

1 W. Murphy
2 US Department of Justice
3 Federal Bureau of Prisons
4 Federal Detention Center
5 P.O. Box 30547
6 Honolulu, Hi 96820

7 UNITED STATES OF AMERICA
8 MERIT SYSTEMS PROTECTION BOARD
9 WESTERN REGIONAL OFFICE

10 [REDACTED]) DOCKET NUMBER [REDACTED]
11 Appellant,)
12 v.)
13 DEPARTMENT OF JUSTICE,) Motion to Show Cause
14 Agency.)

15 NOW COMES Petitioner, [REDACTED] by and through her undersigned
16 representative. Pursuant to 5 CFR § 752.405 - Appeal and grievance rights,
17 [REDACTED] respectfully requests that the Board consider this Motion to
18 Show Cause in which Appellant pleads that she was not, in fact, still a
19 probationary employee when she was removed from service on November 23rd,
20 2020.

21
22 **UNDISPUTED FACTS**

23 Appellant began her service with the Bureau of Prisons on November 24th, 2019.
24 Appellant was due to complete her full year of probation on November 21st,
25 2020.

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1 Appellant was on her regular scheduled days off on November 22nd and 23rd,
2 2020.

3 Appellant was called by Caption Michael Miller and requested to come in to
4 the Federal Detention Center on her day off (non-scheduled workday) to "speak
5 with the Warden".

6 Appellant was informed by Warden E. Derr that she was to be removed from
7 service, effective 11:00 AM, November 23rd, 2020.

8
9 **ARGUMENT**

10 Title 5 USC § 315.804 Termination of probationers for unsatisfactory
11 performance or conduct is quite clear on the specific procedures for the
12 termination of a probationary employee. However, it is also clear in
13 defining precisely when probation ends.

14
15 § 315.804 section (b) states, "*Probation ends when the employee completes his*
16 *or her scheduled tour of duty on the day before the anniversary date of*
17 *the employee's appointment. For example, when the last workday is a Friday*
18 *and the anniversary date is the following Monday, the probationer must be*
19 *separated before the end of the tour of duty on Friday since Friday would be*
20 *the last day the employee actually has to demonstrate fitness for further*
21 *employment.*"

22
23 In the instant case, Appellant would have served her last "*scheduled tour of*
24 *duty*" on November 21st, 2020; Appellant would have then been on her scheduled
25 days off until "*the anniversary date of the employee's appointment*". When

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1 the Agency terminated Appellant's employment, they failed to follow the
2 requirements of 5 USC § 315.804. The last tour of duty performed by
3 Appellant on November 21st, 2020 would have been the "last day
4 the employee actually (had) to demonstrate fitness for further employment"

5
6 Additionally, Appellant believes that the Agency has run afoul of the
7 Doctrine of Laches.

8
9 Appellant asserts that the Agency has "slept on its rights", and that, as a
10 result of this delay, the Agency put itself in the position of removing
11 Appellant when she was no longer positioned as a probationary employee.

12
13 Laches is associated with the maxim of equity, "Equity aids the vigilant, not
14 the sleeping ones (*Vigilantibus non dormientibus æquitas subvenit*
15)" who sleep on their rights. Put another way, the Agency's failure to assert
16 its rights in a timely manner can result in a claim being barred by laches.

17
18 All three prongs of the laches test were fulfilled by the Agency.

- 19 1. a delay in bringing the action,
- 20 2. a delay that is unreasonable and
- 21 3. that prejudices the defendant

22
23 Because the Agency delayed beyond the timeframes laid out in 5 USC § 315.804,
24 the Appellant was not granted the rights entitled to her under § 752.404
25 Procedures, and was thereby prejudiced by the Agency.

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WHEREFORE, Appellant respectfully requests that the Board, in view of this motion, determine that the agency committed procedural error by failing to provide the required procedures, that the error was harmful, that is, that it is likely to have caused the Agency to reach a conclusion different from the one it would have reached in the absence or cure of the error, and that the error caused substantial harm or prejudice to the rights of Appellant.

Respectfully submitted, this 23rd day of December 2020.

Dated this 23rd of December, 2020

W. Murphy

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CERTIFICATE OF SERVICE

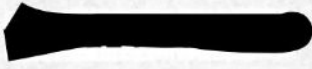

I, W. Murphy, hereby certify that on the 23rd of December, 2020, I electronically filed the foregoing document with the MERIT SYSTEMS PROTECTION BOARD via <https://e-appeal.mspb.gov/>.

I also certify that the foregoing document is being served this day on all counsel of record identified via <https://e-appeal.mspb.gov/>.


W. Murphy

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

)	
Appellant,)	
)	DOCKET NO. 
v.)	AJ:
)	
DEPARTMENT OF JUSTICE,)	
FEDERAL BUREAU OF PRISONS)	DATE: January 14, 2021
)	
Agency.)	

