UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

TONITA CABAN,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
AT-0752-13-0002-I-1

DATE: March 20, 2013

Neil A.G. McPhie, Esquire, Arlington, Virginia, for the appellant.

Alicia Daniels Lewis, Esquire, Atlanta, Georgia, for the agency.

BEFORE
Richard W. Vitaris
Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On September 19, 2012, TonitaCaban timely appealed the action of the agency removing her from the position of Correctional Officer with the Federal Correctional Institution (FCI), Miami, Florida, effectiveAugust 15, 2012.

The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511(a)(1)(A), 7512(2), and 7513(d). The hearing the appellant requested was held on February 14, 2013, at Miami, Florida. For the reasons stated below, the agency action is MITIGATED.

ANALYSIS AND FINDINGS

The agency proved that the appellant introduced contraband into the Institution (Charge 1).

The agency has charged the appellant with six charges. The first is introducing contraband into the Institution on or about January 21 and 28, 2008. The contraband in question is a Play Station Portable (PSP) hand-held game device containing a Texas Hold 'Em gaming cartridge. To prevail, the agency must prove the charge by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Preponderant evidence is "[t]he 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. § 1201.56(c)(2).

The appellant admits that she brought the PSP into the Institution as alleged. Her defense is that she does not believe that the PSP constitutes contraband within the meaning of Bureau of Prison policy and regulations.

Program Statement 5510.12, Section 6 (b), Searching, Detaining, or Arresting Visitors to Bureau Grounds and Facilities, states that:

> prohibited objects include any objects that could jeopardize the Bureau's ability to ensure the safety, security and orderly operations of Bureau facilities and protect the public. Examples of prohibited items include but are not limited to; weapons, explosives, drugs, cameras of any type, recording equipment, electronic devices, and any other object that violate criminal laws or are prohibited by federal regulations or bureau policies

Agency File, Tab 4dd (Emphasis added). Accordingly, because the PSP is an electronic device, and was not authorized by the Warden, I find the appellant did introduce contraband to the Institution. The appellant's belief that the PSP was not contraband may be a factor in mitigation since an offense of inadvertence is less serious than a willful one, but it is certainly no defense to the charge. Charge 1 and its specification are SUSTAINED.

The agency proved that the appellant showed favoritism toward an inmate (Charge 2).

The agency next alleges that the appellant on two occasions allowed an Inmate Noel Alvarado to play with the PSP on two occasions in January 2008. The appellant admits that she did so, but again asserts that the PSP was not contraband. She further asserts that allowing Inmate Alvarado to play with the game did not constitute "favoritism." I disagree.

First, I find that the PSP was contraband for the same reasons cited for my finding with respect to Charge 1. Second, I find that allowing Inmate Alvarado to play with the PSP and have it in his cell constitutes favoritism toward him. Other inmates were not able to enjoy that same privilege. As Lieutenant (Ret.) Armando Bermudez testified for the agency, inmates are not allowed to play with this kind of game and allowing one inmate to do so while others cannot could create a disturbance between inmates. The rules pertaining to contraband are designed to prevent any possibility of inmate uprisings. Indeed, as the agency correctly notes Title 18 U.S.C. § 1791 criminalizes providing or attempting to provide an inmate with "prohibited objects." Charge 2 and its specification are SUSTAINED.

The agency proved that the appellant was inattentive to duty (Charge 3).

The agency next charged the appellant with being inattentive to duty by playing Texas Hold 'Em on her PSP device while on duty on January 21, 2008. The appellant admits that she played the game with her PSP as alleged, but she disputes that doing so constituted inattention to duty. In the appellant's view, she was able to play the video game without violating Bureau of Prisons Program Statement 3420.09 which requires employees to "remain fully alert and attentive during duty hours," and, thus, be able to "respond immediately andeffectively to all emergency situations."

I find that the agency has proven that the appellant was inattentive to duty. As Warden Robby Wilson persuasively testified, correctional officers are

expected to be alert and vigilant in observing inmates at all times in order to look for suspicious behavior. Allowing inmates to observe a correctional officer playing a video game invites them to engage in inappropriate activity which adversely affects the security of the institution. I am satisfied that the appellant could not have been attentive to her duties while, at the same time, concentrating on a video card game. Charge 3 and its specification are SUSTAINED.

The agency failed to prove that the appellant failed to cooperate in an official investigation because she had had a Fifth Amendment right not to testify (Charge 4).

