OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

WHISTLEBLOWER RETALIATION REPORT OF INVESTIGATION

Case Number:	I16-CBP-DET-17715
Case Title:	[redacted] Customs and Border Protection Officer U.S. Customs and Border Protection, Detroit, MI
Investigation Under:	5 U.S.C. § 2302(b)(8) & (9), Whistleblower Protection Act

I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations that [redacted] (Complainant), a Customs and Border Protection (CBP) officer at the Detroit Port of Entry, received a letter of reprimand (LOR) prompted by his supervisor, [redacted] (Supervisor #1), in reprisal for Complainant's attempt to report perceived Fourth Amendment and racial profiling violations to CBP's Office of Chief Counsel (OCC). Complainant claimed the formal reprimand caused him to be denied a temporary duty assignment.

We found that during a training class in Glynco, Georgia, on April 22, 2016, Complainant first reported his belief that CBP was violating the Fourth Amendment and racially profiling African-American drivers at the Port of Detroit. An attorney from CBP's Office of Chief Counsel (OCC) who was teaching the training class encouraged Complainant to report his concerns to the CBP's OCC field office that covered Detroit. The OCC attorney then emailed a summary of Complainant's allegations to a CBP OCC attorney responsible for Detroit, stating that the conduct at the border was potentially "problematic."

After Complainant returned to Detroit, he argued the point with another Customs and Border Protection Officer (CBPO) on May 12, 2016. During the argument, Complainant claimed that CBP was improperly using its border search authority to target African-American drivers who had taken a wrong turn and did not intend to cross the border. Supervisory CBPOs [redacted] (Supervisor #2) and Supervisor #1, overheard the argument and intervened. Supervisor #1 advised Complainant of case law that contradicted his interpretation. Complainant stated that he would contact the OCC to make a complaint. Supervisor #1 then ordered Complainant not to contact the OCC. Shortly afterwards, Complainant disobeyed and spoke on the phone to an OCC legal assistant, trying to reach an attorney. The legal assistant, however, refused to put him through, demanded his name, and stated that she could not find him in the system. Complainant became frustrated and hung up.

On May 18, Complainant called the training center in Georgia and his concerns were once again passed via email to the same OCC attorney responsible for covering Detroit. At this point, the OCC attorney decided not to call Complainant, but called Complainant's immediate supervisor, Supervisor #2, told him about Complainant's call; stated it had been unprofessional; and asked the supervisor whether Complainant still needed any legal advice. The supervisor stated that Complainant did not need anything. He then reported Complainant's communication to another supervisor. As a result, Supervisor #1 learned about Complainant's call to the OCC, ordered Complainant to prepare a written summary of his statements to the OCC, and drafted a memorandum that caused a formal disciplinary letter to be issued to Complainant for insubordination and unprofessional conduct. As a result, Complainant was denied an emergency medical technician (EMT) training opportunity detail in Arizona.

Meanwhile, Complainant filed a labor grievance on August 22, 2016, and disputed several factual details in the LOR. On August 24, he filed a complaint with the OIG. The LOR was withdrawn for amendment. On or about September 1, 2016, we began our investigation, reaching out to interview responsible officials and other witnesses in Detroit. Not long after, CBP told us that the reprimand letter had been "rescinded" on October 7th because it had been "unwarranted." Although pressed repeatedly, CBP failed to explain what it meant by "unwarranted." According to CBP, the only harm Complainant suffered was missing the training opportunity, which it claimed would have no effect on his rating or promotion. After we concluded our investigation, in May 2017, we learned that on or about December 1, 2016, CBP had executed a settlement agreement with Complainant in which CBP promised to rescind the LOR and to send Supervisor #1 to professionalism training.

We substantiated the allegation that Supervisor #1, CBP Port Director [redacted] (Port Director), and others, caused an official letter of reprimand to be placed in the personnel file of Complainant in reprisal for Complainant's protected communications, which caused him to be denied a TDY training opportunity, in violation of 5 U.S.C. § 2302.

At the conclusion of this report we make two recommendations.

II. BACKGROUND

On August 24, 2016, the Department of Homeland Security Office of Inspector General (DHS-OIG) received information alleging that Supervisor #1, a Supervisory Customs and Border Protection Officer, violated the Whistleblower Protection Act when he reprimanded Complainant, a Customs and Border Protection Officer. Complainant received the reprimand after he

attempted to report what he believed to be CBP violations of law and abuse of authority to the component's Office of Chief Counsel. Further, according to Complainant, Supervisor #1 allegedly ordered Complainant not to report the same information to the Inspector General. We concluded the factual inquiry in November 2016, with some follow-up fact-gathering in January 2017.

