UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ANGELA M. CASSADY,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DA-0752-19-0377-I-1

DATE: January 17, 2020

Mauricus Lofton, Esquire, and Daniel Meyer, Esquire, Washington, D.C., for the appellant.

Kasia M. Preneta, Esquire, Springfield, Virginia, for the agency.

BEFORE
Theresa J. Chung
Administrative Judge

INITIAL DECISION

INTRODUCTION

On June 6, 2019, the appellant timely filed this appeal of her removal, effective May 9, 2019. Initial Appeal File (IAF), Tab 1, Tab 8 at 130. The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7511-7513. A hearing was held on November 5, 2019, and November 6, 2019. IAF, Tab 46 (Hearing Compact Disc (HCD)).

Based on the following analysis and findings, the agency's action is MITIGATED.

ANALYSIS AND FINDINGS

Findings of Fact

The following facts are established by preponderant evidence, including credible witness testimony. The appellant was employed as a Chemist, GS-1320-13, with the Drug Enforcement Administration (DEA), Operational Support Division, Office of Science and Technology, South Central Laboratory Group 1, in Dallas, Texas. IAF, Tab 8 at 130. Chemists analyze samples to detect the presence of controlled substances and related materials. IAF, Tab 39 at 39. They establish the presence or absence of controlled substances for the prosecution of such cases. *Id.* Chemists must maintain strict chain of custody in handling, analyzing, and preserving evidence, and are required to write reports containing their analysis and conclusions. *Id.*

The appellant's first-level supervisor was Supervisory Chemist Angel Ramirez, and her second-level supervisor was South Central Laboratory Associate Lab Director Barbara Vasquez. IAF, Tab 46 (Testimony of Ramirez and Vasquez). The lab is headed by a Director; the Associate Lab Director position is under the Director position; and the lab also has a Laboratory Administrative Officer. IAF, Tab 23 at 110. Four supervisory chemists supervise the chemists, who are divided into four groups. *Id.* By January 5, 2018, the appellant was a Senior Forensic Chemist. IAF, Tab 11 at 119, Tab 23 at 99. This promotion from a GS-12 to GS-13 position was effective on June 26, 2016. IAF, Tab 37 at 82.

On December 29, 2015, the South Central Laboratory received two sealed self-sealing evidence envelopes. IAF, Tab 11 at 69. On January 5, 2016, Evidence Technician Kevin Moore processed and entered the evidence into the agency's STARLIMS system.[1] *Id.* Exhibit 1 was assigned Laboratory

[1] STARLIMS is the electronic lab information management system used by the agency and is also referred to as LIMS. HCD (Testimony of Vasquez).

Information Management System (LIMS) number 2016-SFL6-00016, and Exhibit 2 was assigned LIMS number 2016-SFL6-00017. *Id.* A corresponding yellow LIMS label was printed for each exhibit; however, the Evidence Technician incorrectly placed the label corresponding to Exhibit 1 (2016-SFL6-00016) on the evidence bag for Exhibit 2, and the label corresponding to Exhibit 2 (2016-SFL6-00017) on the evidence bag for Exhibit 1. *Id.* at 69, 82-84.

On May 13, 2016, Ramirez assigned the evidence to the appellant to handle and process. *Id.* at 69. On May 13, 2016, the appellant checked out the two evidence exhibits in DEA Case No. KI15-0037. *Id.* at 69, 137-38. The two exhibit numbers were 2016-SFL6-00016, or DEA Exhibit 1, and 2016-SFL6-00017, or DEA Exhibit 2. *Id.* The appellant did not initially notice that the LIMS labels (that the Evidence Technician placed on the bag) did not match the evidence labels (that the case agent had placed on the bag). *Id.* at 141-43.

The appellant took the evidence back to her bench and performed a gross weight.[2] *Id.* at 143. The gross weights were different from what was described on the DEA-7 evidence label, and so, pursuant to protocol, she asked another analyst to witness the gross weights on May 16, 2016. *Id.* at 70, 144. It is not uncommon for the gross weight to differ from the weight on the DEA-7 form. *Id.* at 143-45. The appellant then opened up the bags and wrote down the description of each of the evidence samples. *Id.* at 146. The descriptions were different from what was on the DEA-7 form, and so she asked another analyst to witness the description discrepancies on May 17, 2016. *Id.* at 71, 146. Throughout this process, the appellant did not notice that the evidence bags had incorrect labels. HCD (Testimony of Appellant). *Id.* at 143-51.

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[2] A gross weight involves the chemist measuring and recording the gross weight of each sample on a balance or scale and then recording the information. HCD (Testimony of Vasquez).

The appellant then began screening the evidence samples. IAF, Tab 11 at 151. The screening process involves running several chemical tests to determine the composition or amount of illegal drugs contained in the evidence samples. HCD (Testimony of Vasquez). At this point, the appellant realized that the evidence bags had incorrect labels. IAF, Tab 11 at 151. She contends that, on May 17, 2016, she briefly informed her direct supervisor, Ramirez, that she found some "swapped labels," and that he told her to go speak with Wanda Dawkins, Evidence Technician, or someone at the evidence vault. *Id.* at 151-52, 180-81. She stated that she did not give Ramirez a specific case number or discuss specifics with him, and that their conversation was brief.[3] *Id.* at 185-86.

The appellant then went to the evidence vault to speak with Dawkins. HCD (Testimony of Dawkins, Appellant). The appellant and Dawkins discussed sending an email to the case agent regarding the incorrect labelling. HCD (Testimony of Dawkins). It is office procedure to inform the case agent. *Id.* They went together to Dawkins' desk, which was nearby in the vault. *Id.* Dawkins sat at her computer, and the appellant stood behind her. *Id.*

Dawkins sent the following email through the STARLIMS system:

> After completion of analysis of the above referenced exhibits, it was observed by the chemist, that the exhibits were incorrectly labeled. Exhibit 1 was labeled as (ex-2) and Exhibit 2 was labeled as (ex-1). They have already been entered into the analysis system as such. This is to notify you of this issue and that they will remain as such.

