2015-3234

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TIMOTHY ALLEN RAINEY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF STATE,

Intervenor.

Petition for Review of the Merit Systems Protection Board in No. DC-1221-14-0898-W-1

BRIEF AND SUPPLEMENTAL APPENDIX FOR INTERVENOR

BENJAMIN C. MIZER
Principal Deputy
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

ELIZABETH M. HOSFORD
Assistant Director

EMMA E. BOND
Trial Attorney
Civil Division, Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-3020

Attorneys for Intervenor

Of Counsel:

NIELS VON DEUTEN
Attorney-Adviser
U.S. Department of State
Office of the Legal Adviser, L/EMP

January 14, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ADMINISTRATION DETERMINATIONS

PUBLIC LAW

LEGISLATIVE HISTORY

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, intervenor's counsel states that she is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Counsel also is unaware of any other appeal that may affect, or be affected by, the Court's decision in this case.

BRIEF AND SUPPLEMENTAL APPENDIX FOR INTERVENOR

2015-3234

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TIMOTHY ALLEN RAINEY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF STATE,

Intervenor.

Petition for Review of the Merit Systems Protection Board in No. DC-1221-14-0898-W-1

STATEMENT OF THE ISSUE

In 2015, the Supreme Court interpreted the term "law" in the right-to-disclose provision of the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8)(A), to mean statute, not rule or regulation. Did the Merit Systems Protection Board (board) properly apply the same interpretation of "law" to the WPA's right-to-disobey provision, 5 U.S.C. § 2302(b)(9)(D)?

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Nature Of The Case

Petitioner, Dr. Timothy A. Rainey, appeals the board's decision dismissing his individual right of action appeal for lack of jurisdiction. *Rainey v. Dep't of State*, No. DC-1221-14-0898-W-1 (Merit Sys. Prot. Bd. August 6, 2015), Appx2-8 (Final Decision). The administrative judge dismissed Dr. Rainey's appeal because he failed to make a nonfrivolous allegation of a protected activity for purposes of the WPA. *Rainey v. Dep't of State*, No. DC-1221-14-0898-W-1 (Merit Sys. Prot. Bd. January 30, 2015), Appx20-26 (Initial Decision). The full board denied Dr. Rainey's petition for review and affirmed the dismissal. Appx2.

II. Statement Of Facts And Course Of Proceedings Below

A. Dr. Rainey Receives A Letter Of Reprimand

The intervenor, Department of State (State), employs Dr. Rainey in the Bureau of African Affairs, Office of Regional Security Affairs. SAppx30. Since 2010, Dr. Rainey has served as the Program Director for the office of African Contingency Operations Training and Assistance Program. SAppx30, 43. One of his duties in this position was to act as a contracting officer representative. Appx14. A contracting officer representative is an employee designated by the

contracting officer "to take action for the Contracting Officer" in administering a government contract. 48 C.F.R. § 652.242-70(a).

On August 22, 2013, State issued an official letter of reprimand to Dr. Rainey for failing to appropriately address staff complaints and for threatening to terminate contractor staff. SAppx40-41. According to the reprimand letter, Dr. Rainey threatened contract staff with dismissal and restricted work hours "because someone lodged an [Office of Inspector General] complaint against [him]." SAppx40. The reprimand letter concluded that this and other behavior "negatively affected the work environment" and "resulted in a divide between the contract and government staff," with many of the contract employees afraid of reprisal and "actively looking for other employment." *Id.*

On the same day he received the reprimand letter, Dr. Rainey also participated in a counseling session with his supervisor and a human resources specialist. SAppx43-46. At the meeting, Dr. Rainey was asked to agree to a series of measures to address his supervisors' concerns. SAppx45. One of these measures stated that Dr. Rainey must "[c]onsult with and receive approval from [his supervisors and the bureau's executive office] prior to any discussions with [the contractor] concerning the hiring, firing or contract renewal of [its] contract personnel." *Id.*

B. The Agency Removes Dr. Rainey's Duties As A Contracting Officer Representative

About a month later, on September 24, 2013, Dr. Rainey and his new supervisor agreed to abide by the list of remedial measures, including the measure requiring consultation with a supervisor before approving removal of contract personnel. SAppx38. A week after that, on October 1, 2013, Dr. Rainey contacted his supervisor to notify her of an altercation he had with a contractor employee. *Id.* He reported that the contractor wanted to terminate the employee as a result of the altercation, and indicated he would like to concur with that termination. *Id.* The supervisor asked Dr. Rainey to schedule a discussion with her before any action was taken. *Id.*

Two days later, however, Dr. Rainey informed his supervisor that the contractor had already terminated the employee. *Id.* Dr. Rainey indicated that the contractor's decision in this instance was "entirely outside [his] responsibility and control." *Id.*; *but see* SAppx 22, 25 (noting Dr. Rainey's history of "handpick[ing]" contractor employees as evidenced by an accompanying email). As a result of this incident, the supervisor removed Dr. Rainey's duties as a contracting officer representative. SAppx38. His position otherwise remained the same.

In an October 4, 2013 memorandum, the supervisor notified Dr. Rainey that the terminated employee would return to work in another office. SAppx40. The supervisor cautioned Dr. Rainey not to communicate with that employee, except by email and with the supervisor copied. *Id.* In support of this decision, the supervisor explained that the employee's termination "fed the impression . . . that employees were completely dependent on Dr. Rainey's favor." SAppx16. In the supervisor's view, the contractor terminated the employee based on the "best interest of the [contracting officer representative, Dr. Rainey,] and the [ ] office," but chose to rehire her when informed it was in the best interests of the office. *Id.*

C. <u>The Office Of Special Counsel Denies Dr. Rainey's Claim</u>

Dr. Rainey then filed a complaint with the Office of Special Counsel. *See* Appx43. In this complaint, he alleged a violation of the WPA's right-to-disobey provision in 5 U.S.C. § 2302(b)(9)(D), claiming that the agency ordered him to dictate a contractor's hiring choices. SAppx8. According to Dr. Rainey, the agency penalized him for refusing to obey an order that would have required him to violate "the Federal Acquisition Regulation (FAR) and the Department of State's training course for [contracting officer representative] certification."[1] *Id.* The Office of Special Counsel closed the investigation into Dr. Rainey's complaint

[1] The FAR appears in Title 48 of the Code of Federal Regulation.

on May 13, 2014, finding that he had failed to identify a law—as opposed to a regulation—that he was ordered to violate. SAppx8, 10.

D. Dr. Rainey Files An Individual Right Of Action Appeal At The Board

On July 16, 2014, Dr. Rainey filed an individual right of action appeal with the board, alleging, among other things, that he was the victim of a prohibited personnel practice pursuant to the right-to-disobey provision in 5 U.S.C. § 2302(b)(9)(D). Appx40-43. According to his appeal, the removal of his contracting-officer-representative duties was "retaliation for refusing to comply with [his supervisor's] order to tell a prime contractor to re-hire a sub-contractor, who had been terminated by the contractor for cause." Appx42 (also alleging retaliation in the form of a subpar performance evaluation).

Soon after filing, the administrative judge issued an order alerting Dr. Rainey to his obligation to establish board jurisdiction, and directing him to file a response containing a nonfrivolous allegation that his appeal was within the board's jurisdiction. Appx29-36. As the order explained, "[a] non-frivolous

allegation is a claim supported by affidavits or other evidence relevant to the matter at issue that, if proven, could establish the matters it asserts."[2] Appx31.

In response, Dr. Rainey alleged that his supervisor removed his duties as a contracting officer representative for his refusal to comply with her order "to tell a contractor to re-hire a terminated subcontractor."[3] Appx27-28. According to Dr. Rainey, this order was a violation of the FAR. *Id.* (citing Office of Federal Procurement Policy Act of 1974). Specifically, he stated, FAR 1.602-2(d) provides that a COR "has no authority" to change the terms of the contract "nor in any way direct the contractor or its subcontractor to operate in conflict with the contract terms and conditions." Appx27. Dr. Rainey also cited State's training course for COR certification, which instructed: "Don't become involved in the operations and policies of the contractor such as: Selecting, recruiting, hiring, or firing contractor personnel[, and] . . . [s]upervising contractor personnel…." *Id.* Based on these authorities, Mr. Rainey alleged that he had a right, pursuant to 5 U.S.C. § 2302(b)(9)(D), to disobey his supervisor's order.

---

[2] In early 2015, the Merit Systems Protection Board issued a new regulation defining "nonfrivolous allegation." *See* Practice and Procedures Final Rule, 80 Fed. Reg. 4489-01 (Merit Sys. Prot. Bd. Jan. 28, 2015); *see also* 5 C.F.R. § 1201.4(s). This standard is not at issue in this case, where the sole issue is statutory interpretation of the WPA.

[3] State disputes that the supervisor ever issued this order. At this jurisdictional stage, however, we accept the alleged order as true.

The agency filed a motion to dismiss, arguing that Dr. Rainey failed to nonfrivolously allege that the order in question violated a "law," as opposed to a rule or regulation. Appx21, SAppx47-49. On October 24, 2014, the administrative judge issued an order exercising jurisdiction. *See* Appx22. A hearing commenced on Dr. Rainey's appeal. *Id.*

E. The Supreme Court Decides *MacLean*, Holding "Law" Does Not Include Rules And Regulations

Before Dr. Rainey's hearing concluded, however, the Supreme Court issued a decision in *MacLean*, holding that "law," as used in another provision of the WPA, did not include rule or regulation. *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015). The *MacLean* Court considered "whether a disclosure that is specifically prohibited by regulation is also 'specifically prohibited *by law*' under [5 U.S.C. §] 2302(b)(8)(A)." *Id.* at 919. The Court answered "no" to that question for several reasons. *Id.* First, Congress repeatedly referenced "law, rule, or regulation" throughout section 2302, using that phrase a total of nine times. *Id.* Congress also used "law" in close proximity with "law, rule, or regulation," including in the same sentence. *Id.* "Those two aspects of the whistleblower statute ma[de] Congress's choice to use the narrower word 'law' [in subsection (b)(8)] seem quite deliberate." *Id.* For these reasons, plus other textual and

legislative indicators, the Court concluded that "it is unlikely that Congress meant to include rules and regulations within the word 'law.'" *Id.* at 920.

Given the Court's decision in *MacLean*, the agency renewed its motion to dismiss Dr. Rainey's appeal.

F. The Administrative Judge Dismisses Dr. Rainey's Appeal For Lack Of Jurisdiction

On January 30, 2015, the administrative judge issued her initial decision, dismissing Dr. Rainey's appeal for lack of jurisdiction. Appx20-26. Applying the decision in *MacLean*, the administrative judge concluded that the term "law" in the WPA's right to disobey does not include rule or regulation. Appx23-25 (citing 5 U.S.C. § 2302(b)(9)(D)).

The administrative judge relied on the Court's analysis in *MacLean* to support this result. Although *MacLean* considered the WPA's right to disclose instead of the right to disobey, the administrative judge reasoned that both provisions appear in section 2302(b) alongside numerous references to the phrase "law, rule, or regulation." Appx24. Like the provision in *MacLean*, Congress, in the right-to-disobey provision, "chose to use the word law alone[.]" *Id.* (citing 5 U.S.C. § 2302)). As was the case in *MacLean*, therefore, the administrative judge concluded that "law" did not include "rule or regulation."

Applying this interpretation, the administrative judge concluded that Dr. Rainey failed to nonfrivolously allege that he was ordered to violate a "law." Appx25. Instead, he had only identified an alleged violation of Federal regulation and agency rules. Consequently. the administrative judge dismissed the appeal for lack of jurisdiction. Appx25-26. Dr. Rainey petitioned for review by the full board. Appx9-19.

G. <u>The Full Board Affirms The Dismissal</u>

In an August 6, 2015 decision, the board denied the petition for review and affirmed the initial decision. Appx2-8. Like the administrative judge, the board relied on *MacLean*'s interpretation of the term "law." Appx4. In addition to the factors considered by the administrative judge, the board also considered the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning, particularly when the words are in the same statutory section." Appx5 (citing *Hughes v. Office of Pers. Mgmt.*, 119 M.S.P.R. 677, ¶ 7 (2013)).

Because Dr. Rainey alleged that he was ordered to violate only Federal rules and regulations—and not a law—the board concluded that his claim fell outside of the right-to-disobey provision. It therefore affirmed the dismissal for lack of jurisdiction. Appx5-6.

Dr. Rainey timely filed this appeal.

SUMMARY OF ARGUMENT

In considering the meaning of "law" in 2302(b), this court is not writing on a clean slate. Although Dr. Rainey makes numerous arguments that "law" includes Federal rules and regulations, the Supreme Court recently held in *MacLean v. Department of Homeland Security* that it does not. The reasoning in *MacLean* requires affirmance of the board's decision for several reasons.

First, like the provision in *MacLean*, the right to disobey uses the term "law" in isolation. It omits "rule" and "regulation," although all three terms repeatedly appear as a list elsewhere in the same section of the same statute. As in *MacLean*, therefore, the term "law" does not include "rule" and "regulation" because Congress acts intentionally when it omits language included elsewhere. This canon applies with particular force here (as it did in *MacLean*), because Congress used the broader phrase "law, rule, or regulation" repeatedly in section 2302, and because the right-to-disobey provision uses "law" in close proximity with that broader list.

Second, as in *MacLean*, legislative history supports the narrow interpretation of "law." In addressing an employee's right to disobey, Congress was mindful of the concern of employee insubordination. Expanding the meaning of "law" to include "rule" and "regulation"—which do not appear in the right to disobey—would upset Congress's balance between employee rights and concerns of

insubordination. By contrast, adopting the narrow interpretation would not present that concern, and would be consistent with the plain terms of the statute.

Third, *MacLean* has already interpreted the term "law" in the WPA. Courts presume that terms have the same meaning when used multiple times in the same statute. That presumption is particularly strong here, where the right to disobey appears in the same sentence and statutory section as the provision considered in *MacLean*.

Applying this interpretation, the board correctly determined that the regulation and internal agency rule cited by Dr. Rainey are not "law." Accordingly, we respectfully request that the Court affirm the board's decision.

ARGUMENT

I. Judicial Review Of Board Decisions Is Limited

Judicial review of the board's decision is limited. This Court reviews the board's decision based on the record before the board, and must affirm unless the board's decision 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). This case presents a question of statutory interpretation, which this Court reviews *de novo*. *McCollum v. Nat'l Credit Union Admin*., 417 F.3d 1332, 1337 (Fed. Cir. 2005). The petitioner bears the burden of establishing

reversible error in the board decision. *See Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

II. The Supreme Court's Reasoning In *MacLean* Supports The Board's Interpretation

In adopting the narrow interpretation of the term "law" in the right to disobey, the board properly relied on the reasoning in *MacLean*. Appx4-5. In *MacLean*, the Supreme Court interpreted the right to disclose provision in section 2302(b)(8) of the WPA. *MacLean*, 135 S. Ct. at 918 (citing 5 U.S.C. § 2302(b)(8)). That provision makes it a prohibited personnel practice to retaliate against a Federal employee for disclosing a violation of any "law, rule, or regulation," unless, among other things, the disclosure is "specifically prohibited by law." *See* 5 U.S.C. § 2302(b)(8). The question before the Court was whether a disclosure prohibited by TSA regulation was "specifically prohibited by law." *MacLean*, 135 S. Ct. at 919. In this case, similarly, the question before the board was whether an order that would require Dr. Rainey to violate a rule or regulation was an order that would require him to violate "a law."[4] Appx3. The board, like the Supreme Court in *MacLean*, answered "no." *See* Appx4-5.

[4] This issue was not raised in *Veneziano v. Department of Energy*, a right-to-disobey case that pre-dates *MacLean*. *See* 189 F.3d 1363, 1368-69 (Fed. Cir. 1999).

That reasoning was correct for three primary reasons. First, Congress omitted "rule" and "regulation" from the right to disobey, and that omission should be given effect. Second, the narrow interpretation of "law" is consistent with Congress's goal in passing the right to disobey—to balance the interests of a law-abiding Government with concerns of employee insubordination. Finally, *MacLean* has already adopted the narrow meaning of "law" in the right to disclose, which is part of the same subsection and sentence as the right to disobey. Each of these reasons is discussed in further detail below.