III. SCOPE

This investigation covered the period from approximately April 22, 2016 to October 7, 2016. We interviewed the following: the complainant; the co-worker with whom Complainant argued; Supervisor #1, who caused the LOR to be issued; the CBP Labor and Employee Relations chief who actually issued the LOR; the CBP Port Director who signed the letter; and an attorney with the OCC field office covering Detroit. Additionally, we analyzed Complainant's complaint, the LOR, a memorandum from Supervisor #1 in support of the reprimand, email correspondence, the case law cited to Complainant, and other applicable law.

IV. STATUTORY AUTHORITY

DHS-OIG conducted this whistleblower reprisal investigation under Title 5, United States Code, Section 2302 (5 U.S.C. § 2302), "Protected communications; prohibition of retaliatory personnel actions."

V. FINDINGS OF FACT

Protected Communication

On or about April 22, 2016, in a training class on searches and seizures at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, Complainant, a Customs and Border Protection Officer from the Port of Detroit, approached the instructor, an attorney with CBP's OCC (FLETC Instructor #1). Complainant described what he considered to be violations of the Fourth Amendment occurring at the Port of Detroit. Complainant's concern was the Port of Detroit, located in a dense urban area with many roads feeding into it, frequently had vehicles approach in error, after taking a wrong turn. Even when vehicles attempted to turn around, CBP would chase them down, stop them, and subject them to warrantless searches under its border inspection powers, according to Complainant. Complainant told FLETC Instructor #1 that he could distinguish the situation in Detroit from a case that otherwise authorized border inspections. Complainant believed that CBP was improperly targeting African-American drivers and abusing its border search authority.

After Complainant's April 22nd conversation with FLETC Instructor #1, FLETC Instructor #1 drafted a summary of Complainant's concerns and sent it to [redacted] (OCC Attorney #1), an attorney with the CPB's Office of Chief Counsel field office that covered Detroit. FLETC Instructor #1 advised OCC Attorney #1 in relevant part, as follows:

> Also, I taught a Seized Property Class this week and had a CBPO [Complainant] in the class from Detroit. He has some concerns about a road leading into Canada (I confess I am awful at geography so can't describe its location to you) where many people accidentally end up on it who have had no intention of leaving the U.S. When they turn around, CBP officers are stopping the vehicle as a border stop. He even described a situation in which a funeral procession of 75 cars was routed onto this road mistakenly and all cars were border searched.
>
> What he described to me sounded problematic but I am unfamiliar with the area as well as the case he kept calling the "tunnel case". His opinion is that the "tunnel case" is really different than the area that he is working.
>
> In any event, I told him that some advice from local Chief Counsel sounded to be in order. I passed along your name as a starting point for him. Sometimes it's easier for officers to call Chief Counsel if that (*sic*) have a specific name. I didn't promise him anything on your behalf – just that he could call you to get the ball rolling.

It appears that, while at FLETC, Complainant put OCC Attorney #1's contact information inside his training materials, which he made arrangements to have sent separately back to Detroit, but the package was misrouted. After he returned to Detroit, Complainant did not have the contact information for OCC Attorney #1.

On or about May 12, 2016, Complainant was discussing the legality of the border searches with a fellow CBPO (CBPO #1). According to CBPO #1, Complainant told him that an OCC lawyer at FLETC had informed Complainant that the searches appeared to be unconstitutional. CBPO #1 disagreed with Complainant and asked for the number of the attorney at FLETC so that he could personally call her and tell her she was wrong. CBPO #1 further told Complainant that since Detroit was in the Sixth Circuit, that court's cases controlled and they upheld CBP's legal authority to conduct warrantless searches of vehicles at the border, even those whose drivers had no intent to leave the United States. CBPO #1 told us that he explained to Complainant two specific Sixth Circuit cases concerning searches of "turn-

around" vehicles at the border.[1] Complainant responded that he would call the OCC, but CBPO #1 told Complainant to read the cases and not to call the OCC. CBPO #1 told us that the conversation became argumentative and "heated."

At some point, Supervisor #2 and Supervisor #1 overheard the argument, and Supervisor #2 had to physically separate Complainant and CBPO #1. Supervisor #1 then got involved. Supervisor #1 discussed the case law as well, but Complainant persisted that he was going to call the OCC. At this point, Supervisor #1 gave Complainant a direct order not to call the OCC. According to Complainant, Supervisor #1 also "advised" Complainant not to contact the Office of the Inspector General (OIG) or the Joint Intake Center (JIC). Supervisor #1 denied that he said anything about the OIG or the JIC.

