UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

SHAWN H. SANDERS,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
SF-0752-20-0142-I-1

DATE: July 30, 2020

Arkady Itkin, San Francisco, California, for the appellant.

Kevin D. Mack, Esquire, Sacramento, California, for the agency.

BEFORE
Grace B. Carter
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 7, 2019, the appellant filed a petition for appeal challenging his removal from the Fish and Wildlife Service (FWS) position of Fish Biologist (GS-0482-09), effective November 8, 2019. Initial Appeal File (IAF), Tab 1. At the appellant's request, the Board held a video-conference hearing on May 7, 2020. IAF, Tabs 21, 22; Hearing Compact Disc (HCD). The Board has jurisdiction over this appeal. 5 U.S.C. §§ 7511, 7512 and 7701. For the reasons set forth below, the appellant's removal is REVERSED.

ANALYSIS AND FINDINGS

Issue

Did the agency prove the charged misconduct? If so, has the agency proved nexus, and proved that the penalty selected was reasonable?[1]

Background

After a review of the documentary evidence and the testimony of record, the following facts are undisputed or where disputed, are my findings of fact. In resolving issues of credibility, including the weight to be given declarations, written statements and other documentary evidence, I have been guided by *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83 87 (1981),[2] and *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).[3]

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1 The appellant initially asserted a defense of harmful procedural error, but he waived this defense at the prehearing conference. IAF, Tabs 7, 11.

2 The following factors affect the weight to be accorded to hearsay 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 declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of 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) credibility of declarant when he made the statement attributed to him. *Borninkhof*, 5 M.S.P.R. 77, 87.

3 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 question; (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.

On August 16, 2019, the appellant's first-line supervisor Baker Holden III, Deputy Project Leader, issued a Notice of Proposed Removal based on the single charge of Failure to Follow Instructions, supported by two specifications related to two emails that the appellant sent on April 12, 2019. IAF, Tab 6 at 43-50. On August 23, 2019, the appellant made an oral response. *Id*. at 19-42. On November 8, 2019, Jeffrey McLain, Project Leader, issued a Decision to Remove, which was effective the same day. *Id*. at 13-18. This appeal followed.

The Appellant's Position of Record

The appellant worked with FWS in various roles and locations between 2003 and 2007, and then from 2009 until his removal. HCD, Sanders Testimony. In July 2017, the appellant requested a voluntary downgrade from a Supervisory Fish Biologist position to a nonsupervisory position. *Id*.; *see also* IAF, Tab 6 at 15.

In late 2018, Holden created an Assistant Habitat Restoration Coordinator (sometimes called "HRC") position for the appellant, which was still classified as a Fish Biologist. HCD, Holden and Sanders Testimony; *see also* IAF, Tab 6 at 43. The appellant started working in this position in November or December 2018. *Id*. Holden described the position as a developmental opportunity to assist the appellant to learn about the Anadromous Fish Restoration Program (AFRP), which was a new workload for him. Holden expected the appellant to assist "senior fishery biologists acting as Habitat Restoration Coordinators." *Id*.; IAF, Tab 6 at 104-07 (position description).

Holden stated the position focused on the basics so that the appellant could learn from the senior biologists. HCD, Holden Testimony. Holden wanted him to learn both the workload and the "cultural norms" of the office. *Id*. Holden described the appellant's role as assisting where needed and as directed by the senior biologists. *Id*. In 2018 and 2019, Holden issued the appellant a fully

successful performance rating in this position. HCD, Holden and Sanders Testimony; *see also* IAF, Tab 6 at 56-57; Tab 10 at 38-39.

The Assistant HRC position description included a range of activities. IAF, Tab 6 at 104-07. It stated that Habitat Restoration Coordinators work "with counterparts in other Service offices and the California Department of Fish and Game," "develop[] and nurture[] partnerships," develop projects "with partners that contribute to making all reasonable efforts to at least double natural production of anadromous fish," and oversee projects in which the office had invested funds. *Id*. at 104. Major duties included serving as an assistant to senior fishery biologists and acting "as a fully operating journeyman biologist on resource issues relative to fish management, habitat protection and enhancement, and endangered species." *Id*. at 105.

As the incumbent, the appellant was to "[c]oordinate[] with other Federal and State agencies; counties and municipalities," and public and private organizations. *Id*. He was to ensure that office programs were "fully coordinated with the appropriate offices, and divisions and branches within those offices, in the Central Valley/San Francisco Bay Ecoregion." *Id*. He was to provide assistance in developing and implementing policy, developing and implementing contracts and agreements, developing and implementing technical information, and developing "within Service resources and retaining outside experts to facilitate implementation of habitat restoration actions." *Id*.

