UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF REGIONAL OPERATIONS

JAMES WELLER,
Appellant,

v.

GENERAL SERVICES ADMINISTRATION,
Agency.

DOCKET NUMBER
DA-0752-12-0519-I-1

DATE: February 4, 2014

Alan L. Lescht, Esquire, Washington, D.C., for the appellant.

Ann F. MacMurray, Esquire, Denver, Colorado, for the agency.

BEFORE
Ronald J. Weiss
Administrative Judge

INITIAL DECISION

INTRODUCTION

On July 9, 2012, the appellant filed a timely appeal of the agency's action removing him from his Senior Executive Service (SES) position as Regional Commissioner with the Public Buildings Service (PBS), effective June 25, 2012. Appeal File (AF), Tab 1. Because the appellant is a non-probationary career employee in the SES, the Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7543; 7701. The hearing the appellant requested was conducted in Washington, D.C., on June 4-5, 2013.

For the reasons set forth below, the agency's action is REVERSED.

BURDENS OF PROOF

An agency may remove a member of the SES only for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 U.S.C. §§ 7542; 7543(a). The agency therefore bears the burden of proving by preponderant evidence[1] that it had cause to remove the appellant for one of these enumerated reasons. *See Shenwick v. Department of State*, 92 M.S.P.R. 289, 296-297 (2002). In the present case, the agency removed the appellant from his SES position as Regional Commissioner of the Greater Southwest Region (Region 7), with PBS, located in Fort Worth, Texas, based on the charge of "Conduct Unbecoming of a Federal Employee." AF, Tab 5, p. 49.

Pursuant to 5 U.S.C. § 7701(b)(3), the Board has authority to mitigate penalties imposed against a member of the SES. *See also Hillen v. Department of the Army*, 72 M.S.P.R. 369, 371-374 (1996). Accordingly, the agency bears the further burden of proving that its penalty of removal for any sustained misconduct was reasonable under the circumstances of the case, with reference to the Board analysis in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-08 (1981).[2]

The appellant alleged that the agency engaged in harmful procedural error in bringing the present action. The appellant bears the burden of proving this affirmative defense by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(iii). Harmful procedural error cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

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[1]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).

[2] In contrast to adverse actions taken against non-SES employees, an agency is not required to demonstrate that an SES employee's removal promotes the efficiency of the service. *See Shenwick*, 92 M.S.P.R. at 296.

ANALYSIS AND FINDINGS

The agency did not establish that the appellant engaged in conduct unbecoming a Federal employee.

The agency cited four specifications in support of its charge. AF, Tab 5, p. 49. All four specifications derive from the findings and conclusions of an April 2, 2012 Management Deficiency Report issued by the agency's Office of Inspector General (OIG), regarding "excessive and wasteful spending and employee misconduct" associated with the PBS Biennial 2010 Western Regions Conference (WRC). *Id.* In the first, the agency cited costs associated with the number of employees from Region 7 who attended the WRC, and the number of in-person planning meetings, as well as the number of Region 7 employees who participated in such meetings, concluding as follows:

> Region 7 sent approximately 70 attendees to the WRC. The costs associated with sending those attendees included travel, lodging and per diem. In your role as Regional Commissioner for Region 7, you were in a position to control the expenses related to the WRC by limiting the number of employees who attended the pre-planning meetings and the amount of times your employees attended the pre-planning meeting and calling this to the attention of your peers. The number of planning meetings and the number of participants in those meetings were excessive, and resulted in unnecessary costs to the government. Given your position as Regional Commissioner, your participation in the WRC planning, and the participation of those in your chain of command in the planning meetings, you knew or should have known that this conduct [was] improper.

AF, Tab 5, p. 50. The agency charges that the appellant and four other Region 7 employees attended the last of these planning meetings, a "dry run" held on October 12-14, 2010 at the WRC site, and that either one or two Region 7 employees attended six of the previous in-person meetings. *Id.*

Although, as noted, the agency indicated that the appellant had failed to control costs by permitting 70 employees from his region to attend the WRC, it provided no explanation, either by way of the OIG report, its own response file or prehearing submissions, or during the Board hearing, as to why this number of conference attendees should be deemed untoward or excessive. Indeed, the only

reference to the approved number of regional conference attendees was in testimony by Robin Graf, formerly Regional Commissioner of the Northwest/Arctic Region (Region 10), who indicated, without challenge, that the 70 employees sent to the WRC from Region 7, out of a total number of approximately 700, was consistent with a formula applied to all participating regions since at least 2006. Transcript (Tr.), Vol. 1, p. 253.

As further noted, the agency also charged the appellant with failing to speak out against or otherwise control the "excessive" number of in-person planning meetings held prior to the WRC, and with failing to limit the number of his own employees who participated in these meetings. AF, Tab 5, p. 49-50.

