2022 MSPB LEXIS 1161

Merit Systems Protection Board

March 31, 2022

DOCKET NUMBER PH-0714-20-0353-M-1

Reporter
2022 MSPB LEXIS 1161 *

[redacted], Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.

Prior History:

[redacted] v. VA, 2020 MSPB LEXIS 5078 (M.S.P.B., Dec. 21, 2020)

Core Terms

removal, Factors, initial decision, Notice, petition for review, documentation, becomes, court of appeals, cross petition, backpay, file a petition, district court, parties, replies, disability, preponderance of evidence, mitigating factors, calendar days, misconduct, website, discrimination claim, judicial review, Restoration, SETTLEMENT, electronic, payroll, rights, cases, http, administrative judge

Counsel

[*1] Marc J. Levy, Esquire, Sudbury, Massachusetts, for the appellant.

Jean M. Rummel, Esquire, Bedford, Massachusetts, for the agency.

Administrative Law Judge: MCLAUGHLIN

Administrative Law Judge-Decision

INITIAL DECISION

On December 21, 2020, the Merit System Protection Board (Board) issued an Initial Decision which: (1) affirmed the decision by the Department of Veterans Affairs (agency) to remove the appellant under the authority of 38 U.S.C. § 714; and (2) found the appellant had not proven his disability discrimination affirmative defense. [1] Initial Appeal File (IAF), Tab 32. The appellant challenged the Board's ruling by

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The appellant's original petition for appeal was docketed on June 25, 2020, as [redacted] v. Department of Veterans Affairs, PH-0714-20-0353-I-1, 2020 MSPB LEXIS 5078. All pleadings filed by the parties and Orders issued by the Board in that matter are identified in this Decision as being part of the Initial Appeal File (IAF).

filing a civil complaint with the United States District Court for the District of Massachusetts. [2] District Court File (DCF), Tab 2. On February 8, 2022, the District Court remanded the matter to the Board. [3] DCF, Tab 7; Remand Appeal File (RAF), Tab 1.

After reviewing the evidence in this appeal in accordance with the District Court's remand instructions, I find the decision of the agency to remove the appellant must be REVERSED. However, the finding that the appellant failed to prove his disability discrimination affirmative defense remains unchanged.

ANALYSIS AND FINDINGS

Factual Background And Procedural History

At the time of his removal, the appellant was employed by the agency in the competitive service as a Contract Specialist, GS-1102-12. IAF, Tab 1 (p. 1 of 10); Tab 5 (p. 25 of 98). The appellant is a 10 point preference eligible Veteran as a result of having sustained a service connected disability. **[*3]** *Id.*

On April 1, 2019, the Division Chief of the agency's Network Contracting Office 1 (NCO-1), Ronald W. Hirtle, issued the appellant a Notice recommending his removal based upon the Charge of Misrepresentation of Arrival Time. IAF, Tab 5 (p.p. 82-85 of 98). In addition to explaining why he believed the appellant had misrepresented his arrival time, Mr. Hirtle provided the following justification for recommending his removal:

> "[y]our removal is appropriate because of the serious nature of your behavior. Your position as a Contract Specialist requires honest, integrity, and for you to uphold high moral principle. You have demonstrated through your actions that you lack the character and respect for VA Core Values to serve our nation's veterans. Moreover, you had the opportunity to accept responsibility for your actions during the September 7, 2018 investigatory meeting among Ms. Ruggiero, you, and your union representative. Despite the opportunity, you provided Ms. Ruggiero with an explanation that the enclosed evidence proves to be inaccurate." IAF, Tab 5 (p. 83 of 98).

The Notice also stated that Director of NCO-1, Gerald Jacobs, would decide whether to sustain the charge and the recommended **[*4]** penalty of removal, and it informed the appellant he had the right to submit a written and / or oral response to Mr. Jacobs. *Id.* (p.p. 83-84 of 98). The Notice, however, made no mention of any guidelines which Mr. Jacobs might rely upon when deciding what penalty, if any, to impose should he find the appellant had committed the alleged misconduct. *Id.* Moreover, the Notice did not refer to the factors the Board had identified in *Douglas v. Veterans Administration, 5 M.S.P.B. 313, 5 M.S.P.R. 280 (1981)*, as being criteria Deciding Officials, such as Mr. Jacobs, should weigh during the penalty consideration phase. *Id.*

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The pleadings and Orders pertaining to the civil action the appellant filed in the United States District **[*2]** Court for the District of Massachusetts appear in the Board's record as [redacted] *v. Department of Veterans Affairs*, PH-0714-20-0353-L-1, and are identified in this Decision as being part of the District Court File (DCF).