IAF, Tab 11 at 72; HCD (Testimony of Vasquez). Dawkins sent the email to the following individuals: Group Supervisor Towanda Thorne, Special Agent or Task Force Officer (TFO) Thomas Davis, Barbara J. Vasquez, Laboratory

[3] Ramirez testified that he did not recall speaking with the appellant about the swapped labels. HCD (Testimony of Ramirez).

Administrative Officer (LAO) Hiram Chacon, and the appellant.[4] IAF, Tab 10 at 11-12, Tab 11 at 46-47, Tab 23 at 26-27, 129. Chacon is Dawkins' supervisor, and he reports to Vasquez. IAF, Tab 11 at 46; HCD (Testimony of Vasquez, Dawkins). The email was sent to Vasquez through the STARLIMS system, but she did not read it; Chacon also did not read the email. HCD (Testimony of Vasquez); IAF, Tab 10 at 11, Tab 11 at 46-47. The email is reflected in the "Communication Log" and the "Email Log" for each of the two samples in the agency's electronic records, and the email remains in the case record for the evidence in the STARLIMS system.[5] IAF, Tab 11 at 110-113, Tab 23 at 35, 130. It is undisputed the appellant helped to change the wording of Dawkins' email, read the final email, and authorized the email to be sent. IAF, Tab 11 at 177-78.

After Dawkins sent the email, the appellant returned to her work station; she contends she "finished [her] analysis thinking everything was taken care of with the email, because [she and Dawkins] never heard back from the TFO." IAF, Tab 11 at 174-75. The appellant stated she thought the email took care of everything. *Id.* at 174-75, 186. The appellant ultimately conducted the following tests on the two samples: Gas Chromatography, Gas Chromatography/Mas., Spectrometry, Infrared Spectroscopy, Marquis Color Test, and a Purity Test (Meth-LC/Liquid Chromatography). *Id.* at 115-116. The dates of the tests, as reflected in the computerized test records, reflect that the instruments ran the tests after the May 16, 2016 email. HCD (Testimony of Vasquez).

The appellant then generated final reports for each of the samples, which she submitted on May 18, 2016. IAF, Tab 11 at 73. The reports were erroneous

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[4] The email is contained in the record, but is illegible. IAF, Tab 11 at 72-73, 110-13. However, the parties do not dispute the language in the email. HCD (Testimony of Vasquez).

[5] In addition to sending email through STARLIMS, employees can send email through Outlook. IAF, Tab 23 at 130.

in that the results for Exhibit 1 were contained in the report for Exhibit 2, and vice versa. *Id.* at 115-116 (Original lab reports), 187. Both reports identified "Methamphetamine Hydrochloride" in the samples. *Id.* The appellant could have added notes regarding the label swap in "Remarks" section of the report, but she did not. HCD (Testimony of Appellant). After the appellant submitted the reports to Ramirez for approval, she returned the evidence to the vault. HCD (Testimony of Appellant). On May 19, 2016, Ramirez approved the reports, but was unaware the reports contained inaccurate information. *Id.* at 73, 115-16.

In December 2017, the agency learned of the label error during an annual evidence inventory, and, in January 2018, the appellant and Vasquez issued amended lab reports.[6] *Id.* at 73; HCD (Testimony of Vasquez). On December 19, 2017, the appellant sent an email statement to Vasquez:

> I am trying to the best of my ability to remember back 18 months ago but I will have to speak in general terms seeing as I have done more than 700 exhibits in the time between the incident and now. I always take my DEA 7's to the vault window. I compare the 7 to the yellow evidence sticker. I can tell you that since the incident I now compare the yellow sticker to the actual evidence and double check the ES work. When I have weight discrepancy I usually double check the weight on the 7 and have another analyst witness the discrepancy. Since there are so many weight discrepancies, and many times the discrepancy is that the agent has simply put the net weight down as the gross weight, I usually don't consider this a big deal. When I have a description discrepancy I have another analyst witness the discrepancy. I honestly can't remember when I realized the labels were switched. I do know that when I did realize it I had already gotten the net weights and done the screening so it was too late to simply change the labels and correct the issue. I believe I contacted Angel and then I went to Wanda and had her contact the agent to inform him of the issue. I did not document going to my supervisor

[6] The agency conducted an annual inventory in the fall of 2017, but did not find the error then. HCD (Testimony of Vasquez). The inventory is a week-long review conducted in December by chemists. *Id.* The chemists conducting the inventory discovered the mislabeled exhibits. *Id.*

> in the case file. I do not believe we received confirmation from the agent/GS about the email acknowledging the label switch.

IAF, Tab 23 at 19.

In 2018, the agency conducted an investigation. IAF, Tab 11 at 69-73. On May 25, 2018, Special Agent Todd M. Wheeler, Department of Justice, Office of the Inspector General (OIG), and Inspector Eric Watson, DEA Office of Professional Responsibility (OPR), interviewed the appellant. *Id.* at 123.

On February 13, 2019, Kenneth M. Ludowig, Chairman, Board of Professional Conduct proposed the appellant's removal for: (1) False Statements/Documents; (2) Lack of Candor; and (3) Inattention to Duty. IAF, Tab 9 at 96-103. On April 3, 2019, the appellant submitted a written reply. *Id.* at 5-86. On April 23, 2019, the appellant presented an oral reply. IAF, Tab 8 at 135. The agency did not transcribe the oral reply; however, the Deciding Official, Matthew J. Germanowski, took handwritten notes. *Id.* at 152-63; HCD (Testimony of Germanowski).

On May 2, 2019, Germanowski issued a decision letter sustaining all three charges and the penalty of removal. IAF, Tab 8 at 134-36. The appellant was removed effective May 9, 2019. *Id.* at 130. This appeal followed. IAF, Tab 1. The appellant asserted affirmative defenses of discrimination based on sex/gender, harmful procedural error, and violation of law. IAF, Tab 27 at 5.

The agency bears the burden of proving its charges by preponderant evidence.

