**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**ATLANTA REGIONAL OFFICE**

DINA S. KASWATUKA,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DA-1221-22-0301-W-1

DATE: January 10, 2024

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

Gabrielle Carter, and Michael O'Connell, Washington, District of Columbia, for the agency.

**BEFORE**
John Henderson
Administrative Judge

## INITIAL DECISION

Dina S. Kaswatuka filed this Individual Right of Action (IRA) appeal on May 24, 2022, asserting *inter alia*, that the Bureau of Prisons (BOP) retaliated against her for protected whistleblowing by terminating her employment during her probationary/trial period. A hearing was conducted by video on December 5, 2023.

For the following reasons, corrective action is GRANTED.

Background

The following facts are undisputed unless otherwise identified. The appellant was employed as a Correctional Officer, GL-0007-5, assigned to Federal Medical Center (FMC) Carswell, in Fort Worth, Texas. Initial Appeal File (IAF), Tab 7. The appellant was appointed to her position on January 31, 2021, subject to a one-year probationary period. IAF, Tab 7 at 50. A few days before she completed her probationary period, on January 28, 2022, the agency notified her that she was being terminated for unsatisfactory performance related to repeated failures to follow equipment accountability procedures. *Id*. Generally, the Board lacks jurisdiction to review terminations during probationary periods. *See* 5 U.S.C. §§ 7511–7513 (excluding individuals serving a probationary period from definition of an "employee" with a vested right of appeal to the Board).

However, the appellant alleged that she engaged in protected whistleblowing on or about July 22, 2021, when she reported that she saw an inmate touch or rub another correctional officer's shoulder. IAF, Tab 6 at 13, Tab 7 at 74, Tab 27 at 5. On January 30, 2022, she filed a complaint with the Office of Special Counsel (OSC) and averred that her protected whistleblowing was a contributing factor in the agency's decision to terminate her employment. IAF, Tab 6 at 11.

OSC notified the appellant that it was ending its inquiry into her allegations and informed her that she had the right to seek correction action from the Board. *Id*. This timely appeal followed. By Order dated February 13, 2023, I determined that the appellant had shown that she exhausted her remedies before OSC and made sufficient nonfrivolous allegations of fact to establish Board jurisdiction under 5 U.S.C. § 1221. IAF, Tab 27. A hearing was held to provide the appellant an opportunity to prove her allegations by preponderant evidence.

The appellant bears the burden of proving her allegations by preponderant evidence.

The appellant bears the burden of proof on the issue of jurisdiction and the merits. 5 C.F.R. § 1201.57; *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001). Once jurisdiction is established, corrective action may only be ordered if the appellant proves by preponderant evidence[1] that she exhausted her remedies before OSC, that she made disclosures protected under the WPEA, and that those disclosures were a contributing factor in the personnel action taken against her. 5 U.S.C. § 1221(e)(1); *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356-1357 (Fed. Cir. 2003). If the appellant meets this burden of proof, the burden then shifts to the agency to demonstrate, by clear and convincing evidence,[2] that it would have taken the same personnel action in the absence of such whistleblowing. 5 C.F.R. § 1209.2(c).

The appellant has proven that she made a protected whistleblowing disclosure.

The appellant testified that on or about July 21, 2021, she was working in the FMC and saw a female inmate rub a male correctional officer's shoulder. Hearing Audio (HA). She recounted that she was walking at the time with three other officers—Lt. Anthony, Lt. Krill, and Capt. Bucker—but they did not appear to have noticed. She explained that inmates are not allowed to touch correctional officers and she believed that it was an assault by an inmate or suggested an inappropriate sexual relationship between the officer and the inmate.

The appellant related that she verbally reported the incident to Lt. Anthony that day and prepared a memorandum the next day. Before providing the

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

[2] Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard that preponderant of the evidence. 5 C.F.R. § 1209.4(e).

memorandum to Lt. Anthony she went to the Center's correctional counselor, Sonja Allen, for guidance. The appellant testified that Allen told her that she was obligated to make a statement about what she saw. The appellant testified that she then provided the memorandum to Lt. Anthony and the Center's Special Investigative Agent (SIA), Christi Malone, and sent a copy to Allen. A copy of the memorandum was provided by the appellant. It is addressed to Lt. Anthony and is dated July 22, 2021. IAF, Tab 58 at 17.

Allen recalled that she encouraged the appellant to report what she saw to Malone if it made her feel uncomfortable. HA. She related that SIA has the authority to investigate such allegations against staff. According to Allen, it is agency policy that the Warden be informed of such allegations, though she did not know if he was actually informed.