Not long afterwards, Complainant called the OCC, anyway. OCC Attorney #1 told us that Complainant contacted her office on May 12, 2016, speaking with the "Lead Legal Assistant." According to OCC Attorney #1, the legal assistant at some point later informed OCC Attorney #1 that Complainant would not provide his name and was very vague on why he contacted the OCC. Complainant could also not identify specifically with whom he wanted to speak. During the conversation, Complainant was argumentative and unprofessional with the legal assistant, according to OCC Attorney #1.

According to Complainant, he initially told "the receptionist" that he was a concerned citizen and wanted to speak with an attorney. She would not put him through to an attorney, so he finally gave the receptionist his name, badge number, and supervisor's name. The "receptionist" then claimed she could not find him in "the system" and did not believe him, according to Complainant. Complainant told us that he then became frustrated and ended the phone call.

On May 13, 2016, the day after Complainant called the OCC office covering Detroit, Complainant called back to FLETC to state that he could not get through to an attorney at the OCC to make his disclosure. This time, Complainant spoke with a second attorney at FLETC (FLETC Instructor #2), who then emailed a summary of the conversation to FLETC Instructor #1, who had been Complainant's instructor at FLETC. That email, dated May 13, copied Complainant and stated, in relevant part:

> CBPO [Complainant], who was recently in a seized property class that you taught here in Glynco, got in touch to follow-up on a

[1] Personal Interview of CBPO #1, in which he cited the following cases to us by name (citation and case copies obtained by the OIG via Lexis): United States v. Humphries, 308 F. Appx. 892, 2009 U.S App. LEXIS 1705 (6th Cir. 2009) (unpublished) and Ericksen vs. United States, 2015 U.S. Dist. LEXIS 85459 (S.D. Mi. 2015), *aff'd sub nom.* D.E. v Doe, 834 F.3d 723, 2016 U.S. App. LEXIS 15670 (6th Cir. 2016).

> question related to a legal issue that you addressed in class and he believes is being mis-handled (*sic*) in the field. He recalls that you recommended that he reach out to someone in the Detroit OCC office, but his box of materials was mis-routed (*sic*) to a BP station and he has not received it. His efforts to contact the Detroit OCC office directly were thwarted by a receptionist who he says refused to put him through to any of the lawyers in the office. I explained to [Complainant] (today via telephone) that you are traveling this week, but that I would relay the information to you and ask you follow-up with him when you return to the office next week.

On May 18th, FLETC Attorney #1, in turn, forwarded the above email to OCC Attorney #1, and, further, offered to put OCC Attorney #1 into direct contact with Complainant, as follows:

> Please see the email below. This is the Officer I emailed you about regarding stopping all traffic when there appears to be no border nexus.
>
> If it's all right with you, I was going to email you and CC him to get you two communicating. Please let me know if you prefer a different method.

Rather than taking up FLETC Instructor #1 on her offer to be put in touch with Complainant, OCC Attorney #1 called Complainant's supervisor.

Knowledge by Responsible Management Official

On May 18, 2016, OCC Attorney #1 called Supervisor #2, Complainant's first line supervisor, to report that Complainant had called the OCC and had spoken rudely to the "Lead Legal Assistant." OCC Attorney #1 also asked Supervisor #2 whether Complainant needed any legal guidance. Supervisor #2 confirmed that Complainant was in fact the caller and informed the OCC attorney that Complainant did not need any legal guidance. Supervisor #2, in turn, after confronting Complainant, reported that Complainant had contacted the OCC, relaying that Complainant had been unprofessional when he made the call.

On or about June 16, 2016, Supervisor #1 drafted an undated memorandum documenting Complainant's insubordination and the allegedly "argumentative" and "unprofessional" nature of the call to the OCC. Supervisor #1's memorandum discussed the workplace argument over CBP's outbound search authority and then stated that "I specifically instructed CBPO [Complainant] not to call Chief Counsel under any circumstance, and that he

was not allowed to do that." The memorandum stated that Complainant "defied a direct order to not contact Chief Counsel but took it upon himself to do so, and in addition CBPO [Complainant] was unprofessional in his contact with Chief Counsel." Supervisor #1 forwarded the memorandum to [redacted], a Chief CBPO, Labor and Employee Relations (Chief-LER) responsible for Detroit, with a recommendation that Complainant receive a formal written LOR. According to Chief-LER, he sent the reprimand to a CBP human resources specialist for review. After the human resources review came back to Chief-LER, he sent the draft reprimand to Port Director [redacted] for signature.