SETTLEMENT AGREEMENT

 ("Appellant") and the United States Department of Justice, Federal Bureau of Prisons ("Agency"), agree as follows:

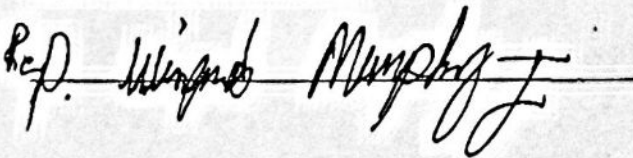
1. In full and final settlement of the above-referenced Merit Systems Protection Board ("MSPB") appeal, the Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Honolulu, Hawaii, and Appellant freely and voluntarily agree to the following terms and conditions.
2. In exchange for the promises made by the Agency in this agreement, Appellant agrees to immediately withdraw the above-captioned MSPB appeal with prejudice, and any other complaints, appeals, or grievances, based on Appellant's employment with the Agency up to the date of the execution of the agreement. The present appeal will be considered dismissed as withdrawn.
3. The Agency will rescind the removal letter issued on November 23, 2020, within 30 days of the execution of this Agreement.
4. The Agency agrees to reinstate the Appellant, within 30 days of the execution of this Agreement to the position of Correctional Officer (GS-0007-05), at the Federal Detention Center in Honolulu, Hawaii ("FDC Hawaii").
5. The Agency agrees to pay Appellant the appropriate amount of back pay from the date of her termination until her reinstatement, in accordance with relevant statutes and regulations. This amount will included the appropriate lost wages, restoration of

sick and annual leave, benefits, and a reasonable amount of overtime that Appellant would have reasonably earned during the aforementioned period.

6. The Appellant agrees to waive any right, should such right exist, to appeal or seek remedies before any forum, judicial, administrative, or other, based upon, in connection with this Appeal, as well as any other complaints, grievances, lawsuits, or other legal actions in any forum she has filed against the Agency prior to the date on which she signs the agreement, except in the event of a breach and/or recession of this Agreement. This Agreement does not waive or release any rights or new claims not arising from the facts contained in this Appeal or the pending Appellant may have that arise after the date on which she signs this Agreement.
7. Appellant waives, releases, and forever discharges the Agency, its officers, agents, employees, and representatives (in their official and/or personal capacities) from any claims, or demands, or causes of action, which the Appellant has or may have, arising from this Appeal.
8. If either of the parties believe this Agreement has been breached, the party will not seek to enforce the Agreement until it first makes a good faith effort through the other party, or that party's representative, to resolve and cure the perceived breach.
9. Should new disputes arise between the parties involving issues other than the terms of this Settlement Agreement, the parties agree such disputes are independent matters which must be presented through the usual channels of administrative, grievance-arbitration, or judicial redress, and not through an action to enforce this Settlement Agreement.
10. This Settlement Agreement does not constitute an admission of fault, error, or wrongdoing by either party and the parties agree that the MSPB has not assumed jurisdiction on this matter and that there has been no third party finding on the merits for the underlying matter.
11. The parties agree that this Settlement Agreement is being entered into due to the unique circumstances of this appeal, and it is not to be used as precedent for any other case. The parties intend that neither this Settlement Agreement nor any terms herein, will be used to justify similar terms in any subsequent matter. The Settlement Agreement shall not be used, cited, or relied upon by either party in connection with any other judicial, administrative, or other proceeding, except in the event of a breach and/or enforcement of this Agreement.
12. This Agreement shall not limit or otherwise affect management rights set forth under 5 U.S.C. § 7106, or any other law, policy, rule, or regulation. This includes but is not limited to Management's ability to investigate and take appropriate action on allegations of misconduct that may have existed at the time of Appellant's removal.

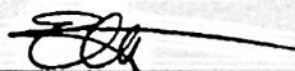
13. The parties agree that they are each responsible for their own fees and/or costs associated with or incurred in the above-cited appeal, and the parties waive the right to seek those fees and/or costs from the other party.
14. The parties agree that the terms of this Settlement Agreement constitute the entire agreement between the parties and that no other promises or representations, either express or implied have been made or sought to induce acceptance of any of the terms herein.
15. Appellant declares she has read and reviewed, with her representative, this settlement agreement and fully understands the terms of such agreement, and that she voluntarily accepts for purposes of making a full and final compromise of all claims of any nature, which she may have in connection with her employment with the Agency through the date on which she signs this Settlement Agreement.
16. The parties acknowledge that there is adequate consideration for each and every promise contained herein.
17. If any provision of this Settlement Agreement is rendered invalid by a court or agency of competent jurisdiction or otherwise held or declared invalid under applicable law, such provision shall be deemed void, and the remainder of the Settlement Agreement shall continue in full force and effect.
18. The parties agree that they have full authority to enter into this Settlement Agreement and to make the promises, obligations, and consideration contained herein.
19. The Effective Date of this Agreement is when it is fully executed by the signatories designed below. The Agency agrees to provide Appellant and her representative with a fully executed copy of the Settlement Agreement.

FOR THE APPELLANT



Date: Jan 14, 2021

FOR THE AGENCY



Estela Derr
Warden
Federal Bureau of Prisons
Federal Detention Center, Honolulu

Date: 1-14-2021

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

[REDACTED]

Appellant,

v.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS

Agency.

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)
) DOCKET NO. SF-315H-21-0126-I-1
)
) AJ:
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)
) DATE: January 19, 2021
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NOTICE OF WITHDRAWL OF APPEAL

I, Katelyn Mann, the Appellant in the above referenced matter hereby withdraws with prejudice the appeal in this matter pursuant to a settlement agreement between the parties.

[REDACTED]

January 19, 2021