2022 WL 1609643 (PERSONNET)

Merit Systems Protection Board - Initial Decisions

ALFORD, WADE
V.
UNITED STATES POSTAL SERVICE

No. DE-0752-20-0208-I-2
May 19, 2022

Before: MILLER, PATRICIA M., AJ

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

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)
WADE ALFORD,) DOCKET NUMBER
Appellant,) DE-0752-20-0208-I-2
) DE-0752-21-0103-I-1
v.)
)
UNITED STATES POSTAL SERVICE,) DATE: May 19, 2022
Agency.)
)

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Wade Alford, Casa Grande, Arizona, pro se.

Samuel J. Schmidt, Esquire, Sandy, Utah, for the agency.

BEFORE

Patricia M. Miller
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 2, 2020, Wade Alford (appellant), a preference-eligible, timely filed an appeal with the U.S. Merit Systems Protection Board (Board) challenging the United States Postal Service's (agency) March 26, 2020 decision to remove him for alleged misconduct from the position of City Carrier (2310-2009) and the federal service, effective April 4, 2020. Docket No. DE-0752-20-0208-I-1, Initial Appeal File (208 IAF), Tab 1. The deciding official was Jorge Lopez, Manager, Post Office Operations, Casa Grande Post Office and his decision was based upon a March 2, 2020 notice of proposed removal.

A hearing was initially convened on August 18, 2020. 208 IAF, Tab 29. On October 19, 2020, the agency sought to moot the appellant's appeal by rescinding the March 26, 2020 removal decision and paying the appellant applicable back pay and benefits. 208 IAF, Tab 43. Since the agency still had pending its March 2, 2020 notice of proposed removal, at the appellant's request I dismissed the appeal without prejudice on November 6, 2020. 208 IAF, Tabs 48 and 49. On January 22, 2021, the agency issued a second decision to remove the appellant based upon the March 2, 2020 proposal notice and again removed the appellant effective January 29, 2021. Docket No. DE-0752-21-0103-I-1 Initial Appeal File (103 IAF), Tab 1 and Tab 9, pp. 9-13. Steve Rademacher, Manager, Customer Service Operations, Tucson, Arizona, was the deciding official. *Id*.

On January 26, 2021, the appellant moved for the first appeal to be refiled (Docket No. DE-0752-20-0208-I-2, Secondary Appeal File (208 SAF), Tab 1) and also filed an appeal of Rademacher's January 22, 2021 removal decision. 103 IAF, Tab 1 and Tab 9, pp. 9-13. In a February 26, 2021 order, I joined the two appeals for adjudication with Docket No. DE-0752-20-0208-I-2 as the lead case number. 208 SAF, Tab 9 and 103 IAF, Tab 14. I reconvened the hearing on May 4 and 7, 2021 (208 SAF, Tabs 22, 24, 27 & 28) and the record closed June 21, 2021 with the submission of closing statements. 208 SAF, Tabs 31-32.

Record evidence establishes that the appellant is a preference eligible who occupied the City Carrier position continuously for more than one year, and he is therefore an employee with appeal rights to the Board under 39 U.S.C. § 1005(a)(4)(A)(i). Accordingly, the Board has jurisdiction over the appellant's appeals pursuant to 5 U.S.C. §§ 7513(d) and 7701(a).

For the following reasons, the agency's adverse actions are REVERSED. The appellant's request for Corrective action is GRANTED IN PART and DENIED IN PART.

ANALYSIS AND FINDINGS

Due Process Findings for Docket No. DE-0752-20-0208-I-1

On March 2, 2020, Kenneth Cobos, Postmaster, Casa Grande, Arizona, issued to the appellant a notice of proposed removal based upon the charge of "violation of the United States postal standards of conduct: unacceptable behavior" due to an event that occurred on December 12, 2019 which is described in detail below. 208 IAF, Tab 9, pp. 91-96. Cobos noted the appellant had 19 years of federal service and made no mention of any prior discipline or prior misconduct. *Id*., p. 95. Lopez was designated the deciding official. On March 10, 2020, the appellant, through his representative J.R. Pritchett, submitted a written response. *Id*., pp. 83-90. On March 26, 2020, Lopez issued a decision letter affirming the misconduct charge and sustaining the penalty of removal. *Id*., pp. 78-81. The appellant filed an appeal, Docket No. DE-0752-20-0208-I-1. 208 IAF, Tab 1.

During the processing of Docket No. DE-0752-20-0208-I-1, the appellant raised several affirmative defenses which were accepted for adjudication on June 27, 2020 including discrimination on the basis of race (African-American) and prohibited personnel actions under 5 U.S.C. § 2302(b)(8). 208 IAF, Tab 22, pp. 3-4.

Based upon the deciding official's testimony during the August 18, 2020 hearing (208 IAF, Tab 29), it became apparent to all parties that the agency had committed procedural due process errors under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999) and *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011). The hearing was suspended to provide the parties with time to explore a possible resolution of the appeal. 208 IAF, Tab 28.

