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*U.S. Merit Systems Protection Board Breakout Session
Hot Topics*

Moderator:

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U.S. Merit Systems Protection Board

Panelists:

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**Practical Implications of the new IRA Provisions in the Whistleblower
Protection Enhancement Act of 2012**

I.) Introduction and Overview of Material

- The Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, amended several sections of the U.S. Code pertaining to, among other things, (1) the processing of federal sector complaints of whistleblower reprisal and (2) reprisal for engaging in other forms of protected activity. The primary legislative history for the WPEA can be found in the Senate Report of the Committee on Homeland Security and Governmental Affairs, S. Rep. No. 112-155 (2012).

II.) Background and History of the Whistleblower Protection Act and the Whistleblower Protection Enhancement Act of 2012

- Federal sector protection against reprisal for whistleblowing, along with protections against several other prohibited personnel practices, was first included in the Civil Service Reform Act of 1978. See Pub. L. No. 95-454, 92 Stat. 1111. The current list of prohibited personnel practices can be found at 5 U.S.C. § 2302(b)(1)-(13).

- In 1989, Congress passed the Whistleblower Protection Act (WPA), which among other things, gave federal employees the right to file an individual right of action (IRA) appeal with the Merit Systems Protection Board alleging reprisal for engaging in whistleblowing. *See* Pub. L. No. 101-12, 103 Stat. 16; 5 U.S.C. § 1221.
- Congress amended portions of the WPA in 1994. *See* Pub. L. No. 103-424, 108 Stat. 4361. These amendments included the codification of several decisions issued by the Board and the U.S. Court of Appeals for the Federal Circuit, and also empowered the Board to order remedial relief in the form of consequential damages and award attorney fees upon a finding of whistleblower reprisal.
- After several years of proposing amendments to the WPA, Congress passed the WPEA in November 2012, which the President signed on November 27, 2012, and became effective on December 27, 2012.

III.) Specific Statutory Changes Pursuant to the WPEA

- WPEA, § 101(a) replaces the terms “a violation” with “any violation” in 5 U.S.C. § 2302(b)(8)(A)(i) and (b)(8)(B)(i). Congress explained that this change “underscores the breadth of the WPA’s protections.” *See* S. Rep. No. 112-155, at 8.
- WPEA, § 101(b)(2)(C) creates new subsections found at 5 U.S.C. § 2302(f)(1)-(2), many of which are intended to overrule statutory interpretations that excluded different types of disclosures from protection under 5 U.S.C. § 2302(b)(8). Under new section 2302(f), a disclosure shall not be excluded from section 2302(b)(8) for the following reasons:
 - The disclosure was made to a person, including a supervisor, who participated in an activity that the employee or applicant reasonably believed to be covered by 5 U.S.C. § 2302(b)(8)(A)(ii). *See* 5 U.S.C. § 2302(f)(1)(A), *overruling Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995).
 - The disclosure revealed information that had been previously disclosed. *See* 5 U.S.C. § 2302(f)(1)(B), *overruling Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000).
 - The motive of the employee or applicant for making the disclosure. *See* 5 U.S.C. § 2302(f)(1)(C).
 - The fact that the disclosure was not made in writing. *See* 5 U.S.C. § 2302(f)(1)(D).

- The fact that the disclosure was made while the employee was off duty. *See* 5 U.S.C. § 2302(f)(1)(E).
- The amount of time that has passed since the occurrence of the events described in the disclosure. *See* 5 U.S.C. § 2302(f)(1)(F).
- The disclosure was made during the employee's normal course of duties, provided the employee can show that the agency took the action in reprisal for the disclosure. *See* 5 U.S.C. § 2302(f)(2), *overruling Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) and *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001).
- WPEA, § 107(b) expands the scope of remedial relief that can be awarded when the Board grants corrective action for reprisal for whistleblowing under section 2302(b)(8), or reprisal for engaging in other forms of protected activity under section 2302(b)(9). Under this revised section, the Board can now award compensatory damages in cases where it grants corrective action. *See* 5 U.S.C. § 1221(g)(1)(A)(ii).
 - The Board has held that this additional scope of relief should not be applied retroactively to cases pending prior to the WPEA's effective date. *See King v. Department of the Air Force*, 119 M.S.P.R. 663 (2013).
- WPEA, § 114(b) amends 5 U.S.C. § 1221(e)(2) to provide that the Board may not order corrective action "if, *after a finding that a protected disclosure was a contributing factor*, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." Congress explained that this amendment specifies that "an agency may present its defense to a whistleblower case only *after* the whistleblower has first made a prima facie showing that a protected disclosure was a contributing factor in the personnel action." *See* S. Rep. No. 112-155, at 45 (emphasis in original).

IV.) Additional Individual Right of Action (IRA) Provisions in the WPEA

- WPEA, § 101(b) amends 5 U.S.C. § 1221(a) to allow an appellant to seek corrective action from the Board for several prohibited personnel practices listed in 5 U.S.C. § 2302(b)(9). An employee, former employee, or applicant for employment may now file an IRA appeal with the Board alleging the following:
 - Reprisal for the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to

- remedying a violation of 5 U.S.C. § 2302(b)(8) under 5 U.S.C. § 2302(b)(9)(A)(i);
- Reprisal for testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in either 5 U.S.C. § 2302(b)(9)(A)(i) or (ii) under 5 U.S.C. § 2302(b)(9)(B);
 - Reprisal for cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law under 5 U.S.C. § 2302(b)(9)(C); and
 - Reprisal for refusing to obey an order that would require the individual to violate a law under 5 U.S.C. § 2302(b)(9)(D).
- In order for an employee, former employee, or applicant for employment to file an IRA appeal with the Board seeking corrective action under any of these provisions, the individual must first exhaust his administrative remedies by filing a complaint with the Office of Special Counsel (OSC). *See* 5 U.S.C. § 1214(a)(3). WPEA, § 101(b) amended this section to include the OSC administrative exhaustion requirement.
 - The Board has found that each of the new IRA provisions should not be applied retroactively, and that they only allow an individual to file an IRA appeal with the Board for alleged retaliatory conduct arising on or after the WPEA's effective date:
 - *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629 (2014) (section 2303(b)(9)(B));
 - *Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677 (2014) (sections 2302(b)(9)(A)(i) and (b)(9)(C));
 - *Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661 (2015) (section 2302(b)(9)(D))
 - The burdens of proof concerning the new IRA appeals are the same that apply to an IRA whistleblower appeal under 5 U.S.C. § 1221(e)(1) and (2). *See* WPEA, § 101(b). Thus, under section 1221(e), if an individual proves that the protected activity under sections 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in a challenged personnel action, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the individual's protected activity. *See* 5 U.S.C. § 1221(e)(1)-(2).

- The specific burdens of proof laid out in sections 1221(e)(1)-(2) apply in both IRA appeals involving claims under sections 2302(b)(8) and 2302(b)(9)(A)(i), (B), (C), or (D), as well as adverse action appeals under chapter 75 in which the appellant raises one or more of these prohibited personnel practice allegations as an affirmative defense. *See* 5 U.S.C. § 1221(i); *Alarid v. Department of the Army*, 122 M.S.P.R. 600 (2015).

V.) All Circuit Review under 5 U.S.C. § 7703

- WPEA, § 108 amends 5 U.S.C. § 7703(b)(1) to allow an individual to seek judicial review of a final Board order in either “the Federal Circuit or any court of appeals of competent jurisdiction.” 5 U.S.C. § 7703(b)(1)(B).
- Congress originally provided this right of “all circuit review” for 2 years, but subsequently extended it in September 2014 to 5 years from the effective date of the WPEA, *i.e.* until December 27, 2017. *See* Pub. L. No. 113-170.
- Decisions Issued Pursuant to 5 U.S.C. § 7703(b)(1)(B)
 - *Aviles v. Merit Systems Protection Board*, 799 F.3d 457 (5th Cir. 2015)
 - *King v. Department of the Army*, 570 F. App’x 863 (11th Cir. 2014)

Expedited Removal Authority for VA Senior Executives
Under the Veterans Access, Choice, and Accountability Act of 2014

Department of Veterans Affairs Expedited Removal Authority

Section 707 of the Veterans Access, Choice, and Accountability Act of 2014, P.L. 113-146, enacted on August 7, 2014, creates new authority for removing an individual in a senior executive position in the Department of Veterans Affairs.

Section 707(a) of P.L. 113-146 adds a new Section 713 to Title 38. Section 713(a)(1) authorizes the Secretary of Veterans Affairs to remove an individual employed in a position in the Senior Executive Service (SES) if the Secretary determines that the individual's performance or misconduct merits removal. The Secretary may remove the individual from Federal service or transfer him or her to a General Schedule (GS) position for which the individual is qualified and determined appropriate.

Sections 713(d)(2)(A) and (B) provide that any removal or transfer may be appealed to the Board if an appeal is filed not later than seven days after the removal or transfer date. The Board is required to refer any appeal to an administrative judge, who must expedite it and issue a decision not later than 21 days after the appeal date. If an administrative judge cannot issue a decision within that time, the Secretary's removal or transfer decision is final.

Under Section 713(e)(4), the Board or administrative judge may not stay any removal from Federal service or transfer to a GS position. A senior executive who is transferred to a GS position, beginning on the transfer date, receives the annual pay rate applicable to that position only if he or she reports for duty. While an appeal is pending, the senior executive may not be paid if placed on administrative leave or any other category of leave which otherwise would be paid. During the period beginning on the date that the senior executive appeals a removal from Federal service and ending on the date that an administrative judge issues a final decision, he or she may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

Section 713 does not preclude the Secretary from using other authorities to transfer career SES members to GS positions or remove them from Federal service; Section 713(f)(1) states that authority provided by Section 713 is in addition to authority provided by 5 U.S.C. § 3592 or §§ 7541, 7542, and 7543, which relate to removing career members from the SES2 or adverse actions to remove them from Federal service, respectively. Section 713(d)(1), however, provides that, if the Secretary exercises authority under 38 U.S.C. § 713 rather than regular adverse action authority for removing a career member of the SES from Federal service, the procedures in 5 U.S.C. § 7543(b) shall not apply.

Section 707(b) of P.L. 113-146 directs the Board within 14 days after enactment to issue regulations to implement Section 713's authority. On October

22, 2014, the Board published Part 1210 of Title 5 of the CFR as a final rule. The Board's regulations address practices and procedures such as discovery, hearings, and standards of proof. They provide that an administrative judge may uphold or reject a Secretary's decision to remove or transfer a senior executive based on the reasonableness of the Secretary's decision, but may not mitigate it.

Section 707(c) of P.L. 113-146 authorizes the Secretary of Veterans Affairs to initiate an adverse action under the regular procedure in 5 U.S.C. § 7543 to remove an individual from the SES, notwithstanding any other provision of law. Subsection(c) of Section 707 of P.L. 113-146 waives the time limitation on removing career senior executives.

Section 707(d) of P.L. 113-146 provides that nothing in Section 707 or 38 U.S.C. § 713, as added by Section 707(a), shall be construed to apply to an appeal of a removal, transfer, or other personnel action that was pending before that public law was enacted. It adds that the authority provided in 38 U.S.C. § 713 is in addition to authority provided by 5 U.S.C. § 3592, which relates to removing a career SES member from the SES, or 5 U.S.C. §§ 7541-7543, which relate to removal from Federal service or suspension of more than 14 days of a career member of the SES.