A. Congress Intentionally Omitted "Rule" And "Regulation" From The Right To Disobey

The board correctly determined that Congress's omission of "rule" and "regulation" from the WPA's provision governing an employee's right to disobey supports a narrow interpretation of "law." Appx5. "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *MacLean*, 135 S. Ct. at 919 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). In the right-to-disobey provision of the WPA, Congress allowed Federal employees to refuse to obey an order that would violate a "law." 5 U.S.C. § 2302(b)(9)(D). By listing the term "law" in isolation, Congress omitted "rule" and "regulation," both of which are expressly included elsewhere in the same statutory section.

Like the right-to-disclose provision in *MacLean*, the right-to-disobey provision is located in section 2302, which uses the term "law" both by itself and as part of the broader list "law, rule, or regulation." *See MacLean*, 135 S. Ct. at 919. That list was used "nine times in Section 2302 alone." *Id.* The *MacLean* Court noted three examples in particular. *Id.* First, "[s]ection 2302(b)(1)(E) prohibits a federal agency from discriminating against an employee 'on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation.'" *Id.* As another example, "[s]ection 2302(b)(6) prohibits an agency from 'grant[ing] any preference or advantage not authorized by law, rule, or regulation.'" *Id.* Third, the Court cited the "right to appeal" in subsection (b)(9) (which also contains the right to disobey), stating "[s]ection 2302(b)(9)(A) prohibits an agency from retaliating against an employee for 'the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.'" *Id.*

"In contrast," the *MacLean* Court explained, "Congress did not use the phrase 'law, rule, or regulation' in the statutory language at issue here; it used the word 'law' standing alone." *Id.* The same is true in this case. Like the right-to-disclose provision, the right-to-disobey provision uses the term "law" in isolation. It prohibits retaliation "for refusing to obey an order that would require the individual to violate *a law*." 5 U.S.C. § 2302(b)(9)(D) (emphasis added). The terms "rule" and "regulation" are omitted. "That is significant because Congress

generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *MacLean*, 135 S. Ct. at 919 (citing *Russello*, 464 U.S. at 23). "Thus, Congress's choice to say ['law'] rather than ['law, rule, or regulation'] suggests that Congress meant to exclude rules and regulations." *Cf. MacLean*, 135 S. Ct. at 919.

The *MacLean* Court further stated that there were "two reasons" why this canon "applie[d] with particular force." 135 S. Ct. at 919. Both reasons apply here.

First, the right to disclose provision places the term "law" in "close proximity" with the broader list. *Id.* The same is true here, where those terms appear together in the same *sub*-subsection.[5] 5 U.S.C. § 2302(b)(9). Subsection (b)(9) contains the term "law" in the right to disobey and the list "law, rule, or regulation" in the right to appeal. *See* 5 U.S.C. § 2302(b)(9)(A) (right to appeal), (D) (right to disobey). These two provisions are closely linked. Both depend upon

---

[5] Subsection 2302(b)(9) makes it a prohibited personnel practice to:

> [T]ake or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
>
> > (A) the exercise of any appeal, complaint, or grievance right granted by any *law, rule, or regulation* . . .; or
> >
> > . . .
> >
> > (D) for refusing to obey an order that would require the individual to violate a *law*

5 U.S.C. § 2302(b)(9) (emphases added).

the general prohibition in (b)(9), which precludes employees from "tak[ing] or fail[ing] to take . . . any personnel action against any employee . . . because of—" exercising his right to appeal or right to disobey. *See* 5 U.S.C. § 2302(b)(9)(A), (D). Even assuming that the right-to-disclose provision places the terms in even closer proximity, as Dr. Rainey argues, Pet. Br. at 28, the terms here nevertheless appear in "close proximity." *See MacLean*, 135 S. Ct. at 919.

Also, as was the case in *MacLean*, the two phrases appear "in the same sentence." *See MacLean*, 135 S. Ct. at 919. The right to disobey is part of the same sentence as the right to disclose. Both are part of the first sentence of subsection (b), which states: "Any employee who has authority to take . . . any personnel action, shall not, with respect to such authority—" undertake any of 13 listed prohibited personnel actions.[6] 5 U.S.C. § 2302(b). Each of the 13 prohibited

---

[6] Section 2302(b) states, in relevant part:

(b) Any employee who has authority to take . . . any personnel action, shall not, with respect to such authority-- . . .

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) any violation of any law, *rule, or regulation*, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by *law* and if such information is not specifically required by Executive order to be

personnel actions is separated by hyphens and semi-colons. There is no period—and thus no terminal punctuation mark—until the final item in that list. *See* Bryan A. Garner, The Redbook: A Manual on Legal Style 43 (2d ed. 2002) (stating the period is "the standard terminal punctuation"). These 13 actions thus comprise a list that relies on the same introductory clause. *See id.* at 14-15 (providing other examples of lists in statutes and contracts). The right to disclose in *MacLean* is the eighth item, *id.* § 2302(b)(8), and the right to disobey is the ninth, *id.* § 2302(b)(9); they are part of the same sentence.

Other cases confirm that multiple numbered subparts can comprise a single sentence. Subsection 3663A(b) of Title 18, for example, presents a similar sentence, with three subparts plus additional divisions. *See Robers v. United States*, 134 S. Ct. 1854, 1857 (2014) (citing 18 U.S.C. § 3663A(b)). Yet the Court recognized that subsection (b) comprised "a long sentence." *Id.* The same is true for subsection 2302(b) in this case. *See* 5 U.S.C. § 2302(b). Although it contains 13 subparts, these subparts comprise a long sentence. As in *MacLean*, therefore,

---

> kept secret in the interest of national defense or the conduct of foreign affairs; . . .
>
> (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of-- . . .
>
> (D) for refusing to obey an order that would require the individual to violate a *law* . . . .

5 U.S.C.A. § 2302(b) (emphases added).

the right to disobey uses "law" and the broader list in "close proximity—indeed, in the same sentence." 135 S. Ct. at 919.

Second, the *MacLean* Court concluded that the canon of intentional omission "applie[d] with particular force," because "Congress used the broader phrase 'law, rule, or regulation' repeatedly" throughout section 2302. *MacLean*, 135 S. Ct. at 919. It used that list "nine times in Section 2302 alone." *Id.* Like the right-to-disclose provision addressed in *MacLean*, the right-to-disobey provision appears in section 2302 alongside these nine references to the broader list. These repeated references, plus the close proximity between the list and the isolated term, "make Congress's choice to use the narrower word 'law' seem quite deliberate." *Id.*

This conclusion is strengthened when considered in conjunction with *Department of Treasury, IRS v. FLRA*, 494 U.S. 922 (1990), also cited in *MacLean*. *See* 135 S. Ct. at 920. In that case, the Court applied different interpretations to "law" and "law, rule, or regulation" even when they appeared in different statutory sections. *Dep't of Treasury*, 494 U.S. at 931-32 (citing 5 U.S.C. § 7106(a)(2); 5 U.S.C. § 7103(a)(9)(C)(ii)) (stating that was the only "reasonable interpretation of the text"). As the Court held, "a statute that referred to 'laws' in one section and 'law, rule, or regulation' in another 'cannot, unless we abandon all

pretense at precise communication, be deemed to mean the same thing in both places.'" *MacLean*, 135 S. Ct. at 920 (quoting *Dep't of Treasury*, 494 U.S. at 932).

Applying the same interpretation to "law" and "law, rule, or regulation" would be even less reasonable here. In this case, a single section, 5 U.S.C. § 2302, includes the term "law" alongside numerous references to "law, rule, or regulation." Given the close proximity of these differing terms, Congress was surely aware that it had omitted "rule" and "regulation" from the right-to-disobey provision. Thus, as was the case in *MacLean*, the best conclusion is that Congress intended that omission.

Dr. Rainey nevertheless contends that the term "law" used alone in the right-to-disobey provision includes "rules" and "regulations." According to Dr. Rainey, the right-to-disobey provision uses "law" as "a generic standalone reference without limitation[.]" Pet. Br. at 28. He contrasts this to the right-to-disclose provision in *MacLean*, where the use of "law" appears as an exception to the general right to disclose any violation of any "law, rule, or regulation." *See* Pet. Br. at 29. Dr. Rainey contends that, unlike in the right-to-disclose provision, there "is no substantive connection between the right-to-disobey provision and any other provision of § 2302 that uses the list 'law, rule, or regulation.'" Pet. Br. at 29.

The trouble with these arguments, however, is that they fail to rebut the canon of statutory interpretation in *MacLean* that Congress acts intentionally when

it omits language included elsewhere in the same statute. Although the right-to-disobey provision itself does not contain both the term "law" and the phrase "law, rule, or regulation," *MacLean* does not require that degree of connection. Instead, the *MacLean* Court began its analysis with the fact that section 2302 overall contained nine examples of the list "law, rule, or regulation." *See MacLean*, 135 S. Ct. at 919. Rather than requiring a specific "substantive connection" between the uses of these terms, the Supreme Court listed numerous instances of "law, rule, or regulation" that appear *throughout* section 2302, not just in the right-to-disclose provision. *Id.* (citing 2302(b)(1), (b)(6), (b)(9)).

In any event, the fact that the right-to-disobey provision uses "law" in the same statutory section of the WPA alongside nine references to "law, rule, or regulation" demonstrates at least some degree of substantive connection between those terms. The right to disobey also appears in a dependent clause alongside the right to appeal in subsection (b)(9)(A), which contains "law, rule, or regulation," suggesting further connection. *See* 5 U.S.C. § 2302(b)(9).[7]

[7] Dr. Rainey contends that the right to disobey in (b)(9)(D) should be considered alone because it "is a free-standing independent protection that is effective without relation to any other separate protected activity, including those defined using the list 'law, rule, or regulation.'" Pet. Br. at 29. But it is just one item in a list alongside *all* of the rights in subsection (b), and is even more closely linked with (b)(9)(A), which contains the broader phrase, "law, rule, or regulation."

Dr. Rainey himself appears to concede a substantive connection between the right to disobey provision and the remaining portions of subsection 2302(b)(9). He argues that "lawfully"—which appears elsewhere in (b)(9)—is a generic word that includes compliance with rules and regulations. Pet. Br. at 31. By extension, he maintains, the use of "law" in the nearby right-to-disobey provision must also be broad and generic. *Id.* But "lawfully" is not the same word as "law," and Dr. Rainey does not cite to any legal decision interpreting "lawfully." Still, the fact that Dr. Rainey relies on the surrounding sections in (b)(9) confirms the connection between the right to disobey in (b)(9)(D) and the right to appeal in (b)(9)(A), which uses the "law, rule, or regulation" list. *See* 5 U.S.C. § 2302(b)(9).

Finally, Dr. Rainey offers a rationale for Congress's omission of "rule" and "regulation" from the right-to-disobey provision. He maintains that using the list "law, rule, or regulation" "would have been too restrictive" and potentially exclude "constitutions, executive orders, court decrees, and decisions of important agencies[.]" Pet. Br. at 32. This interpretation is inconsistent with *MacLean*; further, it would have been odd for Congress to intend the term "law" to be viewed in such an expansive manner, when the phrase "law, rule, and regulation" is employed in such close proximity in section 2302.

This argument is also unpersuasive because it would suggest that the right to disobey (containing "law") is more far-reaching than the right to disclose

(containing "law, rule, regulation"). The right to disclose Government wrongdoing, however, goes to the heart of the WPA, with each of the WPA's "findings" relating to the importance of employee disclosures. Whistleblower Protection Act of 1989, P.L. 101-12, § 2(a), 103 Stat. 16 (April 10, 1989). The right to disobey, in contrast, could not even support an individual right of action appeal in the original WPA. *See id.*, P.L. 101-12, § 1221 (listing only section 2302(b)(8) as an independent basis for board jurisdiction over individual right of action appeals). Congress knew how to be inclusive, and it did so by allowing employees to disclose violations of "law, *rule, or regulation*." 5 U.S.C. § 2302(b)(8) (emphasis added). The term "law" in isolation is less inclusive than that list, not more so. As further evidence that Congress knew how to be inclusive when it wished to, it expressly included Executive Orders in at least one subsection of section 2302. *See* 5 U.S.C. § 2302(b)(8); *see also MacLean*, 135 S. Ct. at 920 (noting Congress's separate inclusion of Executive Orders in subsection (b)(8)). Congress did not separately list authorities such as Executive Orders, rules, or regulations, in the right to disobey provision.

In sum, unlike the repeated references to "law, rule, or regulation" elsewhere in section 2302 and subsection (b)(9), the right to disobey contains only the term "law." It omits "rule" and "regulation." As in *MacLean*, that omission must be given effect.

B. Legislative History Supports The Board's Interpretation

Legislative history also supported the *MacLean* Court's narrow interpretation of the term "law" as used in the WPA's right to disclose provision. *MacLean*, 135 S. Ct. at 920. The Court reasoned that "a broad interpretation . . . could defeat the purpose of the whistleblower statute," as reflected in the legislative history of the WPA. *Id.* Legislative history likewise supports the narrow interpretation in this case, because a broad interpretation could encourage employee insubordination—one of the concerns motivating the drafting of section 2302(b)(9)(D).

In approving the right-to-disobey provision, the House of Representatives stated that "[t]he establishment of this protection is meant to achieve a balance between the right of American citizens to a law-abiding government *and the desire of management to prevent insubordination*." 134 Cong. Rec. 27,855 (Oct. 3, 1988) (joint explanatory statement) (emphasis added). In the law that was ultimately enacted, Congress drew the line at authorizing insubordination against orders that would violate "a law." *See* 5 U.S.C. § 2302(b)(9)(D). It omitted reference to orders that might violate a "rule or regulation."

Dr. Rainey nonetheless contends that the legislative history never expressly limits "law" to statutes. *See* Pet. Br. at 17-21. According to Dr. Rainey, "[a]t no time during [the proceedings before Congress] did any member of Congress or any

witness state that the right-to-disobey provision should be limited to orders to violate statutes." *Id.* at 17.

The same is true, however, about the right-to-disclose provision. The legislative history considered in *MacLean* was equally silent about whether "law" means statute. *See MacLean*, 135 S. Ct. at 919-20 (not mentioning any legislative history directly addressing the definition of "law"). The *MacLean* Court instead considered how its narrow interpretation fit with the broader goals of the provision at issue. *Id.* at 920.

Dr. Rainey next argues that, although Congress stated it was adopting a "'narrower form'" of the right to disobey, it did not intend "to limit the meaning" of "law." Pet. Br. at 19 (citing 134 Cong. Rec. 27,855 (Oct. 3, 1988)). As support, Dr. Rainey cites other changes made in the legislative process that left the word "law" unchanged. *See id.* But Dr. Rainey's interpretation does not explain why Congress omitted "rule" and "regulation" from the right-to-disobey provision, while expressly including those terms elsewhere in the same statutory section.

Instead, he simply assumes that Congress intended "law" to include all types of legal authority, "whatever the form of the law may be."[8] Pet. Br. at 19.

As discussed above, however, that assumption finds no support in the text of the statute. And even Dr. Rainey's citations to testimony during legislative hearings support the narrow meaning of "law." A representative from the Professional Managers Association testified, for example, that the right to disobey would "'codif[y] and make[] absolutely clear that the law itself stands higher than supervisor's orders.'" Pet. Br. at 18 (citing *WPA Hearing Before the Subcomm. on Civil Serv. of the Comm. on Post Office and Civil Serv.*, 100 Cong. 245 (1987)). Although begging the question of what qualifies as a "law," this statement suggests that "law" means statute by stating that "law" stands above the agency supervisor. Laws passed by Congress do stand higher than agency supervisor's orders, whereas internal agency rules and regulations can be crafted and interpreted by agency officials.[9] *See, e.g.*, 5 U.S.C. § 552, 553 (describing procedures for agency rules and regulations).