The agency charges that the appellant failed to cooperate in an official investigation when on June 14, 2010, the appellant refused to answer questions put to her by an Office of Inspector General (OIG) investigator and invoked her Fifth Amendment right to remain silent.[1]

The Fifth Amendment privilege against compulsory self-incrimination may be asserted in an administrative investigation to protect against any disclosure that an individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656, 32 L.Ed. 2d 212 (1972). In addition, the threat of removal from one's position constitutes coercion which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed. 2d 562 (1967). Nevertheless, when an employee is once granted immunity through this so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v.*

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[1] The appellant testified that she did not cooperate in the investigation on advice of counsel and would have done so if her attorney had advised her to do so. That consideration, however, is not a defense but, at best, a mitigating factor to be considered if the charge had been sustained.

Broderick, 392 U.S. 273, 278, 88 S. Ct. 1913, 1916, 20 L. Ed. 2d.1082 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284-85, 88 S.Ct. 1917, 1919-20, 20 L.Ed.2d 1089 (1968).

It is undisputed that, in this case, Special AgentJorge L. Tocuyo, who at the time was with the agency's OIG,[2] informed the appellant that she was exempt from criminal prosecution unless she were to provide a false statement during the interview. Agency File, Tab 4m, p. 9. When the appellant's union representative, Mr. Lionel Phillip asked Inspector Tocuyo whether the appellant had immunity, *id.*at 8, or had written permission from the U.S. Attorney to conduct the interview, the inspector said

> No. There's — all they have to do is decline criminal prosecution on the matter, and that's what they did. And once they — once they decline criminal prosecution on this matter we come and we then – this is you know, in other words what they call use immunity.

Id.

I find that this was legally defective invocation of the *Garrity* rule. In *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1350-52 (Fed. Cir. 2001), the Board's reviewing court discussed a similar case in which the U.S. Attorney did not grant an employee with use immunity in writing.

In *Modrowski*, the agency sent the employee a letter conveying the U.S. Attorney's declination of criminal prosecution and informing him he no longer had a legal basis for refusing to answer agency's questions. The Court found this invocation of the *Garrity* rule invalid, however, because the appellant was only informed that the U.S. Attorney had declined prosecution, but was not given an express grant of immunity. *Id.* at 1351. Based upon the facts, the Court concluded that Mr. Modrowski might well have had a reasonable apprehension that some of his responses might be used against him in any eventual criminal proceeding.

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[2] Special Agent Jorge L. Tocuyo has since transferred to the Department of Transportation's OIG office.

In this case, although Special AgentTocuyo told the appellant that the U.S. Attorney had declined criminal prosecution and that she, therefore, had "use" immunity, he did not provide her with a written grant of immunity or clearly define the scope of that immunity. The only thing he gave the appellant in writing pertaining to immunity was OIG Form III which stated that the appellant was going to be questioned regarding "official misconduct," and that neither her answers nor any information or evidence gained by reason of her answers could be used against her in any criminal proceeding. Agency File, Tab 4n, attachment. After the appellant signed the form, the investigator took it back from her and did not give her a copy.

When her union representative sought clarification as to what "official misconduct" meant on the form, he remarked to the investigator that anything could be thrown in the category of "official misconduct." Special Agent Tocuyoreplied: "Absolutely. Well, we're here to discuss all of the allegations that are against her besides the allegations that developed during the interview." In other words, the appellant had no way to determine if the scope of the interview would exceed the charges about which the United States Attorney had declined prosecution.

In *Sher v. Department of Veterans Affairs*, 97 M.S.P.R. 232, ¶ 12 (2004), the Board emphasized the need for an unambiguous grant of immunity as a necessity for invoking the *Garrity* rule. While the Board reviewed Sher's grant of immunity from the U.S. Attorney and found it unambiguous, in the instant case, the agency did not provide the appellant with either a written grant of immunity from the U.S. Attorney, nor even a writing from the agency itself setting forth the terms of the use immunity. Indeed, it is not even clear from the record that the U.S. Attorney granted the appellant with immunity in this case. Rather, it appears that Special Agent Tocuyomay have simply considered a declination of prosecution to be tantamount to a grant of immunity.

In addition, Mr. Phillip asked Special Agent Tocuyo for a copy ofthe OIG Form III so that the appellant would have evidence she had been given immunity. When the investigator refused, her union representative protested:

> But why can't we have a copy of what we're signing, that we — that we have — she has immunity.