The agency bears the burden of proving its charges by preponderant evidence.[7] 5 U.S.C. § 7701(c)(1)(B). The agency must also show the penalty of removal is reasonable and promotes the efficiency of the service. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Generally speaking, a

[7] Preponderant evidence is the degree of relevant evidence a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

charge usually consists of two parts: (1) a name or label that generally characterizes the misconduct; and (2) a narrative description of the acts that constitute the misconduct. *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 14 (2006) (citing *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 203 (1997)). While an agency is not required to affix a label to a charge of misconduct, if it chooses to label an act of misconduct, it is bound to prove the elements that make up the legal definition of that charge, if there are any. *Id.*

Charge 1, False Statements/Documents

The first charge is "False Statements/Documents." IAF, Tab 9 at 97. Under this charge, the agency stated, in part:

> On May 17, 2016, you knowingly and intentionally dictated, reviewed and authorized the dissemination of an e-mail that contained false statements.
>
> Specifically, on May 17, 2016, you knowingly and intentionally dictated, reviewed and authorized the dissemination of an e-mail which contained statements that were not true. On May 17, 2016, an e-mail was sent to the case agent in which you stated you had completed your analysis of two (2) drug exhibits; however, this information was false. The analysis had not been completed by you at the time the e-mail was sent to the case agent, and in fact, you did not complete the analysis until the next day.
>
> * * *
>
> On March 8, 2018, ES Dawkins was interviewed by OIG. During her sworn OIG interview, ES Dawkins stated you dictated to her the information contained in the e-mail dated May 17, 2016. When OIG requested ES Dawkins describe the contents of the e-mail, ES Dawkins stated, "*What she dictated to me was ...*" OIG questioned whether the e-mail was directly dictated from you to ES Dawkins. ES Dawkins stated, "*That's correct. She was giving me the words. I wouldn't have known what to tell him* [the case agent] ... *That's what was dictated to me, yes, sir.*"

Id. (emphasis in original).

The parties treated this charge as being akin to a charge of falsification. IAF, Tab 41. To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect

information with the intention of deceiving, defrauding, or misleading the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986); *O'Lague v. Department of Veterans Affairs*, 123 M.S.P.R. 340, ¶ 6 (2016); *Scheffler v. Department of Army*, 117 M.S.P.R. 499, ¶ 4 (2012). The Board has held the intent element requires two distinct showings: (a) that the employee intended to deceive or mislead the agency; and (b) that she intended to defraud the agency for her own private material gain. *O'Lague*, 123 M.S.P.R. 340, ¶ 6, *citing Leatherbury v. Department of the Army*, 524 F.3d 1293, 1300 (Fed. Cir. 2008). Thus, the agency must prove (1) the appellant supplied false information; (2) the false statement was material; and (3) the appellant acted with the requisite intent, *i.e.*, (a) the appellant intended to deceive or mislead the agency, and (b) she intended to defraud the agency for her own private material gain. *Leatherbury*, 524 F.3d at 1300; *Boo v. Department of Homeland Security*, 122 M.S.P.R. 100, ¶¶ 11-12 (2014).

A finding that the appellant provided incorrect information cannot control the question of intent. *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 10 (2007). The intent to defraud or mislead the agency may be established by circumstantial evidence and also may be inferred when the misrepresentation is made with a reckless disregard for the truth or with conscious purpose to avoid learning the truth. *Boo*, 122 M.S.P.R. 100, ¶ 10. Whether intent has been proven must be resolved by considering the totality of the circumstances, including the appellant's plausible explanation, if any. *Id.* The definition of "private material gain" is quite broad, and includes both personal monetary gain, as well as efforts to secure employment, use leave to avoid absence without leave or leave without pay, and obscure facts to avoid discipline. *Id.*, ¶ 13. The agency is required to prove only the essence of its charges, and it need not prove each factual specification supporting each charge. *Smith v. Department of Transportation*, 106 M.S.P.R. 59, ¶ 15 (2007) (citing *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table)).

Here, the essence of the charge is that the appellant falsely stated in the May 17, 2016, email, that she had completed her analysis, when she had not completed her analysis. IAF, Tab 9 at 97. At hearing, the appellant explained that, at the time of the May 17, 2016, email, she had already performed the screen analysis and other tests, and completed her handling of the raw material. HCD. She stated that the samples were "in queue" for "instrumentation analysis," but that her "hands-on analysis" of the materials was complete. The samples were waiting for "instrumentation run" and "data drop," but she had no further testing to conduct. *Id.* She explained that when she is done with handling the raw materials, she believes she is done with her analysis. *Id.* She explained that she came up with the email language, "after completion of analysis," noting that she tried to refer only to "chemical analysis," but that Dawkins suggested removing the word "chemical." *Id.*

This testimony varies slightly with the appellant's description of her work during the May 2018 interview. During her investigative interview, she stated:

> I started my screening. And then once I got my screening done I -- for some reason I picked the bags up, because I was feeling -- I looked at the bags again, and that's when I noticed the labels were swapped.

IAF, Tab 11 at 151. She added:

> I went in to talk to [Evidence Technician] Wanda [Dawkins]. And I said, Wanda, I have a problem. I've got, I'm in the middle of this analysis. I've got the screening completed. I have these swapped labels. And I don't know what to do, can you send an e-mail to the TFO.
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> She's like, yeah, what should it say. I said, I'm not sure. I've got this partly completed analysis. And I'm not sure what I should do with it. And that's all I remember about it.

Id. at 162-63.

At hearing, Dawkins testified that the appellant approached her for help with the incorrect labeling. HCD (Dawkins). Dawkins asked her, "Have you started anything chemistry related?" *Id.* The appellant stated that she had. *Id.*

Dawkins then told her that there was nothing she could do. *Id.* Dawkins believed that, because the appellant had started her analysis, there was nothing an Evidence Specialist could do to help; the Evidence Specialist could not take back the evidence and correct the labels. *Id.*

During her interview, Dawkins' description of the appellant's work supports that the appellant had completed her analysis, but not the final reports. Dawkins confirmed the appellant came to her on May 17, 2016, and informed her there was a mistake in labeling the evidence and she needed to notify the agent. IAF, Tab 10 at 132. The appellant informed Dawkins that she had analyzed the evidence, it had already been processed, and so she could not turn it back into the vault and have it fixed. *Id.* at 133. Dawkins told the investigator, "The analysis had been complete, and I suggested, since there was no report, I was under the impression there was no report generated, that we use the DEA-7 as a reference and notify the agency of this error, and then she said that she -- after this was done, she was going to go and speak with Jamie [Vasquez] and see what else to do." *Id.* at 133. Vasquez confirmed it is possible that other chemists had their materials queued up before the appellant, which could have led to delays in the times the tests were run. HCD (Testimony of Vasquez).