---

[8] Dr. Rainey argues that "law" should have a generic meaning in the right to disobey because of that right's "unbridled nature." Pet. Br. at 30. But that right is not unbridled, and it was precisely because of legitimate concerns about insubordination that Congress adopted a *narrower* version of the right to disobey. *See* 134 Cong. Rec. 27,855 (Oct. 3, 1988).

[9] Although the Department of State does not itself draft the FAR, the FAR provision at issue here authorizes agency officials, notably the contracting officer,

Dr. Rainey also cites testimony addressing the protection provided to employees who honor their duties under the Code of Ethics for Government Service. Pet. Br. at 20. But that code uses different terms for statutes than for rules and regulations, referring to employees' duty to "[u]phold the Constitution, *laws*, and legal regulations of the United States and of all governments therein . . . ." *See* P.L. 96-303, 94 Stat. 855 (July 3, 1980) (emphasis added). Congress used only the term "law" in the right-to-disobey provision. 5 U.S.C. § 2302(b)(9)(D).

The legislative history reflects valid reasons for enacting a "narrower form" of the right to disobey. *See, e.g.*, 134 Cong. Rec. 27,855 (Oct. 3, 1988). For example, David M. Sanasack, Executive Director of the Federal Managers Association, explained that "labor-management relations is a balancing act," trying to "allow for worker rights at the same time we try to allow for supervisor authority." *WPA Hearing Before the Subcomm. on Civil Serv. of the Comm. on Post Office and Civil Serv.*, 100 Cong. 204 (1987). As he stated, "[t]o suggest that there is some right inherent in failing to follow orders will upset [this] balance." *Id.* Instead, he elaborated, "[t]he general rule in this area of labor law is [] act now, grieve later." *Id.* "Employees must follow the orders of their supervisors." *Id.* In

---

to specify the contracting officer representative's authority and any limitations to that authority. FAR § 1.602-2(d)(7).

response to concerns like these, one of the bill co-sponsors noted that this was "an important area and quite controversial. We probably ought to look at it again." *Id.* at 208 (statement of Rep. Frank Horton).

This testimony demonstrates that legitimate concerns about insubordination were front and center in considering the right to disobey provision. *See also* 134 Cong. Rec. 27,855 (Oct. 3, 1988). Extending the term "law" to mean rules, regulation, and all the other types of authority listed by Dr. Rainey would heighten the concerns of insubordination. A narrow reading of "law," in line with *MacLean*, is consistent with Congress's intent to balance these competing concerns.

Finally, Dr. Rainey argues that applying *MacLean*'s narrow interpretation of "law" "would defeat the goals of Congress" in enacting the WPA. Pet. Br. 20 But the concerns he points to include preventing reprisals and prohibited personnel practices, thus begging the question of what constitutes a prohibited personnel practice—the very question presented in this case. *See id.* And some of the policy goals cited by Dr. Rainey plainly address only the right to disclose, not the right to disobey. For instance, Dr. Rainey cites Representative Schroeder's statement that the WPA was intended "'to encourage insiders . . . to *disclose* waste, mismanagement, wrongdoing, illegalities, and dangers to public health and safety[.]'" Pet. Br. at 20 (quoting *WPA Hearings Before H. Subcomm. on Civil*

Serv. of the H. Comm. on Post Office and Civil Serv., 99 Cong. 1 (1985)) (emphasis added).

Dr. Rainey could have *disclosed* the alleged violations of the FAR and internal agency rules, because subsection (b)(8) authorizes disclosing violations of "law, rule, or regulation." 5 U.S.C. § 2302(b)(8). But Dr. Rainey instead alleges that he disobeyed his supervisor's order. By proceeding under the right to disobey, Dr. Rainey was limited to relying on a violation of "law," which does not include violation of rule or regulation.[10]

C. The Presumption Of Consistent Interpretation Requires Affirmance Of The Board's Interpretation

As discussed above, the Court's reasoning in *MacLean* supports the narrow interpretation of "law" in the right-to-disobey provision. But even assuming that reasoning is not dispositive here, the Court's prior adoption of that interpretation in the same statute confirms that the board's interpretation was correct.

i. Identical Terms Used In The Same Section Are Presumed To Have The Same Meaning

Acts of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). "[I]t is a well-

[10] Had State taken an adverse action against Dr. Rainey, such as reduction in pay, he could also challenge that action before the board, and State would have to prove that the action advanced the efficiency of the service. *See* 5 U.S.C. §§ 7512, 7513; *see also James v. Dale*, 355 F.3d 1375, 1378 (Fed. Cir. 2004).

established rule of statutory construction that normally 'identical words used in different parts of the same act are intended to have the same meaning.'" *Nat'l Org. of Veterans Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1379 (Fed. Cir. 2001) (citations omitted). Courts thus "presume that the same term has the same meaning when it occurs here and there in a single statute[.]" *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

Like most canons of interpretation, however, this presumption can be rebutted. "'[M]ost words have different shades of meaning and consequently may be variously construed,'" even when they appear in the same section. *Id.* (citation omitted). In determining whether the presumption is overcome, the inquiry is whether "'there is such variation" between the different parts of the act to warrant the conclusion that the words were used "'with different intent.'" *Id.* (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). Relevant considerations include whether "the subject-matter to which the words refer is [different] . . . , or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another." *Atl. Cleaners & Dyers*, 286 U.S. at 433. "Context counts." *Envtl. Def.*, 549 U.S. at 576.

Context includes the proximity between the two provisions. The presumption of consistent interpretation "has even greater force where, as here, the identical words are in the same statutory section." *CUNA Mut. Life Ins. Co. v.*

United States, 169 F.3d 737, 741 (Fed. Cir. 1999). And it is "'surely at its most vigorous when a term is repeated within a given sentence.'" *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

ii. <u>The Presumption Of Consistent Interpretation Controls</u>

The Supreme Court has already adopted the narrow interpretation of the term "law" in the right-to-disclose provision of section 2302 of the WPA. *MacLean*, 135 S. Ct. at 919. The same term also appears in the right-to-disobey provision of section 2302. Applying the presumption of consistent interpretation, the term "law" should carry the same meaning in both places. *Envtl. Def.*, 549 U.S. at 574. That presumption is all the stronger because the right to disobey appears in the same statutory section as the previously-interpreted provision. *See CUNA*, 169 F.3d at 741.

Not only do the two provisions appear in the same section of the WPA, 5 U.S.C. § 2302, but they also appear in the same sentence. As discussed above, the first sentence in section 2302(b) contains all 13 prohibited personnel actions, including the right to disclose and the right to disobey. *See* Section II.A. This case is thus similar to others in which the Supreme Court has applied the presumption of consistent interpretation.

In *Mohamad v. Palestinian Authority*, for example, the Court interpreted "individual" consistent with its ordinary meaning and with four other uses of that term in the same statutory sentence. 132 S. Ct. at 1708. The Court stated that the presumption of consistent interpretation is "surely at its most vigorous when a term is repeated within a given sentence." *Id.* (internal citation and quotation marks omitted). The same principle applied to "property" when it appeared seven times in "part of a long sentence." *Robers v. United States*, 134 S. Ct. 1854, 1857 (2014). As in *Mohamad* and *Robers*, the term "law' appears numerous times in the same sentence, and should be given the same meaning throughout. *See* 5 U.S.C. § 2302(b).

Even if the terms were not in the same sentence, the Court has applied the presumption of consistent interpretation to terms appearing in different sections of the United States Code. When interpreting the phrase "sale or exchange" in the tax code, for example, the Court adopted the "settled meaning" of that phrase as interpreted in other sections of the code. *C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (citations omitted). The Court noted that "the Code must be given as great an internal symmetry and consistency as its words permit." *Id.* (internal citation and quotation marks omitted). Likewise, the WPA should be interpreted to advance internal consistency.

Nothing in the text or history of the right to disobey affirmatively indicates that Congress intended a contrary meaning of "law." The presumption of consistent interpretation thus applies, and there is "no indication that Congress intended to depart from that principle here." *See CUNA*, 169 F.3d at 741. Although Dr. Rainey cites several cases in which the statutory text or other context rebutted the presumption of consistency, each of them is distinguishable. *See* Pet. Br. at 28 n.3.

Dr. Rainey cites *Wachovia Bank v. Schmidt*, for example, in which the Court interpreted the term "location" in a jurisdictional statute. 546 U.S. 303 (2006). The Court reached a different interpretation than a prior case interpreting "location" in a then-repealed statute on venue, which appeared in a separate chapter of the United States Code. 546 U.S. at 315-16 (citing 12 U.S.C. § 94 (1976) (venue); 28 U.S.C. § 1348 (diversity jurisdiction)). The two statutes thus were not part of the same law, nor did they address the same subject matter. *Id.* at 316 (citation omitted). Unlike *Wachovia*, this case presents the same term in the same sentence, section, and statute as the prior interpretation.

Another case cited by Dr. Rainey involved the interpretation of the phrase "wages . . . paid" in statutes regarding taxation of back wages. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001). The Court deferred to the Internal Revenue Service's regulation. *Id.* at 204, 219. It did not follow a 1946

interpretation of that phrase, because (1) that prior interpretation was specific to social security benefits, and inapplicable in the tax context, and (2) the Government had issued a "reasonable" and "longstanding" regulation contrary to the prior interpretation. *Id.* at 204, 212-20. This case is different, because the reasoning in *MacLean* is persuasive here, and because there is no applicable regulation adopting a position contrary to *MacLean*.

The other cases cited by Dr. Rainey similarly present circumstances not at issue here. *See* Pet. Br. at 28 n.3. In *Robinson v. Shell Oil Co.*, the Court held that the phrase "employee" in Title VII, 42 U.S.C. § 704(a), included former employees, even though the same term included only current employees in another portion of Title VII. 519 U.S. 337 (1997). The prior provision, section 701(b), however, had "two significant temporal qualifiers" imposing the "current" limitation, whereas section 704(a) did not. *Id.* at 341 n.2. Section 704(a) instead appeared more consistent with other portions of Title VII that used the term "employee" to include former employees. *Id.* at 342-43 (citations omitted). This case is different, because textual indicators in the right-to-disobey provision—the omission of "rule" and "regulation," for example—support the presumption of consistent interpretation.

Dewsnup v. Timm is also distinguishable. *See* 502 U.S. 410, 417-19 (1992). There, the Court interpreted a provision of the bankruptcy code consistent with the

background rule "that liens pass through bankruptcy unaffected."[11] *Id.* at 417. This case is different than *Dewsnup*, because there is no background principle requiring the broad meaning of "law." And although the terms in *Dewsnup* appeared in the same statutory section, they did not appear in the same textual sentence, as is the case here. *See id.*

Finally, this case is distinguishable from the Court's decision in *Libbey Glass, Div. of Owens-Ill., Inc. v. United States*, 921 F.2d 1263, 1265-66 (Fed. Cir. 1990); *see also* Pet. Br. at 29. *Libbey* was a Customs classification case in which the Court rejected the appellant's interpretation of "toughened (specially tempered)" drinking glasses in TSUS § 546.38,[12] when that interpretation would have excluded the very glassware that "apparently led" to the enactment of the provision at issue.[13] *Libbey*, 921 F.2d at 1266. Although the appellant in *Libbey* argued that the Court should interpret the term consistently with the flat glass provision in TSUS § 544.31, the Court held the appellant "failed to demonstrate" that either provision had the meaning advocated by appellant. *Id.* The Court also emphasized that drinking glasses and flat glasses had different principal

---

[11] Some Supreme Court justices have criticized the reasoning in *Dewsnup*. *See, e.g.*, *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 2000 n.1 (2015).

[12] TSUS stands for the Tariff Schedules of the United States, which has since been superseded by the Harmonized Tariff Schedule for the United States.

[13] As discussed below, no similarly absurd result would flow from adopting *MacLean*'s interpretation of "law" in this case.

purposes—durability for the former and safety for the latter—that affected the meaning of "toughened (specially tempered)." *Id.* at 1265-66. In this case, by contrast, the Supreme Court has issued a definitive interpretation of "law" in section 2302, and Dr. Rainey has not shown meaningful differences between the right to disclose and the right to disobey that would require a broader interpretation of "law" here. *See MacLean*, 135 S. Ct. at 919-20. To the contrary, Congress omitted "rule" and "regulation" in the right to disobey, just as it did in the relevant portion of the right to disclose.

For these reasons, it is too much to suppose that Congress used "law" to mean "statute" in the right-to-disclose provision, and, without any overt signal, also used it to mean all sources of legal authority in the right-to-disobey provision —especially when both provisions appear in the same sentence, section, and statute. *See* Pet. Br. at 11 (arguing for that broad interpretation). Consequently, Dr. Rainey has failed to rebut the presumption of consistent interpretation.

D. <u>The Board's Interpretation Does Not Cause Absurd Results</u>

Contrary to Dr. Rainey's assertion otherwise, no absurd consequences arise from the board's interpretation of "law." Dr. Rainey contends it would be absurd to protect an employee who is ordered to violate a statute, but not an employee who is ordered to violate the constitution, rules, regulations, or other legal authority. Pet. Br. at 11. He is incorrect.

As an initial matter, the question of whether the term "law" includes the Constitution is a question not presented in this case or in *MacLean*, and the Court should decline to opine on this important matter. With regard to the remaining legal authorities cited by Dr. Rainey, there is no absurdity in protecting an employee ordered to violate a statute, but not one who is ordered to violate a subordinate source of law. In *MacLean*, for instance, the Court held that a disclosure was not specifically prohibited by "law" even though it was prohibited by TSA regulations enacted pursuant to express statutory order. *See MacLean*, 135 S. Ct. at 921; *see also id.* at 924-26 (Sotomayor, J., dissenting) (stating relevant statute did not "merely *authorize* the TSA to promulgate regulations; it directs it to do so, and describes what those regulations must accomplish"). It is equally reasonable in this case to conclude that the FAR and internal agency guidance, cited by Dr. Rainey, do not constitute a "law."

Dr. Rainey nonetheless claims that several scenarios demonstrate the absurdity of the board's ruling. For example, he contends that, under the board's interpretation, there would be no protection for disobeying an order to violate the Federal Rules of Civil Procedure, whereas there would be protection for refusing to violate a municipality's building code. *See* Pet. Br. at 12-13. But the Federal Rules of Civil Procedure are promulgated by the Supreme Court pursuant to statutory authority and are "implicitly adopted by Congress[.]" *Bright v. United*

States, 603 F.3d 1273, 1279 (Fed. Cir. 2010). They "have the force and effect of a federal statute." *Id.* (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941)) (internal modifications omitted). It is not clear, therefore, that Dr. Rainey is correct in assuming that these court rules are not a "law."

Nor is it clear that a municipality's building code would qualify as a statute. Dr. Rainey himself observes that the *MacLean* Court suggested "law" is limited to actions of Congress. Pet. Br. at 26 n.1 (citing *MacLean*, 135 S. Ct. at 920). In any event, there is no need for the Court to resolve these questions here, where the only issue is the same that was presented in *MacLean*—whether a Federal regulation qualifies as a "law" pursuant to 2302(b). 135 S. Ct. at 919. There is nothing absurd in answering "no" to that question, as the Supreme Court did in *MacLean*.

To the contrary, it is Dr. Rainey's proposed interpretation that would produce absurd results. It would be absurd to interpret "law" to mean one thing in one subsection of the statute, and yet, with little or no textual basis, to adopt a different and much broader interpretation of "law" in the very same section of the same statute. Congress may not always speak clearly, but there is scant basis here to rebut the normal presumption that Congress says what it means and means what it says, and is consistent when it does so. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (citation omitted); *C.I.R.*, 508 U.S. at 159.

Dr. Rainey further criticizes the Government for switching its position on the meaning of "law," noting that the Government argued for a broad interpretation of "law" in *MacLean*. Pet. Br. at 25. But the Government's prior interpretation lost the day in *MacLean*. Supreme Court precedent is binding, not least against the losing party. There is no excuse for the Government to ignore the important precedent from *MacLean*, and in this case it merely seeks to apply the law set forth by the Supreme Court.

III. <u>The Authorities Cited By Dr. Rainey Are Not "Law"</u>

The board correctly concluded that Dr. Rainey's "claim falls outside of the scope of [the right-to-disobey provision]." Appx5. Like the TSA regulations considered in *MacLean*, the sources cited by Dr. Rainey are not "law."

