UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

FROYLAN MENDIOLA,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBERS
SF-0752-13-0436-I-1
SF-1221-13-0440-W-1[1]

DATE: September 10, 2014

Anne Richardson, Esquire, Pasadena, California, for the appellant.

Mary T. Ross, Esquire, Pasadena, California, for the appellant.

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

Amy L. Dell, San Diego, California, for the agency.

Janet W. Muller, Chula Vista, California, for the agency.

BEFORE
Anthony L. Ellison
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 30, 2013, the appellant filed an individual right of action (IRA) appeal, alleging that the agency's requirement that he undergo a psychiatric fitness-for-duty examination (FFDE) was imposed in retaliation for his protected

[1] These appeals have been joined for adjudicatory purposes. *See* IAF, Tab 8.

whistle-blowing activity, and a Board appeal of his removal from the position of Border Patrol Agent, GS-12, effective April 23, 2013. Individual Right of Action Appeal File (W-1), Tab 1, and Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over these appeals pursuant to 5 U.S.C. § 1221(a) and 5 U.S.C. §§ 7511, 7512, and 7701(a), respectively. For the following reasons, the appellant's request for corrective action is GRANTED, and the removal action is REVERSED.

ANALYSIS AND FINDINGS

The agency's order that the appellant undergo a FFDE was in retaliation for his whistleblowing activities.

The Board has jurisdiction over an IRA appeal if an appellant has exhausted his administrative remedies before the Office of Special Counsel and makes non-frivolous allegations that: 1) He engaged in whistleblowing activity by making a protected disclosure; and 2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunis v Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Here, it is undisputed that the appellant exhausted his administrative remedies as he contacted the OSC and received a letter advising him that the OSC was closing their file. Appellant's Exhibits KK, MM, NN and XX, IAF, Tab 14, pp. 172-183 of 256, 185-191 of 256, and 214-217 of 256.

In reviewing the merits of an IRA appeal, the Board must examine whether the appellant proved by preponderant evidence[2] that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302 (b)(8), and that such whistleblowing activity was a contributing factor in an agency personnel action; if so, the Board must order corrective action unless the

[2] A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

agency established by clear and convincing evidence[3] that it would have taken the same personnel action in the absence of the disclosure. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010)(citing *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 15 (2008)).

A protected disclosure is a disclosure that an appellant reasonably believes evidences a violation of any law, rule, or regulation, 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)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008), *remanded to* 110 M.S.P.R. 321 (2009), *aff'd in part, rev'd in part on other grounds, remanded by* 602 F.3d 1370 (Fed. Cir. 2010). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories in section 2302(b)(8)(A). *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), he need not prove that the condition disclosed actually established a regulatory violation or any of the other situations detailed under 5 U.S.C. § 2302(b)(8)(A)(ii); rather, the appellant must show that the matter disclosed was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *Schnell*, 114 M.S.P.R. ¶ 19 (*citing Garst v. Department of the Army*, 60 M.S.P.R. 514, 518 (1994)).

In addition to establishing a protected disclosure under § 2302(b)(8), the appellant must also prove that it was a contributing factor in the personnel actions

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

being appealed. One of the ways to satisfy the contributing factor standard is by circumstantial evidence that: (1) The agency official taking the personnel action knew of the disclosure; and (2) the personnel action occurred within a period of time that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See* 5 U.S.C. § 1221(e)(1)(A), (B); *see also Veneziano v. Department of Energy*, 189 F.3d 1363, 1368 (Fed. Cir. 1999); *Kewley v. Department of Health & Human Services*, 153 F.3d 1357, 1362-63 (Fed. Cir 1998); *Johnson v. Department of Defense*, 87 M.S.P.R. 454, 458-59 (2000). In a 1994 amendment to the WPA, Congress established a knowledge/timing test that allows an employee to demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action "knew of the disclosure," and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. 5 U.S.C. § 1221(e)(1); *see also Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599 (2006), ¶ 12. To satisfy the test, the appellant need only demonstrate that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Id*.

Here, the appellant has established the following narrative, which is supported by the record. The appellant had a consistent record of excellent work performance as a Border Patrol Agent for over sixteen years. His evaluations have all rated him Competent (where the scale is Competent/Not Competent). Further, in an e-mail dated May 12, 2011, Murietta Patrol Agent in Charge (PAIC) Walter Davenport commended him for "the great work that you perform on a daily basis." Appellant's Exhibit BBB, IAF, Tab 14, p. 250 of 256. On May 23, 2011, PAIC Davenport again commended him his work, telling him that he considered him "a quality Agent and a vital operational asset to this station…and a positive asset here," noting that he had "seen [his] hard work shine for us on

numerous occasions when [he was] called upon to help us in a vital role or position." Appellant's Exhibit P, IAF, Tab 14, p. 78 of 256.