The position description said that the Program Manager and Habitat Restoration Coordinators provide "guidance in the form of general objectives and policies" and the incumbent "independently makes or directs preliminary analyses or studies" subject to oversight. *Id*. at 106. The incumbent was expected to maintain contact with professional biologists and "other professionals inside and outside the Service" for "the purpose of assisting senior biologists in exchanging information and ideas," and other activities. *Id*. at 107.

Holden said he orally communicated to the appellant that he was not to have a role in developing or nurturing partnerships, despite it being in the position description, because the appellant was in a "developmental" role. HCD, Holden Testimony. For his part, the appellant testified that this was not communicated to him, and that he understood his position was for training but also that he was expected to do the job. HCD, Sanders Testimony. The appellant's statement, that he was expected to perform in the position is consistent with the record taken as a whole, and having considered his demeanor, I credit it over Holden's assertion that the appellant was not expected to perform important aspects of his position.[4] *Hillen, supra.*

Appellant's Prior Discipline

The record reveals the following prior discipline, all garnered during his Lodi tenue. On May 9, 2017, when the appellant was in the prior position of Supervisory Fish Biologist, (distinct from the Assistant Habitat Restoration Coordinator position from which he was removed) the appellant's then-first-line supervisor Julie Day, issued a letter of counseling related to unauthorized absence from duty. IAF, Tab 8 at 17.

On May 11, 2017, when the appellant was still in the Supervisory Fish Biologist position, Day issued a letter of counseling related to the appellant delegating to a subordinate the responsibility to address violations of the dress code. *Id.*, Tab 8 at 18.

On July 11, 2017, when the appellant was still in the Supervisory Fish Biologist position, Day issued a performance counseling memorandum that

4 Holden testified that he conducted the appellant's performance evaluation finding him to be fully successful despite his alleged, but undocumented, substandard performance. He asserted that he did this based on the recommendation of HR professionals. I find this assertion disingenuous and certainly contrary to the best practices in Federal workforce performance management. I give it little weight. *Hillen, supra.*

warned the appellant she may rate the appellant as minimally successful. *Id.*, Tab 8 at 20.

On July 25, 2017, when the appellant was still in the Supervisory Fish Biologist position, Day issued a letter of reprimand for "failure to follow my direction as your supervisor on three occasions." *Id.*, Tab 6 at 102-03. By the time of the proposal to remove, the reprimand had "expired for purposes of prior misconduct," but Holden considered it in the proposal to remove "as prior notice." *Id*. at 45.

On October 2, 2017, when the appellant was in the Fish Biologist position (after the voluntary downgrade), Day issued a letter of counseling for failure to follow supervisory direction. *Id.,* Tab 8 at 19.

On November 29, 2017, while the appellant was in the Fish Biologist position, Day issued a letter of reprimand for "failure to follow my direction as your supervisor" related to the appellant taking his work laptop from the office despite not being authorized for telework. *Id.*, Tab 6 at 80-81.

In April 2018, while the appellant was in a prior position of Fish Biologist, Day proposed a 14-day suspension for failure to follow supervisor's direction and disrespectful conduct, which Holden sustained on May 10, 2018. *Id.*, Tab 6 at 78-79.

Mentorship Meeting and Discussions There

On April 10 and 11, 2019, the agency sent the appellant to a mentorship workshop put on by the agency in Auburn, California. HCD, Holden and Sanders Testimony. While there, the appellant spoke with a variety of people, including Michelle Barry, an instructor who introduced the appellant to her husband Matthew Barry, Regional Lead for the Partners Program (a FWS program). *Id.,* Sanders Testimony; IAF, Tab 10 at 56. The appellant and Matthew Barry talked about the respective programs for which they worked, and discussed that there may be opportunities for Barry's Partners Program to work with the AFRP. *Id*. Among other things, they discussed the possibility of setting up a meeting to

discuss ways of working together. *Id*. The appellant provided Barry with a copy of his position description. HCD, Holden Testimony; IAF, Tab 6 at 30. On April 12, 2019, he emailed Michelle Barry to thank her for introducing him to her husband, because "[h]e is a fun guy!" *Id.,* Tab 6 at 24.