Due Process

Because Section 713 authorizes the Secretary of Veterans Affairs to remove an individual in an SES position from that position or from Federal service, it appears to raise due process concerns under the Fifth Amendment of the Constitution. First, Section 713 does not expressly provide for notice and an opportunity to respond. Section 713(d)(1) states that these procedures, which are provided to a career member of the SES in Section 7543(b) of Title 5 for regular adverse actions, "shall not apply."

The Department of Veterans Affairs has issued guidelines, however, which mandate that an individual in an SES position whom it seeks to remove from Federal service or from such a position pursuant to 38 U.S.C. § 713 will receive prior notice of five days and an opportunity to respond to charges in writing in advance of removal. These guidelines acknowledge that, "Unlike many private sector employees who may be terminated 'at-will,' career federal employees whether at the VA or other federal agency, have a constitutionally protected right in continued employment."

Section 713(d)(2)(A) provides that an individual whom the Secretary seeks to remove from federal service or transfer to a nonsenior executive position may file an appeal with the Board within 7 days after removal or transfer. The Board must assign this appeal to an administrative judge for a hearing. An administrative judge must decide the appeal within 21 days, and that decision is final and not subject to further appeal. Section 713(e)(2)(3) states that

if an administrative judge cannot issue an opinion in that period, the Secretary's decision becomes final. This post-removal hearing along with the notice and opportunity to respond in writing procedures mandated by the Department's guidelines facially comply with the basic elements of due process set forth in *Cleveland Board of Education v. Loudermill* and its progeny. The question, then, is whether a court would consider these procedures "meaningful" if it should agree to adjudicate a due process challenge to Section 713.

Judicial Review

Section 713(e)(2) states that the decision of an administrative judge shall be final and shall not be subject to any further appeal. This subsection precludes review by the Board, but does it also preclude any judicial review? This question currently is before the U.S. Court of Appeals for the Federal Circuit in *Helman v. Department of Veterans Affairs*, Docket No. No. 15-3086, in which the Department of Veterans Affairs filed a motion to dismiss this appeal for lack of jurisdiction. The Department of Justice in *Helman* has asserted that preclusion of judicial review is clear from the language, objectives, and legislative history of 38 U.S.C. § 713. The appellant's position on this issue is that the Federal Circuit has jurisdiction to review the decision of the administrative judge; that Section 713 of Title 38 does not deny the court all jurisdiction; and it does not clearly strip the court of jurisdiction to review constitutional claims. Further, the appellant contends that, if Section 713 precludes all judicial review, it violates Article III of the Constitution, which vests Federal judicial power in the Supreme Court and in such inferior courts as Congress may establish, whose judges must be appointed consistent with the Appointments Clause.

Appointments Clause

The appellant in *Helman* also contends that Section 713 contravenes the Appointments Clause, Article II, Section 2, Clause 2 of the Constitution. The Appointments Clause, in relevant part, provides that the President has power to nominate, and by and with advice and consent of the Senate, to appoint principal officers of the United States, but Congress may by law vest the appointment of inferior officers in the President alone, or in heads of departments. Some cases interpreting this clause have held that significant authority of the United States must be exercised by principal or inferior officers appointed pursuant to the Clause. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 126 (1976) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article."). The appellant contends the statute runs afoul of this clause because it allows an MSPB administrative judge, an employee who is not appointed by the President and confirmed by the Senate, to render a final decision of the United States without any review by the presidentially appointed, Senate-confirmed members of the

Board or any other executive officer. Prior to the enactment of the Veterans Access, Choice, and Accountability Act into law, the Members of the MSPB expressed similar concerns in an August 1, 2014 letter to the President.



U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

August 1, 2014

The President
The White House
Washington, D.C. 20500

Re: Section 707 of the Veterans Access, Choice, and Accountability Act of 2014

Dear Mr. President:

We are writing to express our concern with Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 ("Act"). As you may know, Section 707 prohibits the undersigned Members of the Merit Systems Protection Board ("MSPB" or "Board"), sitting as a three-person panel, from participating in the adjudication of any appeal filed with our agency by certain employees of the Department of Veterans Affairs.

As the federal agency responsible for adjudicating appeals filed by veterans in connection with the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, and as a small agency that employs more than 20 veterans, we support and applaud the enactment of any law that seeks to improve conditions for veterans. We also understand that Section 707 is only one provision of a more comprehensive piece of legislation, that the Act was approved on a bipartisan basis by Congress, and that a presidential veto is unlikely. Nevertheless, we feel it is important to share what we believe are very serious concerns with Section 707.

The MSPB is an independent quasi-judicial agency and part of the executive branch. Each of the undersigned Board members was appointed by you and confirmed by the United States Senate to adjudicate appeals filed with our agency by federal employees. We believe that Section 707 which, as noted above, prohibits presidentially-appointed, Senate-confirmed officers of the executive branch from performing the responsibilities for which those officers were appointed and confirmed to carry out, is on weak constitutional footing. Indeed, the Supreme Court has made clear that significant governmental duties, exercised pursuant to public law, must be performed by "Officers of the United States," within the meaning of Article II of the Constitution. Moreover, various courts have suggested that Congress is not permitted to infringe on the right of the executive branch to enforce the laws, nor on the president's appointment or removal powers with respect to executive branch appointees, once confirmed.

Constitutional concerns aside, we also believe that, once enacted, Section 707 could set a very dangerous precedent, under which it is viewed permissible for Congress to undermine – through must-pass legislation similar to the Act – the ability of presidentially-appointed, Article II Officers of the United States to carry out the mission of the agency to which they were appointed to lead.

Again, we understand that this is one provision of a more comprehensive piece of legislation, and more importantly, understand the sensitive nature of any legislation seeking to improve conditions for veterans. However, we hope that you will consider these concerns, and also the possible long-term impact of such a provision of law on your office.

Respectfully,



Susan Tsui Grundmann
Chairman



Anne M. Wagner
Vice Chairman



Mark A. Robbins
Member

United States Court of Appeals
for the Federal Circuit

CARL D. HAYDEN,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2015-3073

Petition for review of the Merit Systems Protection Board in No. CH-4324-13-0534-I-1.

Decided: February 12, 2016

STEPHEN J. SMITH, Cadwalader, Wickersham & Taft LLP, Washington, DC, argued for petitioner. Also represented by KRISTIN LEIGH YOHANNAN MOORE.

RENÉE GERBER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., FRANKLIN E. WHITE, JR.

Before LOURIE, O'MALLEY, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

Carl D. Hayden (“Hayden”) seeks review of the Merit Systems Protection Board (“the Board”) decision denying his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), 38 U.S.C. § 4301, *et. seq.* Specifically, Hayden alleged that the Department of the Air Force (“Air Force”) violated USERRA when it: (1) denied him a promotion due to his military service; (2) denied him the benefit of reemployment in the position he would have obtained had the agency processed his position upgrade; and (3) retaliated against him after he sought USERRA protections. The Board rejected all three of Hayden’s claims. *Hayden v. Dep’t of the Air Force*, No. CH-4324-13-0534-I-1, 2014 WL 6879135 (M.S.P.B. Dec. 4, 2014) (“*Final Decision*”). We agree with the Board that Hayden failed to meet his burden of proof with respect to his reemployment and retaliation claims. With respect to his claim of discrimination based on military service, however, we vacate the Board’s decision and remand for further factfinding.

BACKGROUND

A. Factual Background

Hayden is a member of the Air Force Reserve and has worked as a protocol specialist at the Wright-Patterson Air Force Base since March 2002. The Wright-Patterson Air Force Base is geographically divided into Area A and Area B—each of which has its own protocol office. When Hayden began working at the Base, he worked in B Flight, which is responsible for all protocol support arising on Area B of the Base. At that time, his position was classified as GS-9. *Final Decision*, 2014 WL 6879135, at ¶ 2.

In 2010, Hayden transferred to the protocol office in A Flight, which is responsible for protocol support for Area

A as well as the Air Force Security Assistance Center (“AFSAC”). *Id.* Because he acquired new duties during the transfer, the agency upgraded Hayden’s position from GS-9 to GS-11. *Id.*

The B Flight Protocol Office lost two GS-12 positions in November 2011. *Id.* at ¶ 3. The employees in those positions were declared as “surplus,” meaning that they “were not working in permanently authorized positions.” *Id.* While one of those employees was subsequently placed in another position, the other became a “mandatory placement priority and was still in that status when the appellant filed the petition for review.” *Id.*

On March 26, 2012, Hayden’s supervisor submitted a request to upgrade his position to GS-12, “based on accretion of duties at the higher grade level.” *Id.* at ¶ 4. To justify the upgrade, his supervisor wrote:

Over abundance [sic] of events to work and not enough GS-12’s to perform the duties. Often assign Carl events that are above GS-11 duties due to both requirements and to develop his growth. He is working above his pay grade and has shown he is capable of performing at a GS-12 grade level.

Id.

At the end of March 2012, Hayden received military orders to begin active service on April 10, 2012. His duty was subsequently extended in July 2012. In May 2012, a human resources position classifier notified Hayden’s supervisor that she needed to conduct a desk audit before upgrading his position. The position classifier explained that she needed to interview Hayden in person for the audit, and was unable to do so while he was on extended active duty. *Id.* at ¶ 5. Hayden’s supervisor notified him that the upgrade had been cancelled because he was in nonpay status, but “[o]nce [you] return in January we will re-engage!” *Id.* In July 2012, however, protocol support

duties for the AFSAC were transferred from the A Flight protocol unit to another unit, thus reducing the need for GS-12 level employees in the unit. *Id.*

Hayden returned from active duty in December 2012, and returned to his GS-11 position. Although he received his within-grade increase, his supervisor did not resubmit the request to upgrade his position. *Id.* at ¶ 6. According to Hayden, his supervisor “was unable to explain why the upgrade was not being processed.” *Id.* Hayden performed additional reserve duty from March 4-8, 2013. He subsequently met with his supervisor on March 13, 2013, and asked her to resubmit the upgrade request. According to Hayden, “she informed him that she did not recommend his promotion because he had been absent too often for his Reserve duties.” *Id.* Hayden “immediately sought assistance from the base Employer Support of the Guard Reserve (ESGR) office.” *Id.*

The next day, Hayden met with his supervisors to discuss his performance. “During the meeting, the Chief of Protocol raised concerns about [Hayden’s] performance that, he alleged, had never been raised before, though he admitted at the hearing that the concerns did not lack foundation.” *Id.* at ¶ 7. On May 20, 2013, Hayden received a performance feedback memorandum which stated that he was no longer working at the GS-12 level. *Id.* at ¶ 8. The agency did not request an upgrade to Hayden’s position.

B. Procedural History

On May 28, 2013, Hayden filed a request for corrective action with the Board, alleging USERRA violations. Hayden argued that: (1) he was denied a promotion due to his military service; (2) he was denied a benefit of reemployment in the position he would have obtained had the agency processed his upgrade; and (3) the agency retaliated against him after he sought USERRA protections.