Again, as the appellant notes, the agency provided no evidence that agency regulation or policy prohibited conference planners from holding in-person meetings, or provided any guidance as to how many such meetings might be deemed too many. However, from documentation produced as part of the OIG report, the agency established that groups of employees, ranging in size from 5 to 31, from all four regions participating in the WRC, gathered seven separate times at the conference site in Las Vegas, and once in Denver, incurring travel and other expenses exceeding $130,000. Even apart from any specific guidelines regarding pre-conference planning, and accepting some degree of onsite scouting and preparation as reasonable and necessary for the effective operation of the conference, this record supports the agency's conclusion that, as with other aspects of the WRC, discussed below, the decision to convene such a series of onsite meetings was made with little regard for any notion of reasonable cost management.

The question remains however: who was actually responsible for that decision? The appellant testified that authority for making this and other logistical arrangements rested solely with Jeff Neely, Regional Commissioner of Region 9, the host region for the 2010 WRC, and his staff. Tr., Vol. II at 99-100. The appellant's testimony on this point was corroborated by the testimony of Mr.

Graff, as well as that of Paul Prouty, Regional Commissioner for Region 8. Tr., Vol. I at 239-240, 251-253, 314-315, 324-326.

The appellant testified that he appointed two employees, Stephen Rutledge and Matthew Madison, to serve as representatives from Region 7 on the "planning team" for the WRC, with the expectation that they would provide input on the content of the conference. Tr., Vol. II at 103-105. The appellant further testified that he received no formal feedback from Mr. Rutledge or Mr. Madison, beyond brief "fly-by" exchanges with Mr. Madison, and that he first learned there had been eight onsite planning meetings when presented with material attached to the agency's notice of proposed removal.[3] Tr., Vol. II at 31, 36.

The appellant's testimony on these points was again corroborated by Mr. Graf and Mr. Prouty, who likewise testified that they selected subordinates to provide input in putting together the conference agenda, and that these employees subsequently performed that role autonomously with minimal feedback, Vol. I at 242-243, 248-249, 317-319, as well as by Mr. Rutledge and Mr. Madison, who both testified that they did not communicate with the appellant regarding the details of the planning meetings, and that neither they nor the appellant were involved in scheduling them. Tr. Vol. I at 353-354, 357-358, 360-362, 381-383, 390. Indeed, Mr. Madison testified that he was scolded by employees of Region 9 for failing to attend all of the scheduled meetings. Tr., Vol. I at 385. Mr. Madison also confirmed that an intermediate supervisor, Jimmy Ferracci, rather than the appellant, approved his travel vouchers, so that the appellant would not have had any direct knowledge of the existence of any particular meeting, or whether he had attended it. Tr., Vol. I at 382-383.

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[3] While not challenging the agency's contention that eight separate meetings took place, the appellant argues that one of these was only attended by the host region, Region 9, and thus is not properly characterized as a WRC planning meeting. Tr., Vol. II at 30.

From this consistent and unchallenged evidence, I conclude that, outside of his personal appearance at the final, "dry run" meeting, the appellant possessed no knowledge regarding the WRC planning meetings until well after the fact, and thus was not in a position to contest or otherwise limit the travel costs associated with their frequency and composition. Moreover, consistent testimony from all involved persons further established that Region 9, as the host region for the WRC, was responsible for the logistics of conference planning, with input from non-host regions being limited to the content of the conference itself, and that Mr. Rutledge and Mr. Madison were selected as representatives from Region 7 with this particular function in mind, based on their past experience putting together and executing a successful conference agenda, rather than their knowledge of governmental travel rules or regulations.

The appellant further testified that when his region had hosted past conferences, he had utilized procedures to ensure compliance with applicable rules and regulations, knowing that his decisions in this regard were subject to review by his own supervisors, and that he therefore had reason to believe the same held true for Mr. Neely and Region 9 with respect to the 2010 WRC. Tr., Vol. II at 33-35, 115.

In light of these unchallenged facts, including unrebutted evidence that the appellant was several supervisory levels removed from Mr. Rutledge and Mr. Madison, and thus not responsible for authorizing their travel, I do not find the routine delegation of pre-conference planning to these employees, such that he was unaware of the overall number and composition of onsite meetings, violated his fiduciary duties or otherwise constituted conduct unbecoming a Federal employee.

As noted, it is undisputed that the appellant attended the last planning meeting, the "dry run" held at the conference site on October 12-14, 2010. Although the agency charges that four employees from Region 7, apart from himself, attended the "dry run," the appellant testified, without contradiction, that

only three of these, including Mr. Rutledge and Mr. Madison, were employees under his supervision, with the fourth being an employee under the supervision of George Prochaska, the Regional Commissioner for Region 7 of the Federal Acquisition Service (FAS). Tr., Vol. II at 32. The agency has not demonstrated that the presence of four attendees from Region 7 at the "dry run" was excessive, especially as three of these four were Mr. Rutledge, Mr. Madison, and the appellant, all of whom had a role in the conference as presenter or emcee, and/or were engaged in development of the conference agenda.

It is further undisputed that a total of thirty-one employees from the four participating regions attended the "dry run." Although the appellant conceded that of these thirty-one attendees, only six were scheduled to make presentations at the actual conference, he testified that "others had other roles in making the conference work and it was important to bring those people in as well and make sure that [it] was set up." Tr., Vol. II at 60.