In the first half of 2012, in complaints to the U.S. Department of Justice (DOJ) and the Office of Special Counsel (OSC), the appellant reported what he believed to be racial profiling activity at the Murrieta Station, which he reasonably believed to be a violation of the law. Appellant's Exhibits Y, AA, CC, KK and NN; IAF, Tab 14, pp. 119-123 of 256, 137-8 of 256, 172-183 of 256, 186-191 of 253, respectively. Those complaints pertained to and referenced the following facts. On March 26, 2012, FOS Jaime and SBPA Vargas directed the appellant to alter an arrest report in order to remove what SBPA Vargas thought were "inappropriate" comments the appellant had included, which he believed implied improprieties by another agency. The appellant felt that his comments were important to memorialize what he believed to be racial profiling by the U.S. Forest Service. Testimonies of SBPA Vargas and the appellant. FOS Jaime threatened him with disciplinary action if he did not alter the report, which he then did under protest. Testimony of the appellant. The appellant objected to this order, which he believed to be unlawful, and told FOS Jaime that he intended to file a complaint based on the order. Testimony of SBPA Vargas. On April 1, 2012, the appellant e-mailed San Diego Sector Senior Staff Attorney Carlos Cantu and reported the March 26th incident. Appellant's Exhibit W, IAF, Tab 14, p. 102 of 256. On April 16, 2012, he filed a complaint to the DOJ and reported that he believed that the Riverside County Sheriff's Office and the U.S. Forest Service were targeting Hispanics for arrest and that his supervisors had ordered him to alter his report in order to conceal the unlawful racial profiling activity. Appellant's Exhibit Y, IAF, Tab 14, pp. 140-143 of 256. The appellant named both SBPA Vargas and FOS Jaime in this complaint. On May 9, 2012, he amended his complaint to the DOJ, reporting that, on May 7, 2012, he witnessed Acting Supervisory Border Patrol Agent (SBPA) Raul Diaz direct a subordinate to falsify an arrest report regarding an individual of Hispanic descent who had

been arrested by the California Department of Forestry. Appellant's Exhibit AA, IAF, Tab 14, pp. 137-8 of 256. On May 20, 2012, the appellant filed a retaliation complaint with the DOJ claiming that the agency – specifically FOS Jaime and PAIC Davenport -- was retaliating against him for reporting racial profiling activity. Appellant's Exhibit CC, IAF, Tab 14, pp. 140-3 of 256. On June 5, 2012, the appellant forwarded an e-mail to SBPA Vargas regarding unlawful racial profiling, with the subject, "Forest Service Hit for Border Patrol call." Appellant's Exhibit FF, IAF, Tab 14, p. 150 of 256.

The next day, on June 6, 2012, SBPA Vargas assigned the appellant to ride with Border Patrol Agent Joe Munoz, a canine handler, to patrol the Interstate 15 corridor, an area used by both carriers of illegal aliens and drug traffickers. The appellant, who explained that "all assignments are inherently dangerous," testified that he then reminded SBPA Vargas that Agent Munoz's vehicle, which was a sedan used to carry dogs, was not equipped with a rack on which the appellant could secure his assigned M4 rifle, and SBPA Vargas replied that they would "deal with it later." Testimonies of SBPA Vargas and the appellant.

Later that morning, the appellant went to the armory, where he found SBPA Vargas and SBPA Diaz, and told them he was going to get his own M-4 and the keys to his own truck. When he attempted to do so, SBPA Vargas told him to put the rifle back. The appellant reminded SBPA Vargas that he takes this weapon out every day, and asked if he could check out his own assigned vehicle, which is equipped with a rack for the M4 rifle, as was his usual routine. Testimonies of SBPA Vargas and the appellant. SBPA Vargas denied this request without giving a reason for his refusal to allow the appellant to take his M4 rifle, stating simply that the appellant was "not being allowed to take your M-4 today." Testimony of the appellant.

The appellant testified that he believed that patrolling his assigned area without his primary weapon would place his life and the lives of others in jeopardy. Testimony of the appellant. SBPA Vargas testified that he gave the

appellant "clear instructions" to put the rifle back and to go out into the field in the canine truck as ordered, but that the appellant refused. He then gave the appellant several "direct orders" to put the rifle back, but that the appellant again refused, "holding the M-4 tight to his body," "tensing up," and with an "aggressive" physical demeanor. He called in SBPA Jennifer Higgins as a witness, although SBPA Diaz was already in the armory with them. In his contemporaneous statement, but not at hearing, SBPA Vargas stated that the appellant stated that SBPA Vargas would have to take the rifle from him physically if he wanted it put back, that he felt the situation might escalate into a physical confrontation and that he felt "physically threatened and challenged." He also advised the appellant that the sanction for disobeying a direct order could be as high as removal. IAF, Tab 7, p. 103-106 of 119. The appellant testified that he was leaning on the rifle, which he held vertically on the ground, with his head and hands resting on it, as if to say "here we go again," but that he did not do anything threatening or implying violence of any kind. He acknowledged telling SBPA Vargas, "if you think it's so important that I go out without an M-4, you can take it and put it back yourself." Testimony of the appellant. SBPA Vargas then changed the appellant's assignment for the day to inside duties, and ordered him to wait in the "quiet room" for further instructions, at which point the appellant put the rifle back himself and without incident. IAF, Tab 7, p. 88 of 119. SBPA Vargas took no disciplinary action against him. Testimony of SBPA Vargas. Instead, he placed the appellant on administrative duties; however he asked Deputy Patrol Agent in Charge Martin to require the appellant to relinquish his assigned sidearm. IAF, Tab 7, p. 99 of 119. The following day, the appellant turned in his second sidearm, badge and credentials to Agent Martin, but, in PAIC Davenport's words, he did so "voluntarily as he was not prompted in any way to do this at this time." Appellant's Exhibit GG, IAF, Tab 14, p. 153 of 256; IAF, Tab 7, p. 87 of 119.