During the workshop, the appellant also met Jared McKee, who was at the Stone Lakes National Wildlife Refuge (another FWS program). *Id.,* Tab 6 at 53. McKee emailed the appellant on April 11, 2019, to say that it was good to meet and to ask whether the appellant would "like to setup a meeting at Stone Lakes (or I can come down to Lodi) to discuss our two programs and projects in the area to improve habitat for anadromous fish?" *Id*. The next day, the appellant responded to McKee, and stated that he had met other people (Matthew Barry and Matt Hamman) and that it sounded "like we will be pulling in a number of people for a meeting in the future (including yourself) to talk about our programs and find out where there could be overlap and capacity building together for better leveraged products," which was "Exciting Stuff!!" *Id*.

When the appellant returned to the office on April 12, he spoke with Paul Cadrett, one of the Habitat Restoration Coordinators for whom he worked, about the workshop and "some connections/introductions of regional employees that he had met at the Auburn office." *Id.,* Tab 10 at 58; *see also* HCD, Cadrett and Sanders Testimony. Cadrett was unfamiliar with the Partners Program and agreed that it may be good to learn more about the program. *Id.*, Tab 10 at 58. The appellant asked if he should take the idea to the supervisors, and Cadrett encouraged him to do so. *Id*.; HCD, Cadrett and Sanders Testimony.

On April 12, 2019, at 8:53 A.M., the appellant emailed Matthew Barry and Hamman, with a copy to Cadrett, to say that it was good to meet them and that he "shared the idea of a group meeting with" Cadrett, and "it seems the best option to meet everyone" so they could "learn about the other program(s) and meet the folks in the Partner zones that would overlap." IAF, Tab 6 at 54. He continued, "I have informed my supervisors and will wait on guidance to see when we

could/should meet to get the ball rolling." *Id*. At 11:24 A.M. the same day, the appellant forwarded this email to Holden. *Id*. at 55.

None of these potential meetings happened. Rather, Holden determined that it was necessary to investigate whether the appellant had acted "beyond his authority" in discussing potential meetings with different agency components. HCD, Holden Testimony. On April 23, 2019, Holden emailed the appellant to "acknowledge the hard work you have [done] so far" and to express appreciation for the appellant's desire "to contribute to the overall" team, but to express concern that he "may not be using the Mentoring Program properly." IAF, Tab 6 at 32. "This email is meant to inform you that you exceeded your authority as an Assistant HRC when you approached Matt Barry to coordinate a meeting" between the programs. *Id*. "The proper course of action by you should have been to say something like the following to Mr. Barry: 'Those are great ideas but I will have to run it by Lori Smith Acting Assistant AFRP Manager first.'" *Id*. The appellant responded to this email, stating: "Thank you for re-directing my efforts. I will follow your guidance as charged." *Id*. at 33.

On April 25, 2019, Holden met with the appellant to "discuss his attempt to work outside of his authority," and while Holden said that "in general having discussions with other programs is encourage[d]," where the appellant "went wrong" was "when he tried to arrange a meeting and present[ed] [himself] as someone with the authority." *Id.*, Tab 6 at 25.

On May 1, 2019, Holden spoke with Barry to learn more about the conversation. *Id.*, Tab 6 at 51; HCD, Holden Testimony. Barry reported that the appellant "did not say anything inappropriate," but "behaved strangely" and was "very excited and intense," and "described the overall interactions as strange." IAF, Tab 6 at 51. Barry further reported that the appellant gave his title, which Holden took as "signifying authority," and "even provided a position description." *Id*. "Eventually," Barry gave the appellant contact information for

a subordinate, who met with the appellant during the workshop, and the meeting with the appellant "did not go well." *Id*. at 51-52.

On May 2, 2019, Holden met with the appellant to discuss the investigation. *Id.*, Tab 6 at 51. During the meeting, the appellant "began to tear up," and asked what would happen to him. *Id*. at 52. Holden requested copies of the appellant's communications with other offices and said he would discuss the situation with human resources. *Id*. The appellant provided all of the requested communications. HCD, Holden Testimony.

Holden was concerned about the efforts to coordinate meetings with other programs because no one in the Lodi office had ever met with the Partners Program before. *Id.*, Holden Testimony. Holden described the potential meetings as a "huge lift" for which the appellant did not have sufficient skills or knowledge. When asked what harm there was to the agency related to the appellant's conversations at the mentorship workshop, Holden said that he had to "contact Mr. Barry" and had to "question him" and ask "probing questions" about his exchange with the appellant. *Id*.[5] Holden testified that the appellant's actions made the office look disorganized and was "not a good look." *Id*. Holden did not speak with McKee. *Id*. McLain similarly testified that the "harm" was that the office looked disorganized. *Id.*, McLain Testimony. However, both Holden and McLain acknowledged that no one had told them the office looked disorganized. *Id.*, Holden and McLain Testimony. Similarly, McLain testified that there was a

5 When describing this "harm," Holden chuckled with incredulity, as if it were obvious that creating a situation where he had to talk to someone in a different component of the same agency was clearly improper. There is nothing intrinsically harmful or burdensome for a manager at Holden's level to occasionally interact with agency personnel with whom he does not have an existing or formal relationship. Considering his demeanor, Holden was dismissive and flippant which adversely impacted my assessment of his credibility, particularly with regard to the instruction he allegedly gave the appellant. *Hillen, supra*.