Nevertheless, as was the case with the decision to hold eight separate onsite planning meetings, incurring the travel expense of gathering thirty-one employees, approximately 10 percent of the number who would ultimately attend the conference itself, for this last meeting, again demonstrates, at best, a general disregard for containing costs to the government. It remains troubling, moreover, that the appellant at hearing expressed no particular concern over the costs incurred by the number of planning meetings, or the numbers of employees who attended them, suggesting that his conduct might well have been little changed, even had his knowledge and responsibility been other than they actually were.

In any case, just as there is no evidence that the appellant knew or should have known about the prior eight meetings, much less their composition, the agency likewise presented no evidence that the appellant played any role in arranging the attendance for the "dry run," or that he knew what that attendance would be, before the fact. Based on this record, it was not possible for the

appellant to have controlled the excess costs associated with these events by "calling [them] to the attention of [his] peers."

Accordingly, I find that the agency has not established Specification 1 of its charge.

In its second specification, the agency stated as follows:

> Documentation reviewed in connection to the WRC revealed that more than $140,000 was spent on catered food and beverages during the WRC. The event included food expenditures exceeding $79,000 for light refreshments and breakfast buffets, over $30,000 for a Networking Reception that included petit beef wellington, mini Monte Cristo sandwiches, sushi rolls, and other food items that failed to demonstrate prudent cost control. In addition, over $30,000 was spent for the Cocktail Reception and Awards Dinner. You are aware that Federal employees traveling for work are reimbursed for their lodging costs plus a fixed amount for meals "per diem." The per diem in October 2010 for the Las Vegas area was $71. Conference participants were advised that breakfast would be provided on Tuesday, Wednesday, and Thursday and they "must reduce per diem by $12," and they were also advised that the Thursday dinner would be provided in addition to breakfast and they "must reduce per diem by $36," when in fact each breakfast cost the government $44, and dinner cost approximately $95 per person.
>
> You allowed this violation, and despite your position as Regional Commissioner, you did nothing to stop these irregularities which resulted in the GSA paying a cost greater than per diem. Given the participation of employees in your chain of command, and the briefings you received in the planning of the WRC, you knew or should have known that there was excessive and in some cases impermissible spending. In an email dated July 13, 2011 to the other Western Region Commissioners, Jeff Neely (9P), Robin Graff (10P, and Paul Prouty (R8), regarding possible disciplinary actions in connection with the WRC, you wrote "Jeff—very sad. Can I share in this with you? This was a group decision and supported by CO. Amazing." This email exchange acknowledges your involvement in the decision making of all activities associated with the conference.

AF, Tab 5, p. 50-51.

It is undisputed that the contract arrangements for the food and beverages served at the WRC were exclusively performed by employees of Region 9. The appellant testified, without contradiction, that he was not privy to this contracting process, and did not know what the government was actually charged for any of the catering arrangements at the WRC. Tr., Vol. II at 95. The appellant also testified, again without challenge, that he had not received any advance information from Mr. Rutledge, Mr. Mason, or anyone else, regarding what would be served at the WRC, and the agency provided no evidence that any such details were discussed during the "dry run" meeting that the appellant attended.[4] Tr., Vol. II at 101.

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[4] As noted, the agency cited a July 13, 2011 email exchange between Mr. Neely, Mr. Graf, Mr. Prouty, and the appellant, as evidence of the latter's "involvement in the decision making of all activities associated with the conference." AF, Tab 5, p. 50. The record reflects that Mr. Neely sent the following email to Mr. Prouty, Mr. Graff and the appellant:

> Spoke to bob and David—and looks like I will be getting either a counseling or reprimand letter—much ado about which it will be. No matter---Appears I am going to be slapped around a bit but no other wrc events will be involved. Guess we really have to figure out how to do the wrc very differently if we ever hope to conduct one again. Perhaps a smaller venue with telepresence or vtc sessions and some sort of continuing education credits for attended sessions….

AF, Tab 5, p. 82. The appellant testified that his reply, "Jeff—very sad. Can I share in this with you? This was a group decision and supported by CO. Amazing", reflected his assumption that Mr. Neely was receiving scrutiny for "the decision prior to the [WRC]…about having [the conference] and having it in Las Vegas." Tr., Vol. II at 102-103. The appellant further explained that, at the time of this email exchange, he didn't know the WRC was being investigated by the OIG regarding excessive costs, but was aware of prior agency controversies regarding whether conferences could be held in Las Vegas. Tr., Vol. II at 102-103, 127-128. Although, as noted, Mr. Neely's message appears to make reference to the way the conference was conducted, and not merely to its existence or the fact that it was held in Las Vegas, the appellant's interpretation of this exchange was shared by both Mr. Prouty and Mr. Graf. Tr., Vol. I at 283-286, 328-330. In light of this consistent testimony, and in the absence of evidence that the appellant had contemporary knowledge of conference expenditures or the OIG's investigation of them, I find the agency did not establish that this communication, of

At hearing, the agency further argued that, even without knowledge of actual costs, the lavish nature of what was provided at the conference was essentially *res ipsa loquitur*, and should have caused the appellant to realize that per diem rates had been exceeded. As discussed below, this aspect of the agency's charge, while referenced in its decision letter, *see* AF, Tab 5, p. 14, was not expressly included in the appellant's notice of proposed removal. As also discussed below, however, the appellant challenged this general notion, both in his written response to the proposed removal, and at hearing, producing several witnesses who testified that they interpreted the munificence of the conference catering as evidence that Region 9 had obtained "a good deal," of a type uniquely available in Las Vegas.