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The current appeal, which is docketed as [redacted] *v. Department of Veterans Affairs, PH-0714-20-0353-M-1, 2022 MSPB LEXIS 1161*, is the matter which was remanded to the Board by the United States District Court for the District of Massachusetts. All pleadings and Orders related to this remanded appeal are identified in this Decision as being part of the Remand Appeal File (RAF).

On April 16, 2019, Mr. Jacobs issued a Letter of Decision informing the appellant that, after considering his oral and written replies, along with the evidence in the record, he "found the charge of Misrepresentation of start time, as detailed in the Proposed Removal, is supported by substantial evidence." IAF, Tab 5 (p.p. 26-28 of 98). Mr. Jacobs went on to state that as a result of this determination:

> "I find the penalty of removal to be an appropriate level of penalty. Your position as a Contract Specialist requires the highest levels of integrity and honesty. The evidence I reviewed proves to me that you do **[*5]** not possess these necessary values. As a result, I have lost trust in your ability to perform your duties as a Contract Specialist." *Id.* (p. 26 of 98).

The appellant challenged his removal by filing a petition for appeal with the Board. IAF, Tab 1. In addition to arguing the agency had failed to prove he had engaged in the alleged misconduct, the appellant also claimed he suffers from Traumatic Brain Injury (TBI) and Post Traumatic Stress Disorder (PTSD), and these conditions motivated the decision to remove him. *Id.*

A video hearing concerning the issues raised in the appeal was conducted using Zoom for Government on November 19 and 20, 2020, and telephonic closing arguments were heard on December 4, 2020. IAF, Tabs 29-31 - Hearing Compact Discs. Both the Proposing Official and the Deciding Official testified at the hearing. *Id.*

During his testimony, the Proposing Official, Ronald Hirtle, did not state he had ever informed the appellant or his representatives about the Douglas Factors or their relationship to the Deciding Official's assessment of what penalty to impose should he find the misconduct had occurred. IAF, Tab 29 (HCD - Testimony of Ronald Hirtle).

When Gerald Jacobs testified, **[*6]** in his capacity as the Deciding Official, he identified certain aspects about the appellant's situation which he did consider when deciding to impose the penalty of removal. IAF, Tab 30 (HCD - Testimony of Gerald Jacobs). Among them were Mr. Jacobs' belief that employees working as Contract Specialists and assigned to remote jobsites needed to act with great integrity. *Id.* According to Mr. Jacobs, the appellant's misrepresentation of his arrival time showed he lacked integrity. *Id.* He also testified he had concluded the appellant lacked the potential for rehabilitation because he not only failed to show remorse for his misconduct, but he also would not even admit he had misrepresented his arrival time. *Id.*

Finally, Mr. Jacobs testified that before deciding to remove him, he considered several mitigating factors which he believed were favorable to the appellant's case. *Id.* These factors included: (1) the appellant's status as a disabled Veteran; and (2) the negative financial impact removal would have on the appellant and his family. *Id.*

On December 21, 2021, I issued an Initial Decision which found the agency had proven by substantial evidence that the appellant had misrepresented his **[*7]** arrival time as alleged in the Notice of Proposed Removal. IAF, Tab 32. I also upheld the Deciding Official's decision to remove the appellant for having engaged in this misconduct. *Id.* Finally, I held the appellant had not proven his disability discrimination affirmative defense. *Id.*

After the Initial Decision became final, the appellant filed a civil complaint in the United States District Court for the District of Massachusetts, where he again challenged his removal and raised his disability discrimination claim. DCF, Tab 2. On February 8, 2022, the District Court remanded the matter to the Board. DCF; Tab 7; RAF, Tab 1. In the Remand Order, the District Court instructed the Board to conduct

"further proceedings that are consistent with the decision in ***Rodriguez v. Department of Veteran Affairs, 8 F.4th 1290 (Fed.Cir. 2021)***." *Id.*

Shortly after the appeal was remanded, I scheduled a preliminary status teleconference with the parties for March 10, 2022. RAF, Tab 3. While the appellant and his representative dialed into the teleconference, the agency representative did not participate and did not notify me in advance of any issue which would prevent her participation. RAF, Tab 4.

