

The Agency's Burden of Proof by Clear and Convincing Evidence

- If the employee establishes the *prima facie* case, the burden of persuasion shifts to the agency to show by *clear and convincing evidence* that it would have taken “the same personnel action in the absence of such disclosure.” 5 U.S.C. § 1221(e).
- The MSPB is now require to make a finding on the *prima facie* case before proceeding to the agency's clear and convincing evidence case.

Factors considered for clear and convincing evidence burden

- Factors from *Carr v. Social Security Administration* are generally applied:
 - 1) The strength of the agency's evidence in support of its action;
 - 2) The existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and
 - 3) Any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).