Mootness

On October 19, 2020, the agency filed a motion to dismiss the appellant's appeal as moot because the agency claimed it had fully rescinded the April 4, 2020 removal action. 208 IAF, Tab 43. An agency's unilateral modification of its action after an appeal has been filed does not divest the Board of jurisdiction unless (1) the appellant consents to divestiture or (2) the agency

completely rescinds the action, rendering the appeal moot. *Vidal v. Department of Justice*, 113 M.S.P.R. 254, ;4 (2010). An appeal is not moot until an appellant has in fact received all the relief to which he is entitled to if he were to prevail in the appeal. *White v. U.S. Postal Service*, 117 M.S.P.R. 244, ;11 (2012). Where the appellant has an outstanding claim of discrimination and seeks compensatory damages, the agency's complete rescission of the action does not moot the case, unless the discrimination claim does not have adequate factual support to merit a hearing. *Id*., ;15. Accordingly, I find the appellant's discrimination and reprisal claims in Docket No. DE-0752-20-0208-I-1 remain to be adjudicated and find the first appeal is not moot. *Savage v. Department of the Army*, 122 M.S.P.R. 612, ;;46-48 (2015).

The appellant's procedural due process rights were violated.

The appellant alleged his procedural due process rights were violated in Docket No. DE-0752-20-0208-I-1/2. 208 IAF, Tab 22. When a deciding official receives new and material information by means of ex parte communications, "then a due process violation has occurred, and the former employee is entitled to a new constitutionally correct removal procedure." *Stone*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). "[N]ot every ex parte communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the claimant to an entirely new administrative proceeding"; rather, "[o]nly ex parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice." *Id.* at 1376-77; *see Ward*, 634 F.3d at 1279. In *Stone*, the court specifically identified three factors "[a]mong the factors" that the Board should consider: "whether the ex parte communication merely introduces 'cumulative' information or new information; whether the employee knew of the error and had a chance to respond to it, and whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." *Stone*, 179 F.3d at 1377. The court determined that "[u]ltimately, the inquiry of the Board is whether the ex parte communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Id*. In *Ward*, the court clarified that the due process analysis articulated in *Stone* applies whether the ex parte communication related to the charge itself or to the penalty. *Ward*, 634 F.3d at 1279-80. In determining whether a due process violation has occurred, it does not matter if ex parte information was provided to the deciding official or if the deciding official considered information that he personally knew, as long as the information was considered in reaching the decision and not previously disclosed to the appellant. *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ; 10 (2011).

When Lopez testified about his penalty applying *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), he considered as a significant aggravating factor a July 2019 incident between the appellant and another employee resulting in the appellant being put on emergency placement. 208 SAF, Tab 29, pp. 24-26. It is undisputed by the parties (208 SAF, Tab 29, pp. 58-59) that the appellant was not provided prior notice that the July 2019 incident was being relied upon by the agency as an aggravating penalty factor. Applying *Ward* and *Lopes*, I find the failure to disclose to the appellant that the alleged July 2019 incident was considered a significant aggravating penalty factor was sufficiently prejudicial to the appellant and violative of his basic right to due process that his procedural due process rights were violated by the agency. Therefore, I find the agency's action removing the appellant effective April 4, 2020 must be REVERSED.

The appellant's affirmative defense claims are addressed further below since he raised them in both appeals.

Legal Standard for Adverse Action

The agency has the burden of proving its misconduct charge upon which the January 29, 2021 removal action is based by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(b)(1)(ii). Preponderant 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 true than untrue." *See* 5 C.F.R. § 1201.4(q). Proof of one or more specifications supporting a charge is sufficient to sustain the charge, and the agency need prove only the essence of a charge. *See Greenough v. Department of the Army*, 73 M.S.P.R. 648, 657 (1997), *review dismissed*, 119 F.3d 14 (Fed. Cir. 1997) (Table); *Tom v. Department of the Interior*, 97 M.S.P.R. 395, 404 (2004). Where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir.

1990). Nonetheless, failure to prove all underlying specifications may contribute to a finding that an agency's selected penalty was unreasonable. *E.g., Tryon v. U.S. Postal Service*, 108 M.S.P.R. 148, ; 5 (2008). If the agency proves its charge, it must show that the penalty imposed (here, the removal) is within the tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306.

In resolving witness credibility and evaluating the evidentiary weight of written statements and other documentary evidence, I have been guided by *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) and *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). According to *Hillen*, when resolving issues of credibility, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in questions; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events, and (7) the witness's demeanor. *Id.*

When evaluating documentary evidence, under *Borninkhof* the following factors affect the weight to be accorded such evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence, and (8) the credibility of the declarant when he made the statement attributed to him.

I have made my decision after considering all of the extensive evidence and argument in the record.

The agency has failed to prove its misconduct charge.

The agency charged the appellant with "violation of the United States Postal standards of conduct: unacceptable behavior." Specifically, the agency alleged that on December 12, 2019 the appellant had an unprovoked interaction with a co-worker, Bonafacio Gabaldon, which violated the agency's conduct standards "665.16 Behavior and Personal Habits" and "665.24 Violent and/or Threatening Behavior" justifying his removal from the federal service. 208 IAF, Tab 9, p. 91. The agency did not discipline Gabaldon.

I previously found and advised the parties that by charging the appellant with violating "665.24 Violent and/or Threatening Behavior" the agency is obligated to meet the legal standard under *Metz v. Department of the Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986). [1] In evaluating under *Metz* whether statements or behavior constitute threats, the Board applies the reasonable person criterion, considering the listeners' reactions and apprehensions, the wording of the statements, the speaker's intent, and the attendant circumstances. *See, Rose v. U.S. Postal Service*, 109 M.S.P.R. 31 (2007) (finding *Metz* applies to charge of "Unacceptable Conduct/Violent and/or Threatening Behavior towards Co-worker.") In order to decide whether the agency has met its burden of proof under *Metz*, I must first determine what happened on December 12, 2019.