In response, the agency argued that, due to organizational restructuring in July 2012, while Hayden was on reserve duty, there was a reduced need for GS-12 protocol officers in the A Flight Protocol Office. The agency also explained that: (1) it could not have placed Hayden in a GS-12 position without allowing other officers at his same level to compete; and (2) it was obligated to place the remaining surplus GS-12 employee. *Final Decision*, 2014 WL 6879135, at ¶ 9.

After a videoconference hearing, the administrative judge (“AJ”) denied Hayden’s request for corrective action, “finding that he had not shown by preponderant evidence that his military service was a substantial or motivating factor in the agency’s failure to promote him.” *Id.* at ¶ 10. Indeed, the AJ found that Hayden “produced no evidence whatsoever that his military service was considered adversely when the agency failed to promote him.” *Hayden v. Dep’t of the Air Force*, No. CH-4324-13-0534-I-1, 2013 MSPB LEXIS 5635, at *4 (M.S.P.B. Nov. 5, 2013) (“*Initial Decision*”). During the hearing, there was testimony that the Chief of Protocol requested a desk audit and that the audit could not be completed because Hayden was not at work for the interview. *Id.* at *5. The AJ found that, even if a desk audit had been performed, Hayden would still have been required to compete for the GS-12 position. *Id.* Finally, the AJ found that Hayden failed to meet his burden of proof with respect to retaliation. *Id.* at *6.

Hayden filed a petition for review to the full Board. The Board vacated the Initial Decision, but denied Hayden’s request for corrective action. *Final Decision*, 2014 WL 6879135, at ¶ 1. As to Hayden’s first claim—that he was denied a benefit due to his military service—the Board found that, contrary to the AJ’s decision, there was evidence from which one could conclude that Hayden’s military service was a motivating factor in the agency’s decision not to upgrade his position. *Id.* at ¶ 14. The

Board found “a temporal link between the appellant’s extended period of Reserve duty and the agency’s decision not to upgrade his position.” *Id.* at ¶ 16. In particular, the Board pointed to testimony from Hayden’s supervisor that none of her prior position upgrade requests had required in-person desk audits, and that she had participated in a telephone audit for Hayden’s earlier position upgrade to GS-11. *Id.* The position classifier who examined the upgrade request testified that she was aware of only about ten requests that had not been granted out of the hundreds she had processed. *Id.* And Hayden testified that, during his March 13, 2013 conversation with his supervisor, she informed him that his position had not been upgraded because “he spent too much time out of the office for Reserve duties.” *Id.* at ¶ 17. The Board concluded that the evidence showed that the agency considered Hayden’s absence in making its decision not to upgrade his position.

Although the Board found that the AJ had erred, it nonetheless concluded that Hayden’s USERRA claims failed. Though there was sufficient evidence to shift the burden of proof for Hayden’s first claim to the agency, the Board found that the agency met its burden to establish that it did not deny the upgrade request because Hayden was on military duty. *Id.* at ¶ 25. The Board found that the agency delayed processing the upgrade request because Hayden was unavailable for an in-person desk audit, which the position classifier testified was typically conducted when the upgraded position was at or above the GS-12 level. *Id.* at ¶¶ 21, 25. And, when Hayden returned, the workload in the office had changed such that additional GS-12 protocol officers were not needed. *Id.* at ¶ 25. The Board concluded that the agency showed that it “decided not to pursue the upgrade both during and after the appellant’s absence based on valid reasons other than the appellant’s service in the Air Force Reserve.” *Id.*

As for Hayden's second claim—that he was denied reemployment rights when he returned from military duty—the Board found that Hayden was not entitled to return to a GS-12 position. The Board explained that the “A Flight Protocol Office lost its additional high-level duties about 4 months after the upgrade request was submitted and after the B Flight Protocol Office had declared two GS-12 Protocol Officers in surplus status a few months earlier.” *Id.* at ¶ 29. The record showed, therefore, that the protocol office no longer needed another GS-12 protocol officer. *Id.* In any event, the Board found that Hayden would have had to compete for the upgraded position because there was another GS-11 protocol officer in A Flight. *Id.* Accordingly, the Board found no guarantee that Hayden would have received the upgraded position but for his military service. *Id.* at ¶ 31.

Finally, the Board rejected Hayden's third claim—that the agency retaliated against him for seeking assistance from the ESGR to enforce his USERRA rights. The Board found that Hayden “adduced no evidence . . . that the agency bore any discriminatory animus towards him and he thus failed to meet his initial burden of proof.” *Id.* at ¶ 33. To the contrary, the Board found that the agency established that Hayden's supervisors “were concerned about helping him overcome a decline in his performance and prepare for eventual promotion to GS-12.” *Id.*

Hayden timely appealed the Board's decision to this court, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1). By letter dated October 14, 2015, counsel for Hayden informed the court that Hayden was promoted to a GS-12 Protocol Specialist position effective September 20, 2015. That promotion moots some of the relief requested in this appeal. Hayden continues to seek an award of “back pay, interest, and other benefits to which he is entitled, including attorneys' fees and litigation expenses,” however. Pet'r Br. 17 (citing 38 U.S.C. § 4324; 20 C.F.R. § 1002.312).

DISCUSSION

The scope of our review in an appeal from a decision of the Board is limited. We must affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c).

Hayden maintains that the agency committed three separate USERRA violations and that the Board erred in its analysis of each. First, he argues that the Board failed to apply the requisite burden shifting framework to his discrimination claim. According to Hayden, the Board's rejection of his discrimination claim "is premised on hindsight that allows the Air Force to justify its discrimination based on the later results of that discrimination." Pet'r Br. 16. Next, Hayden argues that the Board erred in finding that he failed to meet his burden to demonstrate that he was entitled to reemployment at the GS-12 level when he returned from military service. Finally, Hayden argues that the Board's analysis of his retaliation claim is unsupported by substantial evidence and ignores its own recognition of discriminatory animus in its analysis of the discrimination claim. We address each of these issues in turn.

A. Discrimination Claim

USERRA prohibits employers from discriminating against their employees because of their military service, and affords certain protections to military service members with respect to their civilian employment. 38 U.S.C. § 4311(a). It provides, in relevant part, that:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial

employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Id.

We analyze USERRA discrimination claims under a burden-shifting framework. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001). Applying this framework, an employee who makes a discrimination claim under USERRA bears the initial burden of showing, by a preponderance of the evidence, that his military service was a substantial or motivating factor in the adverse employment action. *Id.* As we have explained, “military service is a motivating factor for an adverse employment action if the employer ‘relied on, took into account, considered, or conditioned its decision’ on the employee’s military-related absence or obligation.” *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368 (Fed. Cir. 2009) (quoting *Petty v. Metro. Gov’t of Nashville–Davidson Cty.*, 538 F.3d 431, 446 (6th Cir. 2008)).

Discriminatory motivation or intent “may be proven by either direct or circumstantial evidence.” *Sheehan*, 240 F.3d at 1014. In *Sheehan*, we explained that:

Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee’s military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer’s expressed hostility towards members protected by the statute together with knowledge of the employee’s military activity, and disparate treatment of certain employees com-

pared to other employees with similar work records or offenses.

Id. “In determining whether the employee has proven that his protected status was part of the motivation for the agency’s conduct, all record evidence may be considered, including the agency’s explanation for the actions taken.” *Id.*

Where an employee makes the prima facie showing of discriminatory motivation or intent, “the employer can avoid liability by demonstrating, as an affirmative defense, that it would have taken the same action without regard to the employee’s military service.” *Erickson*, 571 F.3d at 1368; see 38 U.S.C. § 4311(c)(1). “An employer therefore violates section 4311 if it would not have taken the adverse employment action but for the employee’s military service or obligation.” *Erickson*, 571 F.3d at 1368.

Here, the Board found that “the agency considered [Hayden’s] absences for Reserve duty when it decided not to process the upgrade request during his absence and not to pursue the upgrade upon his return.” *Final Decision*, 2014 WL 6879135, at ¶ 19. Weighing all of the evidence, the Board concluded “that the agency considered the appellant’s military absences to be problematic, and the absences were a motivating factor in the agency’s failure to provide the position upgrade.” *Id.* Accordingly, the Board found that Hayden satisfied his initial burden.

The Board then purported to shift the burden to the agency to demonstrate, by preponderant evidence, “that it would have taken the same action without considering his military service.” *Id.* at ¶ 20 (citing *Erickson*, 571 F.3d at 1368). The agency explained that it did not upgrade Hayden’s position because: (1) the position classifier had the practice of conducting in-person desk audits for any position at the GS-12 level or above; and (2) by the time Hayden returned, the A Flight Protocol Office had a

reduced workload. *Id.* at ¶¶ 20-21. The agency further argued that Hayden would have had to compete for the upgraded position, and that “the GS-12 employees from B Flight who had been declared as surplus would have had internal priority over the applicant.” *Id.* at ¶ 20.

The Board found that, taken as a whole, “the evidence does not show that the agency denied the upgrade request because the appellant was on military duty. Instead, it shows that processing of the request was delayed because the appellant was temporarily unavailable for part of the consideration process and was on leave without pay.” *Id.* at ¶ 25. The Board concluded that the “agency has thus shown that it decided not to pursue the upgrade both during and after the appellant’s absence based on valid reasons other than the appellant’s service in the Air Force Reserve. Accordingly, the agency met its burden of proof under section 4311(a).” *Id.*

On appeal, Hayden contends that the Board failed to properly shift the burden to the agency to justify its actions in not promoting him and that, if it had, the agency could not have met its burden. In particular, Hayden argues that: (1) the Board erred in finding that a desk audit was required to process his position upgrade; (2) the Board erred in determining that he would have had to compete for the promotion; and (3) the Board’s finding that the Protocol Office no longer needed GS-12 employees “is irrelevant because at the time Mr. Hayden’s upgrade request was placed . . . there were not enough GS-12s to perform the duties of the office and thus [his] position needed to be upgraded.” Pet’r Br. 21. As explained below, we agree with Hayden that the Board did not hold the agency to its burden.

First, as the Board noted, the Office of Personnel Management (“OPM”) Classifier’s Handbook explains that a desk audit “is no more than a conversation [] or interview with the person in the job, or with the supervisor of

the position, or with both . . . to gain as much information as possible about the position.” *Final Decision*, 2014 WL 6879135, at ¶ 21. The position classifier testified that “she normally conducted an in-person desk audit when the upgraded position would have been at or above the GS-12 level.” *Id.* It is undisputed, however, that the decision to conduct a desk audit is discretionary. *Id.* Indeed, Hayden’s supervisor testified that “none of her prior position upgrade requests had required in-person desk audits” and that “she had participated in a telephonic audit for [Hayden’s] position upgrade to GS-11.” *Id.* at ¶ 16.

Although the Board recognized that a desk audit was not necessary for Hayden’s position upgrade, it nonetheless credited the agency’s argument “that it was unable to complete the desk audit and process the upgrade because [Hayden] was unavailable.” *Id.* at ¶ 20. The Board then concluded that the agency had shown that it denied the upgrade request in part because Hayden was “temporarily unavailable for part of the consideration process.” *Id.* at ¶ 25. We agree with Hayden that his “inability to complete an optional procedure cannot form a legally cognizable basis to discriminate against him because of his military service.” Pet’r Br. 23.