For example, Mr. Rutledge testified that "I've always heard, you know, they have deals because they want to draw people there. So I don't know what kind of contracting…that they can do. You know, you always hear of getting people into casinos with good rates for the food. So as I see things, I have no clue whether it's an impropriety or not. I wasn't aware." Tr., Vol. I at 363. Mr. Madison similarly testified that, at the time of the conference, he believed those responsible for contracting had obtained a good deal on catering from the Las Vegas area facility:

> [L]et me give you an example. They had offered a lunch brunch thing in…a casino there at that facility as well, and they offered a spread---I only had it once because I have to watch my weight---but the fact is that it was pretty fabulous. But the expense of that thing was really negligible…it kind of was right within the parameters of what the expenses are that we are allocated by per diem and by the government. So I just assumed if that was being offered to the public, why wouldn't we be receiving the same kind of deal as the

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itself, demonstrates his "involvement in the decision making of all activities associated with the conference."

> government….I, again, thought we got a good deal….I assumed that all those things were being taken care of…and that Region 9---well, no region wants to bust the budget. Everybody's trying to husband their dollars….

Tr., Vol. I at 389-390. The appellant likewise testified that "in the back of my mind…we're in Las Vegas. There is a little different standard here in some respects….I knew that the contracts had been negotiated and my expectation was that they had gotten good pricing because of the economic climate in the Las Vegas area." Tr., Vol. II at 124.

Other testimony from these and other witnesses cast doubt on this explanation, however. Mr. Rutledge, for example, after citing the Las Vegas effect, went on to testify that the catering "[didn't] really seem any different to me than some of those other conferences." Tr., Vol. I at 375. Mr. Prouty, while not himself present at the WRC, testified that, "No one ever mentioned anything when they came back from the conference. Subsequent[ly], I've talked to people; they said it was just average conference fare." Tr., Vol. I at 328. The appellant similarly testified that he "didn't think [the food] was particularly lavish…." Tr., Vol. I at 124.

From this evidence, taken as a whole, a picture emerges of an agency culture, at all levels, apparently not excluding the appellant, accustomed to a kind of routine extravagance in the planning and provisioning of conferences, a spare-no-expense tradition perpetuated, if not originated, by Mr. Neely and his staff with respect to the 2010 WRC. Nevertheless, while it may represent mere chance that Region 9 was sitting in the contractual chair when this music stopped, the fact remains that the appellant did not participate in the relevant purchasing decisions and had no prior notice of the resulting largesse, until actually partaking of it along with other conference attendees. Even had the appellant reacted at that point with greater alarm over the ready flow of petit beef

wellington, et al., it was then too late for him to have "stopped these irregularities," as the agency charged.[5]

Accordingly, I find the agency has not established Specification 2 of its charge.

In its third specification, the agency cites "impermissible spending" with respect to clothing, including the purchase of "19 vests for regional ambassadors and other employees at a cost over $1800," and "the rental of three (3) tuxedos worn by emcees at a cost over $300," and "improper purchasing of mementos for conference attendees," such as "yearbooks and other items at a cost of

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[5] In its decision letter, the agency noted that "[a]ll conference attendees received a copy of the conference agenda and other information related to the conference prior to their arrival. The agenda clearly identified that the scheduled activities included two receptions and the Capstone Gala Dinner. Despite this knowledge, you did not inquire about the propriety of using government funds to purchase food for two receptions during this roughly three and one half day conference." AF, Tab 5, p. 14. The identity of the "other information" cited by the agency remains unclear, but the record includes copies of conference agendas or draft agendas. *See* AF, Tab 5, p. 120;, Tab 25, p. 131. These agendas are undated, and no other evidence was introduced as to when, or if, the appellant received them. Moreover, as noted, Specification 2 of the agency's charge focused on the nature of the food provided at these various conference meals, and the degree to which the actual cost of this food exceeded previously announced per diem rates for Las Vegas, circumstances that clearly cannot be gleaned from the agendas themselves. To the extent the proposal notice's reference to meals as being "in some cases impermissible," may be deemed as having notified the appellant that he was being charged not just with violating an obligation to challenge the cost of these meals, but also their provision at government expense in the first place, where, for example, they were unaccompanied by some form of training, it is again unclear whether receipt of the agendas, by themselves, would have provided sufficient evidence of any such obligation. At hearing, the appellant expressed his belief that breakfasts and other meals may be paid for with government funds, even in the absence of training, so long as employees subtracted the appropriate portion of their per diem from their travel vouchers for such meals, a view the conference agenda might be said to have encouraged, with its repeated emphasis on reducing per diem by specified amounts for provided meals. AF, Tab 5, p. 120-127; Tr., Vol. II at 40. Although the agency cited documentation indicating that this belief was incorrect, *see* AF, Tab 25, p. 166, the agency did not establish that such a misunderstanding, resulting in a failure to raise concerns about meals following presumed receipt of the conference agendas, or at the conference itself, would constitute conduct unbecoming a Federal employee.