Lt. Anthony confirmed that he received the memorandum from the appellant. HA. He stated that the correctional officer identified in the incident, Lt. Curiel, was already under investigation for inappropriate conduct with an inmate. He testified that he and Malone looked at available video footage but could not confirm the report because camera coverage of the area was poor and the quality of the video was low. He related that as result he could not confirm the events but forwarded the information to the Office of Internal Affairs (OIA) and the Office of Inspector General (OIG) for further investigation.

SIA Malone testified that she spoke with the appellant about her memorandum, but the appellant could not identify the inmate and the description was generic. HA. SIA Malone stated she generally reviewed available video but could not recall details of the investigation. She was able to recall that she viewed the appellant's report to be an allegation of an inmate assaulting a staff member rather than an allegation of sexual misconduct. She noted that in May 2021, prior to the appellant's memorandum, OIA had asked her to conduct an investigation of Lt. Curiel after she reports from multiple inmates of an

inappropriate relationship. She explained that that investigation was taken over by OIG, which handles criminal investigations. HA.

The agency did not dispute that the appellant made the disclosure but argued that it was not protected whistleblowing because she reported an assault by an inmate on a correctional officer. The agency also argued that the disclosure was not protected because correctional officers have an obligation to report violations of policy or staff misconduct.

Under 5 U.S.C. § 2302(b)(8), a protected disclosure is a disclosure of information which the employee reasonably believes evidence a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health and safety. *See Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 11 (2004). To establish a reasonable belief, an appellant need not prove that the condition disclosed actually established one or more of the listing categories of wrongdoing, but she must show that the matter disclosed was one which a reasonable person in her position would believe evidenced one of the situations specified. The test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence one of the situations set out in 5 U.S.C. § 2302(b)(8). *Huffman v. Office of Personnel Management*, 92 M.S.P.R. 429, ¶ 9 (2002).

Contrary to the agency's argument, what matters is not how the agency viewed the disclosure. The focus of the analysis is on whether the appellant had a reasonable belief that that the information she provided evidenced a violation of a law, rule, or regulation, or any other (b)(8) category. The appellant testified that she believed that the inmate's rubbing of Lt. Curiel's shoulder suggested an inappropriate or sexual relationship between the two. The appellant did not explicitly state her concern in the memorandum. Nonetheless, it is a reasonable inference given the reported facts—the inmate "rubbed" Lt. Curiel's shoulder,

and Lt. Curiel did not immediately address it even though inmates are not allowed to touch correctional officers. The agency concedes that, at the very least, this would have constituted an assault on Lt. Curiel which he should have addressed immediately or reported. The appellant's concerns were also consistent with testimony from Malone that Lt. Curiel had been the subject of a prior investigation for inappropriate relationships with inmates. I find, therefore, a disinterested observer with knowledge of these essential facts could reasonably conclude that Lt. Curiel was involved in an inappropriate relationship with an inmate.

With regard to the assertion that the disclosure was not protected because agency policy required the appellant to report wrongdoing by staff or inmates, the Board has explained that 5 U.S.C. § 2302(f)(2) requires an employee to prove an additional element when a disclosure is made during the normal course of the employee's duties and the employee's principal job function is to regularly investigate and disclose wrongdoing. *Williams v. Department of Defense*, 2023 MSPB 23 (Aug. 17, 2023). Here, there was testimony that agency policy requires all staff members to disclose wrongdoing by an inmate or staff member. Nonetheless, there was no evidence or indication that the appellant's principal job function was to regularly investigate and disclose wrongdoing. Accordingly, I find that this heighted burden of proof does not apply. *See Harry v. Department of the Interior*, MSPB Docket No. DE-1221-20-0383-W-1, Remand Order at 14 (Aug. 30, 2023) (if either condition is unsatisfied, then section 2302(f)(2) does not apply).

<u>The appellant has shown that her disclosure was a contributing factor in her termination</u>.

The appellant must also show that the protected disclosure or activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). Here, the appellant asserts that her

disclosure contributed to the agency’s decision to terminate her during her probationary period.

To prove that a disclosure was a contributing factor in a personnel action, the appellant need only demonstrate that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 10 (2003). The knowledge-timing test allows an employee to demonstrate that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.* at ¶ 11; *see* 5 U.S.C. § 1221(e)(1). Once the knowledge/timing test has been met, an administrative judge must find that the appellant has shown that her whistleblowing was a contributing factor in the personnel action at issue, even if after a complete analysis of all of the evidence a reasonable factfinder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 21 (2010).