The board correctly concluded that the FAR was a regulation, not a law. Appx5-6. Although Dr. Rainey argues that, when properly issued, the FAR has "the full force and effect of law," Pet. Br. at 33, 35, the same was true of the TSA regulations in *MacLean.* Yet those were not "law," and the same is true of the regulation here. *MacLean*, 135 S. Ct. at 919-20. Although the FAR may be an important regulation in the context of Government contracting, Pet. Br. at 33, that does not transform it into a "law."

Dr. Rainey further argues that the FAR should qualify as a "law," because he could be personally liable for its violation. Pet. Br. at 36 (citing FAR § 1.602-

2(d)(7)(v)). But this argument does not support Dr. Rainey's interpretation, because he contends that "law" includes *all* legal authorities, not just those that could impose personal liability. *See id.* at 32. And even if his interpretation was limited to such regulations, nothing in the text of the right-to-disobey provision suggests that the meaning of "law" hinges on the possible imposition of personal liability. *See* 5 U.S.C. § 2302(b)(9)(D). In any event, agency rules already address this concern by authorizing indemnification for monetary awards rendered against an employee acting "within the scope of employment." 22 C.F.R. 21.1(a) (2015).

Accordingly, the board correctly determined that the sources cited by Dr. Rainey are not "law" pursuant to section 2302(b)(9)(D).

CONCLUSION

For these reasons, we respectfully request that this Court affirm the board's decision.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Elizabeth M. Hosford
ELIZABETH M. HOSFORD
Assistant Director

Of Counsel:

NIELS A. VON DEUTEN
Attorney-Advisor
U.S. Department of State
Office of the Legal Adviser
Washington, D.C.

/s/Emma E. Bond
EMMA E. BOND
Trial Attorney
Civil Division, Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 353-0521

January 14, 2016

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 32(a)(7)(B), this brief complies with the type-volume limitation. This brief was prepared using Microsoft Word Times New Roman 14-point font. In making this certification, I have relied upon the word count function of the Microsoft Word processing system used to prepare this brief. According to the word count, this brief contains 9,005 words.

/s/Emma E. Bond
Emma E. Bond
Trial Attorney
January 14, 2016

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 14th day of January, 2016, a copy of the foregoing "BRIEF AND SUPPLEMENTAL APPENDIX FOR INTERVENOR" was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

___/s/Emma E. Bond___

____ A copy of this filing was served via:

____ hand delivery

____ mail

____ third-party commercial carrier for delivery within 3 days

____ electronic means, with the written consent of the party being served

To the following address:

SUPPLEMENTAL APPENDIX

U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

15-3234

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of Timothy Allen Rainey *v*. Department of State, MSPB Docket No. DC-1221-14-0898-W-1, and that the administrative record is under my official custody and control on this date

on file in this Board

September 30, 2015
Date

William D. Spencer
Clerk of the Board

CERTIFICATE OF SERVICE

I hereby certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

	Counsel For Petitioner
U.S. Mail	Larry S. Gibson Shapiro Sher Guinot & Sandler 250 West Pratt Street, 20th Floor Baltimore, MD 21201
	Respondent
Personal Delivery	Bryan Polisuk General Counsel Office of the General Counsel 1615 M Street, N.W. Washington, DC 20419-0002

September 30, 2015
(Date)

William D. Spencer
Clerk of the Board

INDEX

TIMOTHY ALLEN RAINEY

v.

DEPARTMENT OF STATE

MSPB Docket No. DC-1221-14-0898-W-1

INDIVIDUAL RIGHT OF ACTION (IRA)

TAB	VOLUME	DESCRIPTION OF DOCUMENT	DATE OF RECEIPT OR ISSUANCE
1	1	Appellant - Initial Appeal	July 16, 2014
2	1	MSPB - Acknowledgment Order	July 23, 2014
3	1	MSPB - Jurisdiction Order	July 23, 2014
4	2	Agency - Agency Representative Addition	July 23, 2014
5	2	Appellant - Request for Extension	July 25, 2014
6	2	Agency - Agency's Response to Appellant's Request for Ext. and Agency's Motion to Stay No	July 25, 2014
7	2	MSPB - Time Extension Request Order	July 29, 2014
8	2	Appellant - Response to Judges Order	August 14, 2014
9	2	Agency - Agency File	August 22, 2014
10	2	Agency - Agency's Brief on Jurisdiction	August 22, 2014
11	2	MSPB - Preliminary Status Order	October 16, 2014
12	2	MSPB - Order and Summary of Status Conference	October 24, 2014
13	2	MSPB - Order Suspending Case Processing	October 24, 2014
14	3	Agency - Supplemental Agency File	November 13, 2014
15	3	Agency - Agency Prehearing Submission	December 08, 2014
16	3	Appellant - Request for Subpoena	December 08, 2014
17	3	Appellant - Appellant Prehearing Submissions	December 08, 2014
18	4	Appellant - Supplement to Appellant's Prehearing Submissions	December 11, 2014

19	4	Appellant - Second Supplement to Appellant's Pretrial Submissions	December 11, 2014
20	4	MSPB - Subpoena Notice	December 12, 2014
21	4	MSPB - Subpoena Order	December 12, 2014
22	4	MSPB - Order and Summary of Prehearing Conference	December 12, 2014
23	4	MSPB - Status Conference Order	December 17, 2014
24	4	MSPB - Rainey Hearing CD	December 30, 2014
25	4	Appellant - Appellant Exhibits Reposted	January 02, 2015
26	4	MSPB - Rescheduling Hearing Order	January 07, 2015
27	4	Agency - Agency's Motion to Reschedule Hearing Date	January 12, 2015
28	5	Agency - Agency's Renewed Brief on Jurisdiction	January 26, 2015
29	5	Appellant - Appellant's Response to Agency's Renewed Brief on Jurisdiction	January 28, 2015
30	5	MSPB - Initial Decision	January 30, 2015
31	5	MSPB - Certificate of Service	January 30, 2015

page 2 of 3

INDEX

TIMOTHY ALLEN RAINEY

v.

DEPARTMENT OF STATE

MSPB Docket No. DC-1221-14-0898-W-1

INDIVIDUAL RIGHT OF ACTION (IRA) - PETITION FOR REVIEW

TAB	VOLUME	DESCRIPTION OF DOCUMENT	DATE OF RECEIPT OR ISSUANCE
1	1	Appellant - Petition for Review	February 25, 2015
2	1	MSPB - Petition For Review Acknowledgment Letter	February 27, 2015
3	1	Agency - Response to Appellant Representative's Petition for Review dated 2/25/2015	March 20, 2015
4	1	Appellant - Appellant's Reply to Agency's Response to Petition for Review	March 26, 2015
5	1	MSPB - Opinion and Order	August 06, 2015
6	1	MSPB - Certificate of Service	August 06, 2015

Page 3 of 3

TIMOTHY ALLEN RAINEY v. DEPARTMENT OF STATE
Docket # DC-1221-14-0898-W-1
Response to Judges Order
Summary Page

Case Title : TIMOTHY ALLEN RAINEY v. DEPARTMENT OF STATE

Docket Number : DC-1221-14-0898-W-1

Pleading Title : Response to Judges Order

Filer's Name : Timothy Allen Rainey

Filer's Pleading Role : Appellant

Details about the supporting documentation

#	Title/ Description	Mode of Delivery
1	FAC-COR Certification	Uploaded
2	COR Removal Letter	Uploaded
3	OSC Closure Letter	Uploaded
4	COR Authorities	Uploaded
5	Wood and Dhanani Statements to OSC	Uploaded

Table of Contents

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505
202-254-3600

May 13, 2014

Mr. Timothy Rainey
[redacted]

Re: OSC File No. MA-14-0046

Dear Mr. Rainey:

We have received and reviewed your April 23, 2014, response to our March 25, 2014, preliminary determination letter. Your comments provided no additional evidence or a legal basis that would cause us to change our preliminary determination. Your complaint has been closed.

In our preliminary determination letter, we examined your complaint as possible violations of 5 U.S.C. § 2302(b)(8) and (b)(9)(D). Section (b)(8) makes it unlawful to retaliate against an employee for making a protected disclosure. Section 2302(b)(9)(D) makes it unlawful to take a personnel action against an employee because the employee refused to obey an order that would require him to violate a law. With respect to the Section (b)(8) allegation, you intimated that you made a protected disclosure when you refused to comply with your supervisor's order to tell a contractor to re-hire a terminated subcontractor. We concluded that you did not make a protected disclosure. You have not provided information to change our determination.

With respect to the Section (b)(9)(D) allegation, you clarified that you did not believe your duties as Contracting Officer Representative (COR) were removed for refusing to tell a contractor it should not terminate the employment of a subcontractor. Rather, you believe these duties were removed because you refused to comply with your supervisor's order to tell the contractor to re-hire the terminated subcontractor. You then articulated why you believed this order was improper under the Federal Acquisition Regulation (FAR) and the Department of State's training course for COR certification. However, as stated in our previous letter, one of the elements of section (b)(9)(D) is the violation of a law, not a regulation like the FAR. You did mention the Federal Procurement Policy Act of 1974 but did not cite to a specific section. We reviewed this law's provisions but could not locate any provision that appears to have been violated based on your complaint.

You also alleged a violation of 5 U.S.C. § 2302(b)(1) in your response. Among other things, section 2302(b)(1) prohibits discrimination based on race, color, and national origin. Specifically, you stated that you were issued a letter of reprimand after an investigation into your comments at an August 12, 2013, meeting. The investigators

interviewed six of the 16 people present at the meeting. You noted that only one of the interviewed individuals was non-Caucasian even though a total of six non-Caucasians attended the meeting.

While discrimination on the basis of race, color, and national origin is a prohibited personnel practice, it was not intended that this Office duplicate or bypass the procedures established in the agencies and the Equal Employment Opportunity (EEO) Commission for resolving such discrimination complaints. 5 C.F.R. § 1810.1. Therefore, it is the general policy of the Special Counsel not to take action on such allegations of discrimination as they are more appropriately resolved through the EEO process. In light of the information you have provided, we find no reason to depart from our policy in this matter. Thus, we will take no further action concerning your allegation of discrimination. This decision is not a judgment on the merits of your claim.

For the reasons explained here and in our previous letter, we have closed our file in this matter. We are sending you a separate letter discussing the rights that you may have to seek corrective action from the Merit Systems Protection Board (the Board). Because you alleged violations of 5 U.S.C. § 2302(b)(8) and (b)(9)(D), you may have a right to seek corrective action from the Merit Systems Protection Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action with the Board within 65 days after the date of this letter. The Merit Systems Protection Board regulations concerning rights to file a corrective action case with the Board can be found at 5 C.F.R. Part 1209. ***It is important that you keep the accompanying letter*** because the Merit Systems Protection Board may require that you submit a copy should you choose to seek corrective action there.

Sincerely,

Kevin Wilson

Kevin Wilson
Attorney

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

May 13, 2014

Mr. Timothy Rainey
[redacted]

Re: OSC File No. MA-14-0046

Dear Mr. Rainey:

This letter notifies you that you may have a right to seek corrective action from the Merit Systems Protection Board (the Board). As we informed you in our closure letter, as of this date, we have ended our inquiry into your allegation.

In your complaint, you alleged that Katherine Dhanani, Director, Bureau of African Affairs, Office of Regional and Security Affairs, U.S. Department of State, Washington, D.C., removed you as Contracting Officer Representative (COR) for the Africa Contingency Operations Training and Assistance program on October 4, 2013. You believed this action was in retaliation for refusing to comply with Ms. Dhanani's order to tell a contractor to re-hire a terminated subcontractor. You believed these instructions violated the Federal Procurement Policy Act of 1974, the Federal Acquisition Regulation, and the Department of State's training course for COR certification. Because you alleged that you were the victim of the prohibited personnel practice described in 5 U.S.C. § 2302(b)(8) and (b)(9)(D), you may have the rights stated below.

You may seek corrective action from the Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221 (individual right of action) for the alleged Section (b)(8) and (b)(9)(D) violations that you brought to this office. You may file a request for corrective action with the Board within 65 days after the date of this letter.

The Board regulations concerning the rights to file an individual right of action can be found at 5 C.F.R. part 1209. If you choose to file, submit this letter to the Board as part of your appeal. Additional information about filing an appeal with the Board is available at the Board's webpage: www.mspb.gov.

Sincerely,

Kevin Wilson

Kevin Wilson
Attorney

EEO Investigative Affidavit *(Witness)*

Page No.	No. Pages	Case No.
1	9	DOS-0007-14

1. Affiant's Name (Last, First, MI)		2. Employing Facility	
Katherine Dhanani		Department of State	
3. Position Title	4. Grade Level	5. Employment Address	6. Unit Assigned
Director	FE-OC	Room 5238, 2201 C St NW, Washington DC 20520	**AF/RSA**

Privacy Act Notice

Privacy Act Notice. The collection of this information is authorized by the Equal Employment Opportunity act of 1972, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; the Rehabilitation Act of 1973, as amended. This information will be used to adjudicate complaints of alleged discrimination and to evaluate the effectiveness of the EEO program. As a routine use, this information may be disclosed to an appropriate government agency, domestic or foreign, for law enforcement purposes; where pertinent, in a legal proceeding to which the Agency is a party or has an interest; to a government agency in order to obtain information relevant to a Agency decision concerning employment, security clearances, contracts, licenses, grants, permits or other benefits; to a government agency upon its request when relevant to its decision concerning employment, security clearances, security or suitability investigations, contracts, licenses, grants or other benefits; to a congressional office at your request; to an expert, consultant, or other person under contract with the agency to fulfill an agency function; to the Federal Records Center for storage; to the Office of Management and Budget for review of private relief legislation; to an independent certified public accountant during an official audit of agency finances; to an investigator, administrative judge or complaints examiner appointed by the Equal Employment Opportunity Commission for investigation of a formal EEO complaint under 29 CFR 1614; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; and to a labor organization as required by the FLRA/National Labor Relations Act. Under the Privacy Act provision, the information requested is voluntary for the complainant, and for agency employees and other witnesses.

Statement (*Continue on Form 2569 if additional space is required. Form will auto-create if using Microsoft Word)*

1. Please state your full name, work address, title, email address, and current phone number.

Katherine Simonds Dhanani
Room 5238, 2201 C St NW, Washington DC 20520
Director, Office of Regional and Security Affairs
Bureau of African Affairs
Department of State
dhananiks@state.gov
(202) 647-6476

2. How long have you been in your current assignment?

Six and a half months, since September 3, 2013.

3. Please summarize your job responsibilities.

AF/RSA is comprised of three sub-units. Its Regional Affairs sub-unit coordinates and manages AF's $6-7 billion foreign assistance budget, coordinates and guides the annual Mission and Bureau Resource Requests, and provides expert policy and programming support to the AF Front Office, country desks, and the interagency on democratization, human rights, counter-terrorism, and regional integration via support to the African Union. The Security Affairs sub-unit leads and supports policies and programs that advance USG peace and security goals in Africa. It designs and implements over $220 million in peacekeeping support, security sector reform,

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature Kath Dhanani | Date Signed 3/26/14

Form 2568-B, March 2001 | Page 1 of 39 | Affidavit B

maritime security, and other security-related activities and programs. The ACOTA sub-unit manages a $40-$50 million program which trains and equips African forces for peace support operations on the African continent. In this context, as Director, I perform the following duties:

Continuing Responsibilities:
1. Lead and manage AF/RSA by setting priorities, securing necessary resources, and fostering the professional development of all subordinates.
2. Advise the Assistant Secretary and the AF Front Office leadership on significant developments in RSA's portfolio of issues.
3. Foster a collaborative and service-oriented culture and strengthen RSA's partnerships with AF's country desks, other offices in the Department, and other USG agencies, with special focus on the Department of Defense (DOD) and U.S. Africa Command (AFRICOM).
4. Seek cost savings and efficiencies, while maintaining or augmenting effectiveness, in the planning and implementation of security assistance programs.
5. Proactively engage with U.S. and foreign audiences on key policy issues via public outreach events.
6. Ensure the letter and spirit of EEO regulations are observed and that classified information is properly managed and protected.