approximately $8000…canteens, commemorative coins, shirts for the team-building exercise, and other unnecessary items at a cost of over $12,000." AF, Tab 5, p. 51. The agency further specified that "$6,325 was spent on commemorative coins given to all conference participants for their work on the Recovery Act, along with velvet boxes for the coins." *Id.* As noted, the agency charged that the procurement of these items was not only "unnecessary" and wasteful of government funds, but also "impermissible" under applicable federal acquisition regulations; that the appellant "knew or should have known" about this impermissible spending; and engaged in misconduct by failing "to control these expenses at [his] earliest opportunity." *Id.*

The appellant testified, again without contradiction, that he had no knowledge, prior to attending the conference itself, of any of the decisions to procure the above-referenced items, much less what was spent on them, with the exception of the commemorative coin. Tr., Vol. II at 107. The agency argued, however, that the appellant is responsible, as a senior executive, for the actions or inactions of his representative from Region 7, Mr. Rutledge and Mr. Madison, who became aware, during the various planning meetings they attended, that at least some of these items would be procured for the WRC. The agency further argued that, if not exercising personal oversight as to these procurement decisions, the appellant should either have kept sufficiently apprised of them via communication with Mr. Rutledge and Mr. Madison, or should have ensured that his conference planning representatives possessed the knowledge and initiative to raise the alarm on their own about these practices in time to stop them.

As previously set forth, however, it was the accurate understanding of all involved that contract and procurement decisions for the WRC were to be made by Jeff Neely and his subordinates of Region 9, who remained solely responsible for meeting their prescribed budget, while complying with relevant acquisition regulations. As noted, the appellant testified that Mr. Rutledge and Mr. Madison were selected as planning representatives, not for their knowledge of Federal

acquisition rules or to troubleshoot whether Region 9 was complying with them, but rather to help with the content and mechanics of the conference agenda.

Mr. Rutledge and Madison, for their part, both testified that they were unfamiliar with Federal acquisition rules, but confirmed that, in any case, they did not perceive it as part of their primary purpose to second-guess the procurement decisions made by Region 9. Mr. Rutledge, for example, testified that

> my role in that kind of conference as an emcee was more focused on the program and what would occur during the program and how you lay out the program, how you convey the information to anybody that's attending….And so the issues about contracting and hotels and all that…I had nothing to do with that kind of stuff….I just did not hear about contracting issues at all. That was not the focus for me….You don't walk into these kinds of events assuming that the other groups that you have known and worked with over the years are screwing up….I expect them to be professionals. They expect us to be professionals.

Tr., Vol. I at 353, 360, 362.

Mr. Madison likewise testified that "my main task was to be kind of a quality check off and to ensure the agenda. That was my main emphasis. And then, of course, coming back with any issues. And then I also was kind of the one that…coordinated the attendee list from each of the different divisions." Tr., Vol. I at 381. Mr. Madison acknowledged that price was discussed at least once, with respect to the bicycle building exercise: "And I specifically mentioned that that cost just seemed out of line for what we were trying to accomplish. And it resulted in them actually negotiating down that amount….That was one of the few times they ever even talked price, was that one event." Tr., Vol. I at 387. Despite this singular occasion, however, Mr. Madison elsewhere confirmed his overall assumption that Region 9 was operating with the requisite integrity in making contracting decisions for the conference and that he "had nothing to report [to the appellant] because I didn't have any suspicion that anything was going wrong…." Tr., Vol. I at 389-390.

From this record, I find the agency has not established that, apart from the commemorative coin, the appellant either knew or had reason to know of the particular procurement decisions cited in Specification 3, prior to his attendance at the conference itself.

It is undisputed that the appellant learned of plans to purchase commemorative coins to be distributed to attendees at the WRC, as well as all employees of the four regions participating in the WRC, in an email from Mr. Neely on March 24, 2010:

> So here's the sort of final working version of the coin proposed for the WRC. Just to jog your memories—given out to all WRC attendees and, afterwards, to all the remaining employees in Regions 7, 8, 9 and 10. If you are good with it, I'll turn it over to the team and let them work their magic. If not, please let me know why.

AF, Tab 5, p. 169-170.

The agency contends that the coin constitutes an impermissible "memento," citing GSA Regulation 5090.1, paragraph 4b, which provides, in pertinent part, "Memento items of any dollar value give to agency employees as a souvenir or keepsake of the training conference or meeting that are not necessary to carry out the official agency business are prohibited. The Training Act does not provide authority to use Agency Funds for the purchase of personal gifts to employees." AF, Tab 25, p.170.