As an initial matter, it is undisputed that the appellant came into work on the morning of December 12 5-10 minutes earlier than usual. The appellant normally arrived to clock-in 2-3 minutes after most employees had clocked-in; this later clock-in time was based on prior approval by management. 208 SAF, Tab 28, p. 59. It is also undisputed that the appellant came in early to raise with Gabaldon his belief that the day before - on December 11 - Gabaldon had deliberately knocked over some flyers the appellant was preparing to deliver. I find preponderant evidence in the record establishes that on December 11 Gabaldon had knocked the flyers over, kept walking, and did not assist the appellant in picking them up or otherwise apologize for knocking them over. 208 SAF, Tab 28, p. 77 and 208 IAF, Tab 10, p. 96, #14. Finally, it is undisputed that the appellant and Gabaldon are approximately the same size. 208 SAF, Tab 28, p. 48.

There were several witnesses to parts of the appellant's and Gabaldon's interaction on December 12 - the appellant's supervisor, David Coomber and various co-workers - Elma Maduro, Rebecca Garcia, Jaque Lopez, and Raymond Devellin. Except for the appellant and Gabaldon, no one witness observed and/or heard their entire interaction. Nonetheless, much of what occurred between the appellant and Gabaldon is undisputed.

Coomber recalled that on the morning of December 12, approximately 10 minutes prior to the carriers' start time, Gabaldon was standing at Coomber's desk filling out a no lunch form which he did most days. 208 SAF, Tab 27, pp. 163-64. The appellant came in through the back door and rapidly approached the desk. The appellant asked Gabaldon about his intentionally knocking over flyers the day before. Coomber admitted there was "some banter back and forth" between the appellant and Gabaldon. Coomber, however, failed to explain what was actually said by the appellant and Gabaldon during the "banter" even though he was close enough to hear them. Coomber recalled that the appellant moved closer to Gabaldon and Gabaldon stated "you need to get the hell out of my face." Coomber admitted there was another exchange between the appellant and Gabaldon. Again, Coomber failed to state what was said in the exchange even though he remained close enough to hear. Coomber stood up at which point the appellant took his glasses off. Coomber claimed the appellant "lunged in" hitting Gabaldon's chest. Maduro, Devellin, and Coomber separated them. *Id*. Coomber contended that the appellant aggressively took off his glasses as if he wanted to fight and his actions were a threat to others. *Id*., pp. 166; 170. Coomber claimed Gabaldon was merely going about his day and did nothing to provoke the appellant. *Id*., p. 170. Coomber escorted the appellant to the conference room and filled out paperwork placing the appellant on emergency placement. *Id*., p. 165. I note Coomber's testimony was consistent with an undated written statement he provided where he also claimed "I feel intimidated, and I fear for the safety of myself, and my fellow employees by Mr. Alfords hostile actions." 208 IAF, Tab 10, p. 98.

Coomber's version of what occurred was not fully corroborated by the recollections of Maduro and Devellin who were also directly involved in the December 12 incident. They described Gabaldon's actions as being equally culpable as the appellant's.

Maduro explained that she heard arguing while she was working on parcels nearby. 208 SAF, Tab 27, p. 113. She looked and saw the appellant and Gabaldon come around the management desks bickering, with the appellant following Gabaldon. *Id*. Gabaldon turned around and faced the appellant at which point they were stomach to stomach. *Id*. She walked up to them as did Devellin who was hollering for them to cut it out. She said "you guys." *Id*. The appellant and Gabaldon kept bickering. Maduro stepped between them, facing Gabaldon, and said to Gabaldon, "walk away just walk away" (*Id.*, p. 114) while Devellin stepped between them and had the appellant move away. Gabaldon kept saying things. It took some doing for Maduro to get Gabaldon to walk away. *Id*. Maduro also observed that the appellant is hot-headed. She was waiting for one or the other to throw a blow because they were just bickering back and forth and both were throwing insults. *Id*. The appellant was subsequently walked off the floor by Coomber. Maduro believed Gabaldon should have also been walked off the floor for his behavior. *Id*., pp. 115-16. I note Maduro made no mention of the appellant "lunging" at Gabaldon or that the appellant whipped off his glasses in an aggressive manner. She also testified consistent with her undated handwritten statement. 208 IAF, Tab 10, p. 104.

Devellin was standing by the time clock when he heard some arguing. He heard Gabaldon saying something to the effect of "go ahead and do it then." 208 SAF, Tab 28, p. 55. Devellin turned around and saw the appellant and Gabaldon face to face arguing. *Id*., pp. 44-45; 55. Gabaldon was facing him while the appellant had his back to him. *Id*., p. 56. Devellin's instinct was to try to de-escalate the situation. As he walked towards them, Devellin could see Coomber rising from his desk. *Id*., p. 45. Devellin's concern was "to get in between the two of them." *Id*. They were all about the same size. *Id*., p. 46. He did not notice "either of them aggressive toward each other." *Id*. Gabaldon had taken a step back so Devellin was able to step in between them and catch the appellant's eye. *Id*. He wanted to "have a better chance of bringing one of them, you know, back down." *Id*. It took him 30-45 seconds to "talk to Wade enough that he had calmed down enough." *Id*. Coomber had come over and tried to get the appellant to go one way and one of the clerks [Maduro] had "gotten JR [Gabaldon] to back up even a little bit more than he had on my way over." *Id*., pp. 46-47.

