UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ROBERT DREDDEN,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DA-0752-24-0208-I-1

DATE: December 18, 2024

Lachlan McKinion, Esquire, and Daniel P. Meyer, Esquire, Washington, District of Columbia, for the appellant.

Charles Raymond Vaith, Esquire, Randolph Air Force Base, Texas, for the agency.

BEFORE
Theresa J. Chung
Administrative Judge

INITIAL DECISION

INTRODUCTION

On January 29, 2024, the appellant timely filed an appeal from the agency's action removing him from his GS-7 Police Officer position, with the 502d Security Forces Squadron, Joint Base San Antonio (JBSA), Fort Sam Houston in San Antonio, Texas, effective January 22, 2024. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511-7514. A hearing was held on August 14, 2024. IAF, Tab 23 (Hearing Recording (HR)). The record is closed. *Id.*

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

ANALYSIS AND FINDINGS

Findings of Fact

The appellant was previously employed as a Visual Information Specialist, GS-1084-11, with the U.S. Army Training and Doctrine Command, U.S. Army Medical Center of Excellence, Borden Institute, JBSA, Fort Sam Houston, in San Antonio, Texas. IAF, Tab 8 at 238. JBSA is comprised of Fort Sam Houston, Randolph Air Force Base, and Lackland Air Force Base. The Borden Institute is an agency of the U.S. Army Medical Center of Excellence; it publishes and maintains textbooks on military medicine.

On June 8, 2022, the appellant resigned from his position at the Borden Institute. *Id.* This was a competitive service position. *Id.* The appellant was employed at the Borden Institute for approximately four years and six months before his resignation. HR (Testimony of Appellant).

On February 23, 2023, the appellant completed a Declaration for Federal Employment Optional Form (OF) 306 for a Police Officer position with the Department of the Air Force (the agency) at JBSA. IAF, Tab 8 at 231-32. Question 12 on the form asked, "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management or any other Federal agency?" *Id.* at 231. The appellant checked the box for "Yes," and provided details under Question 16, which are largely illegible in the document provided by the agency. *Id.* at 232.

On or around February 8, 2023, Donna Sue Talamantes completed a suitability review of the appellant. *Id.* at 200; HR (Testimony of Mark Mendes). Talamantes prepared a worksheet regarding her suitability review. IAF, Tab 8 at 200. She noted that the appellant had resigned from the Borden Institute (U.S. Army) on June 30, 2022. *Id.* She noted that he had responded "Yes" on the OF

306 in response to Question 12. *Id.* She also stated the appellant had "resigned from his position due to his workplace being a toxic environment, annual leave taken from him while on administrative leave, and after he was going to be removed for outrageous charges." *Id.* Talamantes noted that he has a positive work history and positive reference checks. *Id.* She concluded by recommending a favorable determination. *Id.*

On February 27, 2023, the agency appointed the appellant to the position of Police Officer, GS-0083-07, with the 502d Security Forces Squadron, JBSA. *Id.* at 234-36. The agency appointed the appellant into the competitive service position using its Direct Hire Authority under 5 U.S.C. § 9902(b)(2). The agency noted that he had completed an initial probationary period.[1] *Id.* at 234.

On March 17, 2023, Colonel Seth Frank, Chief, Security Forces, JBSA-Randolph, sent an email to Lt. Col. James P. Hewett, Commander, 502d Security Forces Squadron, JBSA – Fort Sam Houston. *Id.* at 215-16. In the email, Frank stated:

> I understand a Mr. Robert Dredden is a recent hire into an 0083 position within the 502 SFS.
>
> FYSA, Mr. Dredden, resigned in lieu of termination on 30 Jun 22 from a position w/ MEDCoE on Ft Sam.
>
> I may be mistaken; however, the resignation in lieu of termination should have been annotated on his last SF50
>
> It is my understanding the preferred charges were "Failure to follow instruction, misuse of government equipment and materials, inattention to duty, and conduct unbecoming a federal employee
>
> . . . .
>
> The MedCOE Security Lead (Mr. Hinnant) is also very familiar with Mr. Dredden's temperament and actions (Mr. Dredden was placed on admin leave and escorted off the installation during disciplinary proceedings due to concerns of his volatility

[1] The agency acknowledged the appellant was an employee under 5 U.S.C. § 7511(a)(1). IAF, Tab 8 at 8.

. . . .

> In full disclosure, my spouse is a MedCOE employee and was Mr. Dreddens' supervisor up until his resignation. Also fysa, I corresponded w/ Matt K previously in early June (below)
>
> The above information is meant to ensure your team is full informed only.

Id. Frank's spouse is Gina Frank, who is a Senior Production Editor at the Borden Institute and the appellant's supervisor at the time of his resignation. HR (Testimony of Hewett); IAF, Tab 22 at 283.

On March 17, 2023, Carlton Hinnant, Assistant Chief of Staff for Intelligence and Security, U.S. Army Medical Center of Excellence, JBSA Fort Sam Houston, sent an email to Hewett, stating:

> Per our recent conversation, the following information is provided regarding the former MEDCoE employee identified in the subject line.
>
> On or about 30 June 22, Mr. Dredden tendered his resignation as a Graphic Designer for Borden Institute, MEDCoE. His resignation was tendered in lieu of termination for the misuse of government property. Mr. Dredden was using government equipment for personal gain. Specifically, Mr. Dredden was using the government's graphic design software and printer/blotter to produce and sell products for his personal graphics design business. Additionally, evidence revealed he was also selling Borden Institute publications for personal financial gain. Also included in the proposal for termination were incidents of disrespectful conduct to coworkers as well as insubordination.
>
> Please let me know if any additional information is needed. Greatly appreciate your reaching out to me as the previous supervisor was extremely afraid of retaliation by Mr. Dredden based on previous encounters and the subsequent proposal for his termination.