Immediately after the teleconference, **[*8]** I issued a Close of Record Order, which informed the parties they "may file Close of Record Submissions by March 21, 2022, which contain evidence and argument addressing how they believe the holding in ***Rodriguez v. Department of Veterans Affairs, 8 F.4th 1290 (Fed. Cir. 2021)***, impacts my original decision which affirmed the agency's removal action." [4] *Id.* The Close of Record Order also advised the parties that "[t]heir briefs should also discuss what impact, if any, they believe the Federal Circuit's rulings in *Connor v. Department of Veterans Affairs, 8 F.4th 1319 (Fed. Cir. 2021)* and *Bryant v. Department of Veterans Affairs*, --- F.4th ---- (Fed. Cir. 2022) may have on my original decision." *Id.* Finally, it informed them they could file an optional reply brief by March 28, 2022, which addressed the arguments raised in the other side's Close of Record Submission, and that the record would close on that date. *Id.*

The appellant filed a Close of Record **[*9]** Submission ten days before the filing deadline. RAF, Tab 5. In his submission, the appellant argues the removal should be reversed because the deciding official: (1) had not applied the proper standard of proof; and, (2) failed to consider the Douglas Factors. *Id.*

With respect to the issue of the Deciding Official's failure to apply the correct standard of proof, the appellant contends that in *Rodriquez*, the Federal Circuit held that the burden of proof to be applied by the agency when making its decision in an adverse action taken under *§ 714* is preponderant evidence, and not the substantial evidence standard which Mr. Jacobs applied. *Id.* (p. 5 of 22). The appellant argues that by applying the incorrect standard, the removal action is subject to reversal because it was not made in accordance with the law. *Id.* In support of this legal argument, the appellant states that:

> "[s]ince the issuance of *Rodriguez*, MSPB's Administrative Judges have been consistent in their handling of matters brought before them, either on initial appeal or after remand, wherein the Agency has been shown to have used the incorrect legal standard...Simply put, an action taken under *§ 714* cannot be sustained if the appellant **[*10]** shows that the decision was not in accordance with law..." *Id.*

According to the appellant, administrative judges have not allowed the agency to try to demonstrate that sufficient evidence of wrongdoing exists to satisfy the preponderance of the evidence standard in cases where the Letter of Decision confirms the substantial evidence standard had been used. *Id.* (p.p. 5-6 of 22). Instead, he says, those judges have interpreted Board caselaw to require the reversal of those adverse actions because they were not made in accordance with the law. *Id.*

With respect to the claim the Deciding Official did not conduct a proper Douglas Factor analysis, the appellant does acknowledge that Mr. Jacobs did take a few of those factors into account when deciding to impose the penalty of removal. *Id.* (p. 9 of 22). This limited review, however, was inadequate in his

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[4] The Close of Record Order informed the parties that my ruling concerning the appellant's disability discrimination claim would not be revisited on remand, because the holding in *Rodriguez* did not alter the burdens of proof or standard of review related to this affirmative defense. RAF, Tab 4.

view because "there is absolutely no support for the notion that a full and complete Douglas-factor analysis was done or considered, in particular an analysis of the multitude of mitigating factors which exist." *Id.* He then proceeded to list the mitigating circumstances he believes Mr. Jacobs did not consider. *Id.*

The agency also filed a Close **[*11]** of Record Submission, but not until the day after the deadline for doing so had passed. RAF, Tab 6. In its submission, the agency failed to offer explanation for the filing delay. *Id.*

In response, the appellant filed a motion to strike the agency's untimely filed submission. RAF, Tab 7. The agency replied to this motion by asking the Board to accept its late filing because its representative had "mis-calendared the date that the Briefs were due to March 28th - the response date-- and did not realize the error until March 22, 2022." [5] RAF, Tab 8.

The agency **[*12]** also filed a response addressing the arguments raised by the appellant in his Close of Record Submission. RAF, Tab 9. In it, the agency disputes the appellant's interpretation of Board case law and his conclusion that the removal must be reversed because it was not in accordance with the law. *Id.* (6-7 of 86). According to the agency, "[i]t is clear from the *Rodriguez* decision that the Federal Circuit does not view the failure to use the preponderant evidence standard as a *per se* error requiring reversal. Rather, the Rodriguez panel remanded to the Board with instruction to hold additional proceedings to have the deciding official determine whether the evidence meets the preponderant evidence standard." *Id.* (11 of 86).