This court has made clear that an “employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service.” *Erickson*, 571 F.3d at 1368. And we have recognized that “the overarching goal of [USERRA] is to prevent those who serve in the uniformed services from being disadvantaged by virtue of performing their military obligations.” *Id.* As we explained in *Erickson*, the “most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service.” *Id.* Although an agency is “entitled to remove an employee for prolonged non-military leaves

of absence . . . ‘an employer can not treat employees on military duty like those on non-military leave of absence.’” *Id.* at 1369 (quoting *Allen v. U.S. Postal Serv.*, 142 F.3d 1444, 1447 (Fed. Cir. 1998)). *Erickson* thus stands for the proposition that an employee’s military absence cannot be held against him, and that employers cannot treat employees on military leave like those on non-military leave of absences.

Hayden was not available for an in-person desk audit precisely because he was performing his military obligations. That the agency may otherwise be entitled to cancel a position upgrade request when an employee on non-military leave fails to attend a requested interview is of no moment. *See Erickson*, 571 F.3d at 1369. The fact remains that Hayden was absent from work because of his military service, and USERRA protects against adverse employment actions resulting from such absences.

The mere fact that the position classifier *preferred* to conduct an in-person desk audit for an upgrade at or above the GS-12 level is irrelevant. Under *Erickson*, she was not entitled to impose that mere preference on a person who is on military leave. The bottom line is that an in-person desk audit was not required. To say that Hayden was not eligible for an upgrade because he was unavailable for a discretionary audit that could have been performed via telephone or by interviewing his immediate supervisor violates USERRA. *See id.* at 1368 (permitting an employer to take an adverse action against an employee because of his military absence “would eviscerate the protections afforded by USERRA”). Accordingly, the Board erred in finding that the agency could avoid liability for failing to process the position upgrade request because Hayden was unavailable for an in-person desk audit.

Next, Hayden argues that the Board erred in determining that he was not entitled to a noncompetitive

position upgrade at the time his supervisor requested the upgrade. In support, Hayden points out that OPM regulations give agencies discretion to except certain actions from competitive procedures. 5 C.F.R. § 335.103(c)(3). One such exception is for a “promotion resulting from an employee’s position being classified at a higher grade because of additional duties and responsibilities.” *Id.* at § 335.103(c)(3)(ii). Hayden also argues that he qualified for a noncompetitive upgrade under the Air Force’s civilian staffing rules.¹ As the Board recognized, Hayden’s supervisor submitted the upgrade request because he was performing additional duties and responsibilities at the GS-12 level and because there were “not enough GS-12’s [sic] to perform the duties.” *Final Decision*, 2014 WL 6879135, at ¶ 4. Hayden submits that, in these circumstances, he was entitled to a noncompetitive position upgrade.

The agency responds that, even if the agency proceeded with the upgrade request, Hayden would have had to compete for the GS-12 position. In particular, the agency

¹ Specifically, the Air Force Manual provides that:

If a position is upgraded due to accretion/assignment of additional higher grade duties and responsibilities, the incumbent may be non-competitively promoted provided there is clear evidence that the employee continues to perform the same basic functions as in the former position, that there are no other employees serving in similar or identical positions to whom the duties could be assigned, and he/she meets all qualification and legal requirements for promotion.

Air Force Manual 36-203: Staffing Civilian Positions, ¶ 2.9.6 (Dec. 12, 2002) (Incorporating Change 1, June 2006).

submits that: (1) there was another GS-11 protocol specialist in the office who would have been eligible to compete; and (2) the surplus employee whose GS-12 position had been eliminated would have had priority over Hayden for any such position. According to the agency, the Board “properly determined that those employees’ status constituted evidence supporting the agency’s claim that it would not have promoted Mr. Hayden even if it had not considered his military absence when it decided not to upgrade the position.” Resp’t Br. 19.

As counsel for the agency conceded at oral argument, the agency had the burden to show, by a preponderance of the evidence, that Hayden would have had to compete for the position upgrade and that he would not have received it, regardless of his military service. Oral Argument at 16:48-17:15, *available at* <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2015-3073.mp3>. Careful review of the Board’s decision reveals that it did not hold the agency to that burden, however.

In the context of Hayden’s discrimination claim, the Board merely noted the agency’s argument that it could not upgrade the position noncompetitively because: (1) there were two protocol specialists at the GS-11 level, which would have triggered competition under the agency’s regulations; and (2) even if the position were filled competitively, surplus employees “would have had internal priority over the appellant.” *Final Decision*, 2014 WL 6879135, at ¶ 20. In the next sentence, however, the Board stated that, “*appellant thus could not show* he would have been placed automatically in the upgraded position or whether the position upgrade would have been approved.” *Id.* (emphasis added). But the burden was not on Hayden to show he would have won any competition for the upgrade position. Having demonstrated that his military service was a motivating factor in the agency’s decision to cancel his upgrade, Hayden satisfied his burden with respect to the discrimination claim, and the

burden shifted to the agency to show it would not have processed the upgrade without regard to his military service. *Erickson*, 571 F.3d at 1368; *Sheehan*, 240 F.3d at 1013.

On this record, we conclude that the Board failed to make sufficient factfindings with respect to: (1) whether Hayden would have had to compete for the position; and (2) whether he would have been successful in doing so. There are no findings as to whether the position could have been noncompetitively upgraded at the time the upgrade was requested. Nor is there any evidence or factfinding as to whether the surplus employee necessarily would have been chosen over Hayden. Although the Board states that Hayden would have had to compete for the upgraded position such that it “is not certain he would have been selected,” those findings were in the context of Hayden’s reemployment claim which, as discussed below, requires application of a different standard and different burden of proof. *Final Decision*, 2014 WL 6879135, at ¶ 29. The fact remains that, in the context of Hayden’s *discrimination* claim, the agency had the burden to show that its decision to cancel the upgrade request would have remained the same even if his military leave was not a factor. Because there is insufficient evidence that, had the agency processed the upgrade at the time it was requested, Hayden would have had to compete for the position and would not have won, we vacate the Board’s decision and remand for further findings.

Finally, Hayden argues that the Board erroneously credited the agency’s argument that the A Flight Protocol Office no longer needed additional GS-12 officers after Hayden’s return. Specifically, he argues that reliance on this evidence was erroneous “because the changes to the Protocol Office’s organizational structure occurred after the Air Force cancelled Mr. Hayden’s position upgrade request.” Pet’r Br. 25.

It is undisputed that the workload in the A Flight Protocol Office decreased in July 2012. *Final Decision*, 2014 WL 6879135, at ¶ 5. Given this change, the Board found that, by the time Hayden returned to the office in December 2012, the office no longer needed additional GS-12 protocol officers. *Id.* at ¶ 25. Substantial evidence supports the Board's conclusion that, at the time Hayden returned to work, the agency had a legitimate reason for not upgrading Hayden's position to the GS-12 level. The record is devoid of evidence as to how long an upgrade request typically takes to process, however. The agency has not proven, accordingly, that, had the request gone forward in March 2012, Hayden would not have received the upgrade before the workload in the A Flight Protocol Office decreased. There is also no evidence as to how long any decrease in workload lasted, leaving largely unexplained why Hayden's upgrade was not renewed until so long after his return.

Because the agency could not use the discretionary in-person desk audit to justify its decision to cancel Hayden's upgrade request, and because the Board did not hold the agency to its burden with respect to competition at the time the request was made, we remand for further fact-finding. Accordingly, we vacate the Board's decision with respect to Hayden's discrimination claim.

B. Reemployment Claim

USERRA also provides service members protection in the form of a right to reemployment in their civilian jobs after completing their military obligations. 38 U.S.C. § 4312(a). The regulations further provide that an agency "must consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent." 5 C.F.R. § 353.106(c). The agency must therefore evaluate whether:

- (1) “the ‘incident or advantage’ is one generally granted to all employees in that workplace and whether it was denied solely because of absence for military service;”
- (2) “the person absent on military duty was treated the same as if the person had remained at work;” and
- (3) “it was reasonably certain that the benefit would have accrued to the employee but for the absence for military service.”

Id.

The Board concluded that Hayden was not entitled to reemployment at the GS-12 level when he returned from military leave. First, the Board found that Hayden could not establish that a position upgrade is a benefit generally granted to all agency employees. *Final Decision*, 2014 WL 6879135, at ¶ 28. In reaching this conclusion, the Board explained, “[a]n example of a ‘generally granted’ benefit of employment is a within-grade increase, which is granted when an employee performing at the fully satisfactory level or better accrues a certain amount of time-in-grade.” *Id.*

According to Hayden, even if the position upgrade was not “an incident or advantage generally granted to all employees, as found by the MSPB, *consideration* for a position upgrade is available to all employees.” Pet’r Br. 29-30. In support, Hayden argues that the agency “promoted another GS-11 Protocol Office employee, one who was not serving in the military, to a GS-12 position.” *Id.* at 30. The evidence Hayden cites does not establish that the agency failed to consider him for an upgrade, however. The agency explains, moreover, that the employee who was promoted had a position with a full performance level of GS-12, which meant that it was a personal, noncompetitive promotion, not a position upgrade. Importantly,

there is no evidence that all employees are considered for position upgrades beyond their current performance levels.

Next, because the A Flight Protocol Office lost its additional duties four months after the upgrade request, and after the B Flight Protocol Office placed two GS-12 protocol officers on surplus status, the Board could not determine what would have happened if Hayden had remained at work. *Id.* ¶ 29. It concluded, however, that it was not “reasonably certain” that Hayden would have received the upgrade. Although Hayden was a valued employee with outstanding performance ratings, the Board found that “he and another employee were in GS-11 positions at the full performance level, unlike the employee who was promoted to GS-12.” *Id.* at ¶ 31. The Board further noted that Hayden’s performance “suffered after his return, which the agency documented,” but that it was still willing to promote him if a GS-12 position became available. *Id.*

On appeal, Hayden argues that the upgrade was “reasonably certain” given: (1) testimony from the position classifier that she was aware of only ten upgrade requests out of the hundreds that she had processed that were not granted; (2) his outstanding performance reviews; (3) his prior upgrade from GS-9 to GS-11; and (4) the fact that he was already performing GS-12 duties. Although Hayden disagrees with the Board’s factfindings, we decline his invitation to reweigh the facts on appeal. Substantial evidence supports the Board’s determination that the position upgrade is not a generally granted benefit and that it was not reasonably certain that Hayden would have received it, a showing that, in this context, was Hayden’s burden to make. As such, we affirm the Board’s decision with respect to Hayden’s reemployment claim.

C. Retaliation Claim

USERRA prohibits retaliation against employees for exercising their rights under the statute. 38 U.S.C. § 4311(b). It provides that:

An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

Id. The standard for a retaliation claim is the same as that for a discrimination claim: the employee must first establish that his protected actions were a motivating factor in the employer's adverse action, and then the burden shifts to the employer to establish that it would have taken the same action without regard to the employee's military service. *Sheehan*, 240 F.3d at 1013.