4. To whom did you report to in 2013?

From September 3, 2013, Deputy Assistant Secretary of State Donald Teitelbaum. Prior to that, U.S. Ambassador to India Nancy Powell

5. Do you know Complainant and, if so, how long have you known him?

I did not know Dr. Rainey until I came into the AF/RSA office on September 3, 2013.

6. What supervisory authority did you have over Complainant and since when have you had that authority?

I have been his direct supervisor since I assumed the position of Director of AF/RSA on September 3, 2013.

7. What is your race?

Caucasian.

8. To your knowledge, what is Complainant's race? When did you become aware of that information?

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature Kath Dhanani | Date Signed 3/26/14

Form 2569, March 2001

African American. I became aware of his race the first time we met, which I believe occurred on September 3, 2013

9. Were you aware of the Complainant being involved in EEO activity prior to this complaint (to include providing input on alleged discrimination against a subordinate)? If so, when did you become aware of the Complainant's prior EEO activity?

No, I had and have no knowledge of prior EEO activity.

10. Were you aware of the Complainant voicing opposition to discrimination in an open manner? If so, when did you become aware?

During one of our first meetings, Dr. Rainey mentioned that he had taken steps earlier during his tenure to correct a situation of lack of diversity in the ACOTA office. I am not otherwise aware of him voicing opposition to discrimination.

11. If you were aware of the Complainant's prior EEO activity, how did you become aware?

n/a

12. To your knowledge, have you been named by the Complainant as a Responsible Management Official or witness, in a prior EEO Complaint that he/she filed? If so, please identify the case number(s) and identify the issue(s) involved in the complaint? What was your personal involvement in the prior EEO case(s) filed by the Complainant?

I have not been named in a prior complaint filed by Dr. Rainey.

13. When did you become aware of the current (this) EEO complaint?

I learned of it on October 9, 2013, in an e-mail from Dr. Rainey.

14. Please summarize Complainant's responsibilities and provide a copy of his position description and 2013 Work Commitments (as originally issued and updated).

The ACOTA Program Office (APO) is a sub-unit within the Office of Regional and Security Affairs in the Bureau of African Affairs (AF/RSA). As ACOTA Program Director, the incumbent directly supervises the APO, comprising two U.S. direct hire civil service specialists and ten contract employees. He also oversees the work of contract logistics staff in Newington, VA and the activities of a pool of 250 contract field trainers

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature Kathleen Dhanani Date Signed 3/26/14

supporting ACOTA peacekeeper training programs in 25 African countries. He provides policy advice and recommendations to the AF Front Office (AF/FO) on matters pertaining to peacekeeping issues and force generation and liaises directly with U.S. Ambassadors, Deputy Chiefs of Mission, and other embassy officers in the field with regard to ACOTA program activities.

15. Did you have concerns with Complainant's management of his function in 2013? If so, what were you concerns and what action(s) did you take to remedy the concerns?

(I assume this question refers to concerns I had before October 1, 2013. My concerns and actions subsequent to that date are discussed in questions 19 through 27.)

My predecessor and AF/EX informed me that before I arrived in the office, my predecessor had counseled Dr. Rainey and they had negotiated elements of a document outlining agreed principles for management of the ACOTA office. They informed me that this was focused on the management of personnel in the ACOTA office but also included concern that ACOTA leadership was not properly supportive of collaboration with the U.S. military. During my first month as his supervisor, I discussed with Dr. Rainey the "mitigation measures" document my predecessor shared with me. Dr. Rainey told me that he did not agree with the counseling memorandum, but he did agree with the mitigation measures, as edited. We agreed we would work together on that basis, but that I would otherwise give him a fresh start relative to issues raised in the counseling memorandum. I specifically discussed the need to treat all employees in the ACOTA office equally and to treat them as professionals; he agreed that he would rescind a direction that all employees had to work exactly the same hours every day. Also during September 2013, my first month as his supervisor, I asked Dr. Rainey to facilitate forward movement on a pilot project to examine models for integrating U.S. military in peacekeeping training because I was concerned that it had been delayed in earlier months by the ACOTA office. He responded and the pilot moved forward.

16. What role did you have in the recommendation that Complainant be issued a Letter of Reprimand on August 22, 2013? Please provide a copy of all documentation and emails in your possession regarding the events which led to the Letter of Reprimand.

I had no role in the Letter. I have no contemporaneous documents regarding the events which led to the letter. After I took over as director of AF/RSA, I received e-mails from my predecessor providing drafts of the Letter and later the final Letter. He also provided information about interviews he conducted with staff. The draft and final letter, as well as associated e-mails, are attached. From Dr. Rainey, I received his response to the Letter. That is attached.

17. What role did you have in the recommendation that Complainant be counseled on or about August 22, 2013? Please provide a copy of all documents and emails in your possession regarding the events which led to the Counseling.

I had no role. The documents related to the Letter (question 16) also pertain to the Counseling.

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature		Date Signed
Kathleen Dhanani	Affidavit B Page 4 of 39	3/26/14

18. What role did you have in determining who would be interviewed regarding the charges forwarded by the OIG to AF for investigation.

I had no role.

19. Were you made aware of a decision made by ATSG to terminate the employment of Ms. Puntso? If so, what were you told, by whom, and when was that information given to you?

On October 1, 2013, Dr. Rainey sent me an e-mail in which he indicated that he and Ms. Puntso had a confrontation, ATSG wanted to terminate her as a result, and he wanted my agreement that he should accede to ATSG's terminating her. I asked him to take no such action until we had discussed it with AF/EX. On October 3 I received an e-mail from Ms. Puntso at 11:59 am informing me that she had been fired by ATSG and an e-mail from Dr. Rainey at 12:12 pm informing me that she had been fired by ATSG.

20. What is your understanding as to why ATSG was going to terminate Complainant?

Assuming that this refers to Ms. Puntso and not the Complainant, my understanding was that her clashes with Dr. Rainey in the office were viewed as disruptive.

21. Did you have a concern with that decision, and if so, what was your concern?

I had several concerns about the decision. Most importantly, I was aware that Ms. Puntso had filed an EEO complaint alleging sexual harassment against Dr. Rainey. I was concerned that her firing while her EEO complaint was still pending could expose both Dr. Rainey and the U.S. government to accusations of retaliation. I did not think Dr. Rainey was aware of the complaint, but I did not think I was at liberty to discuss it with him. I sought AF/EX guidance on how to discuss it with him. Secondly, I considered the atmosphere in the ACOTA office negative, with those in the office believing that contract employees were completely subject to Dr. Rainey's personal agenda. I had the impression he had had complete authority over who was hired and who was fired, and the mitigation measure we discussed which required that AF/EX and I agree on terminations and appointments, was designed to improve the sense of security of employees in the office. Ms. Puntso's termination undermined that effort. Finally, I had directly asked him not to accede to her termination until after we had a conversation with AF/EX. I viewed his agreeing to ATSG's decision as insubordinate.

22. Did you communicate that concern directly to ATSG? If so, with whom did you discuss the matter, when and what response did you receive? If you did not discuss the matter directly with ATSG, why not?

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
Kathleen Dhanani	3/26/14

I e-mailed Stan Wood of ATSG first thing on October 4 and spoke with him, in company of AF/EX later in the day. He agreed to reinstate Paige Puntso immediately.

23. Did you discuss Ms. Puntso's termination with Complainant? If so, when and what did the two of you discuss?

I discussed Ms. Puntso's termination with Dr. Rainey on numerous occasions between October 3 and December, 2013. I believe we met in the AF/EX offices on October 4, at which time I explained my concern and Dr. Rainey claimed that he had no role whatsoever in the termination of Paige Puntso. I informed him that I thought it was in the best interests of the government that she be reinstated, and that I would seek to do so. I believe we also discussed removing his COR responsibilities because in my view as COR he should have some influence over the actions of the contractor. He knew his supervisor did not want to see her terminated and yet she was terminated. From my point of view, that indicated he was either insubordinate or ineffective. I also told him that I would consider further action.

24. Do you instruct Complainant to have ATSG cancel Ms. Puntso's termination and retain her? If so, why did you give that instruction?

In concert with AF/EX, I instructed Dr. Rainey, and we also directly spoke to ATSG about reinstating her. My reasons were her sexual harassment complaint and the way her firing fed the impression in the ACOTA office that employees were completely dependent on Dr. Rainey's favor.

25. Under what authority could Complainant require ATSG to retain Ms. Punsto? Please provide a copy of the regulation, FAM or other authority which grants Complainant that authority?

I understood from ATSG that the company sought to take actions which it believed were in the best interest of the COR and the ACOTA office. I believed that if ATSG was informed that firing Paige was not in the best interest of the office, the company would agree readily to reinstate her. The termination had been the result of a misunderstanding, and once the situation was clarified, there would be agreement on appropriate next steps.

26. Did Complainant tell you, that as COR, he does not have that authority? If so, what was your response?

Yes. I immediately contacted the contracting officer to see if the contracting officer could reach out to ATSG.

27. Did you remove Complainant's COR authority? If so, when and why? If you did not make the change, who did? Please provide a copy of the letter removing the authority.

On October 4, 2013, I made the decision to seek to remove Tim Rainey's COR responsibilities. I discussed this with AF/EX and the office which is the contracting office for ACOTA, AQM. I then sent a memorandum to Dr. Rainey explaining my decision, which was taken to ensure that contractors behaved in accordance with the requirements of the Bureau. Formally, only the contracting office could remove his COR appointment, and they did so on October 8. Copies of my memorandum and the letter from AQM are attached.

28. Who replaced Complainant as COR and why was that person chosen?

Chris Tringale from AF/RSA was selected to replace Dr. Rainey because he was qualified and I had confidence in his judgment and professionalism.

29. Was the new COR instructed to ensure Ms. Punsto was retained by ATSG? If so, was that mission accomplished? If not, why not?

The Contracting Officer had already made that determination before Mr. Tringale was appointed, so it was not necessary to instruct him.

30. Was Ms. Punsto retained as a contractor? If so, why?

Yes. She was retained because her EEO complaint remained pending, it was desired to demonstrate to the other employees in the ACOTA office that AF Bureau management was involved in the ACOTA office, and it appeared that there were opportunities to improve logistics operations in the ACOTA office.

31. Was Ms. Punsto subsequently appointed as a Foreign Service Officer? If so, what was the approximate effective date of the appointment? Did she continued to serve as a contractor up and until the appointment?

It became apparent that there was not sufficient work for Ms. Puntso, so a decision was made not to renew her contract after December 31, 2013. She was notified on November 22, 2013. I learned in December from Ms. Puntso that she would be appointed as a Foreign Service Officer on January 13, 2014.

32. Did you instruct Complainant to "find work" for Ms Punsto after her contract expired on December 31, 2013? If so, why?

I do not recall asking the complainant to find work for Ms. Puntso after December 31. I did ask if there was a requirement for a logistics manager, but do not recall further discussion when told there was not.

33. Why was Punsto allowed to telecommute, full time, between November 26, 2013 and the end of the year?

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
Kathleen Dhanani	3/26/14

When Ms. Puntso was reinstated, given the existence of a sexual harassment complaint and the confrontations that had occurred between Dr. Rainey and Ms. Puntso, we decided that it would be best if she work from somewhere other than the ACOTA office space. The desk which she had been occupying, however, would no longer be free after November 26, and we were unable to identify any other desk space in the AF Bureau. Telework seemed like the best available alternative.

34. What involvement did you have in the termination decision for Palmer Phillips?

I was informed of the decision after it was taken. I questioned the decision and asked ATSG to revisit the assumptions upon which the decision was taken.

35. To your knowledge (if true) why was Palmer terminated and Punsto retained?

Ms. Puntso was not retained indefinitely, but was retained for some months, so it is partly true that she was retained and Mr. Phillips was let go. In the Puntso case, her pending sexual harassment complaint was among the factors which made me believe it was in the U.S. government's interest to retain her. In the Phillips case, as with Puntso, I was concerned about the effects of his termination on the atmosphere in the office and the perception that Dr. Rainey's favor was essential to continued employment. I questioned the contractor about the basis for the decision. ATSG reported that they had numerous reports from other contract staff regarding Mr. Phillips' unprofessional actions. I requested that ATSG conduct interviews to determine the facts, and the company agreed to send an HR professional into the office to validate the reports it had received. Additionally, Dr. Rainey indicated that the office no longer needed someone for the role Mr. Phillips had occupied. I did not insist on Phillips' retention when ATSG continued to believe that Phillips was unprofessional.

36. Complainant argues that by no longer being the COR over his contract staff, through ATSG, his authority has been diminished. What is your response to his assertion?

I never informed the other employees in the ACOTA office or in AF/RSA (except Mr. Tringale and Mr. Bittrick, Mr. Tringale's supervisor) that Dr. Rainey's COR duties had been withdrawn, and I asked Mr. Tringale to treat the matter with discretion. I continued to treat Dr. Rainey with the same respect as head of the ACOTA office. My efforts were focused on ensuring that he maintained the respect and status necessary to direct the office effectively. As COR for the ATSG contract, Dr. Rainey did not have formal authority to handpick employees and decide when they would be let go, but if he had such authority informally, as many of his contract employees believed, I would agree that I took that authority away from Dr. Rainey.

37. For 2012 and 2013 have you removed (involuntarily) the COR responsibility for any other individual? If so, whom, when and what is the race of the individual (as known to you)?

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
Kat Dhamai	3/26/14

Form 2569, March 2001

EEO Investigative Affidavit (Continuation Sheet)

Page No.	No. Pages	Case No.
9	9	DOS-0007-14

I have never before involuntarily removed COR responsibility from an individual.

38. Was Complainant's race and/or EEO activity a factor in how he was treated for any of the above claims? If so, how and why?

Race was never a factor and I was unaware of EEO activity until Dr. Rainey informed me of this complaint, so EEO activity was also not a factor.

39. For any claim discussed above, did Complainant file a grievance under the Collective Bargaining Agreement or the FAM? If so, please provide a copy of the grievance and its current status.

Not to my knowledge.

40. Is there anything you would like to add to your affidavit and/or do you have any documents you would like to submit in support of your testimony? If so, please so indicate and attach the relevant information.

See attachments

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
Kaal Dhamani	3/26/14

Form 2569, March 2001

EEO Investigative Affidavit *(Witness)*

Page No.	No. Pages	Case No.
1	10	DOS-0007-14

1. Affiant's Name (Last, First, MI)	2. Employing Facility		
John Hoover	U.S. Department of State		
3. Position Title	4. Grade Level	5. Employment Address	6. Unit Assigned
Ambassador nominee	FE-OC	2201 C St NW, Wash DC	**Bureau of African Affairs**

Privacy Act Notice

Privacy Act Notice. The collection of this information is authorized by the Equal Employment Opportunity act of 1972, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; the Rehabilitation Act of 1973, as amended. This information will be used to adjudicate complaints of alleged discrimination and to evaluate the effectiveness of the EEO program. As a routine use, this information may be disclosed to an appropriate government agency, domestic or foreign, for law enforcement purposes; where pertinent, in a legal proceeding to which the Agency is a party or has an interest; to a government agency in order to obtain information relevant to a Agency decision concerning employment, security clearances, contracts, licenses, grants, permits or other benefits; to a government agency upon its request when relevant to its decision concerning employment, security clearances, security or suitability investigations, contracts, licenses, grants or other benefits; to a congressional office at your request; to an expert, consultant, or other person under contract with the agency to fulfill an agency function; to the Federal Records Center for storage; to the Office of Management and Budget for review of private relief legislation; to an independent certified public accountant during an official audit of agency finances; to an investigator, administrative judge or complaints examiner appointed by the Equal Employment Opportunity Commission for investigation of a formal EEO complaint under 29 CFR 1614; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; and to a labor organization as required by the FLRA/National Labor Relations Act. Under the Privacy Act provision, the information requested is voluntary for the complainant, and for agency employees and other witnesses.