The agency also argues that the penalty of removal should not be disturbed because Mr. Jacobs had given adequate consideration to aggravating and mitigating circumstances which the Board holds to be Douglas Factors. *Id.* (p.p. 13-15 of 86). Therefore, the agency asks the Board to either "sustain the removal action, or, in the alternative, applying a Harmful Error analysis, grant the Agency an opportunity to supplement the record through a sworn affidavit or hold a brief **[*13]** hearing to address the Deciding Official's assessment whether he believed there was preponderant evidence in the record to support the charge, and if necessary, to enumerate the relevant Douglas Factors supporting his decision that the penalty was necessary and reasonable..." *Id.* (p. 21 of 86).

Scope of Review On Remand

The U.S. District Court for the District of Massachusetts remanded this appeal to the Board "for further proceedings that are consistent with the decision in ***Rodriquez v. Department of Veteran Affairs, 8 F.4th 1290 (Fed.Cir. 2021)***." RAF, Tab 1. The *Rodriquez* decision was issued by the U.S. Court of Appeals for the Federal Circuit eight months after I affirmed the agency's removal action in the appeal involving appellant [redacted]. Whereas, I had interpreted *38 U.S.C. § 714* as only requiring the Deciding Official to apply the substantial evidence [6] standard when reviewing the misconduct charge, the Federal

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After reviewing the appellant's motion, and the agency's response thereto, I find the agency has failed to demonstrate Good Cause for why it filed its Close of Record Submission after the deadline. Therefore, the appellant's motion is GRANTED, and the agency's Close of Record Submission will not be considered. The granting of the appellant's motion is a bit of a Pyrrhic victory for him, however, because the agency's reply to the appellant's Close of Record Submission appears to have raised many of the same arguments contained in its Close of Record Submission. Because the agency's reply was timely filed, it will be considered.

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Circuit, in *Rodriguez*, clarified that the burden of proof to be applied by the agency is the higher preponderance of the evidence [7] standard.

In addition to *Rodriguez*, the Federal Circuit has issued a number of other precedential decision since I had ruled in favor of the agency in the underlying appeal. Among them is *Connor v. Department of Veterans Affairs, 8 F.4th 1319, 1326 (Fed. Cir. 2021)*, which held that both the agency and the Board must apply the relevant Douglas factors when considering the reasonableness of penalties imposed against agency employees pursuant to *§ 714*. Therefore, I informed the parties that on remand, I would not only assess my original ruling in light of the *Rodriguez* decision, but would also consider other recent Federal Circuit decisions, to include *Connor*.

However, because none of those precedential decisions impact the basis for my original ruling concerning the appellant's affirmative defense, I will not revisit his disability discrimination claim on remand.

The Removal Action Must Be Reversed Because The Deciding Official Failed To Adequately Consider The **[*15]** Relevant Douglas Factors And The Appellant Was Not Given The Opportunity To Address Those Factors

The parties advocate opposing interpretations on the impact of the *Rodriguez* decision. In the appellant's view, the failure by the Deciding Official to apply the correct standard of review is fatal to the agency's case. The appellant's position is based upon the theory that the removal action was not in accordance with the law. The agency, by contrast, argues that it has the right to cure the issue created by the application of the incorrect standard by having the Board reopen the record to allow the Deciding Official to offer testimony on whether he would have reached a different decision under the preponderance of the evidence standard. Both parties have presented compelling legal arguments in support of their respective positions. It is not necessary, however, to decide which of them is right on this question, because I find the removal must be reversed in light of: (1) the Deciding Official's failure to consider all of the relevant Douglas Factors, and (2) the appellant not being informed of the relevance of the Douglas Factors prior to his written and oral replies to the Notice of **[*16]** Proposed Removal, which denied him the opportunity to address those factors in his replies.

The factors that a deciding official is required to consider when determining what penalty, if any, to apply after a finding that an employee has engaged in the charged misconduct are known as the Douglas Factors, and were first discussed by the Board in *Douglas v. Veterans Administration, 5 M.S.P.B. 313, 5 M.S.P.R. 280 (1981)*. While not purporting to be exhaustive, those factors are: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the

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Substantial evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, **[*14]** even though other reasonable persons might disagree. *5 C.F.R. § 1201.4(p)*.