Based on the totality of evidence, I find the agency has failed to demonstrate the appellant made a false statement in stating the analysis was complete. Although the appellant used inconsistent terminology, I find it plausible the appellant stated the "analysis was complete," referring to the "hands-on" portion of her analysis, although the instruments had not run the tests. The agency failed to demonstrate the appellant's intent was anything other than to communicate that the labels were swapped and that she was not correcting the error. Dawkins' statements support the analysis could be "complete," even without a final written report. IAF, Tab 10 at 133. Further, both Dawkins and the appellant testified that, based on the appellant's statements, Dawkins informed her that "there's nothing that we [Evidence personnel] could do…" to

fix the labels. HCD (Testimony of Appellant, Dawkins). Although their accounts of their conversation varied in some respects, both the appellant and Dawkins were credible in explaining the intent behind the email. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 460-61 (1987)).

Moreover, the agency presented insufficient evidence supporting the appellant provided these statements, even if false, intending to deceive or defraud the agency. Dawkins sent the email to five individuals, including the appellant, the case agent, the case agent's supervisor, the appellant's second-line supervisor (Vasquez), and Dawkins' supervisor and LAO (Chacon); the email remained in the electronic case file. IAF, Tab 11 at 46-47, Tab 23 at 26-27, 35. I find it improbable an employee trying to conceal such an act would send an email to so many people, including her own supervisor. *See Hillen*, 35 M.S.P.R. at 460-61 (contradiction by other evidence and inherent improbability).

I considered the testimony of witnesses who believed the appellant intended to deceive the agency. Ramirez thought the appellant was lazy and wanted to avoid the work involved in correcting the label swap. HCD (Testimony of Ramirez). He provided no evidence, other than unsupported speculation, to support this contention. The Deciding Official, Germanowski, believes the appellant intended to conceal the error by sending the email to the case agent in the field. He testified the appellant claimed the analysis was complete in order to deceive the field into thinking the issue was "not fixable" so they would not return to her with additional work of correcting the labels. HCD (Testimony of Germanowski). He explained that, with her supervisor's help, the appellant could have fixed the error before the reports were finalized, and the appellant intended to create the false impression that she could not fix the error. *Id.* Germanowski believed the appellant was "punting" the issue to the field agent, who was not in a position to change or fix her analysis. *Id.* This, he contends, was in an effort to avoid the difficult work involved in working with her supervisor to correct the error and to avoid scrutiny of her performance by her supervisors. *Id.*

Germanowski also attested "the intent of the email was to make it go away" and to "brush it under the rug without telling her supervisor." *Id.* This is illogical. The simplest way to conceal the swapped labels was for the appellant to do nothing. Again, the appellant sent the email to her second-line supervisor. Although Germanowski claimed the appellant knew Vasquez would not actually read the email and that Vasquez is "too high up," *see id.*, that contention is not supported by the record.

The appellant credibly denied intending to deceive the agency. HCD (Testimony of Appellant). She knew she needed to speak with Dawkins regarding the swapped labels, and stated she was being honest when she sent the email. *Id.* She testified her intent was to let the field know of the swapped labels, and that she believed there was nothing further that could be done. *Id.* Vasquez never responded to the email, and the appellant stated she never heard of further steps to take after the email was sent. *Id.* The appellant acknowledges she finalized reports that were incorrect by failing to note the swapped labels, but claims it "completely slipped [her] mind." *Id.* I found the appellant to be straightforward in her testimony, and without any evidence of an intention to mask the situation as she understood it. I observed her demeanor closely and found her to be believable and truthful. She testified without any evidence of evasion or prevarication and her testimony was consistent with her interview statements. IAF, Tab 11 at 164-65, 174-75, 186; *see also Hillen*, 35 M.S.P.R. at 460-61 (contradiction by other evidence and inherent improbability).

The appellant did not fully explain her actions taken after the email. However, the issue here is not whether the appellant's performance was deficient, but whether the agency has proven the appellant intended to deceive or mislead the agency for her own private gain in stating the analysis was complete on May 17, 2016. Moreover, as discussed above, the essence of the specification is whether the appellant made a false statement in her email, and not in the final

reports regarding the exhibits.[8] Under these circumstances, the agency has failed to meet its required burden. While intent to deceive may be demonstrated by the totality of the circumstances, I find the agency failed to prove the appellant intended to deceive.

Thus, based on a careful review of the record and considering the totality of the circumstances, the agency has failed to prove by preponderant evidence the appellant knowingly provided incorrect information with the intention of deceiving the agency when she stated the analysis was complete in her May 17, 2016 email. Thus, the agency failed to meet its burden and Charge 1 is NOT SUSTAINED.

Charge 2, Lack of Candor

The second charge is "Lack of Candor." IAF, Tab 9 at 98. The narrative following this charge involved the answers the appellant provided during her May 25, 2018, OIG interview regarding the May 17, 2016 email. *Id.* Under this charge, the agency stated:

> On May 25, 2018, you exhibited a lack of candor during your sworn OIG interview. Specifically, on May 25, 2018, you were less than forthcoming in your responses to OIG Special Agents (SA) during your sworn OIG interview, which exhibited a lack of candor. During your sworn OIG interview, you initially denied you "dictated" the information to ES Dawkins included in the May 17, 2016 e-mail sent through LIMS. When questioned by OIG whether you "dictated" the language included in the e-mail, you stated, ***"I don't know what to say to the agents ... I said, [ES Dawkins], I don't know what to say to this guy, you know. This is what's happened. I've completed the analysis; what do you think it should say."*** When OIG pointed out that part of the problem was you failed to complete your evidence analysis at the time the e-mail was sent to the case agent, you stated, ***"I don't see myself telling [ES Dawkins] it's completed when it's***

[8] In the proposal letter, the agency noted, as an aggravating factor, that the laboratory reports had incorrect information. IAF, Tab 9 at 101. However, the essence of the falsification charge is that the May 17, 2016 email—and not the laboratory reports – was false.