IAF, Tab 8 at 222.

On March 21, 2023, Hewett withdrew the appellant's authority to carry a government-issued firearm due to the concerns expressed by his prior agency. HR (Testimony of Hewett); IAF, Tab 8 at 220. The agency conducted a second

suitability review due, in part, to information received from Frank. HR (Testimony of Hewett; Testimony of Mark Mendes).

Suitability Manager Mark Mendes conducted the second suitability review, which he attested was prompted by emails raising concerns about the appellant's prior employment and his "character and temperament." HR (Testimony of Mendes). Employee Relations personnel pulled the appellant's "suitability file," reviewed it, and asked the prior adjudicator (Talamantes) if she had considered the Office of Personnel Management (OPM) investigative file. *Id.* She (Talamantes) had not considered the file. *Id.* Mendes then consulted with OPM personnel and asked what action they should take if there was a suitability determination that did not consider all relevant information. *Id.* OPM advised that Mendes should restart the suitability determination and review the complete information. *Id.* Mendes determined that Talamantes' initial determination did not contain complete information regarding the appellant's resignation from the Borden Institute, such as details on "circumstances surrounding conduct" and the appellant's resignation SF-50. *Id., see also* IAF, Tab 8 at 200. After consulting with OPM, Mendes stated he conducted a more exhaustive review of the appellant's suitability. *Id.* He compiled a file which included the appellant's position description, his e-QIP application, an excerpt from the OPM investigative file, resume, initial suitability determination (of Talamantes), a new suitability determination (prepared by Mendes), and other documentation. *Id.*, citing IAF, Tab 8 at 157-213.

Mendes noted that Talamantes' initial suitability adjudication, contained at IAF, Tab 8 at 200, was incomplete because it did not include the reason for the appellant's resignation, and also failed to include his resignation SF-50. HR (Testimony of Mendes). The appellant's SF-50 reflects that he resigned from the Borden Institute, and the legal authority for the action was Regulation 715.202 CAA, which corresponds to a resignation after receiving a notice of proposed or

pending adverse action based in whole or in part on the employee's misconduct.[2] IAF, Tab 8 at 174-76. Mendes included this SF-50, and the explanation for the personnel action code from the resignation SF-50, with his suitability file. HR (Testimony of Mendes); IAF, Tab 8 at 174-76.

On March 27, 2023, Mendes prepared an Agency Adjudicative Action on an OPM Personnel Investigations form. IAF, Tab 8 at 209-10. In that form, Mendes noted the appellant was "un-suitable." *Id.* On April 26, 2023, Mendes concluded his review, writing:

> 02 2018 to 06 2022 Mr. Dredden was employed with the Borden Institute at JBSA FSH, Mr. Dredden resigned in Lieu of termination for misconduct in the workplace creating a (toxic) environment, and misuse of government equipment for printing posters on a work printer for his personal self without permission, as this posters were for his personal business. Mr. Dredden misconduct in the workplace was not being able to get along with other co-workers, in 06/2022 management placed Mr. Dredden on administrative leave, as he received notice of removal, and management had to request security forces to assist in Mr. Dredden in being escorted out of the building. Mr. Dredden was selected within six months for a police officer position, a position that requires integrity coupled with the ability to resolve conflict within the off base community and on base community.
>
> Mr. Dredden's inability to follow instructions and creating a toxic environment per his previous supervisor, calls into question his judgment, and actions as Mr. Dredden will be in possession of a firearm and a badge and task with enforcing laws, and base regulations.

Id. at 212-13 (grammar and punctuation as in original).[3]

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[2] On June 8, 2022, Gina Frank had proposed the appellant's removal for failure to follow instructions, misuse of government equipment and materials, conduct unbecoming a federal employee, and inattention to duty. IAF, Tab 22 at 275-283. Mendes did not have, or otherwise consider, these documents as part of his suitability review. HR (Testimony of Mendes).

[3] The Table of Contents reflects Mendes completed this suitability determination on April 23, 2026. IAF, Tab 8 at 157. The reference to 2026 appears to be a typographical error as Mendes' determination is dated April 26, 2023. *Id.* at 212-13.

On August 2, 2023, Hewett proposed to remove the appellant based on a charge of Failure to Meet a Condition of Employment (As a Result of a Suitability Determination). *Id.* at 152-55. The specific background for the proposal was listed as follows:

> On or about 27 February 2023, you were appointed to a position with the Department of the Air Force. Prior to your appointment, the Civilian Personnel Office deemed you suitable for federal employment, however, the supporting documentation used to make the original suitability determination revealed not all items required to execute an appropriate determination were utilized. Civilian Personnel Office performed a proper review and executed a valid suitability determination. The Civilian Personnel Office has determined you are not suitable for federal employment based on the contents of this case file, therefore, the Agency can no longer provide employment to you.

Id. at 152. The proposal noted that Hewett considered the appellant's response to Question 12 on the Declaration for Federal Employment Optional Form (OF) 306, the derogatory information contained in the OPM Investigations Service Report, the recency of the conduct, and the absence of rehabilitative potential. *Id.*

The appellant's attorney requested supporting documentation from the agency, and the agency provided a copy of the casefile. The casefile included the Col. Frank email, Mendes' suitability documentation, and the suitability file that Mendes reviewed and compiled. HR (Testimony of Appellant); IAF, Tab 8 at 157-245. The appellant did not receive the entire OPM Investigations Service Report, which contains other documents related to the background investigation of the appellant. IAF, Tab 22 at 7 to 271; HR (Testimony of Appellant, Mendes).