Devellin observed:

He [the appellant] appeared to be upset. He wasn't in, like, attack mode or anything like that. Like, I didn't have to touch him. I didn't--I just tried to--I called his name a few times because he was focused, you know, on something beyond me. I mean, he's looking through me, kinda, at whatever he was focused on. So it took me a few--a few moments to even get his attention to where he made eye contact with me.

IAF, Tab 28, p. 47. Devellin was then able to calm the appellant down. *Id*., p. 48. He did not observe any physical touching between the appellant and Gabaldon. *Id*., p. 49. Devillin noted that Gabaldon and the appellant were both actively participating in the argument, but neither was "really being aggressive towards the other." *Id*. I find Devillin testified consistent with a December 12, 2019 statement he made, where he also noted that it was "not the first time I had to step in and help calm a confrontation between Wade and others." 208 IAF, Tab 9, p. 109.

Applying *Hillen*, I find the testimony of Maduro and Devellin more credible than Coomber. Coomber failed to provide any details about the conversation between Gabaldon and the appellant, minimizing it as "banter;" nonetheless he solely blamed the appellant for the interaction. I find Coomber was coloring his testimony to make Gabaldon appear to be the victim. In contrast, both Maduro and Devellin testified that the appellant and Gabaldon were actively engaged in arguing and bickering with one another. Neither one of them saw the appellant "lunge" at Gabaldon, bump his chest, or behave towards Gabaldon in a threatening manner. I found unconvincing Coomber's claim that the appellant taking his glasses off was an act of imminent violence and thus a threat. The appellant taking his glasses off was so insignificant that neither Maduro nor Devellin mentioned it. Therefore, I do not find credible Coomber's claim that he felt intimidated by the appellant and feared for his safety due to the events of December 12.

In contrast, the testimony of Maduro and Devellin were very credible under *Hillen*. They were consistent and both were well positioned to observe the interactions between the appellant and Gabaldon; neither one of them felt threatened by the appellant when they stepped in between him and Gabaldon to break up their bickering. Finally, unlike Coomber, they exhibited no favoritism, believing both the appellant and Gabaldon behaved inappropriately.

Jaque Lopez explained that she heard the appellant's and Gabaldon's interaction but did not see it because she had her back to them. 208 SAF, Tab 28, p. 11. She was approximately 35 feet away and her view was also obstructed by big tall cages for parcels and casing. *Id*., p. 12. Lopez heard the appellant and Gabaldon arguing but she did not hear how it began. They appeared to be "in each other's faces" and they were "close enough to kiss." 208 SAF, Tab 28, p. 14 and 208 IAF, Tab 10, p. 105. She could hear the appellant talking and then she heard Gabaldon say "I wish you would but you won't." 208 SAF, Tab 28, pp. 16; 20 and 208 IAF, Tab 10, p. 105. Coomber went up to them and tried to resolve the situation. She heard Coomber tell "Wade to calm down. That he won't allow this on the floor. He said he'd give him 2 options. Stay and work calmly or go home." 208 SAF Tab 28, p. 20. She did not see the appellant after that interaction. *Id*. I note Lopez's testimony was consistent with her December 12, 2019, written statement where she also stated that she had no fear about working in the Casa Grande Post office. 208 IAF, Tab 10, p. 105.

Garcia observed the end of the incident between the appellant and Gabaldon, but did not witness how it started. 208 SAF, Tab 27, pp. 153-156. She heard a commotion, turned around, they were being separated. She did not hear what the appellant said but she did hear Gabaldon say "I wish you would." *Id*., p. 154. In her written statement dated December 12, 2019, Garcia noted the appellant and Gabaldon were face to face before they were separated. 208 IAF, Tab 10, p. 100. Garcia mentioned no concerns in either her testimony or her statement about being afraid to work at the Casa Grande Post office.

Gabaldon testified about his interaction with the appellant. Gabaldon explained he was standing at a supervisor's (Coomber's) desk filling out a no-lunch form when the appellant called him by his first name and asked him to explain what happened to the appellant's flyers. 208 SAF, Tab 27, p. 122. Gabaldon said the appellant look aggravated; he told the appellant he did not know what happened to the appellant's flyers; the appellant then said Gabaldon had knocked them over intentionally. *Id*. Gabaldon told him "I have no idea what you are talking about." *Id*. Gabaldon turned to clock-in when the appellant "kind of cut me off" and the appellant's chest bumped into Gabaldon's chest. Gabaldon said the appellant was irate. *Id*., p. 123. "Obviously, he wasn't going to let me turn around and walk away. He wanted more of a confrontation." *Id*., p. 124. He admitted telling the appellant

to "get the hell out of my face." *Id*., p. 128. He denied exchanging insults with the appellant. *Id*., p. 129. He also admitted the appellant never verbally threatened him. *Id*., p. 130. He assumed the appellant wanted to fight. He kept stepping backwards while the appellant stepped forward. *Id*., p. 124. Gabaldon claimed he thought the appellant was going to hit him because the appellant took off his glasses but admitted the appellant never exhibited a fighting stance. *Id*., p. 130. Devellin and Maduro then moved between them. *Id*., p. 124.