> ***not completed."*** However, the e-mail did state that the analysis was complete. When OIG further questioned about your involvement in sending the e-mail, you continued to be less than forthcoming regarding both your involvement in the e-mail and whether your analysis of the evidence had been completed. You stated, ***"I went in to talk to [ES Dawkins] ... And I said, [ES Dawkins], I have a problem ... I'm in the middle of the analysis. I've got the screening completed. I have these swapped labels. And I don't know what to do, can you send an e-mail to the TFO. She's like, yeah, what should it say. I said, I'm not sure. I've got this partially completed analysis. And I'm not sure what I should do with it."*** After being questioned multiple times by OIG regarding your involvement in the e-mail, you finally admitted the e-mail was sent based on your wording, admitted you helped ES Dawkins with the wording of the e-mail, admitted you read the final product, and admitted you authorized the dissemination of the e-mail.
>
> * * *
>
> As such, your actions as described above constitute **Lack of Candor**, and you are so charged.

IAF, Tab 9 at 98-99 (emphasis in original).

Lack of candor is a broad and flexible concept whose elements depend on the particular context and conduct involved. *See Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). A lack of candor charge may be proven by showing that the appellant failed to disclose something that, under the circumstances, should have been disclosed in order to make the given statement accurate and complete. *Id.* (likening the charge of lack of candor to a failure "to state a material fact . . . necessary to make the statements therein not misleading."). While it does not require proof of intent to deceive, lack of candor does necessarily involve an element of deception. *Fargnoli v. Department of Commerce*, 123 M.S.P.R. 330, ¶ 17 (2016). Thus, this charge requires proof that: (1) the appellant gave incorrect or incomplete information; and (2) that she did so knowingly. *Id.*

Based on my review of the agency's lengthy narrative charge, I find the essence of the agency's charge is that the appellant lacked candor with regard to

the following statements in her OIG interviews: (1) denial that she dictated the email to Dawkins; (2) being less than forthcoming in her role in the email; and (3) statement on whether the analysis has been complete. After a careful review of the evidence, I find the agency has not shown by preponderant evidence the appellant *knowingly* provided incorrect or incomplete information to OIG. The agency provided transcripts of the May 25, 2018, interview with OIG, as well as an audio recording. *See* IAF, Tab 11 at 123-209, Tab 29.

During the May 25, 2018, investigative interview, the appellant denied "dictating" the contents of the email to Dawkins. IAF, Tab 11 at 153, 157-158, 160. However, she later clarified in the interview that she did not tell Dawkins "word-for-word what to write," but that she helped to change the wording of the email, she read the final product, and she authorized the email to be sent. *Id.* at 177-78.

At hearing, the appellant testified that she and Dawkins formulated the email "together," and that she did not "dictate" the email to Dawkins. HCD. She stated that, to her, the word "dictate" means to transcribe word-for-word, like a court reporter does, and that the investigator did not define the term. *Id.* She stated that she and Dawkins talked, and that their process of preparing the email was more of "collaboration" than "dictation." *Id.* She further explained that, as a chemist, she does not communicate directly with agents or officers very often, and that she would need help with such a communication. *Id.* She explained, "[Dawkins] is the person who knows most about evidence problems." *Id.* She acknowledged Dawkins was not involved in the original label swap, and all "[Dawkins] knew is what [the appellant] told her." *Id.* She further attested that the interview occurred long after the events in question, and that it was hard for her to recall details from two years before. *Id.* She said she felt intimidated during the investigation and the investigator did not fully allow her to explain what she was trying to say. *Id.* She testified that she did not intend to be less

than forthcoming, or to provide inaccurate information, when making these statements to the investigator. *Id.*

I find the appellant's explanation regarding why she denied "dictating" the email to the investigator to be logical and credible. *See Hillen*, 35 M.S.P.R. at 458 (witness's demeanor, consistency of witness's testimony with other evidence). The Merriam-Webster Online Dictionary defines "dictate" as "to utter words to be transcribed: to give dictation." *See* https://www.merriam-webster.com/dictionary/dictate (last accessed January 16, 2020). The transcript reflects the investigator asked the appellant several times if she dictated the email, to which the appellant responded that she did not. IAF, Tab 11 at 153, 157, 158, 160. Based on my review of the transcript, I note that the term "dictate" was undefined, with the appellant attempting to both understand and answer the question:

> MS. CASSADY: I mean, that's, that's the best I can give you is I don't remember dictating it to her, because I don't feel comfortable writing e-mails to agents, for one.
>
> MR. WHEELER: But you didn't write it.
>
> MS. CASSADY: Well --
>
> MR. WHEELER: What we were told is you --
>
> MS. CASSADY: -- dictating and writing it to an agent is the same thing to me.
>
> MR. WHEELER: Okay. Well, when I read the e-mail stating analysis -- uh, discrepancy noted, labeling discrepancy noted, analysis complete, it's going to remain as such. That sounds like it's more coming from you. These evidence techs and all the ones we talked about said that it would've been a simple fix. Once they're notified, new labels printed, labels switched. Excuse me. You go into the Lims System. Data would be swapped over because the analysis, we know the analysis was done --
>
> MS. CASSADY: Right.
>
> MR. WHEELER: -- opposite. It's a simple fix. You allowed your analysis to continue. And you allowed errant laboratory reports to be issued. And like we talked about in the beginning, this was already gone over for referral. It's been declined.

> You have to now, for your sake, it is critical that you answer these questions honestly. And right now I don't feel like you're fully answering them honestly. I think you're using the I don't remember, and it's been a long time, and maybe, a little bit too much. I need you to take a breath. I need you to try to think about this. And I need you to answer these questions honestly. So --
>
> MS. CASSADY: I'm trying.