On September 1, 2023, the appellant provided a written reply to the proposed action. IAF, Tab 8 at 39-40, 43-145. The appellant's reply contained a statement, which he signed and dated on August 21, 2023. *Id.* at 51-55. On or about September 22, 2023, the appellant submitted an oral response to Colonel Jason Sleger. *Id.* at 34. On November 14, 2023, Sleger signed a *Douglas* factors checklist. *Id.* at 27-32. On January 16, 2024, Sleger issued a decision sustaining

the charge and upholding the penalty of removal. *Id.* at 23-25. The appellant was removed effective January 25, 2024. *Id.* at 21. The removal SF-50 reflects the action was taken under 5 U.S.C. Chapter 75. *Id.*

On January 29, 2024, the appellant filed this appeal. IAF, Tab 1. In his appeal, he stated that the agency violated his due process rights, amounting to harmful procedural error. *Id.* at 12. He also stated the removal was unlawful and lacked evidence to support the charge. *Id.* at 12-13.

The Board has jurisdiction over this appeal.

After the hearing, a question of Board jurisdiction arose. IAF, Tab 24. The parties had an opportunity to respond to a jurisdictional order. IAF, Tabs 26-27.

To qualify as an employee with appeal rights under 5 U.S.C. chapter 75, an individual in the competitive service - such as the appellant - must show that he either is: (1) not serving a probationary or trial period under an initial appointment; or (2) has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A). An appellant has Board appeal rights if he meets either prong of this definition.

As stated, the appellant resigned from the Visual Information Specialist position with the Borden Institute on June 8, 2022. IAF, Tab 8 at 238. The position was in the competitive service. *Id.* The appellant was employed at the Borden Institute for approximately four years and six months. HR (Testimony of Appellant).

On February 27, 2023, the agency appointed the appellant to the Police Officer with the 502d Security Forces Squadron. IAF, Tab 8 at 234-36. The agency utilized Direct Hire Authority under 5 U.S.C. § 9902(b)(2), and the appointment SF-50 indicated the appellant had completed an initial probationary period. *Id.* at 234. The agency also acknowledged the appellant was an employee

under 5 U.S.C. § 7511(a)(1). IAF, Tab 8 at 8. The agency removed the appellant less than a year later, on January 22, 2024. *Id.* at 21.

As to the first option for being an employee - not serving a probationary or trial period under an initial appointment - the agency appointed the appellant under the authority of 5 U.S.C. § 9905 - a direct-hire authority. Under 5 C.F.R. § 315.801(2), "[a] person who is appointed to the competitive service either by special appointing authority or by conversion under subparts F or G of this part serves a 1-year probationary period unless specifically exempt from probation by the authority itself." Section 315.801(e) requires a probationary period only for those appointed under appointing authorities specified in subpart F and subpart G of 5 C.F.R. § 315; 5 U.S.C. § 9905 is not among the hiring authorities specified in those subparts.

In *Tschumy v. Department of Defense*, 104 M.S.P.R. 488, ¶ 14 (2007), the Board interpreted this regulation as requiring 1-year probationary periods only for those appointed under appointing authorities specified in subpart F and subpart G of 5 C.F.R. § 315. Here, the appellant was appointed pursuant to 5 U.S.C. § 9902(b)(2), which is not among the hiring authorities specified in those subparts. Thus, I find he was not required to serve a probationary period under 5 C.F.R. § 315.801(e). *See also Calixto v. Department of Defense,* 120 M.S.P.R. 557, ¶ 11 (2014). Nonetheless, the Board has held that an agency may permissibly require a 1-year probationary period even when it is not required by the appointment authority, *id.* at ¶ 13; however, there is no evidence the agency imposed such a requirement here. Consistent with *Tschumy* and *Calixto*, therefore, the appellant was not required to serve a 1–year probationary period upon his appointment to the Police Officer position. Also, there is no evidence the agency required the appellant to serve a probationary period when he was appointed.

Accordingly, I find the appellant was not serving a probationary period under an initial appointment at the time of his termination, and thus he was an "employee" pursuant to 5 U.S.C. § 7511(a)(1)(A)(i).

The agency removed the appellant under Chapter 75

This appeal was initially docketed as a suitability action. IAF, Tab 2. A suitability determination is directed toward whether the "character or conduct" of a candidate for or current employee is such that employing or continuing to employ him or her would adversely affect the efficiency of the service. 5 C.F.R. §§ 731.101, .201; *see also Duggan v. Department of the Interior*, 98 M.S.P.R. 666, 669 (2005). Factors that could support a negative suitability determination include misconduct or negligence in employment; criminal or dishonest conduct; material, intentional false statement or deception or fraud in examination or appointment; refusal to furnish required testimony; and alcohol abuse or illegal use of drugs in certain circumstances. 5 C.F.R. § 731.202(b); *see Duggan*, 98 M.S.P.R. at 669. Suitability actions that may be taken by OPM or employing agencies (under authority delegated by OPM) under Part 731 include cancellation of eligibility for appointment or reinstatement, denial of appointment, removal, and debarment. 5 C.F.R. § 731.203(a).

Part 731 distinguishes between applicants (persons being considered for employment), appointees (persons who entered on duty and are in the first year of an appointment subject to investigation), and employees (persons who have completed the first year of an appointment subject to an investigation). *Id.* at § 731.101(b). An agency, exercising delegated authority, may take a suitability action against an applicant or appointee. 5 C.F.R. § 731.105(c). An agency may not take a suitability action against an employee. 5 C.F.R. § 731.105(e).