Agency File, Tab 4n, p. 14. To which Special Agent Tocuyo replied:

> It's according — it's according to OIG policy. What makes you think that having a copy is going to change the conditions.

In this case, it is easy to see why the appellant wished written clarification of her immunity. She had no way of knowing that the U.S. Attorney had actually granted her immunity other than Special Agent Tocuyo's say so, or that the scope of an interview with him would not exceed the scope of the charges for which prosecution had been declined.

Based upon the foregoing, I find that the appellant did not receive an unambiguous grant of immunity and had the right to assert her privilege against self-incrimination. While the investigator told the appellant she had immunity, and had her sign a form saying so, it was impossible for the appellant to determine that the immunity being granted to her was as comprehensive as the protection afforded by the Fifth Amendment privilege because she might be subject to questioning on allegations above and beyond those over which the U.S. Attorney had declined criminal prosecution, and was denied a copy of the immunity grant. *Cf.Kastigar v. United States*, 406 U.S. 441, 449; 92 S. Ct. 1653, 1659; 32 L. Ed. 2d 212, 219 (1972) (an individual cannot be held in contempt for refusing to testify where his grant of immunity is less comprehensive than the Fifth Amendment privilege).

Having found that the appellant was entitled to assert her Fifth Amendment privilege, I find that the charge is NOT SUSTAINED.

The agency failed to prove that the appellant had an improper relationship with a former inmate, family member and/or friends of an inmate (Charge 5).

The agency next alleges that during 2007-08 the appellant had an inappropriate relationship with a former inmate, Mr. Silvio Gomez, with Mr. Gomez's mother, and with his brother. The agency contend that the appellant failed to report to his superiors that she had played beach volleyball with Mr. Gomez in 2008, exchanged phone numbers with him after the game, and that she had likewise failed to report that she knew Mr. Gomez's brother and that his mother was her hairdresser.

It is uncontroverted that Silvio Gomez was released from the custody of the Bureau of Prisons in 2004. Bureau of Prisons Program Statement 3420.09 defines former inmate as "[a]ny inmate for whom less than one year has elapsed since their release from Bureau custody or supervision of a federal court." Appellant'sHearing Exhibit F. Since Mr. Gomez was released in 2004, he was, therefore, not a former inmate within the meaning of agency regulations in 2007-08, and, thus, the appellant was not precluded from contact with Mr. Gomez, his mother, or his brother. Accordingly, this charge is NOT SUSTAINED.

The agency failed to prove that the appellant attempted to interfere with an official investigation (Charge 6).

Finally, the agency alleges that the appellant through a series of actions attempted to interfere with an official investigation. There are 5 specifications which the agency labels (a) through (e).

Specifications (a) through (d) concern the appellant's attempt to obtain information regarding an agency investigation of which she was one of the subjects. Specification (a) alleges that the appellant called the Special Housing Unit to ask the reason why Inmate Alvarado was locked up after he was found in possession of the appellant's PSP device. Specifications (b) through (d) allege

that the appellant made other phone calls to learn who the OIG had interviewed in the investigation.

To prove that the appellant attempted to interfere with an official investigation, the agency is required to prove that the appellant had the intent to interfere with an official investigation and that she committed an overt act in furtherance of that intent. *Cf.* Am Jur 2d Criminal Law § 154 (elements of an intent crime).

While Special AgentTocuyo testified that he believed these contacts were intended to interfere with his investigation, the agency has presented no evidence to show either that the appellant's questions actually interfered with the investigation or that her knowledge of who had been interviewed constituted a substantial step toward that end.

The appellant testified that she had simply made inquiries to find out who had been interviewed in the investigationagainst her so that she would be prepared to defend herself. The appellant explained that she never asked any of the witnesses to make any statements or change their testimony in any way. The agency presented no evidence to the contrary. Under these circumstances, I find that the agency has failed to prove specifications (a) through (d).

Specification (e) on the other hand, alleges that on January 31, 2008, the appellant sent text messages to Ms. Rebecca Mendez asking her to delete pictures from Mendez's MySpace[3] page. Special AgentTocuyo testified that Ms. Mendez's MySpace page had photographs of the appellant at the beach with former inmate Gomez and that, by asking Ms. Mendez to delete those photos from her social media account the appellant was, in effect, asking Ms. Mendez to destroy evidence that the appellant had had an improper relationship with a former inmate.

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[3] Special Agent Tocuyo explained that MySpace is a social media website similar to Facebook.