SBPA Vargas reported the incident to FOS Jaime and others in command. Testimony of SBPA Vargas. All the percipient witnesses prepared written statements regarding the incident. In his statement, the appellant conceded that he believed that SBPA Vargas "lacked the authority to deny" him access to an M-4 rifle, and that he was "not going to voluntarily put the M-4 rifle back in the armory." IAF, Tab 7, p. 98 of 119. He noted that SBPA Vargas had similarly ordered him to go out on assignment with Agent Munoz in his truck without a rifle rack approximately 4 weeks earlier, but did not then "have an issue with my using my assigned vehicle" instead. *Id*., p. 99 of 119. The appellant believed that SBPA Vargas' order effectively denying him the use of his M-4 in the field "was a significant threat to [his] safety, as well as the safety of others." He also believed that the pertinent collective bargaining agreement allowed him to carry the rifle as his assigned service weapon. *Id*., p. 98 of 119. Carlos Arias, a Border Patrol Agent at Murietta for 6 years, testified that, while it was not mandatory to carry an M-4 in the field, some agents, including the appellant, routinely check them out "on a daily basis." He explained that management did not "frown upon" that practice, and that it was not unreasonable to take such a weapon, as "you want to be prepared." Testimony of Agent Arias. Hector Gutierrez, a Senior BPA at Murietta for 5 years, and a BPA for 21 years, testified that the appellant takes out an M-4 on a daily basis, that it is not unreasonable to do so, and that, in fact, the appellant had one "zeroed out" for him, that is, permanently adjusted to his specifications. He explained that all vehicles are supposed to have racks that can accommodate rifles, but that the canine vehicles do not. He opined that it would be unreasonable to deny an agent who routinely takes out an M-4 the ability to do so, inasmuch as it is part of that agent's daily complement of equipment, or "a part of their uniform." Testimony of Agent Gutierrez.

Paul Beeson, Chief Patrol Agent of the San Diego Sector, and the deciding official in this case, testified that agents are "usually" given the option of taking out their own assigned vehicles with racks to accommodate an M-4 rifle, and

stated that he was not aware of any other agent ever having been ordered not to take an assigned M-4 with them into the field. Testimony of Chief Beeson. Finally, SBPA Vargas testified that he was aware that the appellant had an M-4 rifle assigned to him, that it was adjusted to his personal specifications and settings, and that he took it out with him on assignment "for the most part." He also explained that he had never previously denied him the right to take the M-4 out on his assignments, and that about a month prior, he had allowed the appellant to take his own vehicle with the rifle rack when he told him that it was his preference to do so. He also acknowledged that it was "safer" to have both an M-4 and a side arm, and that he knew that smugglers had "bounties" out on Border Patrol Agents. He also acknowledged that, before this, he had never refused to allow any agents to take out their own assigned vehicles with gun racks. Testimony of SBPA Vargas. Neither SBPA Vargas or anyone else suggested the basis for his decision to deny the appellant the right to take it out on June 6, 2012.

The following day, June 7, the appellant asked FOS Jaime for annual leave for the rest of the week as his family was very upset about the previous day's events. FOS Jaime granted him such leave, and acknowledged that the appellant had voluntarily returned all of his government property. When FOS Jaime recommended the Employee Assistance Program (EAP) to the appellant, he replied that he did not need the EAP, that he was fine, and that he had an attorney to handle the matter. He also stated words to the effect that, as related by FOS Jaime, "I'm fine and I don't mean to imply any violence in telling you this but I also have personal guns at home," to which FOS Jaime replied that "OK, many people have personally owned guns and that's OK, unless you're trying to tell me something more." The appellant denied any other meaning, stating he just wanted "all this to be over." IAF, Tab 7, pp. 94-5 of 119.

Later that same day, PAIC Davenport forwarded all the witnesses' statements to Chief Beeson with a cover letter. IAF, Tab 7, pp. 87-89 of 119. In

it, PAIC Davenport advised Chief Beeson of the June 6 incident, which he said included "inappropriate handling and unauthorized possession of a service issued M-4 rifle," although none of the evidence, including the contemporaneous statements, suggested either. He described the appellant's actions as "suggesting that he was anticipating a struggle for control of the weapon," and "an attempt to escalate the situation into a potential deadly threat encounter." *Id*., pp. 88-89 of 119. He testified that he got this impression from SBPA Vargas and FOS Jaime. Testimony of PAIC Davenport.[4] PAIC Davenport also conveyed his belief that the appellant had a "propensity for violence in the workplace or threat there of [*sic*]," citing his "previous experience and partial knowledge" of same, and his belief that the appellant had been previously disciplined for workplace violence, although he conceded that he had not been provided specific information regarding this, and there is no evidence of it to which the agency has pointed. He concluded by recommending that the appellant "receive disciplinary action for his willful and intentional refusal to obey a proper order of a Supervisory Border Patrol Agent." However, he also opined, remarkably, that the appellant's actions and statements "indicate a possible serious mental instability that should be considered as hostile to the men and women of the MUR Station and the public that [the appellant] is sworn to serve," and recommended that "a fit-for-duty evaluation should be conducted on [the appellant] to determine his mental stability to perform the duties of a federal law enforcement officer." *Id.*, p. 89 of 119. PAIC Davenport also conveyed, by e-mail and phone, his beliefs regarding the June 6 incident to Karen Rubio, Chief of the Operations Support Division, who reviewed his memorandum and those of the witnesses to the June 6 event, and then ordered the appellant to undergo a general FFDE and later a psychiatric FFDE. *Id*., p. 81 of 119. Testimony of Ms. Rubio.

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[4] In his memorandum to Chief Beeson, he also cited "verbal information that was presented to me by" FOS Jaime, SBPA Vargas and others. IAF, Tab 7, p. 89 of 119.