In a December 12, 2019 handwritten statement, Gabaldon claimed:

As I started to walk to the time clock he cut me off and got directly in my face very aggressively to the point his chest bumped my chest at that point I felt very threatened and intimidated. I told him he needed to get the hell out of my face!!

208 IAF, Tab 10, p. 99. It appears from the statement Gabaldon went back after initially writing it to squeeze in the following sentence between the two sentences quoted above:

He even took his eyeglasses off as if he was trying to fight me.

Id. Gabaldon also noted:

He [the appellant] continued ranting and raving that's when Alma [Maduro], Ray [Devellin] & Dave [Coomber] got between us. I stepped back and he continued to come towards me as Ray was holding him back.

Id.

Applying *Hillen*, I do not find Gabaldon's testimony to be credible. It was inconsistent with the testimony of Maduro and Devellin who I have found very credible and who testified that Gabaldon was equally responsible for continuing the conflict with the appellant. I found Gabaldon's testimony to be evasive and his denials that he was not baiting the appellant or otherwise egging him on not credible.

As to the December 12 incident, the appellant explained that the day before, on December 11, Gabaldon knocked over some flyers by the appellant's vehicle which the appellant believed to be intentional and part of a pattern of hostility Gabaldon directed towards him. 208 SAF, Tab 28, p. 77. The next day, on the morning of December 12, the appellant approached Gabaldon to confront him about his behavior towards the appellant, asking him that if knocking the brochures over was an accident, why did he not apologize to the appellant. The appellant claimed Gabaldon responded by saying stop complaining "you little ass bitch." *Id*., pp. 89; 94. Gabaldon denied he called the appellant a "little ass bitch." Other than the appellant, no one else testified to hearing Gabaldon use this phrase. However, the other witnesses consistently testified that the appellant and Gabaldon were bickering and exchanging insults. Therefore, I find the appellant credible when claiming Gabaldon at some point called him a "little ass bitch."

The appellant explained he took his glasses off:

when Gabaldon threatened me and says he was going to bust me up and crush me. And he moved towards me and he turned around and said I wish you would. That's when I took the glasses off as a form of apprehension of harm. I don't want my glasses to get broken because they're expensive, $600. . . I need my glasses to work.

208 SAF, Tab 28, p. 92. In addition, the appellant said he has high blood pressure and when his blood pressure goes up, his vision becomes blurry, and the glasses do not work. *Id*. The appellant further recalled:

Mr. Coomber came in after the fact. You know, that--that's when it was all broke up. And he asked me are you okay to work or--or would you like to go home? I said I'm okay to work, but you have to do something about Gabaldon's behavior. So at

first, it was going to be deescalated and nothing happened. But as soon as I mentioned about Gabaldon's behavior, that's when he got on the phone. I don't know who he called.

208 SAF, Tab 28, p. 90.

The appellant believed Gabaldon was regularly harassing him in the workplace in revenge for complaints the appellant had previously made about Gabaldon. 208 SAF, Tab 28, pp. 70-71. In 2011, the appellant warned Gabaldon that political activity the appellant observed Gabaldon engaging in the workplace violated the Hatch Act. *Id*. Gabaldon "blew off" the appellant. *Id*. The appellant then filed a complaint with the Office of Special Counsel (OSC) alleging Gabaldon had violated the Hatch Act by engaging in political activity while on duty. IAF, Tab 9, pp. 116-117. In a December 8, 2011 closure letter, OSC advised the appellant:

while Mr. Galbadon [sic] was on duty and/or in the federal workplace, he collected signatures for a nominating petition for the candidacy of the Honorable Kevin White, then-incumbent Judge of Division 7 of the Penal County Superior Court. We determined that this activity violated the Hatch Act. In light of our determination, we issued Mr. Galbadon a letter warning him that should he again engage in Hatch Act prohibited activity while employed in a federal executive agency, we would consider such activity to be a willful and knowing violation of the law that could result in his removal from his employment.

Id., p. 117. The 2011 OSC letter was part of the agency's investigatory file into the December 12, 2019 incident and part of the proposed adverse action record, having been provided to them by the appellant. *Id*. In addition, on May 20, 2015, the appellant submitted a complaint asserting that Gabaldon (1) sexually harassed a co-worker, Amy Wilkes and (2) was regularly harassing the appellant in various ways including stealing his work hamper. 208 IAF, Tab 9, p. 120 and 208 SAF, Tab 28, pp. 72-73.

Gabaldon denied holding any grudges against the appellant based on the OSC complaint or the 2015 complaint. 208 SAF, Tab 27, pp. 125-26. I do not find Gabaldon's denial credible. It is readily apparent that there was animosity between the appellant and Gabaldon, that animosity was mutual, and they engaged in passive-aggressive behavior towards one another. Lacking any other explanation for their conflict, I must infer it is due to the appellant's filing complaints about Gabaldon.

In turn, I find the agency has failed to meet its burden of proving by preponderant evidence that the appellant's actions on December 12 constituted a threat under *Metz*. The record is devoid of any credible evidence that the appellant made any statements indicating that he would physically harm anyone. The record is also devoid of any credible evidence that the appellant engaged in physical actions indicating he would harm anyone. While the appellant and Gabaldon were bickering face to face, there is no credible evidence that he physically bumped or "lunged" at Gabaldon. Instead, when Gabaldon turned around to face the appellant they were very close; Gabaldon went "stomach to stomach" with the appellant. As found above, Coomber's and Gabaldon's claims that they felt threatened and intimidated by the appellant were not credible. In contrast, Maduro and Devellin credibly testified that while the mutual bickering between the appellant and Gabaldon was intense, the appellant did not make any threats. Finally, I do not find the appellant's act of taking off his glasses while bickering to constitute a threat of physical harm to Gabaldon.

