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**TO: Honorable Joann M. Ruggiero
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**FROM: Georgette Gonzales-Snyder
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COMMENTS: Re: Jeffrey Fudin v. Department of Veterans Affairs , DOCKET NUMBER NY-1221-06-0112-W-1. Agency Rebuttal to Appellant's Closing Statement.

**By: Georgette Gonzales-Snyder
Agency Representative**

**cc: Mr. Ronald G. Dunn, Esq. Appellant Representative
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
New York Field Office

In the Appeal(s) of	:	
	:	
JEFFREY FUDIN	:	DOCKET NUMBER
	:	NY-1221-06-0112-W-1
Appellant,	:	
	:	Agency Hearing Submissions
v.	:	
	:	(Administrative Judge Ruggiero)
DEPARTMENT OF VETERANS	:	
AFFAIRS,	:	
	:	
Respondent Agency	:	

AGENCY REBUTTAL TO APPELLANT'S CLOSING STATEMENT

The Agency responds as follows regarding Appellant's Jeffery Fudin's (Appellant's) summary argument after hearing in this matter:

1. Appellant's hearing record is bereft of detail and he relates no recent facts regarding protected disclosures to establish that he is a whistleblower.
2. The fact that Appellant may or may not be a nationally known expert (as he provided no independent evidence) in his field of pain management is irrelevant to the issues at hand.
3. Appellant has misstated Medical Center Director [REDACTED]'s [REDACTED] testimony regarding her awareness of his alleged disclosures. The testimony was that she had seen the website sometime after 2004 and not during the time period regarding when the issues arose in the in the instant matter.
4. Appellant has misstated Medical Center Director [REDACTED]'s [REDACTED] testimony regarding a meeting with Appellant after he was Grand Marshall at a Memorial Day parade in Albany. Her testimony was that she had a meeting with Appellant in November 2003 to discuss any new issues of concern that he might have other than the decade old issues of his past MSPB claims. Her testimony was that she wanted to be clear that he was referring to old issues and had no current concerns and advised him of his responsibility to come forward if he did. It is not clear at all how Appellant being a Grand Marshall at a Memorial Day parade would be characterized as a protected disclosure. Significantly, this parade took place May 23, 2003, according to Appellant's submissions (p. 10), well over a year and one-half before the issues at hand occurred.

5. Appellant has acknowledged once again in his summary statement that his attendance at the ACCP had both a business function and continuing education (CE) function.

6. Appellant has misstated that all issues regarding his attendance at the ACCP conference had been cleared up before he actually attended the conference. Appellant had every intention and did actually have his registration fee waived (a value of over \$350) and therefore ethical concerns are still at issue and shows Appellant's miscomprehension of the Standard of Ethical Conduct.

7. Appellant has misstated the requirements of his job standards regarding making presentations at "local, state, regional, and/or national meetings." Agency testimony by Pharmacy Manager [REDACTED] was that a single presentation a year covered this requirement. [REDACTED] further testified that Appellant exceed this expectation every year.

8. Appellant has misstated Medical Center Director [REDACTED] testimony regarding "whatever issues had been raised about honorariums had been satisfactorily relieved prior to the time that Fudin attended the conference and that she had actual notice Fudin was committed to doing whatever was necessary..." In fact by Appellant simply attending the ACCP conference and accepting a substantial waiver of the registration fee still raises ethical considerations and would be problematic if the Agency was required to give Appellant Authorized Absence (AA).

9. Appellant has misstated the rules for AA under VA Handbook 5011, Part III, Chapter 2. The general rule, states that AA "may be given" under three alternative circumstances. There is no requirement that an Agency exhaust all three as the language for consideration of this discretionary leave is "or." Attendance at meetings rules at 5011 (h) (2)(a) state that there is a communication of ideas and information "in areas of significant agency need." In this case, Appellant did not provide the specifics of his topics until well after the decision to deny AA was made.

10. Appellant's need or desire for CE to attend a conference must be balanced against the benefit to the Agency.

11. Appellant asserts that he needs CE credits to maintain accreditation for his license and the ACCP conference is that high level forum where he can get his CE due to his clinical specialty. The Agency would submit that his being on a whistleblower panel does not benefit either the Agency or Appellant in his professional development.