Ordering an employee to undergo psychiatric testing or examination is specifically included in 5 U.S.C. § 2302(a)(2)(A), which codifies those "personnel actions" for the purposes of an IRA appeal. Further, I find that it is evident that the appellant's complaints to San Diego Sector Senior Staff Attorney Cantu, the DOJ and the OSC in early 2012 contained his disclosures of what he believed to be racial profiling activity at the Murrieta Station, which he reasonably believed to be a violation of the law. Thus, I find that he engaged in protected activity under 5 U.S.C. § 2302(b)(8). *Schnell*, 114 M.S.P.R. 83, ¶ 19. And the timing of those complaints, from April 1 to June 5, 2012, clearly satisfied the so-called knowledge/timing test for demonstrating that the disclosures were a contributing factor in the ordering of the FFDE, inasmuch as it occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. 5 U.S.C. § 1221(e)(1).

More specifically, the last protected disclosure came one day before SBPA Vargas' order to the appellant, denying him the ability to take his regularly assigned M-4 rifle with him on an assignment. As noted above, neither SBPA Vargas nor anyone else proffered a rationale for his unprecedented and inexplicable decision to deny the appellant the right to take it out on June 6, 2012. As also noted, SBPA Vargas, FOS Jaime, SBPA Diaz and PAIC Davenport were all mentioned in the appellant's disclosures, and their statements, as filtered through PAIC Davenport, led directly to the ordering of the FFDEs. Further, PAIC Davenport acknowledged that, a few months earlier, he had told Chief Beeson that the appellant was "argumentative," and Chief Beeson testified that PAIC Davenport had given him the impression that the appellant was a "troublemaker." Testimonies of PAIC Davenport and Chief Beeson.

Further, a FFDE is appropriate generally when an agency "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." *Harris v.*

*Postmaster Genera*l, EEOC Appeal No. 0120050086 (2007). Here, there was no evidence whatsoever that the appellant's ability to perform his duties was impaired by a medical condition. Further, a belief that an employee poses a direct threat due to such a condition may not be based on evidence indicating that the employee has been rude, hostile or disrespectful to a supervisor, or that he "exhibited irrational behavior" when he "rudely interrupted, confronted and refused to obey" his supervisor. *Cerge v. Secretary of Homeland Security*, EEOC Appeal No. 0120060363 (2007); *Whiting v. U.S. Postal Service*, EEOC Appeal No. 01A14923(2003).[5]

In sum, for the foregoing reasons, I find that preponderant evidence of record establishes that SBPA Vargas' order to the appellant on June 6 was intended exclusively to provoke a reaction from the appellant that could be used as a basis for further action, and that the motivation for it was the appellant's protected whistleblowing activity. Consequently, I find that Ms. Rubio's decision to order a FFDE for the appellant – which was based exclusively on PAIC Davenport's excessive extrapolation and speculation based on scant evidence[6] – similarly resulted from such motivation.[7] Further, in light of that

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[5] It is undisputed that the agency took no disciplinary actions against the appellant for this incident based on any allegation of insubordination and/or refusal or failure to follow a direct order.

[6] Ms. Rubio testified that she knew nothing about the appellant before this incident. Testimony of Ms. Rubio.

[7] A discriminatory or retaliatory motive can be attributed to the employer where a supervisor performs an act motivated by discriminatory or retaliatory animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action. *See Staub v. Proctor Hospital*, – U.S. –, 131 S. Ct. 1186, 1194 (2011). In *Staub*, the Supreme Court held that even where the ultimate decision-maker was not motivated by discriminatory animus, and exercises independent judgment to terminate the employee, that independent act "does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.* at 1192. The court noted that even though the ultimate decision maker's action might be another cause of the harm, it

scant evidence, I find that the agency has not shown by clear and convincing evidence that it would have taken that action absent the retaliatory motive.

The appellant's removal

The agency removed the appellant on one charge of Inability to Perform the Essential Duties of Your Position Due to a Medical Condition. IAF, Tab 7, p. 41 of 119. In such a case, the issues are whether the appellant is able to perform the duties of his position, and whether the agency considered reasonable accommodation of that disability. *Schoening v. Department of Transportation*, 34 M.S.P.R. 556, 561 (1987). It is the agency that bears the burden of proving its allegation that the appellant is unable to perform his job. The existence of a disabling condition is not sufficient to warrant discharge; there must be a connection between that condition and "observed deficiencies in performance or conduct, or a *high probability of hazard* when the condition may result in injury to the employee or others because of the kind of work the employee does" (emphasis in original)." *Spencer v. Department of the Navy*, 73 M.S.P.R. 15, 21 (1997); *Smith v. Department of the Air Force*, 22 M.S.P.R. 255, 257 (1984). If the medical evidence demonstrates inability to perform the job, the removal will be sustained. *Neal v. Tennessee Valley Authority*, 28 M.S.P.R. 284, 287 (1985). The Board will examine all the medical evidence of record to determine whether

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did not immunize the employer where the adverse action is the intended consequence of the earlier agent's discriminatory conduct. *Id. See also Shelley v. Geren*, 666 F.3d 599, 610 (9th Cir. 2012)("Although Scanlon and Bryce did not make the hiring decisions alone, evidence of their inquiry and of their influence over the process supports an inference that the Corps' proffered explanation for hiring Marsh was a pretext for age discrimination"). In *Staub*, the Supreme Court held that an employer's mere conduct of an independent investigation does not remove the employer of liability. "The employer is at fault where one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Staub*, 131 S. Ct. at 1193.

the agency's assessment of the appellant's medical condition is sustainable. *See, e.g., White v. Department of the Army*, 46 M.S.P.R. 63 (1990).