Statement (*Continue on Form 2569 if additional space is required. Form will auto-create if using Microsoft Word*)

1. Please state your full name, work address, title, email address, and current phone number.

John Frederick Hoover; Ambassador nominee; hooverjf@state.gov; 202-647-7799.

2. How long have you been in your current assignment?

I have been between assignments since August 22, 2013. Prior to that, I was the Director of AF/RSA from September 2010 through August 2013.

3. Please summarize your job responsibilities.

I am currently between assignments, waiting for Senate confirmation to be the next U.S. Ambassador to Sierra Leone.

4. To whom did you report to in 2013?

When I was the Director of AF/RSA through August 22, 2013, my supervisors were DAS Donald Teitelbaum and PDAS Donald Yamamoto in the Bureau of African Affairs.

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
John Hoover	3-28-14

Form 2568-B, March 2001

Affidavit C

There is no previous complaint by Tim Rainey against me to my knowledge.

13. When did you become aware of the current (this) EEO complaint?

By way of an e-mail from Tim Rainey to myself and others on October 9, 2013.

14. Did you have concerns with Complainant's management of his function in 2013? If so, what were you concerns and what action(s) did you take to remedy the concerns?

Yes, I did have concerns. On August 4, 2013, the AF Bureau received from the Office of the Inspector General (OIG) an anonymous hotline tip alleging a number of allegations of mismanagement and abuse on the part of Tim Rainey. I was alerted to this by phone by AF/EX Director Paul Folmsbee and AF/EX later provided me with a copy of the hotline submission. Thereafter, AF Bureau HR Specialist Joan St. Marie and I met with 13 individuals who were either ACOTA staff or had ties to ACOTA, including first Tim Rainey. At the conclusion of these meetings about three weeks later, we came to the conclusion that none of the specific allegations had merit and I helped draft a memo from AF/EX to the OIG saying so.

But in the course of those meetings, we learned that there were serious underlying managerial challenges in the office under Tim Rainey's leadership. The staff was divided and demoralized, in large part because of perceptions of favoritism practiced by Tim Rainey and unequal treatment by him of the office's contract (vs. direct hire) employees. It appeared that Tim Rainey had created an atmosphere of fear and intimidation by cultivating the perception that he had the de-facto ability (if not the legal authority) to have contract employees fired on-the-spot without recourse or explanation.

In response, AF/EX Acting Director Melinda Tabler-Stone, Joan St. Marie, and I met with Tim Rainey on August 22 for a counseling session. During that meeting, Melinda presented Tim with a Letter of Reprimand specifically in response to a meeting Tim had held on August 12 in which several ACOTA Office employees reported that he used threatening language in response to the OIG hotline complaint, which he implied was made by someone on the staff. On my part, I outlined all of the concerns that emerged from the earlier meetings concerning perceptions of favoritism and intimidation. I also raised a separate concern raised by one ACOTA staff member who told me that Tim was manipulating ACOTA training in the field in ways that were setting up the U.S. military (vs. ACOTA contract) trainers for failure and was perhaps putting them at physical risk. At the end of the meeting, I outlined a series of remedial actions that I requested Tim to take. I summarized the discussion and those remedial actions in a memo for the record to the AF/EX/HR files and for the benefit of my successor, Kathy Dhanani. Tim Rainey and I went back and forth for a couple of weeks trying to finalize the memo. I incorporated every edit that Tim Rainey requested into the memo. But in the end, he refused to provide substantive input in terms of what he said during the August 22 counseling session and he refused to sign it.

Attached to this affidavit are a memo to the file detailing Joan and my conclusions, the counseling memo, and the interview notes from the 13 interviews referenced above. Also attached is an e-mail exchange in which Tim

passed judgment on Jenny Parikh's abilities. In many respects, I believe she is a very capable person. What the interviews conveyed to us was that Jenny was not a good fit for the job she held in the ACOTA Program Office in terms of either her professional background or her interpersonal skills.

30. Did you talk to Ms. Parikh about the concerns? If so, what did she say? If you did not talk to her, why not?

Besides the initial meeting with Jenny in response to the OIG hotline complaint on August 8, I did not speak with her again. I only began to learn about the problems involving Jenny in the ACOTA Program Office in early-to-mid August. On August 22, I counseled Tim Rainey, and then left my position as Director of AF/RSA. This sequence did not allow enough time for me to meet with Jenny again in an official capacity.

31. What is the basis for the conclusion that Complainant may be undermining the effectiveness of the program by manipulating training sessions. (Note: do not disclose classified material in this or any other question).

I did not definitively conclude that Tim Rainey was undermining the program in any way. But I had a concern based on an unambiguous, explicit account from a member of the ACOTA Program Office. In light of the gravity of the allegation, I felt it was imperative to raise it transparently with Tim Rainey to remind him that such behavior and actions, if true, were unacceptable.

32. What was Complainant's response to the Counseling?

Please see my response to #14 above. Tim Rainey initially worked with me on the counseling memo. He made several requests and suggestions for edits, all of which I accepted. In the end, he changed his approach for some reason and refused to provide further input or sign the memo.

33. Complainant argues that AF/RSA and AF/EX may not be involved in the hiring or dismissal actions on the part of the contractor (ATSG) as discussed at Couneling. What is your response to his assertion?

I do not know what the law or regulations say about this issue. In practice, however, Tim Rainey handpicked most if not all of the ACOTA team, except for several hold-overs from before he came on board. ATSG in practice was a pass-through, executing hiring and personnel actions at Tim Rainey's request. During the interview with Paige Puntso on August 15, she alleged that Tim Rainey would often say that he had a stack of resumés on his desk of people he could hire, and that he said this as a way of threatening current staff. Tim Rainey made a nearly identical statement during our counseling session on August 22. I believe this is clear evidence that he believed he had the de-facto power to hire and fire and that he used it to sow fear and intimidation among staff. Neither AF/EX nor I believed this was appropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
John Hoover	3-28-14

Form 2569, March 2001

As such, we included as a remedial action in the counseling session and the counseling memo that Tim would consult with AF/RSA and AF/EX before making any hiring or dismissal decisions. He agreed to this initially; in fact he provided improved language for that bullet point in the counseling memo.

Attached to this affidavit is a July 2012 e-mail from Tim Rainey to Stan Wood of ATSG in which Tim tells Stan that Kevin Gentry "isn't cutting it" and that Tim (not Stan) is therefore demoting him. He then instructs Stan to hire and bring on board Paige Puntso. This is a clear indication that in practice, Tim handpicked his staff and directed ATSG who to hire.

Also attached to this affidavit is an e-mail exchange with me in which Tim Rainey not only agrees to consult with AF/RSA and AF/EX on any hiring or firing actions, but actually provides language for that part of the counseling memo.

34. Despite the information contained in the Counseling, Complainant insists there is no provision in the Contract for comp time for contractor travel. He claims you required him to grant that benefit regardless of the provision of the contract. What is your response to his assertion?

We all believed Tim Rainey had the discretion to grant that benefit, including not least Tim. In fact, he had been providing this benefit previously. During the counseling session, we discussed it and encouraged him to reinstate it in light of the poor morale then present in the ACOTA Program Office. He readily agreed to do so without contention.

35. Have you, during the period January 2013 to August 2013 counseled any other employee for the same or similar reasons as Complainant? If so, whom, when and what (to your knowledge) is that person's race?

No, I have not counseled any other employee for the same or similar reasons as Tim Rainey during the period January 2013 to August 2013.

36. What role did you have in the decision to remove from Complainant his COR responsibilities?

None. I left my position at AF/RSA on August 22.

37. To your knowledge why was the action taken?

I was not involved in taking this action and so am not aware of the specific factors that went into it.

38. What authority does the Department of State have in instructing a Contractor which of its employees shall be hired, retained and/or terminated (Note: this is different from Question 32 which concentrates on the Counseling specific to Complainant. This question is a broader question

involving what you understand the authority by which the Department may be involved in Contractor personnel decisions).

Please see my response to #33 above.

39. What involvement did you have in the decision to remove Complainant's COR authority?

As per #36 above, none.

40. Was Complainant's race and/or EEO activity a factor in how he was treated for any of the above claims? If so, how and why?

During my early involvement in this case, there was no other EEO activity that I was aware of, so that was not a factor in any actions I took. Nothing I did in terms of my counseling of Tim Rainey had anything to do with race. His office was divided and suffered from low morale. As his supervisor, it was my responsibility to counsel him on this and request that he take remedial actions to repair the situation. I attempted to openly and transparently negotiate those remedial actions with Tim Rainey in the counseling memo, but he ultimately refused to engage.

41. ~~For any claim discussed above, did Complainant file a grievance under the Collective Bargaining~~ Agreement or the FAM? If so, please provide a copy of the grievance and its current status.

Not that I am aware of.

42. Is there anything you would like to add to your affidavit and/or do you have any documents you would like to submit in support of your testimony? If so, please so indicate and attach the relevant information.

Attached here:

- Memo to the AF/EX/HR File from John Hoover and Joan St. Marie outlining our conclusions about management challenges and low morale in the ACOTA Program Office.
- Memo to the AF/EX/HR File containing the record of the August 22 Counseling Session.
- John Hoover's notes of 13 meetings held in connection with the August 4 OIG Hotline submission.
- Tim Rainey/Stan Wood e-mail exchange of July 2012 in which Tim Rainey takes unilateral action to demote an ACOTA contract employee and directs Stan Wood to hire a specific person known to Tim Rainey.
- Tim Rainey/John Hoover e-mail exchange in which Tim Rainey agrees to the remedial action that he will consult with AF/RSA and AF/EX before hiring or dismissing any ACOTA staff.

I declare under penalty of perjury that the foregoing is true and correct.

Affiant's Signature	Date Signed
John Hoover	3-28-14

Form 2569, March 2001

Certification

Case No.
DOS-0007-14

I have read the foregoing attached statement, consisting of 10 pages, and it is true and complete to the best of my knowledge and belief. In making this statement, I understand Section 1001, Title 18 of the U.S. Code which states:

> "Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

Privacy Act Notice

Privacy Act Notice. The collection of this information is authorized by The Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16; The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.633a; The Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a; and Executive Order 11478, as amended. This information will be used to adjudicate complaints of alleged discrimination and to evaluate the effectiveness of the EEO program. As a routine use, this information may be disclosed to an appropriate government agency, domestic or foreign, for law enforcement purposes; where pertinent, in a legal proceeding to which the Agency is a party or has an interest; to a government agency in order to obtain information relevant to an Agency decision concerning employment, security clearances, contracts, licenses, grants, permits or other benefits; to a government agency upon its request when relevant to its decision concerning employment, security clearances, security or suitability investigations, contracts, licenses, grants or other benefits; to a congressional office at your request; to an expert, consultant, or other person under contract with the Agency to fulfill an agency function; to the Federal Records Center for storage; to the Office of Management and Budget for review of private relief legislation; to an independent certified public accountant during an official audit of Agency finances; to an investigator, administrative judge or complaints examiner appointed by the Equal Employment Opportunity Commission for Investigation of a formal EEO complaint under 29 CFR 1614; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; and to a labor organization as required by the National Labor Relations Act. Under the Privacy Act provision, the information requested is voluntary for the complainant, and for Agency employees and other witnesses.

Declaration

I declare, under penalty of perjury, that the foregoing is true and correct.

Signature of Affiant	Date Signed
John Hoover	3-28-14

October 2005

Affidavit C
Page 11 of 30

Rainey, Timothy A

From: Rainey, Timothy A
Sent: Tuesday, July 31, 2012 1:53 PM
To: Stan Wood
Subject: Logistics resume - PUNTSO
Attachments: Puntso Resume 2.doc

Stan,

I called earlier to discuss Kevin's performance as Logistics Manager but you were not available. Give me a call back when you get the chance.

Bottom line up front: Kevin isn't cutting it! He has difficulty "multi-tasking" and lacks follow through. Additionally, he needs close supervision and oversight to ensure tasks are completed correctly. He is a good guy with lots of ACOTA experience, but not in this critical position. He can continue to make a valuable contribution in the Logistics Technician position (working the new positions with AQM) once created. I'll already informed him of my decision. I'm looking to get the three new positions approved in August and have folks in place no later than 1 OCT 2012.

Attached you will find the resume of Paige Puntso. She has excellent experience and the right attitude/disposition to "fit" the ACOTA team. In light of our increasing responsibilities ref procuring, storing, shipping, inventorying and granting equipment to our African partners, this position is not only more demanding, but also more important to the success of ACOTA meeting our mission objectives. I've known and worked with Paige for several years back in the late 90's and know t[redacted] she is ideal for the job.

I want her and ACOTA needs her on the Team! Please do the "magic" like you've done in the past (Pat, Coop, Hank, and Vic) to get Paige here by 1 OCT. Thanks!

Tim

Timothy A. Rainey, PhD
Program Director
African Contingency Operations Training and Assistance (ACOTA) Bureau of African Affairs US Department of State
E-mail: RaineyTA@state.gov
Phone: 202-203-7272
Blackberry: 202-615-4052
FAX: 202-203-7532

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

TIMOTHY ALLEN RAINEY, Appellant, v. DEPARTMENT OF STATE, Agency.	DOCKET NUMBER DC-1221-14-0898-W-1 AJ: Melissa Mehring Date: August 22, 2014

AGENCY FILE

The attached Agency File is provided as ordered by the Acknowledgement Order of July 23, 2014. The Department of State ("Agency") notes that this case is in its early stages and respectfully reserves the right to supplement this Agency File in the event it locates additional responsive documents or information.

Respectfully Submitted,

/s/ *Niels von Deuten*
Niels Von Deuten
U.S. Department of State
Office of the Legal Adviser, L/EMP
2201 C Street, N.W., Room 5323
Washington, D.C. 20520
Telephone: (202) 736-7587
Facsimile: (202) 647-6794
Email: VonDeutenNA@state.gov

Counsel for the Agency

Tab 4: Agency Documents

Location	Date	Document Description	Source
4a	05/18/2014	Standard Form 50, Notification of Personnel Action (Within-Range Increase Provided On Regular Cycle)	Agency
4b	04/22/2014	Civil Service Performance Plan and Appraisal	Agency
4c	12/29/2013	Standard Form 50, Notification of Personnel Action (Change in Tenure Group)	Agency
4d	10/08/2013	Termination of Appointment as COR	Agency
4e	10/04/2013	Removal of COR Duties Memorandum	Agency
4f	09/13/2013	Email from Appellant to John Hoover	Agency
4g	09/13/2013	Response to Remedial Measures	Agency
4h	09/04/2013	Response Letter to Letter of Reprimand	Agency
4i	08/22/2013	Letter of Reprimand	Agency
4j	08/22/2013	Memorandum to File (Counseling Session Memorandum)	Agency
4k	08/22/2013	Remedial Measures	Agency
4l	05/20/2012	Standard Form 50, Notification of Personnel Action (Promotion)	Agency
4m	12/20/2010	Appointment Affidavits	Agency
4n	12/19/2010	Standard Form 50, Notification of Personnel Action (Career-Conditional Appointment)	Agency
4o	12/08/2010	Appointment Letter	Agency

TAB 4b

Supervisor

U. S. Department of State

CIVIL SERVICE PERFORMANCE PLAN AND APPRAISAL

General Schedule and Prevailing Rate Employees

TYPE OF REPORT *(Check One)*

☒ Annual Rating of Record
☐ Interim Rating of Record

GENERAL PERSONNEL INFORMATION

Employee Name (Last, First, MI) RAINEY TIMOTHY A	Employee ID PII
Title, Grade, and Series SUPERVISOR FOREIGN AFFAIRS OFFICER, 15, 00130	Bureau/Organizational Symbol AF/RSA
Name of Rating Official DHANANI, KATHERINE S	Title of Rating Official OFFICE DIRECTOR
Name of Reviewing Official TEITELBAUM, DONALD G	Title of Reviewing Official DEPUTY ASST. SECRETARY

Performance Appraisal Period From *(mm-dd-yyyy)* 09-03-2013 To *(mm-dd-yyyy)* 12-31-2013

ALIGNMENT TO THE STRATEGIC GOALS

List the strategic goals that relate to the employee's duties.

