's evidence when it is not entirely certain that the rules it charged him with disobeying were the ones that applied to his conduct.

A more fundamental problem concerns the nature of the agency's evidence itself. Virtually all of it is hearsay evidence, as neither the complainant nor any of the witnesses who provided statements tending to support her version of events testified at the hearing. Although the Board will consider hearsay evidence, assessment of the probative value of such evidence necessarily depends on the circumstances of each case. The following factors affect the weight to be accorded to hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; (8) credibility of declarant when he made the statement attributed to him. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981).

Several of these factors persuade me that the agency's evidence is entitled to little weight. First, there has been no showing that any of the potential witnesses was unavailable to testify.[*] Second, I have strong doubts that these witnesses can be considered disinterested witnesses to the events, as they reported in their statements their own difficulties with the appellant as a co-worker or a supervisor and their strong disagreement with his alleged style of managing and relating to other employees. Third, the only corroboration for the statements is contained within the statements of other employees who did not testify at the hearing. Fourth, the statements are contradicted in large part by the testimony of the appellant. Fifth, there are reasons to be concerned about the credibility of the complainant's statements, given the appellant's uncontradicted testimony that she was performing poorly in her temporary assignment and that he was seeking to terminate the assignment, thus supplying a motive for her to make the accusations she made against him. In addition, I have other concerns

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[*] In its prehearing submission, the agency listed only Mr. Incontro, the deciding official, and Mr. Griffith, the proposing official, as its witnesses. At the prehearing conference, the agency made additional requests for Mr. Jackson, Mr. Miller, Ms. Dorsey, and Mr. Garten. I noted that the Board does not ordinarily approve witness requests not presented in a party's prehearing submission. The appellant objected to Ms. Dorsey on the ground of relevance. Although it was not clear to me initially, the appellant also objected to all of the additional requests because they were not presented in the agency's prehearing submission, and I sustained that objection. Later in the conference the agency requested me to reconsider my ruling, but I declined to do so. IAF, Tab 13 (summary of prehearing conference). At the hearing, the agency stated at the close of its case that it might wish to call the complainant as a rebuttal witness, but at the close of the appellant's case, it did not make that request. At the outset of its closing argument, the agency again objected to my ruling at the prehearing conference. *Id.*, Tab 15. As the agency obviously intends to pursue this issue, I will state here that to me, there is simply no reason why it could not have anticipated the need to present testimony at the hearing from certain employees and have listed them in its prehearing submission. Although I did not include the following information in my prehearing conference summary, it is my distinct recollection that the agency's response, when I inquired as to why the witnesses had not been listed, was that a "he said/she said situation" had not been expected, a claim I found to be rather surprising – to say the least – under the circumstances.

about the agency's evidence; some of the statements contain double and even triple hearsay, and some of them contain information that is inadmissible under Federal Rules of Evidence 404(a) and 608 and that I find inappropriate to consider here even though the Board is not bound by the Federal Rules of Evidence.

In contrast, the appellant's testimony did not cause me to entertain any significant doubts about his credibility. Although bias cannot be discounted as a factor due to his difficulties with the complainant, his version of events certainly was not inherently improbable. Nor did his demeanor while testifying lead me to believe that he was not being truthful; he seemed calm and assured while testifying, and he responded directly and unhesitatingly to the questions he was asked. To a certain extent, moreover, the testimony of Ms. Hershey and Ms. Liberty provided corroboration for his testimony relating to specification two. *See Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458 (1987) (factors to consider in assessing credibility). I note as well that he provided a convincing explanation regarding the relative brevity of his initial response to the complainant's accusations in July 2010 and the nature of his responses to the investigators in October 2010 and to Mr. Griffith in the pre-disciplinary interview in December 2010. I have carefully considered the evidence that was presented to me, and I conclude that the agency failed to prove specifications one and two by preponderant evidence.

Specifications three, four, five, six, and seven

These specifications state as follows:

> [Complainant] states that Rodney Walls has touched her repeatedly in an unprofessional manner. Specifically, she states the following:
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> "On July 12, 2010, I was sitting at my desk, working on the computer, when Mr. Walls came up behind me and pulled my hair and ran his fingers through my pony tail. I turned around and asked him to please not touch my hair".
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> "On July 14, 2010, I was on the 1st floor at the TMS desk attempting to plug in a cordless phone. The cord was hanging by leg, when Mr. Walls walked up to me and squeezed my right thigh with his hand. I told Mr. Walls, "don't do that." Mr. Walls said, "Do what?" I said, "I told you, I'm not like that." He said,