Hayden argued that the agency retaliated against him for seeking assistance with the ESGR to enforce his USERRA rights. The Board found that Hayden failed to present any evidence "that the agency bore any discriminatory animus towards him and he thus failed to meet his initial burden of proof." *Final Decision*, 2014 WL 6879135, at ¶ 33. To the contrary, the agency presented evidence that it did not need additional GS-12 Protocol Officers at the time, and that Hayden's supervisors "were concerned about helping him overcome a decline in his performance and prepare for eventual promotion to GS-12." *Id.*

On appeal, Hayden argues that the Board's retaliation analysis contradicts its finding that there was evidence the agency improperly considered his military service and that there was "animus based on his military service." Pet'r Br. 34. But Hayden attempts to equate discrimination based on his military service—which is the basis for his first claim—with retaliation based on his attempt to enforce his USERRA rights. Although the two claims utilize the same standard, they stem from different events. Importantly, Hayden's retaliation claim is that his consultation with the ESGR about his USERRA rights after his return from military service prompted an immediate negative performance evaluation. The Board found, however, that Hayden "admitted at the hearing that the concerns [about his performance] did not lack foundation." *Final Decision*, 2014 WL 6879135, at ¶ 7. The Board further found that Hayden's "performance suffered after his return, which the agency documented." *Id.* at ¶ 31. Given these factfindings, substantial evidence supports the Board's conclusion that Hayden failed to meet his burden with respect to retaliation.

CONCLUSION

For the foregoing reasons, we agree with the Board that Hayden failed to meet his burden of proof with respect to his reemployment and retaliation claims under USERRA. With respect to his claim of discrimination based on military service, however, we vacate the Board's decision and remand for further factfinding.

**AFFIRMED-IN-PART, VACATED-IN-PART,
REMANDED**

**United States Court of Appeals
for the Federal Circuit**

PETER A. MCMILLAN,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2015-3042

Petition for review of the Merit Systems Protection Board in No. DC-4324-11-0726-B-1.

Decided: February 16, 2016

ADAM AUGUSTINE CARTER, The Employment Law Group, P.C., Washington, DC, argued for petitioner. Also represented by R. SCOTT OSWALD.

ANNA BONDURANT ELEY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., FRANKLIN E. WHITE, JR., NATHANAEL YALE; WILLIAM G. HUGHES, Office of Chief Counsel, Drug Enforcement Administration, Springfield, VA.

Before NEWMAN, O'MALLEY, and TARANTO, *Circuit Judges*.
O'MALLEY, *Circuit Judge*.

Peter A. McMillan ("McMillan") seeks review of the Merit Systems Protection Board ("the Board" or "MSPB") decision denying his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301–4333) ("USERRA"). *McMillan v. Dep't of Justice*, No. DC-4324-11-0726-B-1, 2014 WL 5423476 (M.S.P.B. Oct. 16, 2014). Specifically, the Board found that McMillan failed to comply with the ordinarily accepted standards of conduct in the course of performing his military duties and was, therefore, not entitled to corrective action under USERRA. For the reasons below, we reverse the decision of the Board and remand for determination of an appropriate remedy.

BACKGROUND

McMillan was a GS-13 Criminal Investigator with the Drug Enforcement Agency ("DEA"). McMillan also serves as an officer in the United States Army Reserves. On June 24, 2007, he was assigned to the Lima, Peru County Office ("LCO") of the DEA. His tour at LCO was due to expire in 2010, but he requested and was granted a one-year extension. On September 14, 2010, he again requested a tour extension, this time for an additional two years. That request was denied and is the subject of this appeal. McMillan contends that the DEA's decision not to renew his tour was based improperly on his military service in violation of USERRA.

The LCO office in which McMillan worked for the DEA was a relatively small office—"var[ying] in size from [six] to [fourteen] special agents, intelligence analysts, technical personnel, and tactical analysts." Testimony of retired supervisory special agent from DEA James Watson, Trial Tr. 5 ll. 3–16, Jan. 25, 2012. The office was

occupied, in relevant part, by McMillan, Erika Jimenez (“Jimenez”), Juan Arrivillaga (“Arrivillaga”), Michael Walsh (“Walsh”), William Steffick (“Steffick”), and Patrick Stenkamp (“Stenkamp”). McMillan, as a GS-13 Criminal Investigator, had the following chain of command: Arrivillaga was his first-level supervisor; Steffick was his second-level supervisor; and Stenkamp was his third-level supervisor and also the Regional Director. In addition to McMillan’s direct line of command, McMillan also interacted with Walsh, who was the Field Intelligence Manager (“FIM”) and was outside of McMillan’s chain of command. Walsh’s first-level supervisor was Steffick and his second level-supervisor was Stenkamp.

McMillan also served in the Army Reserves and was scheduled to complete one week of military service at Southern Command (SOUTHCOM), in Miami, FL, from July 17, 2010 through July 26, 2010. As part of his military service, McMillan was assigned to write a “two to three page intelligence assessment on the historical impact of the DEA’s expulsion from Bolivia on drug trafficking, public corruption and social effects.” Pet’r Br. 5. In particular, McMillan was instructed by his military supervisors to create an “Intel Assessment on how DEA’s expulsion from [Bolivia] has affected drug trafficking in [Bolivia], with additional discussion on any political (corruption), or societal effects,” and to use his “DEA expertise” to “look[] at a couple other products” during his week at SOUTHCOM. Joint Appendix (“J.A.”) 630.

In light of this, McMillan approached the LCO FIM, Walsh, to take advantage of his unique expertise on the DEA’s interaction with Bolivia. Walsh had been FIM with the DEA for over six years, had worked with the DEA for over twenty-three years, and, most importantly, was previously stationed in Bolivia. *See id.* at 650 ll. 6–21.

In response to McMillan's request for assistance, Walsh suggested he use a Foreign Situation Report ("FSR") on Bolivia. *See id.* at 652 l. 19–653 l. 1. The FSR is a summary of the intelligence DEA has on a particular country. *See id.* at 664 ll. 11–18. Directly following this discussion, Walsh and McMillan walked down the hall to Stenkamp's office to seek permission to release information from the FSR outside of DEA to McMillan's military supervisors. *See id.* at 653 l. 18–654 l. 7. Stenkamp gave his approval for McMillan to use and cite the FSR. *Id.* at 15. McMillan testified that he "left that office with the understanding that . . . [he] had permission to use the FSR as a citation or a source document for the two to three-page situational awareness brief for interagency benefit." *Id.* at 701 ll. 9–21.¹

Thereafter, McMillan prepared his report and went to Miami to fulfill his military service obligations. While there, two email exchanges took place between McMillan, Walsh, Arrivillaga, Steffick, and Stenkamp. The first concerned the use of the FSR in the military intelligence report, and the second related to McMillan's ability to participate in a secure video teleconference ("SVTC") regarding the potential ejection of the Military Assistance Group from Bolivia. *See id.* at 703 ll. 16–21.

On the morning of Monday, July 19, 2010, McMillan first reached out to Walsh, simply attaching a draft of the

¹ Stenkamp testified that he did not recall providing his approval for use of the FSR, *see* J.A. 227 ll. 4–12, but was aware that McMillan wanted to use DEA resources, including the FSR, to fulfill his military service obligations, *see id.* at ll. 13–16. Walsh, however, agreed with the statement that "Mr. Stenkamp hesitantly agreed to allow [McMillan] to use [the FSR] with the caveat that the DEA would be reviewing his report." *Id.* at 70 ll. 9–12.

“Bolivia Intelligence Assessment” he had prepared. *Id.* at 922–23. That same morning, Walsh responded with various edits, commenting: “Nice report.” *Id.* at 922. McMillan replied, thanking Walsh for his review. *Id.* at 921–22. He also articulated his belief that his work with the military is a “force multiplier for Lima CO.” *Id.* at 922. He stated, moreover, that, while he was aware that there are “official channels,” which he “[wa]s not trying to circumvent,” he did “want to supplement them.” *Id.*

The next day, on Tuesday, July 20, McMillan began a discussion regarding his participation in the SVTC, at the request of his military supervisors. McMillan wrote to Walsh to inform him that he would be “represent[ing] SOUTHCOM J2 in a SVTC with members of the Pentagon’s Joint Staff” and that he “would appreciate it if [Walsh] would advise RD Stenkamp” that he would “appreciate [Stenkamp’s and Walsh’s] perspective, guidance and expertise.” *Id.* at 962. McMillan further noted that he believed his “dual capacity as a MI Reservist and ‘working’ agent,” allowed him “to be a proponent for DEA’s viewpoint in the Southern Cone.” *Id.* This email was forwarded to Stenkamp and Steffick. Stenkamp did not approve of this. He wrote to McMillan:

No. No. No. First, did you run this through your chain? The answer is no, you did not. Second, you are NOT to represent yourself in this meeting as associated with DEA. If DEA is to be respresented, [sic] it will be done at another level. In all due respect, you are not qualified to weigh in on Bolivia. The evidence of that is you are asking for my opinion, expertise and guidance. My opinion, expertise and guidance tell me that you may do more harm than good. I can not prohibit your participation in the SVTC, but you are to do so only in your capacity with the military. End of story – period.

Id. at 961–62. In response, McMillan sent a seven-paragraph email in which he, among other things, “respectfully, [took] issue with [Stenkamp’s] characterization of [his] qualification to weigh in on a given topic” and noted that he found “offensive” Stenkamp’s remark that he “may do more harm than good.” *Id.* at 960. This email appears to be central to the government’s argument that McMillan acted outside the bounds of ordinarily accepted standards of conduct.

The Administrative Judge (“AJ”), in its opinion after the remand, characterized this email, saying that McMillan “set forth his qualifications as though he were applying for a position and stating he would compare it to anyone in the DEA.” *Id.* at 22 (citations omitted). The AJ continued, finding that McMillan “further stated that he sought Stenkamp’s input as a sign of respect and ‘to make [him] aware of events that may interest [him].’” *Id.* (citations omitted). The AJ “found the appellant’s tone and the content of the email to be condescending and improper coming from a line agent to his third line supervisor and the Regional Director.” *Id.* In its Final Opinion, the Board stated that it “agree[d] with the administrative judge that the appellant’s July 20, 2012 email to [Stenkamp] was disrespectful in tone and content.” *Id.* at 6.

Stenkamp replied the next morning, on Wednesday, July 21, to McMillan’s email with: “You are not authorized to represent DEA policy or positions in this meeting. Period!!!! Take all the issue you want.” *Id.* at 960. This ended the conversation regarding McMillan’s participation in the SVTC as a representative of DEA. McMillan still had yet to receive final sign-off on his intelligence report to the military, however.

Later that same day, Wednesday, July 21, Stenkamp conveyed edits he made to the intelligence report to McMillan through Walsh, asking McMillan to remove

certain sensitive information. *Id.* at 921. McMillan complied with the request and asked whether there was “anything else that needs to be modified or removed.” *Id.* McMillan and Walsh engaged in two additional rounds of edits to the report. McMillan then, apparently for the first time, looped in his first-level supervisor Arrivillaga. *Id.* Walsh continued the conversation with McMillan and Arrivillaga, noting that the report “[l]ooks okay to” him and that the “RD [Stenkamp] is reviewing it now” but “wants to verify” that certain information was publicly available. *Id.* at 919. After McMillan responded to that concern, Walsh further indicated that Stenkamp was “off to a meeting, [but] will re-visit [the report] when he returns.” *Id.*

Upon his return, Stenkamp conveyed to Walsh that he wanted all reference to the FSR removed. Walsh wrote to McMillan and Arrivillaga: “Sorry, but RD Stenkamp wants all references to the FSR to be removed from the report.” *Id.* at 918. McMillan replied:

If I remove all references to the FSR then the majority of the document cannot be substantiated and therefore cannot be produced. That will require me to begin researching alternative classified and unclassified materials to produce the same product which is illogical. DEA is a member of the intelligence community. There is no logical reason not to cite the FSR.