I do not condone the appellant's behavior on December 12 and it was inappropriate, as was Gabaldon's. However, the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency; the Board may not substitute what it considers to be a more adequate or proper basis. *Fargnoli v. Department of Commerce*, 123 M.S.P.R. 333, ; 7 (2016). Accordingly, I find the agency has failed to prove its misconduct charge and it is NOT SUSTAINED.

Affirmative defenses for DE-0752-20-0208-I-2 and DE-0752-21-0103-I-1

The appellant raised the following affirmative defenses during the processing of these appeals. Reprisal for 5 U.S.C. § 2302(b)(8) protected disclosures and activities, discrimination on the basis of race (African American), reprisal for EEO activities, reprisal for Union activities, reprisal for exercising rights under the Uniformed Services Employment and Reemployment Rights

Act of 1994 (USERRA) (codified as amended at 38 U.S.C. §§ 4301-4333), and reprisal for filing Board appeals. 208 IAF, Tab 22 and 208 SAF, Tab 18. The appellant bears the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(C); 5 C.F.R. § 1201.4(q); *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, 356 (2007).

Prohibited personnel practice under 5 U.S.C. § 2302(b)(8) & (9)

Postal employees such as the appellant subject to adverse actions over which the Board has jurisdiction have the right to raise an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b)(8) & (9). *Mack v. U.S. Postal Service*, 48 M.S.P.R. 617 (1991). Because the Whistleblower Protection Act (WPA) does not apply to Postal employees, claims of a prohibited personnel practice under § 2302(b)(8) & (9) by Postal Service employees are subject to a higher standard of proof than employees covered by the WPA. *Id.* To prove an affirmative defense of reprisal for disclosures or activities protected under § 2302(b)(8) & (9), the appellant must show by a preponderance of the evidence that (1) he made a protected disclosure and/or engaged in a protected activity; (2) the accused official knew of the disclosure or activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Id.* (citing *Warren v. Department of the Army*, 804 F.2d at 656-58). Under this standard, unlike under the WPA, there is no burden shifting to the agency to show by clear and convincing evidence that it would have taken the same personnel action absent any disclosure. *See e.g., Grubb v. Department of the Interior,* 96 M.S.P.R. 361, ; 11 (2004); *Redschlag v. Department of the Army,* 89 M.S.P.R. 589, 70 (2001) *rev. dismissed,* 32 Fed. Appx. 543 (Fed. Cir. 2002). Accordingly, if the appellant meets his initial burden, the agency must show by preponderant evidence that it would have taken the action even absent the protected activity or disclosure. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988).

Under § 2302(b)(8)(A) a protected disclosure is the disclosure of information that an appellant reasonably believed evidenced gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of a law, rule, or regulation. The disclosure must have been specific and detailed, not a broad-brush accusation that amounted only to a vague allegation of wrongdoing. *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ;13 (2006); *Gryder v. Department of Transportation*, 100 M.S.P.R. 564, ;13 (2005).

Under § 2302(b)(8)(B) a protected disclosure also includes "any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" 5 U.S.C. § 2302(b)(8)(B).

Finally, under 5 U.S.C. § 2302(b)(9) protected activities include (A) the exercise of any appeal, complaint or grievance right granted by any law, rule, or regulation with regard to remedying a violation of section 2302(b)(8); (B) testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint or grievance right granted by any law, rule, or regulation; (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or (D) refusing to obey an order that would require an individual to violate a law, rule, or regulation.

I find the appellant has met his burden of proof under *Warren*. As to prong one, I find, and it is undisputed, that the appellant made a protected disclosure and engaged in a protected activity when he filed the 2011 OSC complaint about Hatch Act violations by Gabaldon. As noted above, upon investigation, the OSC found Gabaldon had violated the Hatch Act. As to prong two, I find, and it is undisputed, that Lopez and Rademacher were aware of the appellant's 2011 OSC complaint. 208 IAF, Tab 29, pp. 38-39 (Testimony of Lopez); and 208 SAF, Tab 27, pp. 48-49 (Testimony of Rademacher).

I also find that there is direct evidence that the appellant's OSC complaint activity played an essential role in Lopez's and Rademacher's decisions to remove the appellant. Lopez explained that he agreed with the proposing official, Cobos, and did not find credible the appellant's claims that Gabaldon was harassing him and otherwise instigating conflict with him. Lopez based

his credibility assessment on the appellant previously making what Lopez considered to be false and exaggerated statements in his OSC complaint against Gabaldon. Lopez believed the OSC found Gabaldon engaged in no wrongdoing based on what the appellant had alleged. 208 IAF, Tab 29, pp. 38-40. It was Lopez's belief that the basis for the OSC's finding that Gabaldon had violated the Hatch Act was due to what Gabaldon told the OSC during its investigation. *Id*. Therefore, Lopez concluded the appellant's ongoing complaints about Gabaldon harassing him were not credible because of his previous false or exaggerated complaint to the OSC about Gabaldon. *Id*.