Id. at 160-61. After the investigator asked more open-ended questions that did not use the term, "dictate," the appellant provided further explanation of the email process. *Id.* at 162-63, 168-69, 174. Based on my review of the transcript and the audio recording, I credit the appellant's explanations for why she denied "dictating" the email. I have considered that Dawkins consistently used the term "dictate" in describing her conversation with the appellant about the email. HCD (Testimony of Dawkins); IAF, Tab 10 at 134-135, Tab 23 at 26. However, I find that it is possible for Dawkins to have characterized the situation differently from the appellant. Under these circumstances, the agency has failed to prove the appellant *knowingly* provided incorrect or incomplete information to OIG.

The agency also alleges the appellant lacked candor when she stated to OIG that her "analysis of the evidence had been completed." IAF, Tab 9 at 98. I find the agency has failed to prove the appellant *knowingly* provided incorrect or incomplete information regarding her statement to OIG as to whether or not her analysis was complete. The transcript reflects the appellant did not recall, at the time of the interview, whether the analysis had been completed. IAF, Tab 11 at 159 ("I don't see myself telling Wanda that it's completed when it's not completed… that was a misstatement then, because I don't see myself telling – I wouldn't lie to Wanda."). It appears she did not remember the details at the time of the interview, and prior to making this statement, she asked the investigators when she completed the analysis. *Id.* at 158 ("When did I … complete the

analysis?"). She also stated she was trying to remember the email from two years ago.[9] *Id.* at 160.

As discussed more fully under the first charge, I find it plausible that the appellant believed that her analysis was complete, and thus characterized it in that manner to OIG. While the agency may disagree with her characterization or phrasing, and the appellant herself was inconsistent in her terminology, the agency has failed to show the appellant made these statements to OIG knowing they were incorrect or incomplete. The agency produced insufficient evidence to contradict the appellant's testimony and I find her testimony and statements credible. *See Hillen*, 35 M.S.P.R. at 458 (witness's demeanor, consistency of witness's testimony with other evidence). The appellant testified in a straightforward and convincing manner, with no indication of hesitation regarding these issues.

I further find the appellant's failure to recall the details in a consistent manner to be credible because the interview took place two years after the incident. I find it reasonable the appellant would not remember the details after such an extended period of time. She testified during her deposition that, at the time of the OIG interview, she thought the focus of the interview would be on the swapped labels, and not the email. IAF, Tab 23 at 141-42. Accordingly, considering the totality of the record, I find the agency has failed to prove the appellant *knowingly* provided incorrect or incomplete information to OIG with regard to these statements, or with regard to her involvement in the email.

Thus, based on a careful review of the record and considering the totality of the circumstances, I find the agency has failed to prove the charge of lack of candor by preponderant evidence. Consequently, I find the agency has not shown

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[9] The transcript reflects that Wheeler made the statement, "Well, I'm trying to remember the email." IAF, Tab 11 at 160. This is a transcription error, as the audio recording reflects that the appellant, and not Wheeler, made this statement. IAF, Tab 29.

by preponderant evidence the appellant committed lack of candor as alleged in this specification and it is NOT SUSTAINED.

Charge 3, Inattention to Duty

The third charge is "Inattention to Duty." IAF, Tab 9 at 99. Under this charge, the agency stated:

> On May 13, 2016, your inattention to duty led to your failure to identify a LIMS labeling error.
>
> Specifically, on May 13, 2016, you failed to conduct a comparison between the evidence bag label and the LIMS label on two (2) drug exhibits. On May 13, 2016, you checked out two (2) drug exhibit evidence bags for analysis from the SFL6 evidence vault. Prior to taking receipt of the evidence bags, you failed to conduct a comparison between the two (2) drug evidence bag labels and the LIMS labels.

Id. at 99-100.

To prove a charge of inattention to duty, the agency must show that the duties assigned to the appellant were carried out in a deficient or inattentive manner. The appellant acknowledged that she did not compare the evidence labels, and that she should have done so. HCD (Testimony of Appellant); IAF, Tab 11 at 141-42. She acknowledged she should have detected the discrepancy at the time she received the evidence. IAF, Tab 9 at 11, Tab 11 at 142. Accordingly, the agency has proven this charge. *See Cole v. Department of the Air Force*, 120 M.S.P.R. 640, ¶ 9 (2014) (appellant's admission to a charge can suffice as proof of the charge without additional proof from the agency). Thus, I find the agency proved Charge 3 by preponderant evidence and it is SUSTAINED.

The appellant failed to prove her affirmative defense of disparate treatment based on her gender.

The appellant asserted an affirmative defense of gender discrimination. The agency's action may not be upheld if the appellant shows: harmful error in the application of the agency's procedures in arriving at such decision; the

decision was based on a prohibited personnel practice; or the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2). The appellant bears the burden of proving her affirmative defenses by preponderant evidence. *See* 5 C.F.R. § 1201.56(b)(2)(i)(C).

When an appellant asserts an affirmative defense of discrimination under 42 U.S.C. § 2000e-16, the Board first will inquire whether she has shown by preponderant evidence "the prohibited consideration was a motivating factor in the contested personnel action, even if it was not the only reason." *See Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 41 (2015). Such a showing is sufficient to establish the agency violated 42 U.S.C. § 2000e-16, thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) or (b)(9)(A)(ii). *See Sabio v. Department of Veterans Affairs*, 124 M.S.P.R. 161, ¶ 35 (2017); *Savage*, 122 M.S.P.R. 612, ¶ 51. In making her showing, an appellant may rely on direct evidence or circumstantial evidence, either alone or in combination.

Direct evidence of discrimination may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). It is evidence that, if believed, proves the existence of a fact in issue without inference or presumption; however, such evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). If an alleged discriminatory statement at best merely suggests a discriminatory motive, then it is only circumstantial evidence. *Id.* An appellant with direct evidence of discrimination will prevail on her discrimination claim if she establishes that improper motivating factors played a part in the agency decision. *Arredondo*, 85 M.S.P.R. 113, ¶ 13.