> "Like what?" I responded, "Letting men put their hands on me and I told you over and over, I am married." After saying that, I dropped the wire and phone and walked away."
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> "On July 15, 2010, I was at my desk working on the computer when Mr. Walls walked up behind me and put his hands on my shoulder, massaging them and asked me, "Baby, is there anything you need?" I immediately jumped up and left the office".
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> "On July 19, 2010, I was in Terri Dorsey's office with her and Kenny Miller looking for parts. Mr. Walls walked in and stood at the side of me. All of a sudden he reached over, grabbed my left arm, his hand slid down my arm some and then he said, "Excuse me."
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> "On July 22, 2010, I was at Robot 3 where Joe Garten was entering information into the computer. I was leaning over the railing looking at Joe, when Mr. Walls walked up behind me and put his hands on my waist. I stood up and his hands dropped after that".

IAF, Tab 5, Subtab 4d.

As was the case with specifications one and two, the allegations in the complainant's July 23, 2010 unsworn statement about these incidents are similar to those in the sworn statement she later provided. *Id.*, Subtabs 4g, 4h. In his initial interview with Mr. Griffith on July 26, 2010, the appellant also denied these allegations. He told Griffith that he never touched the appellant on July 12, 14, or 15, 2010 as alleged, that he recalled being in an office with Ms. Dorsey and Mr. Miller on July 19, 2010 but he did not touch the appellant, and he did not touch her on July 22, 2010 and was not in the area in question until late afternoon. *Id.*, Subtab 4h.

The FFR again quotes from the complainant's sworn statement and summarizes the statements of the other employees who were interviewed. Ms. Dorsey stated that on July 20, 2010, the complainant, Mr. Miller, and the appellant were in her office, out of the blue the appellant grabbed the complainant's arm, and Dorsey then left the office. Mr. Garten averred that on July 22, 2010, the appellant walked up behind the complainant and poked her waist on both sides, which appeared to startle her, they walked away on the workroom floor, the next time Garten saw the complainant, she asked if he had seen the appellant touch her, he replied that he had not, because he feared

retaliation, and the complainant told him that she had asked the appellant not to touch her. Mr. Miller stated that on one occasion he was entering an office with the appellant and the complainant, the appellant reached out and grabbed her hand momentarily for no apparent reason and said, "Excuse me." He continued that after that, the three of them were in Ms. Dorsey's office, the appellant grabbed the complainant's arm out of the blue and again said, "Excuse me." Finally, he stated that the complainant had told him that the appellant had been touching her and would not stop, her demeanor changed, and she started spending time with the employees downstairs to avoid the appellant. Ms. Conway stated that the complainant told her that the appellant had touched her thigh when he was working by the robot on the floor. Mr. Griffith averred that the complainant told him that the appellant had come up behind her and softly touched her hair. Mr. Jackson stated that the complainant came upstairs one day and was upset, she told him that she had to get herself together, she later told him at lunch that the appellant had touched her leg, she wanted Jackson to stay with her, but he responded that he could not, because the appellant had told him to stay away from her, and she also mentioned that while she was working near robot 3 with Mr. Garten, the appellant came up behind her and put his hands on her waist.

In the sworn statement he provided to the investigators, the appellant denied ever having touched the complainant in an unprofessional manner and stated that her allegations were false. At the hearing he testified with respect to specification three that he has never touched the complainant's hair. He testified concerning specification four that on that date, he was assisting Mr. Singletary with the installation of a telephone. After they believed they had completed the installation, the telephone nevertheless was not operable. At that point, the complainant came over to where they were working and somehow managed to cut off the power to a computer. He yelled at her to leave things alone because she did not know anything about the equipment. Later, during a telephone conversation, she provided a password related to the equipment, and Singletary

chastised her for doing so over the telephone because it was improper to provide a password in that manner. According to the appellant, the telephone cord was not near the complainant's leg, he did not touch her thigh, and he did not have the conversation with her to which the specification refers. Testifying about specification five, he stated that this incident did not occur and that he has never called her "baby" or massaged her shoulders. He noted in addition that the complainant's desk was essentially in an open area.

With respect to specification six, he testified that he had been chastised earlier that day by Mr. Incontro regarding a part that was on order. The complainant was responsible for this particular operation, and he later asked her about it. She attempted to shift the blame for the delay to Mr. Miller, at which point he said to her, "Let's take a walk." They went to Ms. Dorsey's office, and Mr. Miller was there. He asked Dorsey about the status of the part and was not satisfied with her answer. He was angry with the complainant, Dorsey, and Miller about the matter. At some point, the complaint stepped back towards him, and he put his hand up to stop her. His recollection was that his hand touched her back or shoulder, not her arm. He was not sure why she had stepped back and he was not sure that it was an accident, but he said, "Excuse me." Conway, Miller and the complainant then proceeded to provide him with additional information about the part on order.