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Preponderant evidence is defined as the degree of relevant evidence 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. *5 C.F.R. § 1201.4(q)*.

employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's **[*17]** ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Id., at 305-06*.

Prior to the *Connor* decision, the prevailing view was that the Douglas Factors did not apply to disciplinary actions taken under *38 U.S.C. § 714*, because the Board cannot mitigate the penalty chosen by the agency. Now that the Federal Circuit has made clear that the Douglas Factors should have been applied, the failure by the Deciding Official to consider **[*18]** them means the removal action cannot stand.

In its reply to the appellant's Close of Record Submission, the agency argues that choice of penalty should not be disturbed due to the lack of a formal Douglas Factor analysis by the Deciding Official, because he nevertheless weighed a number of factors identified by the Board in *Douglas v. Veterans Administration*.

The underlying evidentiary record confirms that the Deciding Official did weigh the following Douglas Factors: (1) the nature and seriousness of the offense, and its relation to the appellant's duties, position, and responsibilities; (2) the employee's type of employment, including fiduciary role; (3) the effect of the offense upon the confidence of the appellant's supervisors in his ability to perform assigned duties; (4) the potential for the appellant's rehabilitation; and (5) certain mitigating circumstances surrounding the offense. The problem with the Deciding Official's consideration of these factors is two-fold.

First, the Deciding Official's assessment of the Douglas Factors is incomplete. While it is true that "not all of the factors will be pertinent to every case," *Douglas* explained that the agency must "consider the **[*19]** relevant factors" when selecting a penalty. *See Connor, 8 F.4th at 1324* (citing to *Douglas, 5 M.S.P.B. 313, 5 M.S.P.R. at 332-33)*. After assessing the evidentiary record in the underlying appeal, to include witness testimony, I find that the Deciding Official neglected to consider a number of relevant factors. Among them are the appellant's length of service, disciplinary record, and job performance. They also include mitigating factors which were not identified by the appellant in his response to the Notice of Proposed Removal or in his appeal.

The absence of information concerning these mitigating factors in the underlying record brings us to the second problem with the penalty assessment conducted by the Deciding Official. In the Notice of Proposed Removal, the appellant was informed of his right to make an oral and / or written reply to the Deciding Official. The appellant, however, was not told what criteria Mr. Jacobs may consider when determining what penalty, if any, to impose.

As a result of this omission, the appellant would not have been aware that it may be helpful for him to emphasize his performance ratings, years of service, awards, and lack of prior discipline. Moreover, while he did bring certain mitigating factors to the **[*20]** attention of the Deciding Official, the appellant did not know of the possible importance such factors could play during the penalty assessment phase. Had he been informed, he would have had the opportunity to provide the Deciding Official with medical

documentation concerning his TBI and PTSD. [8] This lack of awareness on the part of the appellant, may also explain why his oral and written replies did not mention several of the mitigating factors he recently identified in his Close of Record Submission. RAF, Tab 5.

Pursuant to *38 U.S.C. § 714(c)*, employees facing removal are entitled to an opportunity to respond to the charges and proposed penalty. This right to respond has been recognized by the United States Supreme Court as a basic due **[*21]** process requirement for tenured public employees. *See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)*. By not informing the appellant of the role the Douglas Factors would play in the Deciding Official's penalty analysis, the agency deprived him of the opportunity to fully respond to the Notice of Proposed Removal. In so doing, the agency violated his due process rights.

The agency would no doubt argue that such a violation can be cured by reopening the record to permit the Deciding Official to address all of the Douglas Factors he believes to be relevant. But the violation cannot be remedied simply by allowing the Deciding Official to redo the penalty analysis.

Instead, the process would have to be moved back two additional procedural steps to the proposal phase, where the Proposing Official would presumably provide information which may be relevant to the Deciding Official's Douglas Factor analysis. Then, the appellant would need to be allowed the chance to respond to that information, as well as being permitted the opportunity to discuss his mitigating factors. To reopen the record and go back to the proposal phase of the disciplinary process is simply a procedural bridge too far.