The agency advised that it took the adverse action pursuant to 5 U.S.C. chapter 75, and that it was not a regulatory suitability action taken under 5 C.F.R.

Part 731. IAF, Tab 8 at 8, 21; IAF, Tab 20 at 2. Thus, I find the agency removed the appellant under Chapter 75.[4] *See also* IAF, Tab 20 at 2.

The merits of the agency suitability review are at issue.

To sustain a charge of failure to fulfill a condition of employment, the agency must prove the following by preponderant evidence: (1) the requirement at issue is a condition of employment; and (2) the appellant failed to meet that condition. *See Thompson v. Department of the Air Force*, 104 M.S.P.R. 529, ¶¶ 9-10 (2007). Absent evidence of bad faith or patent unfairness, the Board defers to the agency's requirements that must be fulfilled for an individual to qualify for appointment to and retention in a particular position. *Gallegos v. Department of the Air Force*, 121 M.S.P.R. 349, ¶ 6 (2014) (*citing Thompson*, 104 M.S.P.R. 529, ¶ 9). However, when, as in the present appeal, the employing agency controls the withdrawal or revocation of the required certification, the Board's authority generally extends to review of the merits of that withdrawal or revocation. *Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶ 10 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008)). A narrow exception exists in cases in which the adverse action is based on the withholding of a national security credential, such as a security clearance or eligibility to occupy a noncritical sensitive position. *Adams*, 105 M.S.P.R. 50, ¶ 11; *see also Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988); *Kaplan v. Conyers*, 733 F.3d 1148, 1166 (Fed. Cir. 2013) (en banc).

This removal action was not based on the agency's determination that the appellant was ineligible to occupy a sensitive critical or non-critical position

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[4] Even if the agency's removal action were a "suitability action," the action would be reversed due to the agency's failure to comply with the procedural protections in 5 C.F.R. § 731.402, including that the notice "must set forth the specific reasons for the proposed action." 5 C.F.R. § 731.402(a). *See also* 5 C.F.R. § 731.202(b) ("In determining whether a person is suitable for Federal employment, only the following factors will be considered a basis for finding a person unsuitable and taking a suitability action…."). If the agency took a "suitability action," it would have to prove the merits of its negative suitability determination before the Board.

within the meaning of 5 C.F.R. part 732 (National Security Positions). IAF, Tab 8 at 209. The agency took this action pursuant to Chapter 75, and did not rely on 5 C.F.R. part 732 (National Security Positions) to support its action. IAF, Tab 8 at 21. As a result, this case does not involve considerations of national security. Accordingly, the Board can review the substance of the agency's determination that the appellant was unsuitable for employment.

The agency violated the appellant's procedural due process rights.

The appellant argues the agency violated his constitutional right to due process. IAF, Tab 1 at 13-14, Tab 19 at 17-20. I find the agency violated the appellant's right to due process and he is therefore entitled to a procedurally correct new proceeding.

Insofar as I have resolved factual disputes regarding this issue, I have been guided by the following principles. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

In evaluating hearsay evidence the following factors affect the weight to be accorded such evidence: (1) the availability of persons with first-hand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the explanation for failing to obtain signed or sworn statements; (4) whether the

declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; and (8) the credibility of the declarant when he made the statement attributed to him. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981).

Constitutional due process requires a tenured federal employee be provided "written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). The Court has described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Id.* at 542 (emphasis as in original). The Supreme Court expressly noted that a meaningful opportunity to present the employee's side of the case is important in enabling the agency to reach an accurate result for two reasons. First, dismissals for cause will often involve factual disputes and consideration of the employee's response may help clarify such disputes. *Id.* at 543. In addition, even if the facts are clear, "the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id.* Thus, the employee's response is essential not only to the issue of whether the allegations are true, but also with regard to whether the level of penalty to be imposed is appropriate. *See Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1374-76 (Fed. Cir. 1999); *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011).

The Board's reviewing court—the U.S. Court of Appeals for the Federal Circuit—explains the due process rights of the tenured employee, finding the right to constitutional due process in areas other than the opportunity to respond.

In *Stone*, the court noted that, in addition to the statutory procedures an agency must follow in removing a Federal employee entitled to rights, *i.e.*, 5 U.S.C. § 7513(b), procedural due process also dictates that one's property right cannot be deprived except pursuant to constitutionally adequate procedures. The court noted the importance of procedural fairness throughout the pre-decisional stage:

> Our system is premised on the procedural fairness at each stage of the removal proceedings. An employee is entitled to a certain amount of due process rights at each stage and, when these rights are undermined, the employee is entitled to relief regardless of the stage of the proceedings.

Stone, 179 F.3d at 1376. The court in *Stone* reaffirmed its earlier holding in *Sullivan v. Department of the Navy*, 720 F.2d 1266, 1274 (Fed. Cir. 1983), that, when a procedural due process violation has occurred, such a violation is not subject to the harmless error test. *Stone,* 179 F.3d at 1377.

In *Ward,* the court reaffirmed that, if ex parte communications rise to the level of a constitutional due process violation, the action must be reversed based on a denial of constitutional due process even if the communications concerned the penalty, and not the merits of the charges. In *Ward,* the court noted, "*Stone*, referencing Supreme Court precedent, emphasized the importance of giving an employee notice of any aggravating factors supporting an enhanced penalty as well as a meaningful opportunity to address 'whether the level of penalty to be imposed is appropriate.'" *Ward*, 634 F.3d at 1280 (citing *Stone*, 179 F.3d at 1376).