Rademacher also confirmed that he was aware that Cobos did not believe the appellant was credible when alleging Gabaldon was harassing him in December 2019 because of prior false or exaggerated claims the appellant had made to the OSC about Gabaldon. Rademacher agreed with that assessment. 208 SAF, Tab 27, pp. 48-49.

I find Lopez's and Rademacher's belief that the appellant's version of what occurred on December 12 was not credible was premised upon his OSC complaint and therefore is retaliation for his protected disclosures and activities. Therefore, I find the appellant has proven by preponderant evidence prongs 3 and 4 - there is a genuine nexus between the alleged retaliation for filing an OSC complaint and his removal from the federal service.

I also find the agency has failed to establish that it would have taken the removal action even absent the appellant's protected OSC disclosures and activities. When deciding the appellant engaged in misconduct, Lopez and Rademacher concluded he was not credible, was the aggressor on December 12, and was not provoked by Gabaldon. Since the credibility determination made by the agency was inextricably intertwined with the appellant's OSC complaint, I find they have failed to prove by preponderant evidence that they would have taken the removal action in the absence of the appellant's OSC complaint. Accordingly, I find the appellant has proven by preponderant evidence that his removal was in retaliation for his disclosures and activities protected under 5 U.S.C. § 2302(b)(8) & (9).

EEO Discrimination and Retaliation

The appellant has plead affirmative defenses of discrimination based on race (disparate treatment) and retaliation for prior EEO activity. When an appellant asserts an affirmative defense of retaliation or discrimination under 42 U.S.C. § 2000e-16, a two-part inquiry follows. *Sabio v. Department of Veterans Affairs*, 124 M.S.P.R. 161 (2017). First, the administrative judge must assess whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. *See Savage v. Department of the Army*, 122 M.S.P.R. 612, ;51 (2015). Such a showing is sufficient to establish that the agency violated 42 U.S.C. § 2000e-16, thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). *Naval Station Norfolk-Hearing 2 v. Department of the Navy*, 123 M.S.P.R. 144 (2016); *Savage*, 122 M.S.P.R. 612. All of the evidence must be examined as a whole to determine if the appellant has offered preponderant evidence that retaliation or discrimination was a motivating factor in the removal action. If he has not made such a showing, the inquiry will end at that point.

If the appellant meets this initial burden, then the inquiry shifts to whether the agency has shown by preponderant evidence that the action was not based on the prohibited personnel practice, i.e., that it still would have taken the contested action in the absence of the discriminatory or retaliatory motive. *Id.* If the Board finds that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action. *Sabio*, 124 M.S.P.R. 161; *Naval Station Norfolk-Hearing 2*, 123 M.S.P.R. 144; *Savage*, 122 M.S.P.R. 612, ;51.

Race Discrimination

The dispositive inquiry is whether the appellant has shown by the preponderance of the evidence that the agency was motivated by racial discrimination in its decision to remove the appellant from employment. *Savage*, 122 M.S.P.R. 612. It is undisputed that Gabaldon, who is Hispanic, was not disciplined for his role in the December 12 conflict with the appellant, who is African American. The proposing official, Cobos, who is Hispanic, provided no explanation in his testimony as to why he did not

propose any discipline for Gabaldon. 208 SAF, Tab 27, pp. 73-111. When asked about Gabaldon not being disciplined, Lopez, who is Hispanic, merely stated that he was not asked to do anything regarding Gabaldon. 208 SAF, Tab 29, pp. 30-31. Finally, Rademacher agreed that Gabaldon used abusive language towards the appellant but explained that Gabaldon was not in his "purview." 208 SAF, Tab 27, pp. 61-62. Accordingly, I find the record is silent on why Gabaldon received no discipline for his conduct on December 12 even though Rademacher conceded he used abusive language towards the appellant. Given the lack of any credible record evidence explaining the difference in treatment between the appellant and Gabaldon, I must infer the agency was motivated by racial discrimination in its decision to discipline through removal the appellant who is African American but not discipline Gabaldon who is Hispanic for his role in the December 12 conflict. Accordingly, I find that the agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(1).

Since the appellant has made the required showing, the next issue is whether he is entitled to corrective action. A violation of 42 U.S.C. § 2000e-16 will entitle the appellant to reversal of the personnel action only if the prohibited personnel practice was the "but for" cause, meaning that the agency would not have taken the same action in the absence of the discriminatory or retaliatory motive. *Savage*, 122 M.S.P.R. 612, ;; 48, 49. The burden of proof shifts to the agency to show, also by preponderant evidence, that it would have taken the action even if it lacked such a motive. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 273 (1981). "If we find that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action." *Savage*, at ; 51.

I find the agency has not met its burden. Cobos, Lopez and Rademacher were determined to find the appellant solely responsible for the interaction with Gabaldon, ignoring the December 2019 written statements of Maduro, Garcia and Jaque Lopez indicating that they did not feel threatened nor did they fear working at the Casa Grande Post office. As found above, Cobos, Lopez and Rademacher also relied upon the appellant' s OSC complaint in finding him not credible and solely blaming him for the conflict with Gabaldon. Given the lack of credible evidence to support the decisions of Lopez and Rademacher, I find the agency would not have taken the same action in the absence of its discriminatory motive. Accordingly, I find the appellant has established his affirmative defense of race discrimination by preponderant evidence.