Evidence at hearing confirmed that Warden Carr, the deciding official, was notified of the protected disclosure shortly after it was delivered on July 22, 2021. SIA Malone testified that she told Carr about the memorandum shortly after she received it. HA. Carr testified that he did not recall being notified of the memorandum or the allegation, but he agreed that the Warden is required to authorize all SIA investigations and noted that he had conversations with Malone “all the time” on gang intelligence and investigations. Thus, I find it more likely than not that Carr was notified of the disclosure on or about July 22, 2021, by Malone before she began her investigation. The termination letter was issued by Carr on January 28, 2022, roughly six months after Carr would have been notified of the disclosure. The Board has held that a personnel action

that occurs within one to two years of the disclosure is sufficient to satisfy the timing element. *See Salazar v. Department of Veterans Affairs*, 2022 MSPB 42, ¶ 32. Accordingly, I find that the appellant has shown that her disclosure was a contributing factor in her termination.

<u>The agency has failed to show by clear and convincing evidence that it would terminated the appellant regardless of her protected disclosure</u>.

When an appellant satisfies her prima facia case, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the personnel action in the absence of the whistleblowing. *Id*. at ¶ 34. In determining whether an agency has met this burden, the Board generally considers the following ("*Carr* factors"): (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Id*. at ¶ 35 (citing *Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 11 and *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)).

The decision letter explained that the appellant was being terminated for repeated failures to "properly account for equipment by placing your chit on the shadow board when removing equipment for use during your shift." IAF, Tab 7 at 50. It stated that the appellant had been verbally counseled on two occasions in August 2021 and given a "minimally satisfactory log entry" in September. It related that, despite this, "there has been no noticeable improvement" and the appellant again failed to "place your chit on the shadow board on December 27, 2021." *Id*.

The agency provided testimony from Lt. Johnny Frontera, who explained that he supervised the appellant for approximately eight to ten months. HA. He related that he would go to assigned areas and talk to correctional officers,

including the appellant. He explained that metal tags with an officer's initials, called chits, are required to be put on shadow boards when tools or equipment are taken from the board for accountability. HA. Frontera recalled counseling the appellant at least once on August 24, 2021 on the requirement to use chits before making a Performance Entry on September 3, 2021. IAF, Tab 7 at 70. When shown his Performance Entry, he recalled that he counseled the appellant a second time few days later, resulting in the Performance Entry. When asked to explain why he took these actions, he noted that the appellant seemed to believe that she did not have to follow the policy and did not understand the importance of it. HA.

The appellant testified that she only saw Frontera 2-3 times total. She recalled Frontera asking her about a chit on August 24, 2021, but stated that he only asked where her chits were (she told him they were in her car). HA. She disagreed that Frontera counseled her to use the chits and claimed that he only praised her for doing a "good job." Regarding August 28, 2021, she related that he asked her about her chits again, and she told him that they were in her pocket. She related that he did not say anything until he then came back with the Performance Log Entry, telling her that the chit policy was "part of training." She explained that she understood that chits were only used for tools[3] and, in any event, Frontera had never explained the policy to her "in a way [she] could understand." HA.

The appellant's testimony is inconsistent with an email she sent on September 3, 2021. IAF, Tab 7 at 72-73. In the email, the appellant recalled her interaction with Frontera on August 24, 2021, and wrote that, when he asked why her chit was not on the board, she told Frontera that she "accidently" left her chit

[3] There was ample testimony discussing the differences between what is considered a tool versus what is considered equipment and whether the policy applied or was enforced for both tools and equipment. At one point during her testimony, the appellant asserted that the written policy provided by the agency was "falsified" but provided no evidence in support. HA.

in her vehicle and that she only used the chit when checking out equipment from "control." She wrote that he told her that she must carry her chit with her at all times, and she responded that no other Lieutenant had required her to put a chit on the board to check out equipment normally assigned to the unit. *Id*. She confirmed that Frontera asked her about why her chit was not on the board a second time on August 28, 2021, and she stated that she had it in her pocket because she "had just took my chit back so [I] didn't forget." She noted that Frontera had not mentioned chits on two prior occasions when he was doing rounds.

In light of the above, I find that the first *Carr* factor weighs in the agency's favor. Contrary to her testimony, her email evidences that Frontera did counsel her regarding the proper use of chits on August 24, 2021, and August 28, 2021, and that the appellant failed to follow his direction and agency chit procedures. I note that the appellant asserted that chit procedures applies only to tools and not equipment. However, she provided testimony from Christopher Beasley, a Senior Officer Specialist and former union official, who described the chit procedures similarly to Frontera and who clarified that it applied to both tools and equipment. HA. There was also testimony from an agency witness, Beth Buckner, reiterating that chit procedures fell under a key and tool control policy that applied to both tools and equipment. HA (Buckner). While the appellant provided testimony from another witness, Jennifer Howard, that chits did not have to be used unless there was a post order requiring it, she was the only witness (other than the appellant) to testify to that effect.