"significant" amount of time required to "unravel" the situation. *Id.*, McLain Testimony.

Applicable Law

The agency bears the burden of proving the charged misconduct by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B).[6] Proof of one or more specifications supporting a charge is sufficient to sustain that 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). The agency must further establish the existence of a nexus between the conduct and the efficiency of the service. 5 U.S.C.A. § 7513(a); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1994). Finally, the agency must demonstrate that the penalty imposed was within the bounds of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981).

The Agency Did Not Prove the Charge of Failure to Follow Instructions

To establish a failure to follow instruction charge, the agency need only show that specific, proper, procedures or instructions were made known to the appellant and that he failed to follow them, without regard to whether the failure was intentional or unintentional. *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555-56 (1996); *Riese v. U.S. Postal Service*, 40 M.S.P.R. 666, 669 (1989).

Analysis

These specifications will be considered together because they are similar.

> Specification 1: On April 12, 2019, you sent an email to Matt Barry, Matt Hamman and cc'd Paul Cadrett trying to arrange a meeting about the possible restoration overlaps and the potential for working together on restoration activities.

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

IAF, Tab 6 at 44; *see also id*. at 54.

> Specification 2: On April 12, 2019 you replied to an email from Jared McKee stating you talked with the "Matt's" during your training in Auburn and went on to state, "It sounds like we will be pulling in a number of people for a meeting in the future (including yourself) to talk about our programs and find out where there could be overlap and capacity building together for better leveraged products. Exciting Stuff!!!"

IAF, Tab 6 at 44; *see also id*. at 53.

There is no dispute that the appellant sent either email. The question is whether the agency proved that the appellant "failed to follow instructions" in sending the emails – and relatedly, in having the conversations during the mentorship workshop that prompted the emails.

Holden said he told the appellant that having conversations with other programs was "encouraged." IAF, Tab 6 at 25. However, he testified that the purpose of the mentorship workshop was not networking. HCD, Holden Testimony. It is unclear where acceptable conversations end, and unacceptable networking begins. Significantly, for purposes of this charge, there is no credible evidence that Holden ever communicated such a dividing line to the appellant prior to his participation at the mentorship workshop.

When asked where the instruction the appellant allegedly violated was articulated, Holden stated that it was in the portion of the position description that said the appellant should "assist" the Habitat Resource Coordinators, and in the Employee Performance Appraisal Plan (EPAP) review that said the appellant should "assist." HCD, Holden Testimony; *see* IAF, Tab 6 at 56-57. Holden said he orally communicated that the appellant should learn and assist the senior biologists, rather than seek out his own responsibilities. HCD, Holden Testimony. The appellant testified that he did not understand his role to be so limited. HCD, Sanders Testimony. For his part, McLain testified that the position description was "very broad" and that he did not consider it useful when deciding the proposal's charge. HCD, McLain Testimony. Smith testified that she would

"absolutely not" tell an employee to refer to a position description when giving an instruction. HCD, Smith Testimony.

To reiterate, to prove failure to follow instructions, the agency must first prove that specific, proper, procedures or instructions were given to the appellant. *Hamilton*, 71 M.S.P.R. at 555-56. The agency did not prove that it communicated any specific instructions to the appellant relative to the allegations in the charge. At most, Holden's testimony is that the instruction was implied from the position description and his oral communications to the appellant that he was in a developmental role and should focus on assisting the senior biologists. HCD, Holden Testimony.

Merely telling the appellant to "assist" others does not effectively communicate an instruction as to what the appellant should not do. Even assuming that the appellant's developmental position was intended, primarily, to learn from and assist the senior biologists, there is no credible evidence that the agency communicated to the appellant that he should not seek to meet with individuals other than senior biologists or other personnel in the Lodi office.

Indeed, the evidence is to the contrary. The position description explicitly contemplated that the incumbent would "work[] closely with counterparts in other Service offices" and other state, local, and industry entities. IAF, Tab 6 at 104. Moreover, if the agency did not intend for the appellant to interact with people outside the Lodi office, it is unclear why it approved and provided resources for him to attend the mentorship workshop.