Ms. Mendez did not testify but her affidavit in the agency's investigative file states:

> On January 30, 2008, [a] day in which I was off-duty, I received 3 text messages from Caban [the appellant]. . . . In the text messages, Caban acknowledging that we were not in [sic] speaking terms, asked me to delete my personal Myspace.com webpage. She made references that both of our names were out there and that she did not want anything to happen to me. She said she was at a friend's house trying to delete her personal Myspace.com webpage.
>
> I did not understand what Caban intended when she sent me the messages. . . .

Agency File, Tab 4q.

The appellant testified that Special AgentTocuyo told her that Ms. Mendez had been showing inmates pictures of the appellant in a bikini posted at Myspace.com. The appellant said she and Ms. Mendez were not on speaking terms at that point, but that she texted her asking her to delete the webpage because she did not like the idea of inmates seeing her in a bikini.

Analysis of this specification turns on the appellant's intend. If the appellant asked Ms. Mendez to take down the Myspace.com site, knowing that the site contained a photo of her with Mr. Gomez, and with the intent of destroying evidence, then both the specification and the charge must be sustained. On the other hand, if the appellant's intent was to ensure that the Institution's male inmates be unable to see a picture of her clad only in a bikini, then the offense of attempt to interfere with an investigation cannot be proven.

I credit the appellant's testimony. First, the appellant testified that she had learned that inmates were viewing her photo on MySpace from Special AgentTocuyo himself. Thus, the appellant knew that the inspector had already seen the photographs and, therefore, deleting them to prevent him from seeing them would be pointless. Second, Ms. Mendez herself said she did not know what the appellant intended by her text messages. It is more likely than not that the appellant's motivation was exactly what she said it was: to prevent the male

inmates from being able to ogle over her photographs, rather than to interfere with Special AgentTocuyo's investigation. Accordingly, specification (e) has not been proven. The charge isNOT SUSTAINED.

The agency action does not promote the efficiency of the Federal service.

In addition to proving the charge against the appellant, the agency must show that the action taken promoted the efficiency of the service. 5 U.S.C. § 7513(a). I find that the first element of this standard, nexus, is established by the nature of the charges that were sustained which demonstrate a clear and direct relationship between the articulated grounds for an adverse action and either the appellant's ability to accomplish her duties satisfactorily or some other legitimate government interest.*Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 8 (2010)

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Where, as here, not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *Id.* at 308. In such a case, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed.Cir.1999).

The appellant alleges that the removal penalty is too severe under the doctrine of disparate penalties. To establish disparate penalties, the appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 15 (2010).

If she does so, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Id.*

The agency has argued that disparate penalty analysis is inappropriate here because none of the comparative cases involved as many multiple chargesas does this case. The appellant argues, on the other hand, that the comparative cases reflect that the sustained charges were viewed as minor by agency management and, standing alone, would warrant no more than a short suspension. In the appellant's view, this evidence of disparate penalties shows that that the action against her, albeit based on multiple charges, is grossly disproportionate to her misconduct.

I agree with the appellant that it would be inappropriate to reject this disparate penalty evidence showing lenient prior treatment of introducing contraband and showing favoritism to an inmate just because the appellant has also committed other misconduct. The Board can capably consider both factors — the lenient treatment given some of the charges as well as the fact that the appellant was also guilty of other offenses — in determining whether the agency-imposed penalty based upon all of the sustained charges is within tolerable limits of reasonableness.

The appellant presented evidence that another correctional officer, Andrae Barnes, introduced contraband; specifically, acellular phone into the facility.Agency Exhibit M.In Mr. Barnes's case, the agency only had proposed a 3-day suspension, which was reduced by the Warden to a 1-day suspension.

The appellant also presented evidence that Mr. Marco Cuero, an Employee Services Manager provided an inmate access to confidential staff documents, including training material with staff addresses and social security numbers. Appellant's Exhibit L. The latter violated the same Bureau of Prisons Program Statement as did the appellant's action in giving Inmate Alvardo the PSP video

game. Mr. Cuero, although a manager who should be held to a higher-standard than other employees, received a 14-day suspension and reassignment.