Here, the agency contends that the appellant is medically unable to perform the essential duties of his position of Border Patrol Agent. The appellant's position description contains the following information:

> This position is located in the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), U.S. Border Patrol, at various locations along the Nation's borders. As the primary Federal law enforcement agency between the ports-of-entry, the Border Patrol's priority mission is to prevent the entry of terrorists and terrorist weapons from entering the United States. The Border Patrol enforces the laws that protect America's homeland by the detection, interdiction, and apprehension of those who attempt to illegally enter or smuggle any person or contraband across our Nation's sovereign borders.
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> This position supports this mission in the capacity of a full performance level Border Patrol Agent, who performs intelligence analysis, prosecutions, investigations, and other work of comparable difficulty. The incumbent also performs the basic Border Patrol Agent functions of line watch, sign cutting, traffic and transportation checks, and related duties. Incumbents at this level in their career are thoroughly knowledgeable in the skills and abilities required to obtain their journeyman level status and generally assist and mentor agents of lesser grade and efficiency. The incumbent is under the immediate supervision of a Supervisory Border Patrol Agent.

Id., p. 112 of 119. The appellant was also required to "qualify with and maintain proficiency in the use of firearms to protect and defend self and others." *Id.*, p. 114 of 119.

As noted previously, the appellant had a consistent record of excellent work performance as a Border Patrol Agent for over sixteen years. However, after the June 6th incident, the agency sent him for a FFDE, and, in a report dated December 11, 2012, Alex Michelson, M.D., gave the opinion that appellant was psychiatrically not fit for duty. IAF, Tab 7, p. 62 of 119. In a report dated January 3, 2013, Paul Prunier, M.D., concurred with Dr. Michelson's opinion. *Id.*, p. 72 of 119. On February 22, 2013, the agency proposed the appellant's

removal based on inability to perform the essential duties of his position due to a medical condition, and, on April 18, 2013, the agency decided to effect that removal. *Id*., pp. 41 and 26 of 119, respectively.

The Board has held that, "in undertaking medical disability proceedings, an agency must not rely solely upon a showing that the employee has a disabling condition, even when the agency has obtained a medical opinion of incapacity." Rather, the agency "must establish a link between the medical conclusion and observed deficiencies in work performance or employee behavior or a *high probability of hazard* when the disabling condition may result in injury to the employee or others because of the kind of work the employee does." *Schrodt v. U.S. Postal Service*, 79 M.S.P.R. 609, 614 (1998); *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 176 (1996); *Smith, supra*, 22 M.S.P.R. at 257; *Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 583-4 (1981).

Here, in its proposal notice, the agency briefly cited the conclusions of Dr. Michelson and Dr. Prunier that the appellant was "not fit for duty," based on a general medical examination and a psychiatric examination, and determined therefore to remove him based on his "Inability to Perform the Essential Duties of [His] Position Due to a Medical Condition." IAF, Tab 7, p. 41 of 119. It did not state what it believed that medical condition to be, nor did it give any specific example of which duties he was unable to perform. It did state that

> The position you currently occupy requires an employee to be available for duty on a regular, full-time basis and be able to perform the full range of duties of the position. In addition, you were assigned to administrative duties on June 13, 2012, and then placed in an administrative leave status on January 10, 2013. To date, you remain in that status. The Agency cannot continue to hold you in an administrative leave status with no foreseeable end in sight. Consequently, in order to promote the efficiency of CBP, I am proposing your removal from your position of BPA…

However, it is evident that the appellant's absence from the workplace since January of 2013 was in the complete control of the agency, and does not

constitute evidence in support of its conclusion that he was unable to perform his duties. Further, in his decision letter, Chief Beeson wrote:

> In determining whether to remove you from Federal service, I carefully considered the reasons for the proposed action, the materials relied upon in this case, and your written response. I considered all the arguments that your representative brought up in your written reply. However, no convincing medical evidence was provided to show your ability to perform the essential duties of your position as a BPA. In addition, I considered that the major duties and responsibilities of your position require considerable and strenuous physical and mental demands, as well as rotating shifts and unscheduled overtime. The medical evidence shows that you are unable to perform the full range of duties associated with your position on a full time and regular·basis. Your inability to perform the essential duties of your position negatively impacts Agency operations. The position you occupy needs to be filled by an individual capable of performing the full range of duties on a regular, full-time basis

Id., p. 26 of 119. Again, the circular reasoning behind this conclusion is insufficient to support a finding that the appellant is medically unable to perform any particular duty of his position whatsoever. Simply put, having chosen to remove the appellant for medical inability to perform, it has presented no evidence that the appellant used excessive leave, was unreliable, or was deficient in the performance of the duties of his position at any time prior to his termination. *Cf. Yates, supra*, 70 M.S.P.R. at 176.

Notably, the agency did not, in its proposal or decision letter, make any allegation or conclusion that the appellant presented a high probability of hazard because he had a disabling condition that may result in injury to himself or others because of the kind of work he does, despite the fact that Dr. Michelson's report did make such a conclusion. In assessing the probative weight of the medical opinion underlying an agency's allegation of inability to perform, the Board must consider "whether the opinion was based upon a medical examination, whether the opinion provided a reasoned explanation for its findings as distinct from mere conclusory assertions, the qualifications of the expert rendering the opinion, and

the extent and duration of the expert's familiarity with the treatment of the appellant." *Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 142 (1993). the agency "must establish a link between the medical conclusion and observed deficiencies in work performance or employee behavior or a *high probability of hazard* when the disabling condition may result in injury to the employee or others because of the kind of work the employee does." *Schrodt v. U.S. Postal Service*, 79 M.S.P.R. 609, 614 (1998); *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 176 (1996); *Smith, supra*, 22 M.S.P.R. at 257; *Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 583-4 (1981).