Here, I find the deciding official did not consider the underlying allegations of misconduct, i.e. the appellant's alleged misconduct while employed at the Borden Institute, before sustaining the removal action. At hearing, Sleger (the deciding official) testified that he relied on the negative suitability determination that was conducted by Mendes. HR (Testimony of Sleger). He stated that he is not a suitability expert, and that he assumed the suitability personnel conducted an appropriate suitability review. *Id.* He also acknowledged that he did not

assess the seriousness of the alleged misconduct at the appellant's prior employer. *Id.* Sleger did not testify as to the *Douglas* factors he considered, and his decision letter contains no analysis of the underlying charge or the penalty factors. IAF, Tab 8 at 23-25. The *Douglas* factors form he completed at the time of his decision reflects only that he determined the appellant failed to meet a condition of employment based on the outcome of the suitability review, and that it was a "technical issue based on the suitability review." *Id.* at 29. Similarly, the proposing official attested that he relied on the negative suitability determination, and that there were "security and safety concerns" at the appellant's prior agency. HR (Testimony of Hewitt). Hewitt attested he did not know if the appellant was specifically charged with selling products for personal gain, and further that he did not know what specific misconduct the appellant was charged with. *Id.*

Accordingly, I find the agency violated the appellant's right to due process when Sleger sustained the removal action without considering the facts underlying the suitability determination, *i.e.*, by failing to consider the merits of the factors which allegedly rendered the appellant unsuitable for Federal employment. Although Sleger attested that he considered the appellant's replies, preponderant evidence established his decision rested solely on Mendes' suitability determination. Moreover, Mendes' determination was made without affording the appellant the opportunity to respond to the purported negative information. That is, the appellant had no opportunity to challenge the suitability determination which led to the removal action. Although the agency complied with procedural requirements under 5 U.S.C. § 7513 as it related to the specific charge, this process was not meaningful because the appellant did not have an opportunity to challenge the unsuitability finding upon which the charge was based. This is contrary to the well-established requirement that the deciding official "hear the employee's explanation, assess its credibility, and determine whether the charges should be sustained." *Anderson v. Department of*

Transportation, 15 M.S.P.R. 157, 166 (1983). The deciding official must "exercise independent judgment regarding the sustaining of the charges in each case," and the appellant must have a "meaningful opportunity to reply to the charges." *Anderson*, 15 M.S.P.R. at 168. This case is not unlike those where a deciding official renders a decision without considering the appellant's reply. *See Alford v. Department of Defense,* 118 M.S.P.R. 556, ¶ 6 (2012) ("An employee cannot be said to have had a meaningful opportunity to present his side of the story and invoke the discretion of the deciding official if the deciding official did not hear the appellant's oral reply to the proposal notice before issuing his decision."); *Massey v. Department of the Army,* 120 M.S.P.R. 226, ¶ 10 (2013) (reversing a removal for lack of due process where removal decision was issued without having scheduled the reply). Here, I find the deciding official failed to consider the substance of the charge, and thus the agency violated his right to due process.

I also find the agency violated the appellant's right to due process by failing to apprise him of the underlying misconduct. The proposal letter identified the charge of Failure to Meet a Condition of Employment (As a Result of a Suitability Determination). IAF, Tab 8 at 152. The proposal identified, in the background section, the conclusion reached as to the appellant's suitability, namely, "[t]he Civilian Personnel Office has determined you are not suitable for federal employment based on the contents of this case file…" *Id.* The case file contained information relating to the initial (favorable) suitability review; however, those documents fail to adequately apprise the appellant of his charged misconduct given that his initial suitability review was positive. *Id.* at 157-213. The case file also contains minimal documentation supporting Mendes' finding regarding suitability. *Id.* at 208-213. Mendes' narrative, which describes his conclusions regarding the appellant's suitability, fails to apprise the appellant of the specifics of his charged misconduct. *Id.* at 213. The proposing official Hewett attested that he was not aware of the specific misconduct the appellant

was charged with at the Borden Institute, and that he was generally unaware of whether or not the appellant was charged with selling products for personal gain. HR (Testimony of Hewett). Hewett also stated that some of the issues at the appellant's prior employment involved "concerns regarding the appellant's mental health and anger management type issues."[5] *Id.* However, this differs from the allegation that the appellant improperly printed posters at work. IAF, Tab 8 at 213. In sum, the record reflects that the agency documentation failed to specifically identify what the appellant's alleged misconduct was, or adequately apprise the appellant of his charged misconduct. I thus find the agency failed to comply with due process requirements in this regard.[6]

Due process is "flexible and calls for such procedural protections as the particular situations demands." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In *Gajdos v. Department of the Army,* 121 M.S.P.R. 361, ¶ 18 (2014), the Board advised consideration of the three factors (the "*Mathews* factors") to determine whether administrative procedures are constitutionally sufficient: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used; and (3) the government's interest, including the function involved and the fiscal and administrative burdens the additional or substitute procedural requirement would entail. *Id.* (internal citation omitted).

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[5] The underlying proposed removal action at the Borden Institute involved charges of failure to follow instructions, misuse of government equipment and materials, conduct unbecoming a federal employee, and inattention to duty. IAF, Tab 22 at 275-83. The agency's suitability determination appeared to identify some, but not all, of these issues.

[6] It is undisputed the appellant did not receive the entire OPM Investigations Service Report, which is contained in the record. IAF, Tab 22 at 7-271; HR (Testimony of Appellant, Mendes). I find no due process error in this regard because the suitability file the appellant received contained the substantive portions of that file. IAF, Tab 8 at 182-185.