The appellant testified, however, that although labelling on the coin included reference to the WRC, it was not, in fact, a conference memento, but rather an appropriate reward for the employees of all four regions for the extra efforts involved in implementing the recent Recovery Act:

> …I believe it's some type of a non-monetary award. Now, we could've given everybody a cash award…for their accomplishments on the Recovery Act, because everybody, frankly, contributed….GSA had delegated five-plus billion dollars of new work for the American public. There was lots of pressure to accomplish that. As Paul [Prouty] and Rob Graf indicated yesterday, that was two, three, four times our annual workload we did in 18

> months. Everybody pitched in….We could have given them cash awards. The decision was made to recognize them with a coin. The WRC Conference Planning Committee, because they were in existence and because the conference was coming two, three weeks after that key milestone, it made sense to do that recognition to as large a group as we could at the conference since we had the Commissioner, Bob Peck, at the conference, to sing the praises and thank those 300 people that were there and to make sure that we took the coin back and [gave] it to the rest of the people who couldn't attend the conference. That's why we ordered 1,500 coins. If it was a conference memento, we would've ordered 300, 325….It's not outrageous and it's not unreasonable, by any stretch. It was very cost-effective. I think it was less than four dollars a coin to thank people for a monumental effort.

Tr., Vol. II at 90.

As the appellant noted, his characterization as to the nature and purpose of the coin was corroborated by both Mr. Prouty and Mr. Graf. Tr., Vol. II at 262-266, 330-332. Moreover, the relevant GSA regulation, 9451.1, "GSA Associate Performance Recognition System," permits "[n]on-monetary awards…intended to recognize contributions that might otherwise go unrecognized[,]" and are "justified by some superior achievement or accomplishment…." AF, Tab 36.[6] The regulation further provided that such awards "must be of nominal value not to exceed $99.00…." and "demonstrate good taste and preserve the credibility and integrity of GSA's awards program." *Id.* As examples, the regulation included "coffee mugs, desk sets, desk clocks, clothing, and GSA wristwatches[,]" *id.,* but both the appellant and Mr. Prouty testified, without contradiction, that it was common practice for the agency to utilize coins as non-monetary awards for employee performance. Tr., Vol. I at 91, 332.

As the agency notes, the regulation also requires supervisors to "maintain documentation of the awards[,]" including "name of the award recipient, date of

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[6] The agency testified, without challenge, that GSA regulation 9451.1, introduced into the record as its "substituted exhibit 27," was "the correct version of the policy at the time." Tr., Vol. II at 83; AF, Tab 36.

issuance, and a brief description of the contribution being recognized." AF, Tab 36. The appellant acknowledged that such documentation appeared to be "missing" for the coins at issue here, but testified that, rather than produce individual documentation on each person, "I would've hoped there would've been [some] kind of universal justification. And if there wasn't, that was an error." Tr., Vol. II at 90-91.

The agency provided no evidence establishing the appellant's responsibility for any such documentary omission. In any case, this record, taken as a whole, does not support a finding that the appellant's actions with regard to the issuance of the coin in question constituted conduct unbecoming a Federal employee.

Accordingly, I find the agency has not established Specification 3 of its charge.

The agency bases its fourth specification on a "team building session" performed during the WRC. AF, Tab 5, p. 51. Pursuant to findings by the OIG report, the agency cites the award of a $75,000 contract to a private entity, "Most Valuable Performers (also known as Delta 4)," as well as the contractor's purchase of 24 bicycles as part of this exercise, noting further that "even though GSA specified the bikes were the property of the provider, GSA selected the recipient of the bikes (local Boys and Girls Club)." *Id.* Based on these findings, the agency charged that the appellant "acquiesced to excessive spending that [he] knew of should have known would waste taxpayer dollars…." *Id.*

Although not explicitly stated, the agency implies that $75,000 was an excessive amount for the team building contract. As previously noted, Mr. Madison testified that the initially proposed cost of the exercise was the one discussion of price he remembered participating in during the planning phase of the conference. Mr. Madison further testified that he expressed the opinion at the time that the proposed cost was too high, and that it was subsequently reduced. Unsigned and anonymous notes of the March 8-11 planning meetings include reference to "Cost $90K with Delta…." under the heading, "Team Building." AF,

Tab 5, p. 191. For its part, the OIG Report addressed the cost issue as follows: "A GSA program director told the vendor that its initial offer of almost $125,000 was too high. At the vendor's request, the program director disclosed the GSA's maximum budget for one day of team-building training was $75,000. GSA then awarded the contract at this price." AF, Tab 5, p. 62.