As the Program Director of the African Contingency Operations Training Assistance (ACOTA) program, Dr. Rainey supports the State Department's Strategic Goal of "Achieving Peace and Security," the Bureau of African Affairs (AF) number three Strategic Goal, "Countries in Sub-Saharan Africa Free of Conflict," and the following performance indicator: “Percentage of U.S.-trained African units deployed to peace support/humanitarian response operations, and number of African armed conflicts resolved and peace support missions concluded.” Conflict resolution and stability are critical to democratization, improved governance and economic development in Africa. The Bureau's priorities are to strengthen African capabilities to respond to threats through security sector reform, training and equipping African peacekeepers, and support for the African Standby Force. Such efforts, to which the ACOTA program contributes both directly and indirectly, support and strengthen African capacity to achieve peace and to more effectively prevent and resolve conflicts on the continent.

JOB DESCRIPTION

Briefly describe where the position fits in the organizational structure.

The ACOTA Program Office (APO) is a sub-unit within the Office of Regional and Security Affairs in the Bureau of African Affairs (AF/RSA). As ACOTA Program Director, the incumbent directly supervises the APO, comprising two U.S. direct hire civil service specialists and ten contract employees. He also oversees the work of contract logistics staff in Newington, VA and the activities of a pool of 250 contract field trainers supporting ACOTA peacekeeper training programs in 25 African countries. He provides policy advice and recommendations to the AF Front Office (AF/FO) on matters pertaining to peacekeeping issues and force generation and liaises directly with U.S. Ambassadors, Deputy Chiefs of Mission, and other embassy officers in the field with regard to ACOTA program activities.

GENERIC PERFORMANCE STANDARDS

The Generic Performance Standards are the primary basis for assigning element ratings. They define levels of performance in terms of quality, quantity, and extent of supervision required. The following are general definitions:

Exceeds Expectations: This is a level of unusually good performance. The quality and quantity of the work under this element are consistently above average.

Fully Successfully: This is a level of good, sound performance. The quality and quantity of the work under this element are those of a fully competent employee. The performance represents a level of a accomplishment expected of a great majority of employees.

Not Successful: The quality and quantity of the employee's work under this element are not adequate. The employee's work products fall short of requirements.

Supervisor

APPRAISAL FOR:

Employee Name *(Last, First, MI.)* RAINEY TIMOTHY A

Employee ID PII

DATE THE WORK COMMITMENTS WERE CHANGED:

CRITICAL PERFORMANCE ELEMENT 1 - EMPLOYEE WORK COMMITMENTS AND STANDARDS

The incumbent and his/her supervisor should describe a limited number of critical actions, objectives, and/or results that incumbent will be expected to accomplish during the evaluation year. Work commitments are derived from and directly contribute to program priorities and objectives established by the Department/Bureau/Office strategic goals, and are written at the "Fully Successful" level. Performance of work commitments should include a measurement of results and be expressed in terms of quantity, quality, manner of performance, timeliness, and/or cost effectiveness. Work commitments may be modified during the evaluation period if circumstances warrant, provided there are at least 120 days before the end of the evaluation period. *(It is recommended that **THREE to FIVE** Employee Work Commitments be established.)* Any work commitments rated NOT SUCCESSFUL will result in a summary level rating of NOT SUCCESSFUL.

Work Commitment 1a:

Policy Development: In support of the State Department's Strategic Goal of "Achieving Peace and Security" the incumbent:
-- Develops, plans for, and manages the annual operations of the ACOTA program.
-- Provides policy advice and recommendations to the AF/RSA Director and AF/FO on matters pertaining to peacekeeping issues and force generation. Conducts briefings and attends workshops, conferences, and meetings to promote the ACOTA program.
-- Ensures that ACOTA trains an additional 40-50,000 African troops for UN and AU peacekeeping operations per year, including the training and equipping of 12,000 troops for deployment to the African Union Mission in Somalia (AMISOM).
-- Oversees and implements the Dutch and other foreign government partnership with the ACOTA program.
-- Manages $53 million in FY-2013 funding for ACOTA program activities ensuring that ACOTA activities are cost-effective, non-duplicative, and consistent with U.S. policies and Department of State regulations.
-- Provides timely and consistent reporting including training metrics to the PM Bureau.
-- Conducts "Lessons Learned" activities to refine program training content and goals.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

Work Commitment 1b:

Policy Coordination: In support of the State Department's Strategic Goal of "Achieving Peace and Security," the incumbent:
-- Serves as primary policy coordinator for the Africa Bureau's peacekeeper training program.
-- Plans and coordinates the ACOTA Program goals and objectives with Partner Country high-level officials to include senior foreign general and flag military officers, ministry officials, including Cabinet-level officials, foreign embassy officials, and African experts.
--Convenes and chairs weekly interagency coordination meetings with the Office of the Secretary of Defense, the Defense Department's Joint Staff, U.S. Africa Command, other U.S. military components, the Department's Bureau of Political Military Affairs, other State Department offices and U.S. Embassies in the field to promulgate, coordinate, collaborate, and explain ACOTA program and policy activities.
-- Meets as required with representatives of the UK, France, the Netherlands, Canada, the European Union and other potential partner countries to coordinate and complement joint policy implementation concerning various peacekeeping support operations (PSO) programs in Africa.
-- Provides environmental assessments and develops scenarios to assist in the formulation of future policies and objectives in support of peacekeeping training and conflict transformation.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

Supervisor

APPRAISAL FOR:

Employee Name *(Last, First, MI.)*	Employee ID
RAINEY TIMOTHY A	PII

CRITICAL PERFORMANCE ELEMENT 1 - Continued

Work Commitment 1c:

Program Management: In support of the State Department's Strategic Goal of "Achieving Peace and Security," the incumbent:
-- Applies appropriate leadership and human resource practices to the management of the APO. Manages a professional staff of two direct hire Civil Service specialists, 11 contract employees working as Regional Training Operations Managers, Logistics and Equipment Managers, and associated specialists; a secondary warehouse and logistics 2-person staff (SECOR); and approximately 250 contract field trainers in 25 countries in a way that advances ACOTA program activities and the policy goals they support.
-- Assumes responsibility as Program Director for four major Indefinite Delivery-Indefinite Quantity (IDIQ) contracts involving program management staffs; the movement of training teams; the timely procurement, shipment, and delivery of equipment; and the establishment of an ACOTA database.
-- Convenes and chairs a weekly coordination meeting with the four major Indefinite Delivery-Indefinite Quantity (IDIQ) contract holders to promulgate, coordinate, collaborate, and explain ACOTA program and policy activities. Chairs the Technical Evaluation Panel (TEP) which recommends contracts and task orders.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

Work Commitment 1d:

☐ Exceeds Expectations ☐ Fully Successful ☐ Not Successful

Work Commitment 1e:

☐ Exceeds Expectations ☐ Fully Successful ☐ Not Successful

Supervisor

APPRAISAL FOR:

Employee Name *(Last, First, MI.)* RAINEY TIMOTHY A

Employee ID PII

CRITICAL PERFORMANCE ELEMENT 2 - Competency: Demonstrates Leadership and Achieves Organizational Results

Description: Creates a shared purpose and vision for his/her group and motivates others to work toward it.

Expectations of ***Fully Successful*** *contribution:*

- Plans and assigns work, aligns staff and resources, and delegates effectively to meet the organization's goals.
- Supports and effectively implements change, as appropriate.
- Holds subordinates accountable for achieving organizational goals and achieving business results.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

CRITICAL PERFORMANCE ELEMENT 3 - Competency: Manages Performance and Resources

Description: Establishes and communicates clear performance expectations and allocates resources in a manner that supports these goals.

Expectations of ***Fully Successful*** *contribution:*

- Appropriately recruits, selects, utilizes, and develops new staff to facilitate their successful transition into Federal Service.
- Establishes employee performance plans within established timeframes and communicates performance expectations and feedback on a ongoing basis.
- Conducts final year-end appraisal discussions and completes final appraisals by Department deadlines.
- Appropriately rewards employees and takes action to address performance problems.
- Administers resources in a manner that achieves organizational goals
- Applies internal control measures to protect organizational integrity and prevent unauthorized use or misappropriation of sensitive and classified material.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

CRITICAL PERFORMANCE ELEMENT 4 - Competency: Problem Solving and Initiative

Description: Gathers and analyzes information and uses it to efficiently and effectively solve problems.

Expectations of ***Fully Successful*** *contribution:*

- Encourages problem solving, and exhibits ability to anticipate, identify, and address problems.
- Encourages innovative approaches, as well as open, candid exchange of information and professional points of view.
- Effectively seeks solutions that balance competing demands.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

CRITICAL PERFORMANCE ELEMENT 5 - Competency: Teambuilding and Communication

Description: Develops and maintains productive, effective teams through clear and concise communications.

Expectations of ***Fully Successful*** *contribution:*

- Treats staff fairly and equitably in accordance with EEO standards and practices.
- Promotes an environment where staff are provided resources necessary to accomplish common goals.
- Fosters collaboration, team problem solving, and the sharing of information and ideas.
- Written and oral communications are clear, accurate, concise and well organized.

☐ Exceeds Expectations ☒ Fully Successful ☐ Not Successful

CERTIFICATION - Supervisor and Employee certify that the performance plan has been established.

/s/ TIMOTHY RAINEY	03-07-2014	/s/ KATHERINE DHANANI	03-07-2014
Signature of Employee	Date *(mm-dd-yyyy)*	Signature of Rating Official	Date *(mm-dd-yyyy)*

☐ The employee has not signed this performance plan. I am, therefore, forwarding the report on, in accordance with 3 FAM 2820. The employee has been informed of this decision and has been given a copy of the appraisal report.

Supervisor

APPRAISAL FOR:

Employee Name *(Last, First, MI.)*	Employee ID
RAINEY TIMOTHY A	PII

NARRATIVE SUMMARY (Mandatory)

Narrative comments are required to address overall performance. Specific examples should be provided when Critical Performance Elements are rated 'Exceeds Expectations' or below 'Fully Successful'.

Although this rating period spans less than 4 months, I have learned beyond doubt that Tim Rainey is committed to the central mission of the ACOTA office: ensuring that the soldiers our ACOTA partners deploy to some of the world's most dangerous peace-keeping missions have the knowledge and training to protect civilians and enhance security. As we discuss various aspects of policy and program coordination, he reminds me regularly that we have to keep that bottom line in the front of our minds at all times. His focused management of the ACOTA office has ensured the USG is contributing effectively to ongoing peacekeeping operations throughout Africa. He has fostered a partnership with the Dutch government that enhances our impact on peacekeeping by leveraging their financial support.

Tim Rainey has been a guardian of the policy priorities of the Africa Bureau (AF), ensuring that AF retains ownership and control of the ACOTA program, despite the program's reliance on the PM Bureau for funding, and despite institutional pressures from the Department of Defense. During this rating period I have encouraged Dr. Rainey to foster a relationship with these partners that focuses on the areas where our missions converge, rather than the areas where we prioritize different components of our mutual objectives differently. Dr. Rainey's cooperation has facilitated the launch of a long planned pilot project to compare different models for providing peacekeeping training. During the months to come, Dr. Rainey needs to work to develop a common vision with these USG partners on how we can ensure that African partners take over ownership of their own training programs, instead of relying on repeated iterations of ACOTA training.

Tim Rainey's performance management and teambuilding are areas where I have encouraged him to develop skills. For the two GS employees under his supervision he takes his responsibility for performance management seriously, and for the entirety of his office he is vigilant in the application of internal controls to prevent waste or fraud. In the latter effort, he has been especially attentive to ensuring that all in the ACOTA office understand the distinctions between the roles appropriate for government employees and for contractors. The manner in which this was emphasized, and Dr. Rainey's efforts to remind contract employees that they can be terminated "at will," fostered an atmosphere in which factions developed in the office, feeding perceptions of favoritism. In order to foster collaboration, team problem solving and the sharing of information and ideas, Dr. Rainey needs to focus on creating an environment which treats contractors and government employees equally while ensuring that the regulations are followed.

Given the brevity of the rating period and current efforts to address weaknesses, I consider Tim Rainey to be fully successful even in areas where this narrative indicates further attention is required.

Supervisor

APPRAISAL FOR:

Employee Name *(Last, First, MI.)*
RAINEY TIMOTHY A

Employee ID
PII

FINAL RATING

Critical Performance Element Ratings		Summary Level Rating
Critical Performance Element 1: Work Commitments	**Critical Performance Elements 2-5:**	*(Check only one)*
1a. Fully Successful	**2.** Fully Successful	☐ Outstanding
1b. Fully Successful	**3.** Fully Successful	☐ Exceeds Expectations
1c. Fully Successful	**4.** Fully Successful	☒ Fully Successful
1d.	**5.** Fully Successful	☐ Not Successful
1e.		

DERIVING THE SUMMARY LEVEL RATING

Outstanding	All Work Commitments (Critical Performance Element 1) and all competencies (Critical Performance Elements 2-5) must be rated "Exceeds Expectations".
Exceeds Expectations	Must be rated "Exceeds Expectations" for 50% or more of Work Commitments (Critical Performance Element 1); and rated "Exceeds Expectations" for 50% or more of Critical Performance Elements 2-5.
Fully Successful	Must be rated "Exceeds Expectations" for less than 50% of Work Commitments (Critical Performance Element 1); and must have "Fully Successful" or higher rating for Critical Performance Elements 2-5.
Not Successful	"Not Successful" on one or more Critical Performance Elements (including Work Commitments and Critical Performance Elements 2-5).

CERTIFICATION OF PROGRESS REVIEW

In addition to providing continuous performance feedback to an employee, the supervisor is required to hold at least one performance discussion during the appraisal period, usually a mid-cycle review. This discussion should cover the employee's job elements and performance standards; employee strengths and weaknesses; performance deficiencies; recommendations for improvement; developmental training and assignments; and supervisory expectations for the remainder of the appraisal period. ***(The Mandatory Mid-Year Performance Review, Form DS-7645 must be used to facilitate the progress review discussion. The form does not become part of this appraisal report.)***

Indicate date(s) of Progress Review and sign below:

(1) 02-12-2014 Date *(mm-dd-yyyy)*
(2) _____ Date *(mm-dd-yyyy)*
(3) _____ Date *(mm-dd-yyyy)*

Signature of Rating Official	Date *(mm-dd-yyyy)*	Signature of Employee	Date *(mm-dd-yyyy)*
/s/ KATHERINE DHANANI	03-07-2014	/s/ TIMOTHY RAINEY	04-22-2014

APPRAISAL DISCUSSION

We acknowledge that an appraisal discussion was held and that the employee has been provided with a copy of his/her appraisal report. The employee's signature on this appraisal report is an acknowledgement of receipt of the rating and in no way implies that he/she is in agreement with the narrative summary and/or rating.

Signature of Rating Official	Date *(mm-dd-yyyy)*	Signature of Employee	Date *(mm-dd-yyyy)*
/s/ KATHERINE DHANANI	04-22-2014		

☒ The employee has not signed this appraisal report. I am, therefore, forwarding the report on, in accordance with 3 FAM 2820. The employee has been informed of this decision and has been given a copy of the appraisal report.