Here, while there is no basis for questioning Dr. Michelson's qualifications,[8] his report is based on a one-time interview of the appellant on October 4, 2012. He also reviewed the appellant's medical history report, position description and the various contemporaneous statements regarding the incident of June 6th, discussed above.[9] In his report, he noted that the appellant had "poor ability to relate" and "impaired insight" ("He did not see a lack of subordination as a problem in his line of work as long as he proves his point"),

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[8] While Dr. Prunier and Dr. Michelson were both approved to testify at the hearing in this matter, only the former did so. Dr. Prunier's report, dated January 3, 2013, is merely a re-iteration of Dr. Michelson's report, from which it quotes liberally. IAF, Tab 7, pp. 72-74.

[9] The appellant also completed the Minnesota Multiphasic Personality Inventory (MMPI-2), which is the most widely used and researched clinical assessment tool used by mental health professionals. The results of that test were interpreted by Richard Frederick, M.D., who noted that, while the appellant answered all the questions, he was "extremely guarded and defensive" when doing so, and did not give "an open and honest account of his thoughts, feelings, attitudes and behavior." Therefore, Dr. Frederick concluded that he could not "effectively evaluate important psychological and emotional characteristics." IAF, Tab 25, p. 137 of 145. He went on to speculate, however, that the appellant was "likely" bitter, oversensitive to criticism, and readily converts stress into physical pain and discomfort. Dr. Michelson incorporated these suppositions in his own report.

that he was depressed after the June 6th incident,[10] that he "projects many of his problems to others," which Dr. Michelson noted is "usually a sign of narcissistic and borderline personality disorders," that he is "overly sensitive to criticism," collects guns, and had filed multiple discrimination complaints and had worked for the union. He recorded that the appellant had "a history of two incarcerations for assault with a deadly weapon," with no further discussion. At hearing, the appellant explained the circumstances of those events, which consisted of two brief detentions resulting from "brawls" between the ages of 18 and 20, for which all charges were dismissed. Testimony of the appellant.

Dr. Michelson also noted, however, that the appellant was "able to follow instructions," was of above average intelligence, and denied current use of medications, alcohol or illicit substances. He notes that the appellant had no suicidal, homicidal or paranoid ideations, and no compulsive behaviors, and "does not express any homicidal thoughts towards anybody, including his coworkers and supervisors." Curiously, however, he then responds to the agency's question as to whether the appellant is "a potential threat to self or others" by saying "Yes. At this point the employee does represent a potential threat of harm to self or others," while again noting that the appellant has no plan or intent of suicide or of harming any employees or supervisors at his workplace…." This conclusion seems to be entirely unsupported by the rest of the report, including Dr. Michelson's assignment to the appellant of the Global Assessment of Functioning (GAF) Scale score of "approximately 60," which connotes only "moderate symptoms… OR moderate difficulty in social, occupational, or school functioning…." On the GAF scale, "[s]ome danger of hurting self or others" correlates to the much lower score of 11-20.[11]

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[10] Erroneously referred to as having taken place on June 5th.

[11] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), p. 32.

Dr. Michelson gives a diagnosis of an adjustment disorder, not otherwise specified, with a "maladaptive pattern of behavior." He also says that "an Axis II diagnosis of Narcissistic and Borderline personality traits is noted…" (emphasis added). I infer from this that he did not intend actually to diagnose the appellant as suffering from Narcissistic and Borderline personality disorders, inasmuch as the only basis for this is his belief that the appellant "projects many of his problems to others," which is only one of many criteria that would have to be present to confirm such a serious diagnosis. He also concludes that the appellant "cannot use proper judgment and make quick decisions in law enforcement situations to protect the lives of self, the public, law enforcement personnel"[12] as he has "difficulty communicating with other staff and supervisors." He also states that the appellant would be "overly stressed" with "extended hours or changing shifts and unscheduled overtime."[13] Consequently, he opines that the appellant cannot "carry a government weapon" [14] in his employment, and "cannot safely, efficiently and reliably perform all the duties of his position."[15] IAF, Tab 7, p. 69 of 119. Such sweeping conclusions appear to have scant factual support in the record or even in the rest of his own report.[16] Further, the agency never documented any insufficient performance or deficiencies by the appellant in performing his job, and, as noted earlier, there is no evidence that he ever

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[12] Dr. Michelson's wording of these conclusions is precisely that of the agency in its referral questions to him.

[13] *See* Footnote 12.

[14] *See* Footnote 12

[15] *See* Footnote 12.

[16] While Dr. Michelson stated that he did review the appellant's position description, he did not connect any of his observations or opinions to the appellant's ability to perform any specific duties of that position. *See Royster v. Office of Personnel Management*, 68 M.S.P.R. 655, 659 (1995)(finding unpersuasive a medical report that did not show familiarity with the employee's job duties).

received less than fully successful performance appraisals. The absence of such evidence has been found to counter an allegation of medical inability to perform. *See Schrodt*, 79 M.S.P.R. at 615-6. *See also Spencer v. Department of the Navy*, 73 M.S.P.R. at 23 (satisfactory performance appraisals provide significant evidence to rebut the agency's claim that the appellant was unable to perform the duties of his position).

In sum, I find that the agency has not proven its charge of Inability to Perform the Essential Duties of Your Position Due To A Medical Condition by preponderant evidence.