12. Appellant is misleading when he states that his "survey" of other VA clinical pharmacists in the country, when he states "every single pharmacist in the country that was at the conference that responded to the survey was granted authorized absence to attend the conference..." If one examines Appellant's email to other pharmacists in his "survey" he does not mention that he was denied attendance based on ethical considerations and due to his specific stature as the "outgoing Chair of the Pain PRN Committee," or due to his statements about accepting non-VA funds for this conference. Additionally, when he posed the question, Appellant inquired about attendance at both the ACCP Conference and/or the "American Society of Health-System Pharmacists Meeting" (ASHSP

which does accredit VA and VA recruits there according to [REDACTED] testimony) and stated that he was "recruiting for a Pharmacy Resident for our VA facility" (this was untrue). Testimony by [REDACTED] explained the differences between the conferences and that Appellant was never asked to recruit at ACCP.

13. Agency witness, [REDACTED] testimony fully explained why Appellant's attendance at the 2004 ACCP was different from past years. [REDACTED] testified that he had indeed given AA to Appellant to attend other conferences where [REDACTED] determined on a case-by-case basis that there was a clear benefit to the Agency and no ethical considerations were at issue.

14. Contrary to Appellant's assertions, Kerry Johnson testified that he put together a list of pharmacy employees and how much AA that the Agency had been given them over the two years before this conference to ensure that he was giving Appellant at least his fair share of AA and not as a reason to deny Appellant AA. This was it was not a determinative factor in denying Appellant AA to attend ACCP.

15. Appellant's statement that Director [REDACTED] "admitted" that she had the ultimate responsibility to determine if his request was handled correctly is inaccurate. Just as Appellant's own witness, Mr. Dave Kupiac testified, when he was unhappy with a decision to deny him AA to attend a conference, he appealed to the VISN Chief George Knight. In the instant matter, Appellant did not.

16. Appellant did not establish retaliatory animus with regard to the decision to rescind his swipe card access. Contrary to his assertion that the Agency took retaliatory action against him after he "revealed his intention to file a complaint with the OSC and contact his Congressional Representative," the Agency was merely following VA rules and regulations. There is no jurisdiction where a previous issue involved primarily a personal appeal right and where the "disclosure" was incidental to the appeal. Filing an appeal with the OSC is not a disclosure. *Test v. Department of the Army*, 53 M.S.P.R. 285, 287 (1992) (allegation to Congressman that agency's suspension of discloser was improper failed to evidence a condition protected by statute and therefore not a protected disclosure).

17. Appellant misstates the facts when he asserts that there are three other clinical pharmacists at the Albany VA and that he is the only one who has had his swipe card access removed. He makes the same argument regarding without compensation employees (WOC). The reason these employees continue to have swipe card access is that they are in the D&T Careline, unlike Appellant who transferred voluntarily to the MVAC Careline. The VA rules found at M-2, part VII, Chapter I, were established in 1993, and require that security access cease when an employee leaves the Pharmacy Service. [REDACTED] testified that he routinely checks for changes in status for WOC employees, pharmacy students and other Pharmacy Service employees and that he has removed swipe card access for pharmacists who have left the D&T Careline to other Carelines (including Valentine Rymanowski, Andreas Mergner, Virginia Vece, Shirley Lesieur, and Lesa Paulsen-Cortes).

18. It should again be reiterated that removal of swipe card access did not and does not impact on Appellant's ability to do his job in any way. On those

occasions where he believes he needs access, he is granted access. There is no testimony to the contrary. Control of swipe card access is a security measure and does not tie to a person but rather to a process.

Consequently, the Agency respectfully requests that Appellant's whistleblower IRA appeal be dismissed.

Dated: Syracuse, New York
June 28, 2006

DEPARTMENT OF VETERANS AFFAIRS

By: Georgette Gonzales-Snyder

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2006, I sent the foregoing Agency Rebuttal Closing Statement via Fax and U.S. mail to the following address:

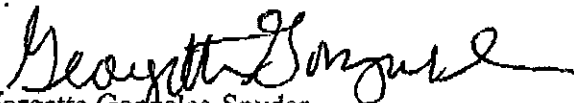
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