Id. Walsh’s response conveyed a message from McMillan’s second-level supervisor Steffick: “[I]t was a direct order from the Regional Director, and it is to be followed; no further discussion required. Is this clear?” *Id.* McMillan complied. Indeed, there is no contention that McMillan failed to follow any directive given by his DEA supervisors during his military service.

McMillan returned to LCO from his military duties on July 25, 2010. The next day, Arrivillaga sent McMillan a

Memorandum on “Issues Regarding Chain of Command, DEA Representation with US Military Entities, and Email to Southern Cone Regional Director.” *Id.* at 924–25. The memo “establish[ed] clear and precise guidelines from Lima Country Office management in light of recent issues.” *Id.* It addressed “some misunderstanding as to [McMillan’s] role as a DEA GS-13 and [his] role as a Major in the US Army.” *Id.* Of particular importance, the memorandum stated:

In order to prevent any further misunderstanding, *from the date of the receipt of this memorandum*, in addition to explicit orders from the Regional Director, you are not to represent in any way or fashion anything associated with your duties or work product as a result of your employment with the DEA to your military colleagues. Your specific role as a GS-13 in the DEA and how you represent this role outside of this agency will be determined by the LCO chain of command. Should your colleagues in the military have a specific question or request because of your employment with the DEA, you are hereby instructed to refer them to our DEA liaison GS-15 representative at SOUTHCOM. . . . Any work product that you produce for the military must be authored by you under your military status and rank and not associated in any way or be attributed to your employment status with the DEA. If in the future there are any questions that arise, please refer back to this memorandum for guidance.

Id. (emphasis added).

On September 14, 2010, less than two months after McMillan’s military service, McMillan submitted a request for a two-year tour extension. *Id.* at 710 ll. 12–14. This request was rejected the next day. *Id.* at 330 ll. 7–10; 710 l. 20–711 l. 5.

McMillan filed a complaint in November 2010 with the Department of Labor's Veterans' Employment and Training Service ("VETS"), complaining that the Agency's actions violated USERRA. After that claim was investigated and found unsupported, McMillan appealed that decision to the Board on June 21, 2011. On February 15, 2012, an AJ issued the first Initial Decision of the MSPB. See J.A. 614–625. The AJ found:

[T]he record contains no evidence that the appellant's status or obligations as a military reservist played any part whatsoever in the agency's decision to disapprove his request for a 2-year renewal of his tour of duty in Lima, Peru. The appellant's request for corrective action under USERRA therefore must be denied.

Id. at 624–25. On March 21, 2012, McMillan petitioned the MSPB for review. The MSPB granted McMillan's petition on July 16, 2013, and vacated the AJ's Initial Decision, remanding the case for further proceedings. *Id.* at 628–643. In particular, the Board found that, "to the extent an employee's military duties are themselves at odds with the interests of the civilian employer, the employer may not take action against the employee on that basis" and "remand[ed] the appeal to provide the parties an opportunity to present additional evidence and argument in light of [its] holding." *Id.* at 638–39.

On December 17, 2013, on remand, an AJ held an additional hearing to resolve the issues identified by the Board in its remand order, leading to a second Initial Decision, dated January 31, 2014. In that decision, the AJ resolved each issue against McMillan and denied his request for corrective action. *Id.* at 8–28. In particular, the AJ found that McMillan's military duties were not a motivation for the denial of his request for a tour extension. Instead, the AJ identified three motivations for the denial of McMillan's request: McMillan's "performance

issues,” which are considered in terms of the number of arrests, seizures, informant recruitment, and disruptions of criminal organizations McMillan facilitated, *id.* at 19–20; McMillan’s alleged failure to follow his chain of command in soliciting assistance with his military assignment, *id.* at 14–19; and McMillan’s “disdain[ful],” “arrogant], “disrespectful and improper” emails to his supervisor, Stenkamp, *id.* at 19, 22.

After McMillan petitioned the Board for review of the second Initial Decision on March 7, 2014, the Board issued its final decision denying McMillan’s request for corrective action on October 16, 2014. *Id.* at 1–7. This appeal followed.

STANDARD OF REVIEW

On appeal, a final order or decision from the MSPB must be upheld unless we find that it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c).

Underlying factual determinations are reviewed for substantial evidence. *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998); *see also Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1115 (Fed. Cir. 1987) (The correct “standard is not what the court would decide in a *de novo* appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole.”). This Court “will not overturn an agency decision if it is supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Hogan v. Dep’t of Navy*, 218 F.3d 1361, 1364 (Fed. Cir. 2000) (internal quotation marks omitted) (quoting *Brewer v. U.S. Postal Serv.*, 647 F.2d 1093, 1096 (Ct. Cl. 1981)). “It is not for this court to reweigh the evidence before the Board.” *Henry v. Dep’t of*

Navy, 902 F.2d 949, 951 (Fed. Cir. 1990). We have jurisdiction to review the final order of the MSPB pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Resolution of McMillan's appeal turns on this court's interpretation of USERRA, the purpose of which is, among other things, "to prohibit discrimination against persons because of their service in the uniformed services." See 38 U.S.C. § 4301(a)(3). The operative provision in this case is 38 U.S.C. § 4311, which provides, *inter alia*, that, "[a] person who . . . has an obligation to perform service in a uniformed service shall not be denied . . . any benefit of employment by an employer on the basis of . . . performance of service." § 4311(a). And, further, that:

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.

§ 4311(c)(1).

In *Sheehan v. Dep't of Navy*, 240 F.3d 1009 (Fed. Cir. 2001), this court articulated the analysis the Board must employ in a USERRA case. In *Sheehan* we held that, "an employee making a USERRA claim of discrimination . . . bear[s] the initial burden of showing by a preponderance of the evidence that the employee's military service was 'a substantial or motivating factor' in the

adverse employment action.” *Id.* at 1013. Once the employee has made the requisite showing, “the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason.” *Id.* Notably, however, “an employer can not treat employees on military duty like those on non-military leave of absence.” *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1369 (Fed. Cir. 2009) (internal quotation marks omitted) (quoting *Allen v. U.S. Postal Serv.*, 142 F.3d 1444, 1447 (Fed. Cir. 1998)).

“The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence.” *Sheehan*, 240 F.3d at 1014. As we have explained, “military service is a motivating factor for an adverse employment action if the employer ‘relied on, took into account, considered, or conditioned its decision’ on the employee’s military-related absence or obligation.” *Erickson*, 571 F.3d at 1368 (quoting *Petty v. Metro. Gov’t of Nashville–Davidson Cty.*, 538 F.3d 431, 446 (6th Cir. 2008)). Because employers rarely concede an improper motivation for their employment actions, we recognized in *Sheehan* that employees may satisfy their burden to establish that their military service or obligation was a motive in the challenged action by submitting evidence from which such a motive may be fairly inferred. *Sheehan* describes four, non-exclusive factors that should help the Board determine whether a discriminatory motivation may be reasonably inferred in any given USERRA challenge:

Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including [1] proximity in time between the employee’s military activity and the adverse employment action, [2] inconsistencies between the proffered reason and other actions of the employer, [3] an employer’s expressed hostility towards

members protected by the statute together with knowledge of the employee's military activity, and [4] disparate treatment of certain employees compared to other employees with similar work records or offenses.

240 F.3d at 1014 (numbering added).

Much, therefore, hinges on whether the testimony before the Board was sufficient to allow a reasonable inference that the adverse employment action at issue was discriminatory under USERRA. If McMillan demonstrated by a preponderance of the evidence that his military service was "a substantial or motivating factor" in the denial of his request for a tour extension, *id.* at 1013, the Board must shift the burden to the government to demonstrate, also by a preponderance of the evidence, that the adverse employment action would have taken place for a valid reason.

A. The *Sheehan* Factors

The Board never formally shifted the burden to the government because it concluded that McMillan failed to meet his initial burden of showing by a preponderance of the evidence that his military service and obligations were relied on, taken into account, or considered in the adverse employment action. Whether a petitioner's military service was a motivating factor in the employment decision is a flexible inquiry. We conclude that the evidence permits only one reasonable finding: the evidence establishes the presence of all four of the *Sheehan* factors, which together demonstrate that McMillan satisfied his burden.

1. Timing of the Adverse Action

The first factor discussed in *Sheehan* is the "proximity in time between the employee's military activity and the adverse employment action." *Id.* at 1014. McMillan approached Walsh on July 7, 2010 for assistance with

completing his military obligation, J.A. 62 ll. 17–21, to produce an “Intel Assessment,” *id.* at 630. McMillan’s military leave was from July 17 through July 26, 2010. *Id.* at 631. The email communications that gave rise to the adverse employment action, *id.* at 918–23, 960–62, are dated between July 19 and July 22, 2010, during McMillan’s military leave. Upon his return to the DEA, McMillan was presented with a disciplinary memorandum on July 26, 2010, which “establish[ed] clear and precise guidelines from Lima Country Office management in light of recent issues regarding” McMillan. *Id.* at 924–25. And, while McMillan had received an overall “Outstanding” performance rating in 2008, *id.* at 874, and 2009, *id.* at 888, he received a “Significantly Exceeds Expectations” rating in October 2010, *id.* at 903—a downgrade—after he took his military leave.²

McMillan requested a tour extension on September 14, 2010, *less than two months after his military leave.* *Id.* at 19. It was denied the next day on September 15, 2010. *Id.* at 19–20. The timing of the adverse action, therefore, favors McMillan’s claim that there was discriminatory motivation in violation of USERRA.

2. Inconsistencies Between the Employer’s Reasons and Actions

The second *Sheehan* factor looks to the “inconsistencies between the proffered reason and other actions of the employer.” 240 F.3d at 1014. The AJ identified three reasons for the denial of McMillan’s request for a tour extension, each of which is at least somewhat inconsistent

² The four-tiered rating system, in descending order, is: “Outstanding,” “Significantly Exceeds Expectations,” “Acceptable,” and “Unacceptable.” *See, e.g.*, J.A. 915.

with DEA's other actions and explanations for its treatment of McMillan.

First, the AJ pointed to "performance issues," which are considered in terms of the number of arrests, seizures, informant recruitment, and disruptions of criminal organizations facilitated by McMillan. J.A. 19–20. Second, it found that McMillan failed to follow his chain of command in soliciting assistance with his military assignment. *Id.* at 14–19. Third, it found that McMillan's email to Stenkamp was "disrespectful and improper" and "arrogant[nt]." *Id.* at 19, 22. We find inconsistencies with respect to each of these reasons, making reliance on them questionable.

i. Performance Issues

First, McMillan's alleged "performance issues" do not appear to be a factor upon which the DEA actually based its decision not to renew his tour extension request. The AJ found that "Arrivillaga told [McMillan] of management's decision on September 15, 2010, and informed the appellant that his performance with respect to seizures, arrests and informant recruitment were not at expected levels." *Id.* at 19–20.