On July 12, 2016, Supervisor #1 wrote Complainant an email ordering him to draft a memorandum describing the content of his call with the OCC. Supervisor #1 advised Complainant that he could have his union steward review the memorandum. The memorandum from Complainant, dated July 22, 2016, states that Complainant called the OCC on his scheduled day-off, following instructions from a senior attorney at FLETC. While he was still off-duty and at home, Supervisor #2 called him the next morning and asked if he had called the OCC. Complainant admitted that he had.

Personnel Actions

As a result of the Supervisor #1 memorandum, on or about August 19, 2016, [redacted], the Port Director of the Port of Detroit, signed an official LOR to Complainant. Chief-LER had drafted the letter based on Supervisor #1's memorandum. The LOR briefly summarized the facts described above, but incorrectly stated the date of Supervisor #1's order not to contact the OCC as May 13 (it was, in fact, May 11 or 12) and, further, incorrectly stated that Complainant had spoken directly to the OCC attorney (in fact, he spoke to the legal assistant). The letter concluded that Complainant's "unprofessional behavior" and "unwillingness to respond readily to your supervisor's lawful direction" justified the written reprimand. Chief-LER presented the letter to Complainant, who, after becoming upset, pointed out the two factual errors and signed the acknowledgment. The LOR went into Complainant's personnel file for the purpose of remaining there up to 18 months to justify potential further disciplinary action.

In the meantime, Complainant applied to attend a training course in Arizona in emergency medical techniques. As an Area Port Director[2] in Detroit explained to us, a LOR is considered a disciplinary action and so long as an

[2] The CBP chain of command here is the District Field Officer (DFO), the Port Director, Area Port Directors, Customs and Border Protection Officers (CBPO) Chiefs, CBPO supervisors and then line CBPOs (e.g., Complainant).

employee is under such an action, training requests are denied as a matter of Port policy. The denial of the training was the only adverse consequence Complainant or CBP identified.

Not long after Chief-LER issued the LOR to Complainant, a senior supervisor, [redacted], notified Chief-LER (based on information from Supervisor #1) that certain information on the letter was incorrect and needed to be amended. Chief-LER later explained to us that he drafted a new letter with the correct information and "rescinded" the old letter. On September 27, 2016, Chief-LER reached out to Complainant to schedule a meeting for the purpose of issuing the corrected letter. The next day, however, as OIG investigators were interviewing witnesses in this investigation, another senior supervisor, an Area Port Director, instructed Chief-LER not to issue the corrected letter to Complainant, but to "stand down" and to give the letter to the Area Port Director.

Chief-LER later informed us that the revised letter was "rescinded" on October 7, 2016, "because it was unwarranted." The Port Director told us that no policy bars individual officers from calling the OCC, but that an officer would typically put in a request through the chain of command to contact the OCC.

According to a senior CBP supervisor in Detroit, now that the LOR has been rescinded, Complainant will suffer no additional denials of training opportunities for which he would otherwise qualify. Moreover, we were assured that the denial of the training opportunity would have no bearing on Complainant's promotion or career progression.

VI. ANALYSIS

In reviewing whether Complainant suffered reprisal as a result of protected whistleblower activity, we are required to determine whether the following elements were present: (1) a protected disclosure; (2) knowledge by a responsible management official of the protected disclosure; (3) a personnel action taken, threatened or withheld; and (4) the protected disclosure was a contributing factor to the personnel action. If these four elements are satisfied based on a preponderance of the evidence, a complaint will be found to be substantiated if the agency cannot demonstrate that it would have taken the personnel action absent the protected disclosure.

The standard of proof under 5 U.S.C. § 2302 for every element is preponderance of the evidence, which means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Below, we analyze each of the elements.

A. Protected Communication(s)

Under the Whistleblower Protection Act (WPA), a "protected communication" is any disclosure of information that the employee "reasonably believes" evidences either (1) a violation of any law, rule, or regulation, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[3] A belief is reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidence a violation cognizable under Section 2302(b)(8).[4] Frivolous allegations or allegations that amount simply to a disagreement with the law or rule at issue are not reasonable.[5] Allegations must be sufficiently detailed and specific to be protected.[6] An employee need not actually have made the disclosure; it is enough that the employer believed that the employee did so.[7]

We determined that Complainant made three protected communications, as follows:

(1) when he disclosed his concerns to FLETC Instructor #1 on or about April 22, 2016;
(2) when he discussed the matter at length with his colleagues and Supervisor #1, on or about May 12, 2016; and
(3) when he called the Office of Chief Counsel, on or about May 12, 2016, and hung up in frustration.