As for specification seven, he testified that he was in his office most of the day because he was waiting for information about his wife's medical condition; she had become ill on a flight to California and was taken to a hospital upon arrival. Most persons did not even know he was in the building, and he was planning on leaving early, in the event that he had to fly to California. He nevertheless processed a pay adjustment for Ms. Hershey that day, assisted another manager with preparations for a pre-disciplinary interview of another employee, responded to several e-mail messages from Mr. Griffith, and had a conversation with the complainant around 10:00 a.m. about software for a robot.

When speaking with the complainant, he also told her that she was not following his instructions, he was tired of her behavior, and he was going to speak with Griffith about it. He testified that he had had several conversations with her prior to that day about her performance and conduct. He went downstairs around 1:30 p.m. on his way out of the building to check on the robot. He saw the complainant and Mr. Garten, but she had her back towards him. He must have startled her, because when he greeted them, she jumped. He never touched her. He then assisted them with the robot. When he spoke with Griffith about the complainant, Griffith agreed that if she was not following instructions, they had no use for her.

Akilah Griffin, an industrial engineer, was called as a witness by the appellant in connection with specification four. She stated that she knows the complainant and has worked with her, she did not recall any incident involving the complainant's attempting to plug in a cordless telephone on the date in question, and she did not recall seeing the complainant any time that day. She did observe the appellant working on a telephone, as she was in the same area on and off performing one of her assignments.

I will not repeat here my analysis of the agency's evidence in light of the *Borninkhof* factors or my analysis of the appellant's testimony under the *Hillen* factors and otherwise, but the considerations I addressed previously apply to these specifications as well. I conclude that the agency failed to prove specifications three, four, five, six, and seven by preponderant evidence.

Specification eight

Specification eight states as follows:

> [Complainant] states that Rodney Walls has looked at her in a sexual manner. Specifically, [complainant] states:
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> "There was also a time in June 2010 when Cornell and I were walking and Mr. Walls just stopped and stared at me. Mr. Walls did not make eye contact with me. He was staring at my body. I looked down at my zipper thinking maybe it was open, which it was not. Cornell asked Mr. Walls what was wrong and Mr. Walls commented, "Nothing, I just lost my train of thought".

> [Complainant] states that because of the actions of Mr. Walls, she started wearing a smock to cover up her clothing more and changed her hair style to draw less attention to herself. [Complainant] states that she is afraid of Mr. Walls.

IAF, Tab 5, Subtab 4d.

The complainant did not present this allegation in her unsworn, handwritten statement; it first appeared in her August 3, 2010 sworn statement. In addressing this allegation, the FFR refers to the sworn statement provided by Mr. Jackson, who indicated that he and the complainant were leaving room 375 when the appellant approached them to discuss the APS machine. The appellant stopped talking and started staring at the complainant below her waist, and it appeared as if he was in a trance. She asked him what he was looking at, and he responded that her shoe was untied. Jackson stated that a shoe lace was loose but the shoe was not untied. He believed that the appellant was looking at the complainant's crotch area, and he and the complainant were shocked at his actions. According to Jackson, as a result of this incident, the complainant began wearing a long smock.

In his statement, the appellant averred that he never looked at the complainant in an unprofessional manner. He testified at the hearing that he had no recollection of any such incident. He stated that, due to a neck injury he suffered in 2001, which required surgery, he looks down while walking. As for the complainant's claim that because of his actions, she began wearing a smock to cover up her clothing, he testified that even before she started her detail, and for as long as he could remember, she wore a smock, knee-length or longer, at work. During her testimony, Ms. Whitfield also stated that the complainant wore a smock prior to her detail. She described it as blue in color and below the knees in length.

I also will not repeat here my prior analysis of the agency's evidence and the appellant's testimony. I note, however, that the appellant's uncontradicted claim that the complainant and Mr. Jackson appeared to have a close relationship

and the testimony disputing the complainant's assertion that she began wearing a smock in response to the appellant's conduct are additional reasons for discounting the agency's evidence. I conclude that the agency failed to prove specification eight by preponderant evidence.

As the agency failed to prove any of the specifications of the charge of misconduct by preponderant evidence, the charge is not sustained, and the agency's action must be reversed. Accordingly, it is not necessary for me to discuss the nexus requirement or the agency's penalty determination. I must, however, address the appellant's affirmative defense.