Under the first *Mathews* factor, i.e., the private interest affected by the action, one must consider the "length and finality of that deprivation." *Id.*, ¶ 19. This factor weighs against the agency, as the appellant's removal decision ended his employment with the agency. The second *Mathews* factor, the risk of an erroneous deprivation and the probable value of additional procedural safeguards, also weighs against the agency. *Id.*, ¶ 20. Here, the underlying action at the appellant's prior employing agency involved complex facts. I find there was a high risk of "erroneous" deprivation of the appellant's property interest through the procedures used by the agency. Testimony at hearing supported that the appellant's performance and conduct at the Borden Institute was favorable in many respects. For instance, Joan Redding, Senior Production Editor at the Borden Institute, attested that she supervised the appellant for three years, at the Borden Institute. Redding attested that she gave the appellant positive performance reviews, and attested that he worked hard, was professional, and had integrity. HR (Testimony of Redding). She also testified that she had "zero trust" in the leadership of the Borden Institute based on how they treated her and other employees. *Id.* She noted that leadership had removed another employee for taking protected leave under the Family and Medical Leave Act, and that they retaliated against her (Redding) after she complained of a hostile work environment. *Id.* She attested that they forced her out after sixteen years of successful performance. *Id.* She also attested that the appellant's personal use of the office printer was a "fairly minor" issue that should have led to counselling, and not a removal. *Id.* Richard Salomon, Technical Editor and a coworker of the appellant at the Borden Institute, also testified regarding the appellant's reliability and professionalism, and added that the appellant provided him with excellent graphic support. HR (Testimony of Saloman).

Considering the third *Mathews* factor, the government's interest, I find this too weighs against the agency. The agency has a strong interest in ensuring that its police officers are suitable for employment given the importance of the

position and the high degree of trust placed on incumbents. Thus, the agency had a strong interest in taking disciplinary action against the appellant under these circumstances. However, the agency could have afforded the appellant a process that complied with constitutional due process requirements had Sleger considered the appellant's underlying misconduct and the applicable *Douglas* factors as the deciding official, rather than having him function as a "ratifying official" who essentially rubber-stamped the suitability decision made by Mendes.[7] Weighing the *Mathews* factors, I find the agency failed to satisfy the requirements of due process in this case.

The agency contends the appellant received the same due process rights afforded to any other employee facing a Chapter 75 action because he was permitted the opportunity to respond to the proposed action through written and oral replies. IAF, Tab 18 at 5-6. The agency's position, however, is not supported by the record, which shows the appellant was denied the opportunity to challenge the merits of the underlying suitability action. In addition, the deciding official seemingly believed he lacked the authority to overturn or otherwise question the suitability determination made by Mendes. HR (Testimony of Sleger). As such, the process afforded the appellant was not a meaningful one because he was never provided the opportunity to challenge the basis for the suitability determination, and, in essence, the deciding official lacked the authority to change the outcome of the removal.

Although the agency is entitled to subsequently initiate "new, constitutionally correct" proceedings against the appellant based on these same facts, *see Stone*, 179 F.3d at 1377, or to take some other action on another legal basis, I find the agency's action based on the record before must be reversed. Even if were to reach the merits of the action, I find the charge is lacking as the

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[7] The agency also could have taken an action under 5 C.F.R. part 732 (National Security Positions) if the appellant's issues with his prior employer impacted his ability to hold a Secret security clearance, which was a requirement of his position. IAF, Tab 8 at 165.

record fails to support that the appellant's conduct at the Borden Institute was unsuitable. Moreover, the appellant offered unrebutted testimony contradicting much of the alleged misconduct underlying the suitability determination. HR (Testimony of Appellant, Redding).

Accordingly, I find the agency action must be REVERSED.

The appellant asserted affirmative defenses.

The appellant alleges the agency's removal action resulted from harmful procedural error and retaliation based on whistleblowing. IAF, Tab 10 at 1-2. Because the appellant may be entitled to additional relief if he proves his allegations that the agency's action constituted prohibited whistleblower reprisal, this affirmative defense is not rendered moot by the determination that the agency's action must be reversed on due process grounds. *Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶¶ 13, 14 (2012); *Cowart v. U.S. Postal Service*, 117 M.S.P.R. 572, ¶ 8 (2012).

The appellant's harmful procedural error claim, however, is moot based on the found due process violation. This affirmative defense is distinguishable from the whistleblower retaliation claim because it does not entitle him to any relief beyond reversal of the action. *See Fernandez v. Department of Justice*, 105 M.S.P.R. 443, ¶ 5 (2007) (a matter is moot where the employee received all of the relief that he could have received "if the matter had been adjudicated and he had prevailed"); *Compton v. Department of Energy*, 3 M.S.P.R. 452, 454 (1980).

The appellant bears the burden of proving his affirmative defenses by preponderant evidence. *See* 5 C.F.R. § 1201.56(b)(2)(i)(C).

The appellant failed to establish the agency's decision was based on whistleblowing retaliation.