In terms of the specificity of Complainant's communications, even if the May 12, 2016 telephone call to the OCC lacked detail and was incomplete standing alone, it was supplemented by the email that had already been sent to [redacted], the OCC attorney covering Detroit. That email memorialized Complainant's earlier communication with FLETC Instructor #1 at FLETC on

[3] 5 U.S.C. § 2302(b)(8).
[4] Lachance v. White, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999); Haley v. Dep't of the Treasury, 977 F.2d 553, 556 (Fed. Cir. 1992).
[5] Rusin v. Dep't of the Treasury, 92 M.S.P.R. 298, 307 (M.S.P.B. 2002) (non-frivolous allegations are reasonable); Haley, 977 F.2d at 556-57 (affirming that that the Merit Systems Protection Board was correct in rejecting complainant's legal and policy disagreements as "reasonable belief" of a rule violation because complainant was expert enough to know better); O'Donnell v. Dep't of Agriculture, 120 M.S.P.R. 94, 99 (M.S.P.B. 2014) (not a vehicle for policy disagreements or criticism of discretionary authority); 5 U.S.C. § 2302(a)(2)(D).
[6] Keefer v. Dep't of Agriculture, 82 M.S.P.R. 687, 692 (M.S.P.B. 1999).
[7] King v. Dep't of the Army, 116 M.S.P.R. 689, 694 (M.S.P.B. 2011) (citing cases).

April 22, 2016, and it provided sufficient specifics to articulate a belief that the searches amounted to potential law violations or an abuse of authority. In short, by May 18, 2016, the OCC was fully aware of the nature of Complainant's disclosure, as were Complainant's supervisors because of the conversations Complainant had with them and the resulting order on May 12, 2016.

Next, in determining whether the communications above were protected under the statute, we are required to analyze whether they were reasonable. Complainant's allegations, given the facts at issue here, were not "frivolous" or merely argumentative policy differences such that they could be deemed unreasonable. We discuss our analysis below.

It is well-established that warrantless searches of items and persons entering the border do not implicate the Fourth Amendment because of the sovereign's plenary power to protect the country.[8] Due to ambiguities in the initial line of border search cases, which spoke only of *entries* into the country, various challenges were brought to the legality of searches of persons and items *exiting* the country. The result was that federal courts have extended the logic of entry searches to exit searches — albeit with some dissenting opinions.[9]

A more recent subset of exit search cases involves persons in vehicles who approach the border in error, but state at the checkpoint that they have no subjective intention to exit.[10] The cases that were cited to Complainant, provide some support of his supervisor's argument that the United States Court of Appeals for the Sixth Circuit had essentially blessed all searches of vehicles that approach the border in error. The Sixth Circuit stated in D.E. v. Doe that "[t]here is no reliable way for the CBP officers to tell the difference

---

[8] United States v. Ramsey, 431 U.S. 606, 617-18 (1977) (citing Carol v. United States, 267 U.S. 132 (1925)). See also United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004) ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border' (citation omitted)".

[9] See United States v. Boumelhem, 339 F.3d 414, 420-21 (6th Cir. 2003) ("Further, every circuit that has considered the question has concluded, at least with regard to the circumstances before it, that the border search exception applies to 'exit searches' as well as searches of incoming persons and materials") (citing United States v. Oriakhi, 57 F.3d 1290, 1296 (4th Cir. 1995) (noting, in following other circuits, that "every other circuit addressing the issue has held that the exception applies regardless of whether the person or items searched are entering or exiting the United States" but that the rationale for exit searches is based more on "the paramount importance of regulating currency" [money laundering]).

[10] See cases cited at footnote 9, above.

between a motorist who has just crossed the border or who intends to cross the border and a 'turn-around' motorist who is at the border by mistake."[11]

But the holding in D.E. v. Doe has limits to the factual situation in that case. In D.E., the driver had already approached the border booth on the U.S. side, then explained his error, and in response was routed past the booth, and then back toward the United States, along with Canadian traffic entering the United States. The Sixth Circuit panel, in a split opinion, reasoned that, at that point, there was no "reliable" way for the officers searching the traffic in the entry lane to determine the truthfulness of the driver's "subjective" claim not to have intended to enter Canada, "especially considering that D.E.'s vehicle was in the same lane as motorists arriving from Canada."[12]

That is not the situation at the Port of Detroit crossing where Complainant worked. Complainant indicated that vehicles attempting to turn around some distance from the border had, in fact, been "chased," stopped, and searched, based on racial profiling. Chasing vehicles before they approach the border is a scenario not covered in the D.E. case. The majority opinion in the D.E. case simply cannot be read to cover every situation and to foreclose all inquiry.