Turning to the second *Carr* factor—the existence and strength of any motive to retaliate—I find that this also weighs in the agency's favor, though only slightly. The disclosure did not concern either Frontera or Carr, the two officials involved in the decision to terminate the appellant. Nonetheless, the disclosure did suggest that a supervisory correctional officer might be engaged in an inappropriate relationship with an inmate. Such a relationship if made public

would reflect poorly on the Warden, the institution, and the agency as a whole. *See Smith v. Department of the Army*, 2022 MSPB 4, ¶¶ 28-29 (holding that the Board must consider any professional retaliatory motive and general institutional interests). However, the record reflects that the agency was already investigating Lt. Curiel for inappropriate relationships and that the appellant's disclosure did not contribute to that investigation given that it could not be substantiated. As noted above, Carr genuinely did not seem to recall even being notified of the allegation, though he most likely was. It seems credible under the circumstances that the allegation was not memorable. Thus, I see little basis for a retaliatory motive by either Frontera or Carr for the disclosure.

I find that the third *Carr* factor weighs in the appellant's favor. Carr could not recall having terminated or removed another employee for violation of the chit policy in his tenure as the Warden. Beasley, a former union official with over 20 years of service with the agency, also could not recall an instance in which an employee was removed or terminated for violation of the chit policy. As a result, the agency provided no evidence that similarly-situated non-whistleblowers were treated similarly. The Board has found that this factor may be considered neutral where the record fails to address it or the agency has not identified whether similarly-situated comparators exist. *Karnes v. Department of Justice*, 2023 MSPB 12, ¶36. This, however, does not appear to be a case where there is an absence of relevant comparators, but rather a case where termination for failure to follow chit-procedures is an outlier.

Most importantly, the testimony suggests that the most common way such violations are corrected has been something less than termination or removal. It is unclear why or how the decision was made to terminate her employment based on the log entry, especially given that it is undisputed that the appellant was only counseled twice, had not yet completed all of her formal correctional officer training, and no other corrective actions were taken before her termination. As Buckner testified, a performance log entry is normally the corrective action taken

if an individual has to be counseled more than once. HA. Given this, and the relatively minor nature of the infraction, I am unable to form a firm belief that the agency would have terminated the appellant, at least for the reason stated in the termination notice, in the absence of her whistleblowing. Accordingly, I find that the agency has failed to meet its burden by clear and convincing evidence.

## DECISION

The appellant's request for corrective action is granted.

## ORDER

¶1 The agency is ORDERED to vacate the appellant's termination and provide her with relief such that she is placed in nearly as possible in the same situation she would have been had the agency not terminated her during her probationary/trial period. The agency must complete this action no later than 20 days after the date of this decision.

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: John A Henderson
______________________________
John Henderson
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 14, 2024**, 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

**NOTICE TO THE APPELLANT**
**REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL AND/OR COMPENSATORY DAMAGES**

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.204.

In addition, the Whistleblower Protection Enhancement Act of 2012 authorized the award of compensatory damages including interest, reasonable expert witness fees, and costs, 5 U.S.C. §§ 1214(g)(2), 1221(g)(1)(A)(ii), which you may be entitled to receive.

If you believe you are entitled to these damages, you must file a motion for consequential damages and/or compensatory damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

**NOTICE TO THE PARTIES**

If this decision becomes final and the Board "determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action" under 5 U.S.C. § 1215. 5 U.S.C. § 1221(f)(3). Please note that while any Special Counsel investigation related to this decision is pending, "no disciplinary action shall be taken against any

employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel." 5 U.S.C. § 1214(f).

**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 | Dina Kaswatuka<br>Served on email address registered with MSPB |
| | Agency Representative |
| Electronic Service | Gabrielle Carter<br>Served on email address registered with MSPB |
| | Agency Representative |
| Electronic Service | Michael O'Connell<br>Served on email address registered with MSPB |
| | Private Attorney |
| Electronic Service | Lachlan McKinion<br>Served on email address registered with MSPB |
| | Private Attorney |
| Electronic Service | Daniel Meyer<br>Served on email address registered with MSPB |

| 01/10/2024 | *Markeilsha Hamer* |
| --- | --- |
| (Date) | M. Hamer |
| | Paralegal Specialist |