Retaliation for protected EEO activity

For an appellant to prevail on a contention of illegal retaliation, he has the burden of showing that: (1) He engaged in protected activity; (2) the accused official knew of that 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. *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

Here, it is undisputed that, beginning in December of 2010, the appellant represented Agent Clarence Boyce as a union representative in his EEO complaints, and, beginning in February of 2011, as an EEO Representative. Appellant's Exhibit AAA, IAF, Tab 14, pp. 228, *et seq.*, of 256. Agent Boyce filed complaints of discrimination based on race and sexual orientation. In his complaint, Agent Boyce named management officials of the Murrieta Stations, including PAIC Davenport. *Id*. The appellant represented Agent Boyce during counseling meetings in which Border Patrol management officials at the Murrieta station counseled Agent Boyce for alleged violations of the employment policy.

On May 20, 2011, in response to an e-mail from the appellant alleging a "Hostile Work Environment," PAIC Davenport sent an e-mail to the appellant, SBPA Vargas and others in which, among other things, he opined that it was

"blatant conflict of interest" for the appellant to represent Agent Boyce, saying that it was "against [his] better judgment to allow" the appellant to represent Agent Boyce "without my strong opposition and documentation of such." Appellant's Exhibit CCC, IAF, Tab 14, p. 254 of 256. The next day, the appellant e-mailed Chief Beeson and reported the retaliation he believed he had suffered as a result of his participation in the EEO process. In that e-mail, he advised Chief Beeson:

> On May 19, 2011, as a result of my ongoing participation in the EEO process, Walter M. Davenport, the Patrol Agent In Charge of the Murrieta Border Patrol Station, retaliated against me by depriving me of my seniority right and removing me from the day shift schedule, which I successfully bid for based upon seniority. Mr. Davenport then, against my wishes, summarily reassigned me to the midnight shift without having specified any causal offense, which could have warranted his adverse action against me.[17]
>
> Also, on May 19, 2011 resultant of my ongoing protected reporting activity, which was related to my participation in the EEO process, Mr. Davenport, who I have named as a responsible management official, threatened to reassign me away from the Murrieta Station; an act that would repudiate the settlement agreement, wherein my transfer to the Murrieta Station was secured. I believe Mr. Davenport seeks to create a chilling effect upon my workplace to establish the cessation of participation in protected activities…. Mr. Davenport is intimidating me and humiliating me to promote fear throughout my workplace, brandishing overwhelming authority, in the absence of any sensible and logical explanation for his behavior.
>
> …
>
> Currently, my wife has expressed fear to me that the "Border Patrol" is conducting "A professional lynching" [and] "Is trying to stage sequential events in which to propose my termination"….
>
> …
>
> For the past five months, I have been the victim of carefully orchestrated hostility due to the assistance and representation I willingly offered to an openly gay African-American Border Patrol

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[17] *See* Appellant's Exhibit N, IAF, Tab 14, p. 74 of 256.

> Agent, in his EEO complaint. His complaints are filed against responsible management officials of the Murrieta Station; Mr. Davenport is also one of them.
>
> …
>
> Unlike similarly situated employees, who do not participate in the EEO process, I am denied seniority and required to work a midnight schedule, adverse to me and the quality of life of my family. Unlike similarly situated employees, who have not participated in the EEO process, I am being threatened by a responsible management official that I will be relocated to another duty station. Mr. Davenport is conducting a campaign calculated to deter my participation in protected EEO activity. I am being routinely taunted toward an emotional reaction in order to discredit me professionally. … I anticipate Mr. Davenport creating issues as pretext for the eventual recommendation of my removal from the Murrieta Station.

Appellant's Exhibit O, IAF, Tab 14, pp. 75-77 of 256. On January 9, 2012, PAIC Davenport ordered the appellant not to be involved any longer in Agent Boyce's EEO complaints. At that time, the appellant informed Agent Boyce that he could no longer assist him in his EEO complaint or in meetings with management officials, explaining that he was "fearful that PAIC Davenport will make good on his threat and remove me from the Murrieta Station, if not, terminate my employment with the Border Patrol, if I continue to act as your personal representative." Appellant's Exhibit U, IAF, Tab 14, p. 97-8 of 256. On August 7, 2012, in a memorandum to Chief Beeson, the appellant again recounted PAIC Davenport's order to cease representing Agent Boyce, and clearly expressed his belief that his being relieved of duty following the June 6th incident, discussed above, was the culmination of his "steadfast willingness to continue my support of …Agent Boyce." Appellant's Exhibit QQ, IAF, Tab 14, pp. 195-6 of 256.

The Board has stated that, to show retaliation using circumstantial evidence, an appellant must provide evidence showing a "convincing mosaic" of retaliation against him. *See Kohler v. Department of the Navy*, 108 M.S.P.R. 510, ¶ 13 (2008) (*citing Troupe v. May Dept. Stores Co*., 20 F.3d 734, 737 (7th Cir.

1994); *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 20 (2008)). In *Kohler*, the Board further explained:

> A mosaic is a work of visual art composed of a large number of tiny tiles that fit smoothly with each other, a little like a crossword puzzle. "A case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: 'a number of weak proofs can add up to a strong proof.'" *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (*quoting Mataya v. Kingston*, 371 F.3d 353, 358 (7th Cir. 2004)). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Troupe*, 20 F.3d at 736-37; *see, e.g., Culver v. Gorman & Co.*, 416 F.3d 540, 546-47 (7th Cir. 2005). Where an employer's motives or state of mind are relevant, the record must be carefully scrutinized for circumstantial evidence that would support an inference of retaliatory animus. *Cooney v. Consolidated Edison*, 220 F.Supp.2d 241, 250-51 (S.D.N.Y. 2002), *aff'd*, 63 F. App'x 579 (2nd Cir. 2003).