The appellant contends the agency removed him in retaliation for disclosures and activity protected by the Whistleblower Protection Act (WPA) of

1989 and the Whistleblower Protection Enhancement Act (WPEA) of 2012. Specifically, the appellant claims the agency retaliated against him because of disclosures he made, at the Borden Institute, to Gina Frank alleging a hostile work environment. IAF, Tab 5 at 9. More specifically, the appellant states that, in January 2022 and again in March 2022, he told Frank that Chief Layout Editor Lyndon Crippen-Gonzalez was creating a hostile work environment. *Id.* He also alleges that Frank retaliated against him based on an unspecified type of complaint he made against Administrative Officer Gilbert Rodriguez on July 13, 2021, for which Gina Frank retaliated against him. *Id.* at 12. The appellant also states he filed an Equal Employment Opportunity (EEO) complaint on January 6, 2022. *Id.*

The record reflects that, in 2019, Rodriguez accused the appellant of committing an unauthorized commitment on government purchases. *Id.* at 35. In 2021, Rodriguez called the appellant's cell phone, but the appellant did not answer; the appellant called him back later. *Id.* In December 2021, Rodriguez scolded the appellant concerning completion of course work training, and the appellant told him he had other work to do and would get to it as soon as he could. *Id.* The next day, Rodriguez asked him why he was printing so many colored prints, and when the appellant told him it was a for project, Rodriguez said, "That's Ass O' Nine." *Id.* In January 2022, the appellant filed an EEO complaint alleging Rodriguez created a hostile working environment. *Id.* at 36.

In March 2021, the appellant spoke to Crippen-Gonzalez regarding some corrections. *Id.* According to the appellant, Crippen-Gonzalez had been disrespectful to him by laughing and smirking at things the appellant said, rolling his eyes, and turning his back to the appellant when the appellant spoke to him. *Id.* A couple days later, Crippen-Gonzalez smirked and smiled at the appellant again. *Id.* In March 2022, the appellant spoke to Crippen-Gonzalez regarding receipt of an email. Crippen-Gonzalez alleged said to the appellant, "Don't start with me this morning," and slammed the door in his face. *Id.* The appellant

reported this incident to Gina Frank. *Id.* Redding reported the appellant had previously complained to her "about two staff members being disrespectful toward him after they worked together for several months," and that she counseled him and the coworkers and developed a new procedure for handling the work-related issues. IAF, Tab 8 at 136; HR (Testimony of Redding); *see also* IAF, Tab 8 at 183.

To meet his evidentiary burden, the appellant must prove by preponderant evidence that: (1) he engaged in protected whistleblowing activity, *i.e.*, activity protected under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (B), (C), or (D); and (2) the protected whistleblowing activity was a contributing factor[8] in the agency's decision to take or fail to take a personnel action. 5 U.S.C. § 1221(a); *Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1367 (Fed. Cir. 2020); *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 5 (2016).

If the appellant proves by preponderant evidence his protected activity was a contributing factor in a covered personnel action, the agency then must prove by clear and convincing evidence it would have taken the same action even absent the disclosure or other protected activity. *Salerno,* 123 M.S.P.R. 230, ¶ 5; *see also* 5 C.F.R. § 1209.7. In determining whether an agency meets this burden, the Board will consider the following factors: the strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

[8] Contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure. 5 C.F.R. § 1209.4(d).

As an initial matter, it is unclear whether the appellant made a protected disclosure or engaged in protected activity.[9] To qualify for whistleblower protection, an appellant must have a reasonable belief that his disclosure "evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8). An abuse of authority is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person, that results in personal gain or advantage to himself or to preferred other persons, or that is inconsistent with the mission of the agency. *Smolinski v. Merit Systems Protection Board*, 23 F.4th 1345, 1352 (Fed. Cir. 2022); *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 15 (2014). Gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 19 (2010).

While a coworker's treatment, or creation of a hostile work environment, could rise to a violation of law, rule, or regulation, the appellant failed to make a nonfrivolous allegation that she reasonably believed this occurred here. Moreover, vague allegations of wrongdoing do not constitute proof of a protected disclosure. *See, e.g.*, *El v. Department of Commerce*, 123 M.S.P.R. 76, ¶ 8 (2015) (the disclosures must be specific and detailed, not vague allegations of wrongdoing); *Luecht v. Department of the Navy*, 87 M.S.P.R. 297, ¶ 12 (2000) (a report of "ongoing fraud" lacked the detail necessary to constitute a nonfrivolous allegation of a violation of law, rule, or regulation). The appellant has not made a nonfrivolous allegation that he had a reasonable belief that the matters he disclosed were such that a reasonable person in his position would have believed

[9] It appears one of his complaints was an EEO complaint, which would not be a protected disclosure or activity under 5 U.S.C. § 2302. IAF, Tab 5 at 42-43; *see also Edwards v. Department of Labor*, 2022 MSPB 9; *Williams v. Department of Defense*, 46 M.S.P.R. 549 (1991).

evidenced a violation of law, rule, or regulation. *Chambers v. Department of the Interior,* 515 F.3d 1362, 1368 (Fed. Cir. 2008); *White v. Department of the Air Force*, 391 F.3d 1377, 1383-84 (Fed. Cir. 2004).

Moreover, disagreements with the agency's debatable decision regarding the handling of workplace matters are not protected under the WPEA. *See Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 7 (2015) (appellant's policy disagreement with agency's decision not to reorganize the service as the appellant suggested is not protected under the WPEA). The appellant does not explain in any detail how the manner in which his colleagues treated him amounted to an abuse of authority. *See Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001) (abuse of authority occurs when there is arbitrary or capricious exercise of power by federal official or employee that adversely affects rights of any person or results in personal gain or advantage to himself or to preferred other persons).

The appellant has not made a nonfrivolous allegation that he had a reasonable belief the matters he reported were ones that a reasonable person in his position would have believed evidenced gross mismanagement, a violation of law, rule or regulation, or any other protected disclosure or activity. Thus, I find the appellant failed to make a nonfrivolous allegation that he engaged in protected activity when he told Frank, or others, about the behavior of Crippen-Gonzalez or Rodriguez. *Chambers,* 515 F.3d 1362, 1368; *White,* 391 F.3d 1377, 1383-84. Insofar as the appellant raised complaints of discrimination in his EEO complaint, these also would not be protected disclosures. *See generally McCray v. Department of the Army,* 2023 MSPB 10, ¶ 21 (holding claims of discrimination in violation of title VII are excluded from protection as whistleblowing under 5 U.S.C. § 2302(b)(8)); *Edwards v. Department of Labor*, 2022 MSPB 9, ¶ 5 (same).