During his testimony, McLain testified that he considered the email from Holden communicated to the appellant an instruction that he should not talk with other components. HCD, McLain Testimony. However, on examination, McLain also acknowledged that the email, sent April 23, postdated the workshop and the appellant's emails to Barry and McKee. *Id*.; *see also* IAF, Tab 6 at 32.

An agency cannot prove a charge of failure to follow instructions based on actions occurring before it issued the instructions. Pointedly, McLain was

unaware of any evidence that the appellant failed to comply with the April 23 instruction from Holden. HCD, McLain Testimony. In short, the agency did not prove that it articulated a specific instruction to the appellant prior to his participation in the workshop.

The agency also expressed concern that the appellant presented himself as having "authority" to schedule a meeting during the workshop, but the record shows that he clarified that he was subject to supervision and approval within his office.[7] Specifically, in the email sent to Barry and Hamman in the morning on April 12, 2019, the appellant wrote: "I have informed my supervisors and will wait on guidance to see when we could/should meet to get the ball rolling." IAF, Tab 6 at 54. This is a clear statement that the appellant was not then setting up a meeting, because he acknowledged his supervisors had not yet approved whether they "could/should meet."

McLain took issue with the timing of this email, noting that the appellant sent it to other components before forwarding it to Holden. HCD, McLain. But that timing supports the appellant rather than the agency. The appellant's email – before Holden became involved – expressed that the appellant needed supervisory approval. Thus, to the extent the agency was concerned that the appellant presented himself as having "authority" to schedule meetings, the appellant expressly disclaimed any such authority.

Further, the agency's speculation about how much corrective action it is expected to undertake before it can remove an employee for misconduct has been considered, but warrants no different result in this case. *See* HCD, Agency Closing Argument. Indeed, after reviewing the entire record, any reasonable

7 On this point, McLain referred to the fact that the appellant gave Barry a copy of his position description. HCD, McLain Testimony. This was unusual. But being unusual does not prove a failure to follow instructions.

arbiter would struggle to identify in the agency's charges anything the appellant did that would be classified as misconduct.

The agency approved the appellant to attend a meeting with personnel from across the agency, the appellant talked with other participants at the meeting, became excited about the prospect of working together with these people in his job, and networked with those people he met. Based on the reception from these attendees, other conference participants were interested in meeting with the AFRP. That no one in the Lodi office had previously interacted with personnel from the Partners program, or other programs generally, does not mean that it was improper for the appellant to suggest such an interaction. Taking initiative, at least as reflected in this record, is not misconduct.

Holden and McLain both identified concerns with the appellant's prior failures to follow supervisory instructions, as reflected in prior discipline and letters of counseling as part of their thinking in pursuing the charge and specifications at issue in this appeal. HCD, Holden and McLain Testimony. The record reflects the agency already took actions for those instances of misconduct, and while prior misconduct may be used to justify a chosen penalty, it is irrelevant to the question of whether the appellant failed to follow instructions in the instances charged, particularly, where, as here, there is no preponderant evidence that the an instruction was given.

Moreover, both Holden and McClain identified concerns that the appellant may have been too talkative or required more supervisory oversight to stay on task than other employees. *Id*. Again, "needing supervision" is hardly misconduct, and even if it were, that was not what the agency charged. It is axiomatic that the Board cannot sustain a charge other than that stated in the proposal. *Rodriguez v. Department of Homeland Security*, 117 M.S.P.R. 188, ¶ 8 (2011) (the Board will not sustain an agency action on the basis of a charge that could have been brought but was not.

Having considered the entire record, and based on the foregoing, Specification 1 and Specification 2 are NOT SUSTAINED. Thus, it did not meet its burden of proof, and the charge is NOT SUSTAINED. Because the only charge was not sustained, it is unnecessary to discuss nexus or to consider penalty.[8]

Decision

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **November 8, 2019**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

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

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

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8 It is worthy to note concerning nexus, were such a finding required, the conclusion must be that the agency failed to show a clear and direct relationship between the appellant's attempt to network with other agency components and his ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Hoofman v. Department of the Army,* 118 M.S.P.R. 532, ¶ 16 (2012).

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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

INTERIM RELIEF

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

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of Fish Biologist, GS-0482-09. 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: /S/
Grace B. Carter
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 **September 3, 2020**, unless a petition for review is filed by that date. This is an important date because it is

usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's eAppeal website (https://eappeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

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 courtappointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S.

Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

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

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).

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-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 17 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.