Kohler, 108 M.S.P.R. 510, ¶ 13.

Here, I find that the narrative set forth above clearly constitutes a "convincing mosaic" of retaliatory motive. It is apparent that PAIC Davenport – who, as previously discussed, was also one of subjects of the appellant's whistleblowing complaints – was irritated by the appellant's representation of Agent Boyce and, along with FOS Victor Jaime and SBPA Vargas, was one of the individuals who were the moving forces behind the events about six months later that eventually led to the appellant's removal. Further, while PAIC Davenport was neither the proposing nor deciding official in this case, it is clear that the deciding official, Chief Beeson, was well aware of the fact that he was bothered

by that representation,[18] and it was PAIC Davenport's direct input to Chief Beeson regarding the June 6th incident[19] that directly led to the appellant being ordered to undergo a psychiatric FFD examination. IAF, Tab 7, pp. 87-89 of 119. It is also true that Chief Beeson was aware that the appellant believed that the June 6th incident and its aftermath were the culmination of PAIC Davenport's "steadfast willingness to continue my support of …Agent Boyce." Appellant's Exhibit QQ, IAF, Tab 14, pp. 195-6 of 256.

I find clear evidence of retaliatory motive on the part of PAIC Davenport, who was instrumental in the process of the appellant's termination. Retaliatory motivation on the part of a lower-level official involved in the initial stages of an adverse action can be attributed to an agency decision by a deciding official otherwise uninvolved in prohibited conduct. *Cf. Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, 119-22 (2000). *See also Gagnon v. Sprint Corp*., 284 F.3d 839, 848 (8th Cir. 2002)("Courts look beyond the moment a decision was made in order to determine whether statements or comments made by other managerial employees played a role in the ultimate decision making process"), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).[20] As noted by the Board in *Walsh v. Environmental Protection Agency*, 25 M.S.P.R. 460, 466-69 (1984), the plain language of the relevant statute clearly makes it a prohibited personnel practice for an employee with authority to

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[18] Chief Beeson testified that, before the June 6th incident, PAIC Davenport had talked to him about the appellant, from which Chief Beeson concluded that the appellant was "a troublemaker." Testimony of Chief Beeson.

[19] In which he suggested that the appellant had a "serious mental instability that should be considered as hostile to the men and women of the MUR Station and the public that [the appellant] is sworn to serve," and recommended that "a fit-for-duty evaluation should be conducted on [the appellant] to determine his mental stability to perform the duties of a federal law enforcement officer." *Id.*, p. 89 of 119.

[20] *See also* FN 7, *supra*.

"recommend" any personnel action to do so with respect to any employee as reprisal for a protected activity. 5 U.S.C. § 2308(b)(9).

In light of the narrative set forth above, I credit entirely the appellant's contention that, but for his representation of Agent Boyce, as well as his whistleblowing activity discussed earlier,[21] the appellant would not have been put in a position to be terminated. As noted, I have already found the agency's charge against the appellant not to have been sustained, and, in light of the strong evidence of retaliatory motivation, I find that the agency has not established that it would have taken the same action against him in the absence of that motivation.

In sum I find that the preponderant evidence of record establishes that (1) the appellant engaged in protected activity; (2) the accused officials knew of such activity; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) after careful balancing of the intensity of the motive to retaliate against the gravity of the misconduct, a nexus exists between the motive and the subsequent action. *See Warren, supra*. Therefore, I find that the appellant has supported the affirmative defense of retaliation for protected EEO activity, as well as for protected whistleblowing activity.

DECISION

The agency's removal action is REVERSED.

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[21] It is impossible to separate the retaliatory motive stemming from the appellant's protected EEO activity from that stemming from his protected whistleblower disclosures discussed above. Nor is it possible to strictly attribute the appellant's being ordered to undergo a FFD examination to one form of retaliation and his ultimate termination to another. It is clear that both personnel actions were motivated by both forms of retaliation.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **April 23, 2013**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.[22]

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.

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[22] Reversal of the removal action is the maximum relief available based on my finding of retaliation for whistleblowing. Accordingly, I make no separate order for corrective action regarding the referral for a FFD examination. However, if my finding of whistleblower retaliation withstands final review, the appellant may file a motion for damages in a supplemental proceeding. Thus, if this decision becomes the final decision of the Board, the appellant may request such a proceeding within 30 days of the date it becomes final.

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.

FOR THE BOARD: _____

Anthony L. Ellison
Administrative Judge

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 **October 15, 2014**, 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 Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal district 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

The criteria for review are set out at 5 C.F.R. § 1201.115, as follows:

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;

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

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.

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.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this decision only after it becomes final, as set forth above. There are several options for further review set forth in the paragraphs below. You may choose only one of these options, and once you elect to pursue one of the avenues of review set forth below, you may be precluded from pursuing any other avenue of review.

Discrimination Claims: Administrative Review

You may request review of this decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

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

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

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

You, or your representative if you are represented, should send your request to EEOC no later than 30 calendar days after the date this decision becomes final. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You, or your representative if you are

represented, must file your civil action with the district court no later than 30 calendar days after the date this decision becomes final. If you choose to file, be very careful to file on time. 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. 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you want to request review of this decision concerning your claims of prohibited personnel practices described in 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the United States Court of Appeals for the Federal Circuit or by any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time.

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 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States 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, and 11. Additional information about other courts of appeals can be found at their

respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

NOTICE TO THE PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8).

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

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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-50's (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.