Moreover, **[*22]** such a remedy is not available because a due process violation is not subject to the harmful error test; instead, the employee is automatically entitled to a new constitutionally proper removal proceeding. *See Ward v. United States Postal Service, 634 F.3d 1274, 1279 (Fed.Cir. 2011)*. When a procedural due process violation occurs, "the merits of the adverse action are wholly disregarded and the administrative judge must simply reverse the agency's action without proceeding to make alternative findings." *Giannantonio v. United States Postal Service, 111 M.S.P.R. 99, P 5 (2009)*.

Because the agency violated the appellant's due process rights, the removal must be REVERSED.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **April 22, 2019**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after

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While the Deciding Official appears to have been aware of these health issues, the record indicates he had only been told the appellant suffers from these conditions. If the Notice of Proposed Removal had made reference to the penalty analysis criteria outlined in *Douglas*, then the appellant would have known of the role mitigating information plays in that analysis and could have provided further detail concerning his medical conditions to the Deciding Official.

the date this initial **[*23]** decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount. 15

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the **[*24]** agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with *5 U.S.C. § 7701(b)(2)(A)*. The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of Contract Specialist, GS-1102-12. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of *5 U.S.C. § 7701(b)(2)(A)(ii)* and *(B)*. If the appellant challenges this certification, **[*25]** the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

/s/

Daniel F. McLaughlin

Administrative Judge

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance.

Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing **[*26]** good cause for the delay and a request for an extension of time for filing.

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* *5 C.F.R. § 1201.112(a)(4)*.

NOTICE TO APPELLANT

This initial decision will become final on **May 5, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for **[*27]** review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of *5 C.F.R. § 1201.14*, and may only be accomplished at the Board's e-Appeal website (*https://e-appeal.mspb.gov)*.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to *5 C.F.R. § 1201.115*, the Board normally **[*28]** will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of **[*29]** the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in *5 C.F.R. § 1201.114(h)*, a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must **[*30]** be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must **[*31]** also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* *5 C.F.R. § 1201.4(j)*. If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* *5 C.F.R. § 1201.14(j)(1)*.

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar **[*32]** days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. *5 U.S.C. § 7703(a)(1)*. By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. *5 U.S.C. § 7703(b)*. Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your **[*33]** case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. *5 U.S.C. § 7703(b)(1)(A)*.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, *www.cafc.uscourts.gov*. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro **[*34]** bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at *http://www.mspb.gov/probono* for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal

Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision--including a disposition of your discrimination claims--by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. *5 U.S.C. § 7703(b)(2)*; *see Perry v. Merit Systems Protection Board, 582 U.S. ___, 137 S. Ct. 1975, 198 L. Ed. 2d 527 (2017)*. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling **[*35]** condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See 42 U.S.C. § 2000e-5(f)* and *29 U.S.C. § 794a*.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. *5 U.S.C. § 7702(b)(1)*. You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. *5 U.S.C. § 7702(b)(1)*.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012 [*36] . This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under *5 U.S.C. § 2302(b)(8)* or other protected activities listed in *5 U.S.C. § 2302(b)(9)(A)(i)*, *(B)*, *(C)*, or *(D)*. If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in *section 2302(b)* other than practices described in *section 2302(b)(8)* or *2302(b)(9)(A)(i)*, *(B)*, *(C)*, or *(D)*," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. *5 U.S.C. § 7703(b)(1)(B)*.

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, *www.cafc.uscourts.gov*. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is **[*37]** contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at *http://www.mspb.gov/probono* for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

DEFENSE FINANCE AND ACCOUNTING SERVICE

Civilian Pay Operations

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to *5 CFR § 550.805*. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: *https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx*** **[*38]** .

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

[] 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

[] 2) Settlement agreement, administrative determination, arbitrator award, or order.

[] 3) Signed and completed "Employee Statement Relative to Back Pay".

[] 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

[] 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

[] 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

[] 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, **[*39]** workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under *5 U.S.C. § 5551* for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to *5 CFR § 550.805(g)*.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.

b. Detailed explanation of request.

c. Valid agency accounting.

d. Authorized signature **[*40]** (Table 63).

e. If interest is to be included.

f. Check mailing address.

g. Indicate if case is prior to conversion. Computations must be attached.

h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected (if applicable).

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement (if applicable).

2. Copies of SF-50s (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump **[*41]** Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.

b. Prior to conversion computation must be provided.

c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

End of Document