Reprisal for protected EEO activity

The appellant raises the affirmative defense of reprisal for protected EEO activity. He has the burden of proving this affirmative defense by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(iii) (2011). To establish a prima facie case of reprisal, he must show that the accused official knew of the protected activity, that the adverse employment action under review could, under the circumstances, have been retaliation, and that there was a genuine nexus between the retaliation and the adverse employment action. *See Cloonan v. U.S. Postal Service*, 65 M.S.P.R. 1, 4 (1994). To establish a genuine nexus between the protected activity and the adverse employment action, he must prove that the employment action was taken because of the protected activity. *Id.* at n.3. If he meets this burden, the agency must show that it would have taken the action even absent the protected activity. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1989).

Here, however, the hearing has been held and the record is now complete. Although the agency failed to prove its charge of misconduct by preponderant evidence, I find that it nevertheless articulated a non-discriminatory reason for its disciplinary action against the appellant. Thus, as the Board explained in *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, 11-13 (2008), the

agency has done everything that would be required of it if he had made out a prima facie case, and whether he in fact did so is no longer relevant. The inquiry therefore proceeds directly to the ultimate question of whether, upon weighing all of the evidence, he has met his overall burden of proving illegal retaliation, *i.e.*, whether he has produced sufficient evidence to show that the agency's proffered reason for its action was not the actual reason and that the agency intentionally retaliated against him. The evidence to be considered at this stage of the analysis may include: (1) the elements of the prima facie case; (2) any evidence he presented to attack the agency's proffered explanation for its action; and (3) any further evidence of retaliation that may be available to him, or any contrary evidence that may be available to the agency.

The appellant's evidence concerning his reprisal claim is wholly circumstantial, but the Board may consider such evidence in determining whether or not he has met his burden of proof. As explained in *Marshall*, he must show that the accused official knew of the protected activity and provide evidence demonstrating a "convincing mosaic" of retaliation against him under which a number of pieces of evidence, each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: a number of weak proofs can add up to a strong proof. As a general rule, this mosaic includes 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 of information 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.

The appellant filed a formal complaint of discrimination on February 1, 2009. He made allegations of discrimination based on race, color, and sex (sexual harassment), stated that the dates on which the alleged acts of

discrimination had occurred were March 2007 to November 2008, and named Mr. Griffith and Ms. Dorsey as the persons who took the actions alleged to be discriminatory. According to the appellant, Dorsey sexually harassed him repeatedly and Griffith not only failed to put a stop to her behavior but at times facilitated it. IAF, Tab 10, Ex. B. The appellant testified at the hearing that after learning about the complaint, Griffith was angry with him and told him that he could not believe he had filed the complaint. He further testified that he received the investigative file regarding the complaint in December 2010, shortly before the agency proposed disciplinary action against him, that he had also filed another EEO complaint in which he named Mr. Incontro as a responsible management official, and that Incontro was not happy about having to respond to the complaint. Mr. Griffith testified that the appellant's complaint had no effect upon his decision to propose disciplinary action against the appellant, and Mr. Incontro testified that he was not aware of the particulars of the complaint, he was not sure when he became aware of the complaint, but in any event the complaint did not affect his decision in this matter.

I have considered the evidence presented to me, and I conclude that preponderant evidence does not support the appellant's claim of reprisal. Given the nature of the allegations the complainant and others made against him and the time period during which his actions purportedly occurred, the timing of the disciplinary action does not appear to be unusual or suspicious, and the reasons for the agency's action do not strike me as pretextual. Although I have concluded that the agency failed to prove its charge of misconduct by preponderant evidence, in my view the FFD at least to a certain extent provided evidence on which reasonable persons could base a decision to proceed with disciplinary action. There also is no evidence that employees similarly situated to the appellant were better treated. Finally, there is no evidence to suggest that Mr. Incontro, Mr. Griffith, or anyone else involved in taking the disciplinary action had anything more than a very weak motive to retaliate against him for the filing

of his complaints. The record indicates that the filing of EEO complaints by supervisors at the Baltimore P&DC is a relatively commonplace occurrence, and absent any credible evidence to the contrary here, I find it unlikely that the appellant's complaints triggered a retaliatory response. Accordingly, his affirmative defense is not sustained.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the reduction in grade and pay and to retroactively restore appellant effective **April 9, 2011**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

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

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

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

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

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

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

FOR THE BOARD:

_____
Michael H. Garrety
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 5, 2011**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and

may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c), must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

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

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

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

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

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

NOTICE TO AGENCY/INTERVENOR

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

DFAS CHECKLIST

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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