Moreover, the concurring opinion in D.E. strongly supports Complainant's argument that chasing down "turn-around" vehicles could in fact constitute a violation of the Fourth Amendment. That opinion articulates clear legal principles that CBP may have violated, were it shown to be pursing the aggressive chase policy and profiling that Complainant alleged. In relevant part, the concurrence explained the following four points, paraphrased below:

> (1) The application of the border search exception "must remain tethered to its primary purpose" (quoting United States v. Humphries, 308 F. App'x 892, 896, n.1 (6th Cir. 2009);
>
> (2) the person or item to be searched must have crossed, or be in the process of crossing, an international border (citing United States v. Delgado, 810 F.2d 480, 483 (5th Cir. 1987) ("Regardless of the type of [border] search involved, the fact that a border crossing occurred must be demonstrated"); United States v. Garcia, 672 F.2d 1349, 1357 (11th Cir. 1982) (concluding that the "point of origin has no bearing on the reasonableness of a [border] search so long as a border crossing has been established");

[11] D.E. v. Doe, 834 F.3d 723, 726-28 (6th Cir. 2016).
[12] D.E., 834 F.3d at 726, 727, 728.

> (3) otherwise reasonable suspicion is required to search vehicles merely in proximity to the border (citing United States v. Glaziou, 402 F.2d 8, 13-14 (2d Cir. 1968) (holding that persons who have "direct contact with a border area" or whose movements are "reasonably related to the border area" are not subject to search absent suspicion); and
>
> (4) that mere difficulty in complying with the dictates of the United States Constitution is not a free pass to not comply (citing United States v. Ogbuh, 982 F.2d 1000, 1004 (6th Cir. 1993) ("Delay due to any difficulty in locating an Assistant U.S. Attorney to approve the warrant request does not excuse abrogation of the requirements of the Fourth Amendment.")[13]

Additionally, the concurring opinion excoriated CBP for creating the situation in D.E. that led to its inability to distinguish turn-around vehicles, and for violating the Fourth Amendment as a matter of policy:

> I am deeply troubled that the CBP has established a pattern and practice of violating the Fourth Amendment. Direct evidence of this practice is the laminated card. The laminated card provided by the CBP states that the person receiving the laminated card is being allowed to turn around without crossing the border. The same card also states that the person (and his or her belongings) are still subject to search by a customs official. This card is written evidence that the CBP has a practice of searching persons and items that have not and will not cross an international border *without probable cause and without reasonable suspicion.*[14]

Likewise, in congested urban areas, the Supreme Court has also generally recognized the potential for abuse:

> In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in

[13] D.E. v. Doe, 834 F.3d 723, 729-32 (6th Cir. 2016) (Keith, J., concurring in result).
[14] D.E. v. Doe, 834 F.3d at 733.

> these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens.[15]

Of course, Fourth Amendment case law is often heavily fact-dependent and hinges on "reasonableness."[16] Although not a lawyer, Complainant knew that cases can turn on specific facts, as when he appeared to distinguish the "tunnel case" from the situation he was describing at the Port of Detroit when he spoke with the OCC attorney instructor while at FLETC.

That Complainant's belief was not subjectively frivolous or merely argumentative can also be inferred from his conversation with the OCC attorney instructor at FLETC. The OCC attorney instructor at FLETC, in referring the question to the OCC office covering Detroit, in her own words, wrote that Complainant's allegations were "problematic." For his part, Complainant, a non-attorney, certainly could have walked away from the conversation with the OCC attorney instructor at FLETC with the reasonable impression that a professional CBP lawyer with no vested interest in the Port of Detroit had validated his concerns. Indeed, the OCC attorney instructor at FLETC directed Complainant to make a disclosure to the OCC office covering Detroit. Even were Complainant ultimately incorrect on the Fourth Amendment law of border searches, Complainant, as a non-lawyer, cannot be held to the same objective standard to which a lawyer versed in Fourth Amendment law would be held.[17]

Aside from the Fourth Amendment issue, Complainant's claims could be taken to constitute an abuse of authority allegation. Complainant's allegation that the exercise of discretion at the border was either targeting, or falling disproportionately on, African-Americans, can be understood to raise an equal protection concern under the Fifth and Fourteenth Amendments — an issue quite apart from the Fourth Amendment inquiry.[18] In any event, it is "well

---

[15] United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (roving patrols in border cities) See also United States v. Valenzuela, 365 F.3d 892, 901 (10th Cir. 2004) ("mere proximity to the border does not automatically place the citizenry within a deconstitutionalized zone") (quoting United States v. Newell, 506 F.2d 401, 405 (5th Cir. 1975).