In a Rebuttal Affidavit, KennyAtkinson, the deciding official in the Cuero matter, claimed that the suspension andreassignment was based on Mr. Cuero's "19 years of agency service, his lack of anyprior disciplinary sanctions, and his acknowledgment and acceptance of responsibility forhis actions." In the other AgencyRebuttal Affidavit, Jorge Pastrana, the deciding official inthe Barnes matter, noted that Barnes' suspension for introducing dangerous contrabandwas reduced to 1 day because Barnes accepted responsibility for the incident, cooperatedwith the investigation, and had no prior disciplinary record.

While it is true that Mr. Cuero had 19 years of unblemished Federal service while the appellant had only 14, that mitigating factor is offset by the fact that Mr. Cuero was a supervisor and, thus, may be held to a higher standard. *Edwards v. United States Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010). In addition, providing inmates with addresses and social security numbers of staff is far more deleterious to the maintenance of good order and discipline in a penal institution than allowing an inmate to play a hand-held video game.

While Warden Wilson, the deciding official, testified that a PSP device could be modified to allow an inmate to access a Wi-Fi signal and, thus, communicate with the outside which would pose a significant security risk, the agency presented no evidence that Inmate Alvarado did anything with the device more serious than play a game of Texas Hold 'Em. On the other hand, Mr. Barnes brought a cell phone into the institution, which unlike the PSP device could be used for communication without modification, and more effectively at that. Yet, the agency mitigated his proposed 3-day suspension to 1-day based upon his acceptance of responsibility and remorse.

While the appellant said she was sorry for what she had done, I was singularly unimpressed with the quality of her remorse and have questions regarding her potential for rehabilitation. As the agency correctly argues, the

appellant admitted that she still does not believe it was wrong for her to introduce the PSP device into the correctional institution or allow an inmate to take possession of it. Moreover, the appellant admitted on cross-examination, that during her oral response to the Warden, she allowed her Union representative to misrepresent facts regarding Lieutenant Bermudez's knowledge of her bringing the PSP into the institution, and her reasons for bringing the device in. When asked if she corrected her Union representative or attempted to clarify the information, the appellant responded in the negative.

Finally, I have considered that the appellant was indefinitely suspended for nearly five years[4]pending investigation into her alleged misconduct. *But cf. Camaj v. Department of Homeland Security*, 119 M.S.P.R. 95, ¶ 14 (2012) (the mere existence of an open agency investigation into alleged misconduct does not serve as cause for takingan adverse action under subchapter II of chapter 75); *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 28 (2010) (same).Warden Wilson testified that he did not consider the indefinite suspension in arriving at his penalty determination. While the warden correctly testified that an indefinite suspension is "nondisciplinary" and therefore should not be considered as a prior offense, I believe the fact that the appellant was without pay for nearly five years owing to the investigation of the misconduct underlying this discipline is also a significant mitigating circumstance which the deciding official should have been considered. *SeeDouglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981) (The *Douglas* factors are a nonexhaustive list, and there may be other relevant penalty considerations).

In summary, despite the appellant'slack of genuine remorse, this was her first offense. She had already been indefinitely suspended for 5 years pending the investigation of these charges, and she has had 14 years of unblemished agency

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[4] The appellant was indefinitely suspended on September 8, 2008, and remain so through the effective date of her removal.

service. As discussed above, a more serious incident of introducing contraband was deemed to warrant only a 1-day suspension, and a more serious incident of showing favoritism to an inmate warranted a 14-day suspension. While this is a very difficult and close case, balancing all of these penalty considerations, I find the maximum reasonable penalty for the sustained charges to be a 90-day suspension and, therefore, the agency action taken does not promote the efficiency of the Federal service. 5 U.S.C. § 7513(a).

DECISION

The agency's action is MITIGATED.

ORDER

I **ORDER** the agency to cancel the removal and substitute in its place a **ninety** day suspension without pay. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

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

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully

complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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

INTERIM RELIEF

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

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

certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: /S/
Richard W. Vitaris
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 24, 2013**, 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 the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. 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 (eff. Nov. 13, 2012), 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) (eff. Nov. 13, 2012), 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.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

If your petition to the court "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)," you may file your petition for review with the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.

The right to file a petition for review to any of these courts is limited to the two year period beginning on the December 27, 2012 effective date of the Whistleblower Protection Enhancement Act.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703(b)(1)(B) (5 U.S.C. § 7703(b)(1)(B)). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information about 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, and 11. Additional information about the other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

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.

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 AGENCY/INTERVENOR

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc., with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:

a. Outside earnings with copies of W2's or statement from employer.

b. Statement that employee was ready, willing and able to work during the period.

c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.

5. 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.