However, even assuming the appellant engaged in protected activity or made a protected disclosure at the Borden Institute, I find that the agency has

shown by clear and convincing evidence that it would have removed the appellant even absent his disclosures. The individuals involved in his removal had knowledge of his disclosures, as the appellant referenced them in his reply. IAF, Tab 8 at 52. However, I find the agency presented clear and convincing evidence for its action. With regard to the strength of the agency's evidence in support of the action, although I did not sustain the action, the agency based the removal action on a suitability determination. HR (Testimony of Sleger, Hewett). Sleger credibly attested that he believed the removal action was supportable based on the underlying suitability determination. HR (Testimony of Sleger). His testimony was genuine and sincere, and I found his explanation for his actions to be truthful. He was unhesitating and forthright in explaining why he imposed disciplinary action. I credit the testimony of Sleger and Hewett that they believed removal was an appropriate course of action based on the appellant's position as a Police Officer. *Id.* After observing their testimony, I was left with a firm conviction that the removal was unrelated to the appellant's purported protected disclosures or activities. Consequently, the appellant's request for corrective action is denied. Accordingly, the first *Carr* factor weighs in favor of finding the agency would have removed the appellant in the absence of his whistleblowing activity.

As to the second *Carr* factor, the motives of the relevant agency officials to retaliate against the appellant must be considered. *See Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 30 (2008). Those responsible for the agency's performance overall may well be motivated to retaliate even if they are not directly implicated by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them in their capacities as managers and employees. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1370-71 (Fed. Cir. 2012). As an initial matter, I find no evidence supporting any motive to retaliate on the part of either Sleger or Hewett. The appellant's complaints during his employment at the Borden Institute did not implicate either

of these individuals or the agency as a whole. *Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶¶ 14-15. Both Sleger and Hewett testified in a neutral manner about the removal action, and I find no indication they were hostile to the appellant for expressing concerns or making complaints during his tenure at the Borden Institute. HR (Testimony of Sleger, Hewett). Sleger also attested that Frank was not in his chain of command, and was not an individual who could impact his career. HR (Testimony of Sleger). Hewett acknowledged that the second suitability review was initiated partly based on the information provided by Frank. He also stated that Frank told him that he had concerns about the appellant's mental health and anger management issues. HR (Testimony of Hewett). However, Hewett attested that he and Frank did not discuss the appellant's protected activities or whistleblowing. *Id.* Both Hewett and Sleger testified candidly and in a forthright manner. *See Hillen*, 35 M.S.P.R. 453, 458 (witness demeanor is a factor in assessing credibility).

Taking the record as a whole, I found no indication the removal action was motivated by a retaliatory animus due to the appellant's prior complaints at the Borden Institute.[10] Accordingly, the second *Carr* factor weighs in favor of

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[10] Insofar as the appellant contends the Borden Institute retaliated against him for protected whistleblowing, such a claim is beyond the scope of this Board appeal. Further, insofar as the appellant asserts an affirmative defense of EEO retaliation, the agency has shown by preponderant evidence that it would have taken the removal action regardless of any retaliatory motive. *Savage v. Department of the Army,* 122 M.S.P.R. 612, ¶¶ 48-49, 51 (2015), *overruled in part by Pridgen v. Office of Management and Budget,* 2022 MSPB 31, ¶¶ 23-25. When an appellant asserts an affirmative defense of retaliation for EEO activity protected by Title VII, he bears the burden to prove by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. *Pridgen,* 2022 MSPB 31, ¶ 21. If the appellant meets his burden, the burden then shifts to the agency to prove by preponderant evidence that it would have taken the personnel action regardless of the discriminatory or retaliatory motive. *Id.*, ¶¶ 48-49, 51. The Board has clarified that evidence of discrimination or retaliation should not be sorted into piles of "direct" and "indirect" evidence, and emphasized that the evidence should be considered as a whole in determining if an appellant satisfied his burden. *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, ¶¶ 28-31 (2016), *clarified by Pridgen*, 2022 MSPB 31, ¶¶ 23-24*; see also Zepeda v. Nuclear Regulatory Commission,* 2024 MSPB 14, ¶¶ 30-33.

holding the agency would have removed the appellant in the absence of his whistleblowing activity.

Thus, I conclude the agency provided clear and convincing evidence supporting the appellant's removal.[11]

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective January 22, 2024. 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

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[11] The agency failed to produce evidence on the third *Carr* factor. Thus, it adds little to the overall analysis in this case, but if anything, tends to cut slightly against the agency. *See Soto*, 2022 MSPB 6, ¶¶ 17-18; *Miller v. Department of Justice*, 842 F.3d 1252, 1262 (Fed. Cir. 2016) (citing *Whitmore*, 680 F.3d at 1373-74).

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 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 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 for review on that basis.

FOR THE BOARD: Theresa J. Chung
_____
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 **January 22, 2025**, 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/).

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. 420 (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 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 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).

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-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 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.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Service — Robert Dredden
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Lachlan McKinion
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Daniel Meyer
Served on email address registered with MSPB

Agency Representative

Electronic Service — Chief Labor Law Field Support Center
Served on email address registered with MSPB

Agency Representative

Electronic Service — Charles Vaith
Served on email address registered with MSPB

12/18/2024
(Date)

Sharon McDaniel

Sharon McDaniel
Paralegal Specialist