Circumstantial evidence is evidence that may support an inference that intentional discrimination or retaliation was a motivating factor in an employment action. The Board has identified three types of circumstantial evidence. The first kind of circumstantial evidence consists of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. The second kind is comparator evidence, consisting of evidence that similarly situated employees were treated more favorably. The third kind consists of evidence that the agency's stated reason for its action is unworthy of belief and a mere pretext for discrimination. *See Savage*, 122 M.S.P.R. 612, ¶ 42.

In *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, ¶ 30 (2016), the Board clarified that this analysis does not require administrative judges to separate "direct" from "indirect" evidence and to proceed as if such evidence were subject to different legal standards, or require appellants to demonstrate a "convincing mosaic" of discrimination or retaliation. Rather, the dispositive inquiry is whether the appellant has shown by the preponderance of the evidence that the prohibited consideration was a motivating factor in the contested personnel action. *Savage*, 122 M.S.P.R. 612, ¶ 51. If the appellant has made such a showing, the Board will find that the agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(1). If she has not made such a showing, the inquiry will end at that point.

If the appellant makes the required showing, the next issue is whether she is entitled to corrective action. A violation of 42 U.S.C. § 2000e-16 will entitle the appellant to reversal of the personnel action only if the prohibited personnel practice was its "but for" cause, meaning that the agency would not have taken the same action in the absence of the discriminatory or retaliatory motive. *Savage*, 122 M.S.P.R. 612, ¶¶ 48, 49. The burden of proof shifts to the agency to show, also by preponderant evidence, that it would have taken the action even if

it lacked such a motive. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 275 (1981). "If we find that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action." *Savage*, 122 M.S.P.R. 612, ¶ 51.

Here, the appellant alleges her removal was the result of disparate treatment discrimination based on her gender. IAF, Tab 7 at 5. She alleges that male colleagues were similarly situated but did not face removal. *Id.* The appellant did not present any direct evidence of discrimination but alleges the agency treated coworkers not in the appellant's protected groups more favorably than she was treated. For another employee to be deemed similarly situated for purposes of an affirmative defense of discrimination based on disparate treatment, all relevant aspects of the appellant's employment must be "nearly identical" to that of the comparator employee. *See Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 10 (2012). Thus, to be similarly situated, a comparator must have reported to the same supervisor, been subjected to the same standards, and engaged in similar conduct without differentiating or mitigating circumstances. *Gregory v. Department of the Army*, 114 M.S.P.R. 607, ¶ 44 (2010).

All of the men involved in the label incident received less serious discipline than the appellant. The agency verbally counselled Moore, the Evidence Specialist who had originally swapped the labels. HCD (Testimony of Vasquez). Joel Stephenson was the supervisor acting as Evidence Specialist when the appellant returned the evidence to the vault. *Id.* Stephenson also did not notice the label error, and received a verbal counseling from Vasquez. *Id.*; IAF, Tab 23 at 24 (Stephenson email stating, "In hindsight I probably should have checked both the original label, LIMS label and the chemist seal to see that all three were consistent.").

In a separate incident, another chemist, Xui Liu, who is male, received a letter of caution or written reprimand for failing to notice swapped labels. HCD

(Testimony of Liu, Vasquez). Liu did not notice the swap at the time he analyzed the evidence, and the two samples were fairly similar. HCD (Testimony of Vasquez). The agency learned of the error during the December 2016 evidence inventory. *Id.* Liu testified he received a written reprimand. HCD.

At hearing, Vasquez explained that she issued a Corrective Action Request for Liu. HCD (Testimony of Vasquez); IAF, Tab 23 at 39. Vasquez explained that Liu failed to notice the swapped labels during the course of his analysis, and that he received a letter of caution from his supervisor, Michael Morley. HCD (Testimony of Vasquez). Vasquez stated Liu was not referred to OPR because Liu was not aware of the swap during his analysis; there was no evidence that he knew of the swapped labels during his analysis, while she believed there was dishonesty and a lack of candor involved in the appellant's case. *Id.*; *see also* IAF, Tab 23 at 39-42 (Corrective Action Request), 43 (Memo of Exhibits Switch), 44-45. Vasquez testified that the agency investigation began because the appellant had caught the error but did not properly correct it. HCD (Testimony of Vasquez); IAF, Tab 23 at 159-63. Vasquez's notes reflect that, before the investigation, she had concerns the appellant exercised poor judgment in addressing the label swap. IAF, Tab 23 at 162.

While I ultimately found the agency lacked preponderant evidence for its charges of falsification and lack of candor, I found Vasquez to be credible with regard to her explanation for why the agency did not formally investigate Liu and why he received lesser discipline than the appellant. Vasquez's testimony was direct and straightforward, and, thus, I find the appellant failed to show that Liu is a valid comparator under these circumstances. *Hillen*, 35 M.S.P.R. at 458 (witness's demeanor, consistency of witness's testimony with other evidence). I also find that Moore and Stephenson are not valid comparators as they were not responsible for analyzing the evidence and reporting on their results.

Nevertheless, even absent comparator evidence, an appellant can still meet her burden if she produces sufficient evidence from which an inference of

discriminatory intent might be drawn or the agency's stated reason for its action is unworthy of belief and a mere pretext for discrimination. *See Savage*, 122 M.S.P.R. 612, ¶ 42. The appellant has offered little more than unsupported allegations to show the agency removed her because of her gender. *See Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 539 (1992) (appellant's mere allegation of retaliation, unsupported by probative and credible evidence, does not prove reprisal).

During the hearing, I observed the behavior and demeanor of the witnesses, and Germanowski testified in a candid and straightforward manner. *Hillen*, 35 M.S.P.R. at 458. He credibly testified as to the reasons for the appellant's removal and his deep concerns regarding the appellant's integrity and potential to be truthful. HCD. I found Germanowski to be sincere and credible with regard to his explanation for why he believed the appellant's misconduct warranted removal, and how he struggled with the gravity of the removal decision. *Id.* I also found no indication of discriminatory animus (based on the appellant's gender) in Germanowski's or Vasquez's testimony. Further, there is no evidence of discriminatory animus on the part of the proposing official.