Reprisal

The appellant also has alleged he was removed in retaliation for his protected EEO activities. In 2010-2011, he filed an EEO complaint naming Lopez as responsible management official which resulted in a settlement. 208 SAF, Tab 15, pp. 27-30 and Tab 28, p. 67. Under 5 U.S.C. § 2302(b)(9) it is a prohibited personnel action to "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of— (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." The *Warren* test again applies. *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, ;; 28-31 (2016).

It is undisputed that both Lopez and Rademacher were aware of the appellant's EEO activities. However, unlike his OSC complaint, I find that the record is devoid of any credible evidence that the appellant's EEO complaint activities influenced either Lopez's or Rademacher's decision to remove him or they were in anyway motivated to retaliate against the appellant. Accordingly, I find the appellant has failed to establish this affirmative defense.

Retaliation for the exercise of a grievance right

The appellant has alleged reprisal for union activities. The *Warren* test again applies. I find, and it is undisputed, that the appellant engaged in numerous union activities over many years as a union representative and on his own behalf. It is also undisputed that both Lopez and Rademacher were aware of the appellant's union activities. However, unlike his OSC complaint, I find that the record is devoid of any credible evidence that the appellant's union activities influenced either Lopez's or Rademacher's decision to remove him or they were in anyway motivated to retaliate against the appellant. Accordingly, I find the appellant has failed to establish this affirmative defense.

Retaliation for exercising USERRA rights

The appellant alleged the agency removed him in retaliation for exercising his rights under USERRA. The standard for retaliation claims is set forth at 38 U.S.C. § 4311(b), which provides in relevant part that an employer "may not discriminate in employment against or take any adverse employment action against any person' because he '(1) has taken an action to enforce a protection afforded any person under this chapter ... or (4) has exercised a right provided for in this chapter." *Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ;10 (2006). To prevail on his claim of retaliation under 38 U.S.C. § 4311(b), the appellant must prove by preponderant evidence that: (1) he took action to enforce a protection afforded any person under chapter 43 of Title 38 of the U.S. Code, gave testimony or made a statement in or in connection with any proceeding under that chapter, rendered assistance or otherwise participated in an investigation under that chapter, or exercised a right provided for in that chapter; and (2) his action was a substantial or motivating factor in the agency's action at issue in this appeal.

I find, and it is undisputed, that the appellant filed a USERRA appeal with the Board regarding his placement on emergency leave, Docket No. DE-4324-20-0132-I-1. 208 IAF, Tab 9, pp. 10-25.[2] He therefore has met prong one - he exercised a right provided to him under 38 U.S.C. Chapter 43. It is also undisputed that both Lopez and Rademacher were aware of the appellant's USERRA appeal. However, unlike his OSC complaint, I find that the record is devoid of any credible evidence that the appellant's filing of a USERRA appeal was a substantial or motivating factor in either Lopez's or Rademacher's decision to remove the appellant from the federal service. Neither manager was involved in the emergency placement decision nor in any way adversely impacted by the appellant's decision to file an appeal. *Id*. Accordingly, I find the appellant has failed to establish this affirmative defense.

Retaliation for the exercise of Board appeal rights

In Docket No. DE-0752-21-0103-I-1, the appellant alleged his removal by Rademacher was in retaliation for filing a Board appeal challenging Lopez's removal decision, Docket No. DE-0752-20-0208-I-1/2. Applying *Warren*, I find, and it is undisputed, that the appellant engaged in the protected activity of exercising Board appeal rights and that Rademacher was aware of the activity. However, I find that the record is devoid of any credible evidence that the appellant's filing a Board appeal influenced Rademacher's decision to remove him or that he was in anyway motivated to retaliate against the appellant for filing the appeal. Rademacher was not involved with the prior Board appeal and the record is devoid of any credible evidence that he was adversely impacted by it. Accordingly, I find the appellant has failed to establish this affirmative defense.

In summary, the agency's first April 4, 2020 removal action must be reversed for procedural due process errors. The agency's second January 29, 2021 removal action must be reversed because the agency failed to prove its misconduct charge by preponderant evidence. The appellant has proven by preponderant evidence his affirmative defenses of reprisal for protected disclosures and activities (OSC complaint) and race discrimination and therefore corrective action is granted. The appellant's remaining affirmative defenses are denied as not proven.

DECISION

The agency's adverse actions are REVERSED. The appellant's request for corrective action is GRANTED IN PART and DENIED IN PART.

ORDER

In Docket No. DE-0752-20-0208-I-2, I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **April 4, 2020**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

In Docket No. DE-0752-21-0103-I-1, I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **January 29, 2021**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

For both appeals, 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.

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of City Carrier (2310-2009). The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

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: _____
Patricia M. Miller
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 **June 23, 2022**, 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:

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The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419
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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. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

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Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013
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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:

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Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507
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(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:

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U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439
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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 COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at 42 U.S.C. § 1981a. The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.204. If you believe you meet these requirements, you must file a motion for compensatory damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

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.

Footnotes

1 I advised the parties of the legal standard in my June 27, 2020 order and summary of prehearing conference in Docket No. DE-0752-20-0208-I-1. 208 IAF, Tab 22.

2 On June 11, 2020, the agency had filed a motion arguing that the appellant was barred from pursing these appeals under the doctrine of res judication/collateral estoppel because of a March 30, 2020 initial decision in Docket No. DE-4324-20-0132-I-1. I denied the agency's motion in a June 27, 2020 ruling. 208 IAF, Tab 23, pp. 2-3.

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