Although the agency provided no specific supporting evidence for the proposition that expending $75,000 in government funds for a single conference exercise was "excessive," one might reasonably conclude that it was, especially set against an overall conference budget ceiling elsewhere characterized as $250,000. *See* Tr., Vol. I at 247 (Testimony of Graf), 316 (Testimony of Prouty), Vol. II at 52 (Testimony of Weller). In any case, even granting this implicit contention, and, further, that such profligacy resulted from lax or negligent practices on the part of those responsible for negotiating the contract, the agency provided no evidence that the appellant played a role in such negotiations or knew anything about their outcome.[7] Moreover, although, as noted, the record reflects that Mr. Madison did participate in a discussion over the cost of the team building exercise, both he and the appellant testified, again without contradiction, that the subject was never communicated to the appellant.

Although not elaborated as part of its specification, the agency elsewhere asserted that GSA officials, having come into possession of the 24 bicycles assembled as part of the team building exercise, improperly donated them to the local Boys and Girls Club, in violation of the agency's own procedures governing disposal of Federal property. The OIG Report explained the findings underlying this aspect of the charge, as follows:

> The goal of the bicycle-building project was that employees would work together in an act of service to those in need. Therefore, GSA

[7] In his written reply to the proposed removal, the appellant stated, without rebuttal, that the team building exercise was not discussed during the "dry run," the one planning meeting he attended, as it was intended to be "a surprise." AF, Tab 5, p. 42.

> officials wanted participants to see the bicycles donated to the children of the local Boys' and Girls' Club during the conference. However, if the government acquires property, it may only dispose of that property pursuant to the Federal Surplus Property Donation Program---created by GSA itself to enable all federal agencies to comply with the Property Act. In order to avoid the requirements of the Property Act, GSA specified that the bicycles would remain at all times the property of the team-building provider. Even though GSA specified the bicycles were the property of the provider, GSA selected the recipient of the bicycles (from a list provided by the vendor); this action appears inconsistent with the assertion that the vendor owned the bicycles.

AF, Tab 5, p. 62. As further evidence that the bicycles were purchased by GSA as part of the contract, the agency cites Delta F's financial statement for the WRC exercise, which includes the notation "11,013.56" as "Cost of Goods Sold," presumably documenting sale of the bicycles to GSA. AF, Tab 24, p. 214.

Again, however, even assuming that the donation of the bicycles represented a conscious circumvention of applicable agency rules, the agency provided no evidence that the appellant participated in any such decision. Although the appellant acknowledged that, as an attendee of the conference, he took part in the bike building exercise, and witnessed the bikes being given to the children of the Boys and Girls Club, *see* Tr., Vol. II at 121, he testified, without challenge, that he had no prior knowledge that the bikes were being donated in violation of agency rule or regulation: "The only information I had on that was second-hand from Rob Graf and Paul Prouty that they had asked Neely about getting a legal opinion on that. That's when I found out about it and that's all I knew. I was told that he, Jeff Neely, had gotten a legal opinion on it." Tr., Vol. II at 114.

The appellant's testimony on this point was corroborated by both Mr. Graf and Mr. Prouty. Mr. Graf, for example, testified that he learned about the proposal for a team building exercise involving bicycles at one of the planning meetings:

> [A]fter we got through the logistics, and after we got through the agenda, we talked about team building and how that would fit into the program. And there were a number of options---this was again pre-planning---there were a number of options put on the table. [The bicycle exercise] was one of them….When it came to that one, I remember personally having a concern….I certainly know the laws that govern GSA, and I was very concerned about it, if GSA owns the bicycle for a second, they own it forever. And if we own these bicycles, our authorities don't allow us to gift them. I was very concerned about that….I raised the concern…with Jeff [Neely] and his team and our team….[Neely's response was] [t]hat this was one option. That he was going to go flesh it out. That he was going to get a legal opinion. He was going to check with counsel in Region 9 and make sure we were clear that…if we go that route, he understood my concern, and that he would address my concern….[W]e asked [Neely] later down the road whether he had or not and he informed me that he had gotten a legal opinion.

Tr., Vol. I at 249-251.

Mr. Prouty similarly testified that he received assurance from Nr. Neely that a legal opinion would be obtained about donating the bicycles:

> Rob [Graf] and I at the first planning meeting both said, we're concerned about the personal property aspects of that bike building. So while my preference is you don't go that way, you've got to assure us that if you decide to go that way, that somebody's going to get a legal decision….[Neely] said he would and he later said he did.

Tr., Vol. I at 338.

This record does not demonstrate that the appellant knew or had reason to know that excessive government funds were being expended on the bicycle exercise, or that the exercise would result in improper donation of agency property. Accordingly, I find that the agency has not established Specification 4 of its charge.

Two motifs emerge from the record evidence as to these four specifications of alleged misconduct. The first is that a series of decisions were made with respect to aspects of the 2010 WRC, including conference planning, catering, and assorted other expenditures, resulting in what the agency's OIG aptly characterized as an "over the top approach," utterly at odds with that responsible

stewardship of public funds that the agency is itself uniquely charged with enforcing throughout the federal workforce. The second is that the appellant, with minor exception, was not personally involved in any of these decisions.