Although I did not sustain the charges of falsification or lack of candor, I conclude this factor alone is insufficient for the appellant to meet the burden for her affirmative defense. In sum, the appellant presented insufficient evidence to meet her burden of identifying similarly situated employees outside of her protected group who were treated more favorably, that the agency lied about its reason for taking the action, that the agency generally treats employees in her protected groups less favorably, or of any incriminating statements. Accordingly, I find the appellant has not established by preponderant evidence that her gender was a motivating factor in her removal.

Other Affirmative Defenses

The appellant also raised affirmative defenses of harmful procedural error and violation of law. IAF, Tab 41. The appellant alleges the agency violated the

Privacy Act, 5 U.S.C. § 552a(e)(2), in failing to seek information regarding the misconduct "to the greatest extent practicable directly from the subject individual." IAF, Tab 27 at 5. The appellant's harmful procedural error argument is based on a similar contention. *Id.* Specifically, the appellant argues that the agency violated its internal regulations when Wheeler failed to thoroughly question the appellant, which left the resulting report "devoid of important information." *Id.* There is no indication the OIG investigation was incomplete or missing key information as the appellant contends. Thus, I find the appellant has failed to meet her burden of proving these affirmative defenses.

The agency penalty of removal must be mitigated.

An agency may subject an employee to an adverse action only for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). An adverse action promotes the efficiency of the service, satisfying the nexus requirement, where the grounds for the action relate to either the employee's ability to accomplish her duties satisfactorily or some other legitimate government interest. *See Fontes v. Department of Transportation*, 51 M.S.P.R. 655, 665 n.7 (1991). Nexus is proven when the conduct occurred at work. *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987). Here, the sustained misconduct of Inattention to Duty directly involved the appellant's job duties, and thus, I find the agency satisfied the nexus requirement.

When not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 24 (2012) (citing *Douglas*, 5 M.S.P.R. at 308). Where the agency has not indicated it would have imposed a penalty less than the maximum reasonable penalty for the sustained charges, the Board may determine the maximum reasonable penalty for the sustained offense. *Mancini v. Department of Veterans Affairs*, 84 M.S.P.R. 70, ¶ 15 (1999), *reversed on other grounds by Mancini v. Department of Veterans Affairs*, 8 F. App'x 952 (Fed. Cir. 2001).

Germanowski testified the appellant would not have been removed if he had sustained only the inattention to duty charge. HCD (Germanowski). He stated, "if [inattention to duty] was the only charge, we would not be here." *Id.* Thus, the record establishes the agency would not have removed the appellant for Inattention to Duty, but the agency did not indicate that it would impose less than the maximum reasonable penalty. Therefore, I may determine here the maximum reasonable penalty for the sustained offense. In reviewing the penalty determination, I do not credit the agency's analysis with the degree of deference normally granted by the Board, because I only sustained the least serious of the three charges. *See Hill v. Department of the Army*, 120 M.S.P.R. 340, ¶ 4 n.4 (2013) (conducting an independent analysis when only one of two charges was sustained).

The Board has articulated factors to be considered in determining the propriety of a penalty, such as the nature and seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the employee's ability to perform his assigned duties, the consistency of the penalty with the agency's table of penalties, and the consistency of the penalty with those imposed on other employees for the same or similar offense. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-6 (1981). Not all of the factors will be pertinent in every instance, and so the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Douglas*, 5 M.S.P.R. at 306; *see also Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 17 (2007) ("In assessing the appropriateness of the agency's penalty selection, the most important factor is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated.").

I find the sustained misconduct is serious. The appellant's position requires that she analyze samples to detect the presence of controlled substance

and related materials. IAF, Tab 39 at 39. The sustained misconduct directly relates to the appellant's duties in identifying and analyzing drug samples. I also considered whether the appellant's actions adversely reflect on the agency. In this instance, the lab had to follow up with agency personnel in the field to inform them of the error, and to determine any impact on any criminal cases. IAF, Tab 23 at 34-35. I consider this to be an aggravating factor. *See Stump v. Department of Transportation,* 761 F.2d 680, 681-82 (Fed. Cir. 1985) (where public awareness of the misconduct would undermine its confidence in the agency, and given that disciplinary proceedings are not secret, lack of publicity at the time was not fatal to agency's position); *Byrd v. U.S. Postal Service*, 13 M.S.P.R. 86, 89-90 (1982) ("potential adverse publicity" was relevant in *Douglas* analysis).

Although Germanowski testified he lost confidence in the appellant's ability to perform her assigned duties, that loss appears to be primarily related to the falsification and lack of candor charges. HCD. I make this finding based on his testimony and considering the appellant's eight years of service with the agency. IAF, Tab 8 at 145. The record supports the appellant has no prior disciplinary history and had average or slightly above average performance ratings. *Id.* at 145-46. I considered that the other employees involved in handling the evidence with the swapped labels (Moore and Stephenson) received verbal counseling, and that Liu received a letter of caution or a written reprimand. HCD (Testimony of Vasquez, Liu). I considered that the appellant expressed regret for her inattention to duty and testified that she has learned from her mistakes. HCD (Testimony of Appellant); IAF, Tab 11 at 176, 180. I also considered the agency's *Guide for Disciplinary Offenses and Penalties* (effective June 30, 2015). *See* IAF, Tab 9 at 159. Although not binding, it recommends a first-offense penalty range of a reprimand to a 7-day suspension for the sustained charge of Inattention to Duty. *Id.*; IAF, Tab 8 at 147.

Considering these factors, I find that a written reprimand, which is the lowest penalty in the recommended range for this offense, is the maximum reasonable penalty for the sustained charge of Inattention to Duty. Thus, I mitigate the removal to a written reprimand.

DECISION

The agency's action is MITIGATED.

ORDER

I **ORDER** the agency to cancel the removal and substitute in its place a written reprimand. 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 the date this initial 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.

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 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.

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, 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/
Theresa J. Chung
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 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 **February 21, 2020**, 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 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).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally 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 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 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 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 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 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 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 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling 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. 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 you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, 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 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**

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, 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).

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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 (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-50's (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 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.