Supervisor

APPRAISAL FOR:

Employee Name *(Last, First, MI.)*
RAINEY TIMOTHY A

Employee ID
PII

EMPLOYEE COMMENTS ***(Optional)***

This evaluation is tainted by inaccurate information and, while I understand it is my performance evaluation, fails to address any of the significant contributions the ACOTA program has achieved in the 4-month rating period. During this rating period, the ACOTA program closed out FY2013, fully accounting for the obligation and expenditure of over $53M. Rapidly shifting priority and resources, ACOTA was able to train, equip, and deploy troop contributing countries for the newly formed MONUSCO Intervention Brigade, re-engage with three ACOTA partners that have been inactive, and provided assistance/assessment to DOD trainers in Guinea and Chad. As a result of ACOTA support, over 40K African peacekeepers were trained and deployed by the end of calendar year 2013.
Many ACOTA partners would have already achieved self-sufficiency if the initial requirements placed upon them to reach FTC had not changed. However, almost every long-term partner has seen significant "mission creep" in response to the changing operational environment. As a result, ACOTA has had to modify, increase, and/or prolong training to meet crises in Mali, C.A.R., Sudan, and Somalia. For the past 2 years, the ACOTA program has lead the interagency in cooperating and accommodating active-duty military personnel in our pre-deployment training. We have embraced and supported DOD efforts in Burundi "sapper" training, EOD/IED training for AMISOM, the ACOTA Military-Trainer/Mentor program, and now the Pilot Program. However, DOS and DOD goals and objectives are different. This is not a new issue. It has been the main issue of "friction" since the creation of the ACRI program, ACOTA's predecessor. As importantly, the fact that all the other Combatant Commands oversee peacekeeping training, AFRICOM will continue to apply pressure in the interagency to be like the others. This requires our constant efforts to coordinate and work cooperatively. ACOTA is neither designed or funded to build institutions in partner countries. That requires a whole of US Government approach. While our 10-week training program has been significant in assisting our host countries in building capacity and self-sufficiency, it is other USG partners that need to do the heavy lifting on building institutional capacity. The issue concerning Government and contractor relations is inaccurate and based on a flawed investigative process and allegations which have proven to be

EMPLOYEE'S REQUEST FOR A HIGHER LEVEL REVIEW BY THE REVIEWING OFFICIAL

I understand that I may request a higher level review of my appraisal report by the reviewing official.

☐ I ***do not*** ☐ ***do*** request a higher level review.

Signature of Employee — Date *(mm-dd-yyyy)*

REVIEWING OFFICIAL'S APPROVAL OF RATING OF RECORD

To be completed when the employee has opted for a higher level review by the reviewing official; *or* the employee has received a rating of "Not Successful"; or when the interim performance rating will become the rating of record. *Comments must be provided below when the rating is changed or the employee is rated "Not Successful".* **The Final Summary Level Determination is:**

☐ Outstanding ☐ Exceeds Expectations ☐ Fully Successful ☐ Not Successful

Reviewing Official's Comments

Signature of Reviewing Official — Date *(mm-dd-yyyy)*

TECHNICAL REVIEW

A technical review of this rating has been completed.

ST MARIE, JOAN A — **Printed** name of Executive Director/Designate

/s/ JOAN ST MARIE — **Signature** of Executive Director/Designate

04-25-2014 — Date *(mm-dd-yyyy)*

TAB 4e

SENSITIVE BUT UNCLASSIFIED

MEMORANDUM

4 October 2013

TO: Tim Rainey, ACOTA Program Director

FROM: AF/RSA – Kathy Dhanani Kath Dhanani

SUBJECT: Removal of Contracting Officer Representative responsibilities

On September 24, you and I agreed to abide by a list of measures my predecessor, John Hoover, developed for the management of the ACOTA office. The first item on that list was: *Consult with and receive approval from AF/RSA and AF/EX prior to any discussions with ATSG corporate concerning the hiring, firing or contract renewal of ATSG contract personnel.*

On October 1, you contacted me to indicate that you would like to concur with a recommendation from the contractor, ATSG, to terminate Paige Puntso. In response I told you I wanted to sit down with you and AF/EX for a discussion before any action was taken.

On October 3, you informed me and AF/EX that the contractor had terminated Paige Puntso. In discussions on October 3 and 4 you indicated that the contractor's decision was entirely outside your responsibility and control.

I am removing COR responsibilities from you. This will represent a substantial new burden for the employee assigned to take your place, but appears necessary to ensure that contractors behave in accordance with the requirements of the Bureau.

Paige Puntso will return to work as Logistics Manager on the same portfolio for which she was hired. She will work from another office. If you have a need to speak to her please do this only through email and cc me on all correspondence.

Further responses to this incident remain under consideration.

TAB 4i

United States Department of State

Bureau of African Affairs
Washington, D.C. 20520

UNCLASSIFIED
PERSONNEL SENSITIVE

August 22, 2013

TO: Timothy A. Rainey

FROM: Melinda Tabler-Stone AF/EX

SUBJECT: Letter of Reprimand

This memo serves as a Letter of Reprimand for the failure to appropriately address repeated complaints by staff members and for threatening contract staff with terminating their positions within the African Contingency Operations Training and Assistance Program (ACOTA) office.
On Monday, August 12th, it was brought to the attention of the Director of Regional and Security Affairs that you called a meeting and threatened the contract staff with dismissal and restricted working hours because someone lodged an OIG complaint against you. You implied to those present that you believed someone in the room lodged the complaint. This is a form of reprisal and not tolerated within the Bureau and Department.

Furthermore, you are reprimanded for ignoring repeated complaints concerning a government subordinate in your office. The complaints have concerned repeated rudeness to contract staff, inability to accomplish contract specialist work, and administering contract staff time and attendance in such a way that employees have not been paid in a timely fashion, and have lost compensated time you authorized. When these issues have been brought to your attention your response has been to protect the individual and to yell at and threaten the other staff with dismissal if they didn't learn to get along with the government worker. Your behavior has negatively affected the work environment and resulted in a divide between the contract and government staff; contracted staff are afraid of reprisal and many are actively looking for other employment.

In the future, I expect that you will work to create an environment where people can concentrate on their work without fearing being yelled at or threatened. As part of this expectation, you will complete No Fear Act training through FSI no later than August 30, 2013.

Memo Transmitted by E-mail

The intent of this Letter of Reprimand is to deter you from engaging in this type of conduct again. However, should there be another case of threats and not addressing personnel problems within the office subsequently creating a negative atmosphere then further disciplinary action may be imposed.

AF/EX/HR will retain a copy of this Letter of Reprimand and a copy will be placed in your Official Personnel Folder for one year from today's date. You may submit comments in writing to me, if you wish, and your comments will be attached to this Letter of Reprimand.

Acknowledgment of Receipt:

Timothy A. Rainey 8/22/2013

Signature of Employee Date

Memo Transmitted by E-mail

TAB 4j

SENSITIVE BUT UNCLASSIFIED

MEMORANDUM TO THE FILE

TO: AF/EX/HR Files

FROM: AF/RSA – John Hoover

SUBJECT: August 22 Counseling Session

Joining the meeting were AF/EX Acting Director Melinda Tabler-Stone and AF/EX HR Specialist Joan St. Marie. Melinda Tabler-Stone began the meeting by saying that she would shortly send a memo to the OIG stating that after investigating an anonymous OIG Hotline submission alleging mismanagement and abuse in the ACOTA Program Office, the Bureau had determined that the allegations could not be substantiated. She also presented a letter of reprimand to Tim Rainey for the threatening behavior he displayed during an August 4 ACOTA staff meeting on the subject of the OIG Hotline submission.

Thereafter, John Hoover and Joan St. Marie raised several issues of concern to Tim Rainey. These issues concerning a negative dynamic in the ACOTA workplace had surfaced in the course of investigating the OIG Hotline submission. They made the following points:

- The ACOTA program under Tim Rainey's leadership and management is highly successful at its mission, which is to build peacekeeping capacity in Africa.
- Tim has also done an admirable job rebuilding the ACOTA staff since he began work as the Program Director late in 2010.
- However, the ACOTA Program Office is divided and demoralized. The primary division is between the office's direct hire civil service management staff, comprised of Tim Rainey and Contract Specialists Larry Noel and Jignasa "Jenny" Parikh, and the balance of the full-time permanent staff, comprised of 11 contractors who are hired either directly or indirectly though a company called ATSG.
- The picture of the ACOTA Program Office that emerged from the OIG submission investigation is best summarized as "us vs. them." A significant

number of the contract staff feels marginalized, under-valued, silenced, and disempowered. They feel that they are treated unequally and at times unfairly. They believe that the USG employee vs. contractor dichotomy harms collaboration in the workplace and is deliberately emphasized by Tim Rainey.

- On top of this, a significant number of contract staff feels intimidated by Tim Rainey, who they believe is vindictive. They fear for their jobs if they displease Tim.
- This atmosphere of conflict and fear is exacerbated by another factor, which is the role played by Contract Specialist Jenny Parikh, and in the way that she is accorded special treatment by Tim Rainey.
- Jenny herself revealed concerns about the dynamics in the workplace, and expressed feelings that some members of the contractor staff disrespect and make fun of her.
- However, it is also clear that Jenny herself, whether consciously or not, is at the center of the turmoil and the climate of fear and hostility in the ACOTA Program Office.
- First, it appears Jenny Parikh is not a good fit for her job – she does not appear to have the requisite background, skills, or knowledge to be successful.
- She also has great difficulty working with others in a collegial and collaborative way. But she has been give managerial status, which she uses to further reinforce the "us vs. them" divide in the office.
- The atmosphere is further poisoned by the perception that Tim Rainey has a special relationship with Jenny Parikh and protects and defends her at all costs.
- In this toxic atmosphere, contract employees feel that they may incur Tim's wrath and lose their jobs if they somehow get on the wrong side of Jenny Parikh.
- On a different note, there is a perception that Tim Rainey may be undermining the effectiveness of the program in meeting its fundamental mission by manipulating training situations in order to ensure failure in situations in which U.S. active duty military trainers (as opposed to contract trainers) have the lead in executing ACOTA training.

- Also, there is the perception that ACOTA leadership has directed its staff, including contract training teams in the field, to avoid engagement with U.S. Embassies.

As a way to begin to remedy these issues and improve cohesion and morale in the ACOTA Program Office, Tim was asked to agree to a series of measures, including the following:

- Consult with and receive approval from AF/RSA and AF/EX prior to any discussions with ATSG corporate concerning the hiring, firing or contract renewal of ATSG contract personnel.
- Flexible work hours for contract personnel should be reinstituted. To the extent possible allowed by law and regulation, there should be no difference in the rules and practices governing work hours between direct hire and contract personnel.
- Reinstitute the comp time formula for contractor travel in place before August 12.
- Remove Jenny Parikh from the contractor time and attendance function.
- Hold (not just schedule) regular all-staff meetings to communicate not only program priorities and activities, but also whole-of-office management expectations.
- Announce and uphold an open door policy for the Program Director for all employees and an open door/open communication policy between all ACOTA personnel and the AF/RSA and AF/EX leadership.
- There should be minimal restrictions on the ability of all ACOTA personnel to communicate freely, openly, and directly with relevant Department offices such as AQM and other entities outside ACOTA for the purposes of achieving ACOTA's programmatic goals, so long as such communication does not violate U.S. law or regulation, and for transparency and oversight purposes, is also copied to the ACOTA U.S. direct hire management team.
- All ACOTA personnel, including contract trainers in the field should be notified immediately about the necessity to pro-actively seek contact and regular coordination with relevant U.S. Embassy personnel in the countries in which they are working or visiting. Personnel should be reminded of the

need to obtain country clearances at all times. All ACOTA personnel should be periodically reminded of these imperatives.

- Recognizing that ACOTA is a whole-of-government effort, ACOTA leadership will make every effort to utilize and integrate active duty trainers supporting ACOTA in ways that maximize their safety, effectiveness and chances for success, while also ensuring the effectiveness and efficiency of African peacekeepers.

NOTE: Tim Rainey was given the opportunity to provide input to, and sign, this memo. He initially provided a detailed response to the improvement measures listed above. I incorporated all of his requested changes, using language he provided to me, and deleted one measure at his request. After seeming to reach agreement, however, Tim later refused to provide input to this memo in terms of his response to our points during the meeting, and he refused to sign it. Thus, while the measures listed above reflect the changes requested by Tim, it remains unclear whether he is in agreement with them or not.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

TIMOTHY ALLEN RAINEY, Appellant,	)	DOCKET NUMBER DC-1221-14-0898-W-1
v.	)	AJ: Melissa Mehring
DEPARTMENT OF STATE, Agency.	)	Date: August 22, 2014

AGENCY'S BRIEF ON JURISDICTION

Appellant Timothy Allen Rainey ("Appellant") filed the above-captioned appeal with the Merit Systems Protection Board ("Board") on July 16, 2014, alleging that the United States Department of State ("Agency") retaliated against him for his alleged whistleblowing and protected activity. On July 23, 2014, the Board issued an Acknowledgment Order, and an Order on Jurisdiction and Proof of Requirements ("Jurisdiction Order") directing Appellant and the Agency to file evidence and argument regarding the Board's jurisdiction. On July 25, 2014, Appellant filed a motion for a ten-day extension to respond to the Board's Jurisdiction Order, and the Agency filed a motion seeking to stay all non-jurisdictional deadlines. The Board granted the parties' motions on July 29, 2014. The Agency hereby submits this timely response. For the reasons set forth below, the Board should dismiss this appeal for lack of jurisdiction.

evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

A. The Board Lacks Jurisdiction Over Appellant's Appeal Because Appellant Has Failed To Identify A Law He Was Ordered To Violate

Because Appellant has failed to show that he was retaliated against for disobeying an illegal order, he has failed to meet his burden under § 2302(b)(9)(D), and his appeal should be dismissed. The Board has jurisdiction over an IRA appeal if an appellant can show that the Agency retaliated against him "for refusing to obey an order that would require [him] to violate a law." 5 U.S.C. § 2302(b)(9)(D); *see also Davis v. Dep't of Def.*, 103 M.S.P.R. 516, 522 (MSPB 2006); *Krafsur v. Davenport*, 736 F.3d 1032, 1038 (6th Cir. 2013). Pursuant to § 2302(b)(9)(D), an Agency may not "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment . . . for refusing to obey an order that would require the individual to violate a law." 5 U.S.C. § 2302(b)(9)(D).

Appellant argues in his response that the Board has jurisdiction because he "was removed of [his] duties as the [COR] by [his] supervisor for refusing to tell a contractor to re-hire a terminated subcontractor." Appellant's Resp. at 4. Appellant asserts that complying with his supervisor's alleged instruction "would have required [him] to exceed [his] authorities, interfere with contractor employee relations, and violate the Federal Acquisition Regulation (FAR), in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Public Law 93-400), as amended by Public Law 96-83 and the Code of Federal Regulation, Title 48, Chapters 1." *Id.* He adds that the alleged instruction also would have conflicted with the agency's training course for COR certification. *Id.*

Like the OSC, which considered—and rejected—substantially the same argument, the Board should conclude that Appellant has failed to meet his burden under § 2302(b)(9)(D). *See*

Initial Appeal (OSC letters, dated May 13, 2014). As in his OSC complaint, Appellant continues only to identify federal regulations and agency policies. *See id.* (Appellant's letter to OSC, dated Apr. 21, 2014). Neither constitutes a law within the meaning of § 2302(b)(9)(D) as indicated by case law that clearly focuses on whether the order in question was *illegal*. *See Garst v. Dep't of the Army*, 56 M.S.P.R. 371, 387 (MSPB 1993) (activity not protected under § 2302(b)(9) where it did not "involve [a] refusal to obey an illegal order"); *see also Brown v. Napolitano*, 380 F. App'x 832, 835 (11th Cir. 2010) ("Because [appellant] has failed to show that following [the agency official's] order required him to violate any law, he is due no protection under this section.").

That regulations are insufficient under § 2302(b)(9)(D) follows from § 2302(b)'s language and structure. "It is an axiom of statutory construction . . . that a statute should not be interpreted so as to render one part superfluous." *Owne v. Dep't of the Air Force*, 63 M.S.P.R. 621, 627 (MSPB 1994). Section (b)(9)(D) is limited, by its terms, to orders that would require an employee to violate a "law." Other parts of § 2302(b), by contrast, apply more broadly, and refer to "laws, rules, and regulations." For example, § 2302(b)(9)(A) provides that an Agency may not "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any *law, rule, or regulation*." 5 U.S.C. § 2302(b)(9)(A) (emphasis added); *see also* 5 U.S.C. § 2302(b)(1) (prohibiting discrimination on the basis of marital status or political affiliation, as prohibited under any "law, rule, or regulation").

The absence of the words "rules" and "regulations" from § 2302(b)(9)(D), and the inclusion of the same words in other subparts of the same statute, makes clear that Congress carefully circumscribed the Board's jurisdiction to cases involving illegal orders. *See Olsen v.*