But on October 6, 2010, McMillan was given an overall rating of "Significantly Exceeds Expectations." *Id.* at 903. In 2009, the year prior, he received the rating of "Outstanding." Accompanying that rating, management penned a narrative under "Performance Accomplishments," explaining why it believed McMillan was functioning at a high level. *Id.* at 900. The narrative noted that McMillan, among other things, "has been at the forefront of complex money laundering investigations," has "develop[ed] in-roads to the . . . Money Laundering Investigations Division" that "proved critical to successfully dismantling" a priority target organization and an infamous individual, resulting "in the seizure of over \$200 million in tangible assets and severely damaged the drug

industry export flow” using “new and innovative undercover money laundering techniques.” *Id.* No reference to seizures, arrests or an identified number of informants appeared in that narrative. There was no narrative at all in McMillan’s 2010 performance review. Thus, there is nothing explaining the new rating decisions, pointing to any specific performance failures, or indicating that McMillan’s prior positive activities had ceased. Stenkamp’s testimony below indicated that—from his perspective—the reason for the drop in McMillan’s ratings from 2009 to 2010 was based less on the number of seizures and arrests and more on “a failure to engage with management.” *Id.* at 237 ll. 5–11.

Furthermore, it is undisputed that “there were never any metrics or statistics established at the LCO for McMillan in particular, or for an agent seeking a tour extension more generally.” Pet’r Br. 16. Jimenez, an agent previously assigned to LCO, also testified at McMillan’s hearings in front of the Board. When asked: “None of your DEA managers in Lima, Peru informed you that in order to have an agent’s tour extended that the agent needed to demonstrate any particular level of performance, correct?,” she responded: “Not that I recall, no. I don’t believe I was ever told that.” J.A. 88 ll. 6–11. McMillan testified that he believed that he needed to be rated “acceptable” in order to have his tour extension request approved. *Id.* at 714 ll. 8–14. To the extent, therefore, that McMillan actually fell short of management’s expectations, that shortcoming was never reflected in any documentation related to his performance rating. And, to the extent the DEA relies on McMillan’s performance metrics to demonstrate that his tour extension request was properly denied, there is no evidence that that policy was ever made known to McMillan or similarly situated agents.

ii. Chain of Command

The Board found that McMillan “was required to follow the agency chain of command in soliciting assistance with his military assignment” and that “he was . . . obliged to proceed through his own chain of command prior to approaching [Stenkamp] for approval to use the FSR.” *Id.* at 3, 4.

Yet the government does not dispute that, when McMillan approached Walsh to ask for help on his military assignment, there was an “open-door” policy in place for the office. Jimenez testified as follows:

Q: The type of environment and [sic] you and Mr. McMillan worked in in Peru was one where an agent could freely move around and ask people for help, including other – his supervisors and other employees at the DEA, correct?

A: Yes, sir. It’s a very small office.

Q: And the supervisors there had open door policies about helping one another.

A: I – I think so, yes. That’s correct.

Q: And it was a cooperative environment.

A: Yes.

Id. at 91 ll. 4–14. Similarly, Walsh testified that there was nothing at all unusual about McMillan approaching him for help on this project. *See id.* at 652 ll. 15–18 (“Q: And so there was nothing inappropriate about Mr. McMillan approaching you at all; is that right? A: That’s right.”). This testimony directly contradicts Stenkamp’s testimony that McMillan broke the chain of command when he approached Walsh. Stenkamp testified that “[McMillan] went straight to Mike Walsh, and he knows that’s not the chain or I submit he should have known that that was not the chain, the proper chain of command.

It doesn't matter if it's an intelligence function. He did not report to Mike Walsh." *Id.* at 231 ll. 14–19.

On this issue, the Board found that, “even if the appellant had acted within the bounds of the agency’s open door policy when he first approached [Walsh], he was nonetheless obliged to proceed through his own chain of command prior to approaching [Stenkamp] for approval to use the FSR.” *Id.* at 4. This conclusion suffers from three inconsistencies: first, it was Walsh who walked McMillan down the hall to see Stenkamp and seek approval for the use of the FSR—see Pet’r Br. 19 (Walsh “took McMillan down the hall to obtain permission to use the DEA source material”); second, “clear and precise guidelines” regarding the “[c]hain of [c]ommand, DEA [r]epresentation with US [m]ilitary [e]ntities, and [e]mail to Southern Cone Regional Director” had yet to be formally established, J.A. 924; and third, as discussed in more detail below, Walsh violated his own chain of command when he took McMillan directly to Stenkamp but was never criticized for that.

As previously discussed, when McMillan returned from his military leave, he was presented with a memorandum from his first-level supervisor Arrivillaga, which “establish[ed] clear and precise guidelines from Lima Country Office management in light of recent issues.” J.A. 924–25. But, that memorandum established concrete policies “from the date of [its] receipt.” *Id.* One policy established by that memorandum is that “[a]ny work product that [McMillan] produce[s] for the military must be authored by [McMillan] under [his] military status and rank and not associated in any way or be attributed to [his] employment status with the DEA.” *Id.* The memorandum implies that no clear policy was in place before the date of its receipt. It is entirely inconsistent for DEA to take an adverse employment action based on McMillan’s alleged failure to comply with a policy created after the occurrence of the complained-of actions. Indeed, Stenkamp did not even know what the precise chain of

command in the office was, indicating further its lack of strict enforcement prior to this incident. *See id.* at 820 ll. 3–16 (Q: And nor did you raise [issues regarding the chain of command] with Mr. Walsh, Mr. Walsh approaching you directly about this matter either? A: I did not because Mike Walsh reported directly to me. Q: No, he didn't. He reported to Mr. Steffick. A: No. Mike Walsh reported directly to the regional director. Q: So if Mr. Walsh testified that his supervisor was Mr. Steffick, is he being untruthful or just wrong? A: I think he's wrong. My recollection is that Mike Walsh reported directly to me.”).

We do not question the fact that the chain of command is “need[ed] and importan[t].” *Id.* at 19. This is especially true where the civilian setting is a law enforcement agency. The Board failed, however, to address the fact that the policy was explicitly defined to cover McMillan's situation only *after* the complained-of actions. Although the Respondent notes that “Mr. Walsh was not in Mr. McMillan's chain of command, and Mr. McMillan failed to contact Mr. Arrivillaga his first-level supervisor” before contacting Walsh, Resp't Br. 3, Walsh obviously did not believe McMillan did anything wrong and clearly did not believe he needed to bring his own immediate supervisor into the dialogue regarding McMillan's military project.

Finally, McMillan did not approach Walsh as a civilian. The Board makes much of the fact that McMillan was acting in a “dual capacity” and that he was “in his civilian position” when he approached Walsh for help. *Id.* This is because McMillan did not “contest the administrative judge's finding that he would be required to go through the chain of command if he were (1) acting in his capacity as a [DEA] agent, and (2) seeking to disseminate DEA information outside the agency.” J.A. 3. McMillan was not acting in his capacity as a DEA agent, however. Both Walsh and Stenkamp were keenly aware that

McMillan was approaching them for assistance with a military project, assigned to him in his military capacity.³

³ Walsh testified as follows:

Q: In the early part of July 2010, my client, Mr. McMillan approached you to tell you about an assignment that he had received in his capacity as a military intelligence officer; is that correct?

A: Yes.

Q: And he told you at that time that it was to be an intelligence assessment concerning Bolivia; is that correct?

A: That's correct.

Q: And did you understand that Mr. McMillan was asking you that – for that question or for that help in his capacity as a – or on behalf of the military?

A: Yes.

Q: Indeed it was in preparation for his ongoing military assignment?

A: That's right.

Id. at 651 l. 19–652 l. 14. Stenkamp was similarly aware of the military nature of the request. And, although he was unable to recall that McMillan personally asked him for permission to use the FSR outside of DEA, he did recall that the resources he discussed with Walsh in July, 2010 were to be used externally by McMillan in his role with the military:

Q: Okay. On or about July 7th, 2010 Mr. McMillan came to you along with Mr. Walsh to ask about using background material on Bolivia for a

Further compounding the inconsistencies between the proffered reason—breaking the chain of command—and the adverse employment action, Stenkamp testified that McMillan’s alleged breaking the chain of command was not even the reason he did not concur with McMillan’s request to renew his tour:

Q: Is the fact that appellant did not follow the chain of command the only reason why you did not concur with his request to renew his tour?

A: It was a – it was symptomatic of the reasons why I did not concur with the renewal of his tour. It was not per se a reason that was specific. Had he followed the chain of command 100 percent in this particular instance that we’re talking about, I still would not have renewed his tour.

Q: And why would you still not have concurred with his request?

A: For several reasons. . . . They did not appear to be investigations that merited a GS-13. I didn’t

military intelligence assignment that he had, correct?

A: I don’t recall that Pete McMillan actually came to me. I recall that Mike Walsh came to me.

Q: You don’t recall the two of them standing in your office talking about this assignment?

A: I do not.

Q: Okay. You were aware though that Mr. McMillan desired to use DEA resources and this background report in his role as a military Reservist.

A: I was.

Id. at 227 ll. 4–16.

think that he meshed with the team notion that I was trying to cultivate there in Lima. He was a lone wolf, liked to do his own thing, wasn't intuitive of the many reasons.

Id. at 814 l. 19–815 l. 20. The Board's reliance on McMillan's breaking the chain of command in using the FSR in his military report is unsupported by and, in fact, contradicted by the record: the evidence of an open door policy in the office, the after-the-fact establishment of an explicit chain of command policy, the apparent disregard of the chain of command by others, and Stenkamp's testimony that McMillan's alleged breaking the chain of command did not influence his decision.

iii. McMillan's Tone

McMillan's personality and tone through his communications are a third reason given for his dismissal. The Board found that McMillan "fail[ed] to comply with the ordinarily accepted standards of conduct in the course of performing his military duties." *Id.* at 6; see *Figueroa Reyes v. Hosp. San Pablo del Este*, 389 F. Supp. 2d 205, 212 (D.P.R. 2005) ("The protection of a veteran's employment is, therefore, 'based upon the veteran's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of all employees.'") (quoting *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 792 (2d Cir. 1997)).

In finding that he failed to comply with "reasonable and ordinarily accepted standards of personal conduct and performance applicable to all employees," the AJ noted that, in his emails, "the appellant's reaction and responses to his manager's instructions were not within the ordinarily accepted standards of personal conduct." J.A. 21. Reliance on the content and tone of McMillan's email responses as a basis for the denial of his tour renewal request, however, is inconsistent with the employer's other actions, including emails sent from McMillan's

third-line supervisor and Regional Director Stenkamp that appear equally, if not more, out of keeping with “ordinarily accepted standards of personal conduct.” The email exchanges must be construed in context.

The first email mentioned by the Board was what the Board characterized as McMillan’s “seven paragraph email in which he set forth his qualifications as though he were applying for a position,” which the Board said “make[s] clear his arrogance and opinion that he was not required to follow his chain of command or even consult with them.” *Id.* at 22. The Board “found the appellant’s tone and the content of the email to be condescending and improper coming from a line agent to his third line supervisor and the Regional Director.” *Id.* We find the Board’s characterization of this email unsupportable.