[16] United States v. Villamonte-Marquez, 462 U.S. 579, 588-89 (1983) (in the context of searching a boat on a waterway feeding into international waters discussing "reasonableness" as the touchstone of all Fourth Amendment jurisprudence and drawing distinctions based on the location and level of intrusion for vehicle searches).

[17] See e.g., Carolyn v. DOI, 63 M.S.P.R. 684, 692 (M.S.P.B. 1994) (stating that complainant's "education, training, and skills" are relevant to consider in reasonableness inquiry).

[18] See e.g., Bradley v. United States, 299 F.3d 197, 205 (3d Cir. 2002) ("The fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for a search ... To make an equal protection claim in the profiling context, Bradley was required to prove that the actions of customs officials (1) had a discriminatory effect and (2) were motivated by a discriminatory purpose"). It is important to note that in our analysis of the search and

established" that the Whistleblower Protection Act, as a "remedial statute intended to improve protections for federal employees," should be "broadly construed in favor of those whom it was intended to protect."[19] We therefore conclude, by a preponderance of the evidence, that Complainant reasonably believed a violation of law or abuse of authority had occurred, and, thus, made three protected communications.

B. Knowledge by Responsible Management Official

It is not in dispute that the responsible officials involved in issuing the LOR had actual knowledge of Complainant's protected communications. The record shows that Complainant, CBPO #1, Supervisor #2 and Supervisor #1 all agreed that, on May 12, 2016, Complainant discussed his earlier (April 22, 2016) conversation with FLETC Instructor #1 while at FLETC, in which he first disclosed the "turn-around" searches and claimed they were illegal. The witnesses all agree that Complainant raised these concerns and discussed them openly with Supervisor #1. All of the witnesses agree that Supervisor #1 ordered Complainant not to contact the OCC and not to make a further disclosure.

The record shows that on May 18, 2016, OCC Attorney #1 informed Complainant's first-line supervisor, Supervisor #2, that Complainant, in fact, had called the Office of Counsel regarding the outbound searches. Supervisor #1 then learned of Complainant's call. Next, Supervisor #1 generated memoranda and emails that caused the LOR to issue—all of which documents directly reference Complainant's protected communication with the OCC. The Port Director signed the LOR, which, again, directly referred to the protected communication. Based on these undisputed facts, we conclude, by a preponderance of the evidence, that responsible management officials Supervisor #1, Port Director, and others involved in issuing the LOR, had actual knowledge of Complainant's protected communications.

C. Personnel Actions

Under the Whistleblower Protection Act, a "personnel action" includes both a "detail"[20] and "other disciplinary or corrective action."[21] Here, the "letter of reprimand" was a formal, written "disciplinary action" that went into

---

equal protection issues in this report, we are not opining whether Complainant's allegations had substantive merit. Our investigation and report is limited to the whistleblower retaliation inquiry and does not constitute any opinion or conclusion on the underlying allegations.
[19] Rusin, 92 M.S.P.R. at 306 (citing Keefer v. Dep't of Agriculture, 82 M.S.P.R. 687 (1999)).
[20] 5 U.S.C. § 2302(a)(2)(A)(iv).
[21] 5 U.S.C. § 2302(a)(2)(A)(iii).

Complainant's personnel file. As such, it was a personnel action.[22] Second, the denial of the TDY for the EMT training in Arizona was another personnel action, as it involved the denial of a "detail" under the statute.[23] Third, Supervisor #1's order of May 12th to Complainant not to contact the OCC to report a potential violation was also a personnel action.[24] Were we to credit Complainant's account that Supervisor #1 further advised Complainant not to contact the Inspector General, then that would constitute yet an additional direct statutory violation.[25] Accordingly, we conclude by a preponderance of the evidence that Complainant suffered three adverse personnel actions, stated below in chronological order:

(1) Supervisor #1's order of May 12, 2016;
(2) the August 19, 2016 LOR; and
(3) the subsequent denial of the training opportunity in Arizona, due to the LOR placed in Complainant's file.

D. Contributing Factor

Under the Whistleblower Protection Act, if the protected communication was a "contributing factor" in the personnel decision taken against the employee, then the final element of the analysis is satisfied. A contributing factor can be established by direct or circumstantial evidence. Circumstantial evidence can include evidence of knowledge of the protected communication on the part of responsible management officials, and can even be established by an inference based on the timing of the disclosure and the personnel action.[26] The contributing factor element is satisfied in this claim through the "knowledge-timing test" as set forth in 5 U.S.C. § 1221(e)(1). Specifically, the statute states that complainants "may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence" that "(A) the official taking the personnel action knew of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel

[22] See, e.g., Gonzales v. Dep't of Housing and Urban Dev., 64 M.S.P.R. 314, 319 (M.S.P.B. 1994) (citing Weaver v. Dep't of Agriculture, 55 M.S.P.R. 569, 575 (M.S.P.B. 1992) (formal letter of reprimand is a personnel action).
[23] 5 U.S.C. § 2302(a)(1)(iv).
[24] 5 U.S.C. § 2302(b)(8) (unlawful "to threaten" a personnel action as well as unlawful to "take" a personnel action).
[25] 5 U.S.C. § 2302(b)(9)(C) (unlawful to "threaten to take ... any personnel action against any employee ... because of ... cooperating with or disclosing information to the Inspector General ...").
[26] See 5 U.S.C. § 1221(e)(1). A "contributing factor" has been defined as "any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(d).

action." Id. Merit Systems Protection Board case law has generally held that an approximate one-year period "per se" satisfies the knowledge-timing test.[27]

Here, the direct evidence is irrefutable and clear: the LOR states on its face that the personnel action was taken in part *because of* Complainant's protected activity. The responsible officials admit knowledge of the protected communications and the personnel actions took place very shortly thereafter. [28] Therefore, under applicable law, the burden shifts to CBP to demonstrate by "clear and convincing evidence" that it would have taken the same action absent the whistleblowing.[29]

Given the fact that the LOR has been "rescinded," acknowledged to have been "unwarranted," and that CBP sent Supervisor #1 to "professionalism training" as a term of settling with Complainant, CBP cannot under any circumstance logically meet its burden by clear and convincing evidence that the personnel actions it took against Complainant were justified. Further analysis of whether CBP would have issued the LOR is moot and logically contradicted by CBP's own actions and words.[30]

---

[27] See, e.g., Jones v. Dep't of the Interior, 74 M.S.P.R. 666, 673-76 (M.S.P.B. 1997). The Federal Circuit has not addressed what period of time could satisfy a "per se" knowledge-timing test. Indeed, it has declined to "state a specific period of time for all cases" but has also cautioned to use the "'reasonable time standard liberally.'" Kewley v. Dep't of Health and Human Svcs., 153 F.3d 1357, 1363 (1998) (quoting S. Rep. No. 100-413, at 15 (1988)). Because the statutory language references a "reasonable person" standard, which suggests a subjective consideration of each case, and because the question remains unsettled in the Federal Circuit, the DHS OIG may determine in the future that the facts of a particular case do not warrant a finding that the knowledge-timing test is satisfied, despite falling within a similar time period to the present case.

[28] See Kewley v. Dep't of Health & Human Servs, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998) ("If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the removal action was initiated within a reasonable time of that disclosure, no further nexus need be shown, and no countervailing evidence may negate the petitioner's showing").

[29] See Rumsey v. Dep't of Justice, 2013 M.S.P.R. 259 at p. 8 (M.S.P.B. 2013) ("the agency may still prevail if it can show by clear and convincing evidence that it would have taken the personnel action at issue absent its perception of the appellant as a whistleblower") (citing King v. Dep't of the Army, 116 M.S.P.R. 689, P 9 (M.S.P.B. 2013); Schnell v. Dep't of the Army, 114 M.S.P.R. 83, 94 (M.S.P.B. 2010).

[30] Were the matter to proceed as an individual right of action at the Merit Systems Protection Board (MSPB), before the MSPB could "order" a "corrective action" the agency would be permitted an opportunity to demonstrate by "clear and convincing evidence" that it would have issued the letter of reprimand anyway. See 5 U.S.C. § 1221(e)(2); Marano v. Department of Justice, 2 F.3d 1137, 1143 (Fed. Cir. 1993)." This report does not constitute a proceeding before the MSPB; nor do the recommendations herein amount to any "order" of corrective action. So, in light of the irrefutable direct evidence of reprisal and the mootness of the letter at this point, we are not required to engage in the logically dubious exercise of asking the CBP to prove that the personnel action would have been issued anyway.

VII. CONCLUSION

We conclude, by a preponderance of the evidence, that Supervisor #1, Port Director, and others, caused an official letter of reprimand to be placed in the personnel file of Complainant in reprisal for Complainant's protected communications, which caused him to be denied a training opportunity, in violation of 5 U.S.C. § 2302.

VIII. RECOMMENDATIONS

We recommend the following:

1. That CBP be directed to make a similar EMT training opportunity available to Complainant at its earliest possible convenience; and

2. That CBP provide guidance to the Port of Detroit, and CBP-wide, for all employees regarding protections applicable to whistleblower disclosures, and establish training and procedures for OCC attorneys and staff who receive such disclosures.