First, the email must be construed in context. McMillan’s first email in this chain was respectful and informative. He simply noted to Walsh that he would be “represent[ing] SOUTHCOM J2 in a SVTC with members of the Pentagon’s Joint Staff” and that he “would appreciate it if [Walsh] would advise RD Stenkamp” that he would “appreciate [Stenkamp’s and Walsh’s] perspective, guidance and expertise.” *Id.* at 962. He appears proud of his military assignment and its relation to his civilian position and seeks input from his civilian supervisors. *Id.* This is consistent with the orders he received from his military supervisor, in which McMillan was informed that he was expected to use his “DEA expertise” to help with “other projects” while at SOUTHCOM. *Id.* at 630.

Walsh forwarded this email to Stenkamp and Steffick, merely stating, “FYI.” *Id.* Stenkamp’s response then changed the tone from one of respect to one of derision. Stenkamp wrote, “No. No. No.” *Id.* at 961–62. He told McMillan that he was “not qualified to weigh in on Bolivia” and, as evidence for that proposition, he pointed to the fact that McMillan was “asking [Stenkamp] for [his]

opinion, expertise and guidance.” *Id.* McMillan’s request for guidance from his superior caused a seemingly unprovoked backlash.

McMillan saw an opportunity to capitalize on his particular position and connections at DEA to better fulfill his military obligations. He sought to use the FSR in his intelligence report, as Walsh suggested he do. It was only after Stenkamp realized the military was viewing McMillan as a possible spokesperson for the DEA that Stenkamp pulled the plug on the use of the FSR.

The second email exchange with which the Board took issue was one in which McMillan characterized the belated decision to forbid use of the FSR and require McMillan to prepare a new report as “illogical.” *Id.* at 22. That email was sent the day after the exchange relating to McMillan’s participation in the SVTC. At that point, McMillan had approval for use of the FSR for over two weeks, Walsh had been in contact with McMillan on edits to the intelligence report that referenced the FSR, and Stenkamp himself had read the report and provided feedback that did not require removing reference to the FSR. McMillan complied with all edits up to that point without complaint. Then Walsh gave McMillan the bad news: “Sorry, but RD Stenkamp wants all references to the FSR to be removed from the report.” *Id.* at 918. Clearly, Walsh knew this was information likely to upset McMillan or, at minimum, upend his reasonable expectation that the FSR was an appropriate source upon which to rely. On July 21, 2010, halfway through his military leave, he had to redo his report. His email demonstrates his understandable frustration. It is also hard to understand how the AJ could characterize the email as one in which McMillan called his third-line supervisor “illogical.” *Id.* at 22. On its face, the email simply refers to McMillan’s need to rewrite the report from scratch as “illogical.” *See id.* at 918.

The content and tone of McMillan's responses to his supervisors were, to be sure, not ideal. But they were not unprompted and not as inappropriate as the Board's strained characterization of them indicates. They cannot, without more, explain the motivation for the decision not to renew his tour.

3. Expressed Hostility

The third *Sheehan* factor that may lead to an inference of discriminatory motivation is the "expressed hostility towards members protected by the statute together with knowledge of the employee's military activity." 240 F.3d at 1014. While the Board made no finding one way or the other, Stenkamp's emails to McMillan ordering him not to represent DEA during the SVTC cannot be reasonably construed as anything but hostile to McMillan's military assignment. See J.A. 960, 961-62. While Stenkamp may not have been hostile to McMillan's need to do his military service, he certainly was hostile to McMillan's military obligations once he focused on what those obligations entailed.

4. Disparate Treatment of Other Employees

The fourth factor discussed in *Sheehan* as indicative of discriminatory motivation is the "disparate treatment of certain employees compared to other employees with similar work records or offenses." 240 F.3d at 1014. McMillan points to the DEA's treatment of Walsh as evidence that non-military employees were treated differently. In particular, McMillan alleges:

Walsh admittedly, went around his own chain-of-command (bypassing Steffick) by going directly to Stenkamp on July 7. Walsh's supervisor, Steffick testified that by approaching Stenkamp directly, without first clearing his question through Steffick, Walsh broke his chain-of-command. Despite Walsh breaking chain-of-command, Walsh was

never disciplined. Walsh, who is not covered by USERRA, also had all of his tours renewed in the LCO.

Pet'r Br. 9 (citations omitted). As Steffick explained:

Q: All right. Let's go back to July 7th and I'll represent to you the testimony has been that Mr. McMillan approached Mr. Walsh for some help on his research assignment. Mr. Walsh mentioned the FSR and Mr. Walsh said, "But before it can be released outside of DEA, we've got to go down and get Mr. Stenkamp's authority," and that they walked down to Mr. Stenkamp's office to get his approval. That's the wind up. Here's the pitch. Did you – do you believe that if those are the facts, that Mr. Walsh, as your supervisee, had an obligation to take this matter through you?

A: Yes, I do.

Q: Okay. Did he get disciplined for breaking the chain of command?

A: No, he did not.

J.A. 799 l. 18–800 l. 12.

DEA points out that it was McMillan, and not Walsh, who was "the individual taking DEA resources and using them outside the agency." Resp't Br. 28. This is certainly an important distinction as the dissemination of confidential information outside the organization requires more scrutiny than use of that same information for internal purposes. But Walsh understood that McMillan's intention was to use the information being sought for military purposes. So did Stenkamp. See J.A. 651 l. 19–652 l. 14, 227 ll. 4–16. That McMillan was the individual who ultimately sought to rely on the confidential information in his military report does not absolve Walsh of his responsibility to go through his chain of command before

supplying McMillan with the confidential document, knowing of McMillan's purpose in acquiring the document. Yet Walsh was never the subject of any adverse employment action, while McMillan was.

* * *

All of this evidence gives rise to a fair inference that McMillan's obligation to prepare a report on DEA's ouster from Bolivia while on military duty was a motivation for the denial of his tour extension. As the Board noted in its remand following McMillan's initial appeal, McMillan requested a written explanation for the denial of his request, but LCO command curtly refused to provide any. *Id.* at 633. The Board's after-the-fact effort to now provide an explanation of the DEA's motivations is fraught with too many overstatements and inconsistencies to offset the inference that the actual motivation was an improper one under USERRA.

While, in hindsight, it perhaps would have been better if the military had not ordered McMillan to prepare a report relating to the DEA and Bolivia, it did. While Walsh and Stenkamp may wish, also in hindsight, that they did not agree to help with that report, they did. Under USERRA, McMillan may not be punished for fulfilling his military obligations.

B. The Government's Burden

We thus conclude that McMillan carried his burden to demonstrate by a preponderance of the evidence that the employee's veteran status was "a substantial or motivating factor for an adverse employment action." *Erickson*, 571 F.3d at 1368. Because the Board did not find that McMillan successfully carried his burden, it never shifted the burden to the DEA. Because McMillan has made the requisite showing, "the [DEA] then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the

adverse action anyway, for a valid reason.” *Sheehan*, 240 F.3d at 1013. At oral argument, attorneys for both parties agreed that, if this court were to find that McMillan carried his burden, no remand is necessary to provide the government with an additional opportunity to meet its burden. Oral Arg. at 6:21–8:31; 25:38–26:16, *available at* <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2015-3042.mp3>. As such, we rely on the evidence of record, as the parties have invited us to do.

We must determine, therefore, whether DEA adduced evidence sufficient to prove by a preponderance of the evidence that it would have denied McMillan’s request for a tour renewal despite the protected activity. The first step is defining what activity was protected.

In *Erickson*, this court applied the “substantial or motivating factor” analysis from *Sheehan*. *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364 (Fed. Cir. 2009). There, a Postal Service employee was absent from his position for almost five years during his service in the National Guard. The Postal Service removed Mr. Erickson from his position, noting as its reason “his excessive use of military leave.” *Id.* at 1368. The court noted that:

[a]n employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service. As other courts have held, military service is a motivating factor for an adverse employment action if the employer “relied on, took into account, considered, or conditioned its decision” on the employee’s military-related absence or obligation.

571 F.3d at 1368 (quoting *Petty*, 538 F.3d at 446). Indeed, “the overarching goal of [USERRA] is to prevent those who serve in the uniformed services from being disadvantaged by virtue of performing their military obligations.” *Id.*

The Postal Service is “entitled to remove an employee for prolonged *nonmilitary* leaves of absence.” *Id.* at 1369 (emphasis added). But “an employer can not treat employees on military duty like those on non-military leave of absence.” *Id.* (internal quotation marks omitted) (quoting *Allen*, 142 F.3d at 1447). “Congress enacted USERRA in part to make clear that discrimination in employment occurs when a person’s military service is ‘a motivating factor,’ and not to require . . . that military service be the sole motivating factor for the adverse employment action.” *Id.* *Erickson* stands for the proposition that, even when an employee’s acts—in that case prolonged absence—would justify the agency’s adverse employment action if not related to his military service, USERRA is violated if the frowned-upon acts of the employee are required by the military service.

Here, unlike in *Erickson*, McMillan was not obligated to seek assistance from his colleagues and superiors at DEA to fulfill his military obligations, and he does not allege that he was obligated by his military supervisors to use the FSR. In the end, of course, he fulfilled his military duties without referring to the FSR in his intelligence report. The question is whether the complained-of actions are so related to his military obligations—as in *Erickson*—that it would be improper to consider them in an adverse employment action.

The Board resolved this issue against McMillan, finding that:

Protection under USERRA is contingent on the employee’s compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of all employees. Hence, assuming *arguendo* that management denied the tour extension based solely on the appellant’s conduct in connection with his military assignments, and not on performance issues, there was no USERRA

violation if the appellant failed to comply with ordinary accepted standards of personal conduct and performance in the course of fulfilling his military assignments.

J.A. 5 (citing *Figueroa Reyes*, 389 F. Supp. 2d at 212).

But as the discussion above makes clear, DEA failed to establish that two of its proffered reasons—McMillan’s alleged performance issues and his failure to follow the chain of command—were “ordinary accepted standards of personal conduct and performance.” *Id.* The tone in McMillan’s emails, moreover, is simply not egregious enough to independently support the DEA’s burden under the preponderance standard, especially considering that it was triggered by Stenkamp’s reaction to McMillan’s reasonable request for assistance in fulfilling his military obligations. If McMillan’s alleged “arrogance, disrespect and condescension,” Resp’t Br. 9, were characteristic, then surely the government could have adduced evidence of additional examples of his misconduct that were wholly unrelated to his military service. It did not. Instead, McMillan’s previous performance reviews indicated that there were no such issues. Indeed, all of the proffered reasons for the denial of McMillan’s tour extension were related to the project McMillan was assigned to perform as part of his military service and the interactions with LCO command in connection thereto. Again, while the DEA may have been unhappy with McMillan’s military assignment, it was not entitled to punish him for attempting to fulfill it.

We do not intend to give *carte blanche* to employees to engage in misconduct in service of their military duties under the protection of USERRA. But once the petitioner meets his burden, an employer must prove, by a preponderance of the evidence, that the non-military-service justifications for the adverse employment action are legally sufficient. For all of the reasons explained, the

DEA failed to demonstrate that it would have made the same decision in the absence of McMillan's military service.

CONCLUSION

Because substantial evidence does not support the Board's finding that McMillan failed to meet his burden under USERRA, and because the testimony proffered below by the government is insufficient to satisfy its burden, we reverse the ruling of the Board that USERRA was not violated, and remand for determination of an appropriate remedy.

REVERSED AND REMANDED