As previously set forth, the appellant and all other fact witnesses testified that, apart from the approximately $6000 spent on commemorative coins, intended as a modest gesture of recognition to employees of the four regions participating in the WRC for their recent, exceptional efforts implementing the Recovery Act, the appellant was not involved in or even aware of any of the relevant contractual and budgetary decisions leading up to the WRC, which resided exclusively within the province of Mr. Neely and his subordinates from Region 9.

While, on the one hand, the agency did not challenge the appellant's lack of actual knowledge as to the contractual decisions in question, on the other it persuasively argued that those decisions did not arise in a vacuum, but seemingly reflected an ongoing culture of fiscal abuse, for which the appellant, as a longtime senior executive, might reasonably be deemed responsible for addressing in some way. The agency essentially adopts two theories to affix such responsibility: 1) if the appellant lacked knowledge of what was being spent and why, he should have taken steps to become informed, either through personal involvement, or adequate oversight of his designated conference planning representatives, Mr. Rutledge and Mr. Madison; and 2) if the appellant lacked firsthand knowledge of what things cost, he should nonetheless have been able to recognize excess and impropriety when faced with it, either at the "dry run" meeting, or the conference itself.

Much of the appellant's own argument in opposition to these theories is unconvincing. For example, the appellant asserted that he was simply too busy with his duties as Commissioner of Region 7, and, for a period, as Acting Commissioner of Region 4, to personally attend to the planning of the 2010 WRC. While such a consideration might be extenuating, it cannot be

exonerating, if, in fact, both functions were part of his fiduciary responsibility. As the agency notes, there's no authority for a manager to pick and choose which of his obligations he will fulfill.

The appellant also cited his thirty plus years of unblemished Federal service, both military and civilian, and argued that he has a record of prudence, even vigilance, managing budgets in Region 7, involving sums which dwarf what was spent at the 2010 WRC. Again, however, such considerations constitute potential mitigating factors, and do not bear directly on his responsibility for the events in question.

Moreover, as the agency notes, it is not a defense to ultimate responsibility to point out that the excesses depicted here did not represent a departure from past practice, that it was what "everybody" had always done:

> And to a witness, no one saw anything…out of the ordinary. I think almost every witness, at least [for the appellant], said that. And I think the reason is because GSA has a history of these conferences. They are all very similar. They…all spent…lavishly, if what [the appellant] said is true, that this conference was like any other WRC that they had. And the fact of the matter is, it became, somewhere along the line, GSA norm. So no one saw anything out of the ordinary. It's the norm. It's the way GSA did business….[A]nd they just perpetuated the norm because this is the way we've done it and that became the manta. Well, the other WRCs…did it so it must be okay. It is stereotypical of the problem when people don't step up and make sure that they're attending to the business of government in accordance with the regulations that are right before them and easily, readily available.

Tr., Vol. II at 152.

However, as previously set forth, the record established an agency procedure of assigning contractual and budgetary authority for these conferences to the Regional Commissioner of the primary host region, who would be responsible for delegating that authority, as necessary, to members of his or her own staff, and would, in turn, be answerable to his or her own superiors for any

resulting improprieties.[8] Along the way, officials from other regions might learn about a contracting issue, as Mr. Graf and Mr. Prouty did during the first planning meeting, when the bicycle donation was discussed, or as Mr. Madison did during a planning meeting discussion about the proposed contract for the team building exercise. Notwithstanding such ad hoc exchanges, however, under this general agency procedure in place at the time of the 2010 WRC, neither the appellant, nor those employees he designated to help with conference planning, had any formal role in making such decisions, or any expectation of oversight as to them.

As also set forth above, the record does not establish that the appellant personally learned about or encountered the specified excesses in such a way as would have enabled him to have stopped or controlled them, as the agency has charged. For example, although the record reflects that the appellant learned, via emails from Mr. Graf and Mr. Prouty, that concerns had been raised regarding the propriety of donating the bicycles, the record further reflects that he was subsequently notified that this action had been cleared by agency legal counsel. The record also reflects that although the appellant acquiesced in the decision to purchase a coin for the employees of the four participating regions, believing it to represent a reasonable and appropriate non-monetary award, as opposed to a mere conference memento, the agency failed to show this judgment was improper under applicable regulations. Furthermore, as noted, although it is undisputed that the appellant attended the final, "dry run" planning meeting, there is no evidence that, by virtue of this attendance, he learned about the seven previous

[8] It is undisputed that, during the events in question here, the Regional Administrator position for Region 9 was vacant, so that Mr. Neely, in addition to being Regional Commissioner, was also Acting Regional Administrator, so that, in essence, he was reporting to himself. Tr., Vol. II at 100 (Testimony of Weller).

onsite planning meetings; the other specified purchases; the team building exercise; or the food to be served at the conference itself.[9]

Finally, as previously noted, the agency contends that, even in the absence of any prior knowledge of the costs involved, at the conference itself the appellant came face to face with food that, in quality and quantity, should have caused him to realize that the agency's own travel regulations governing per diem limits, and the kinds of meals that may legally be charged to the government, were being wantonly ignored:

> [I]t…goes without saying that the meals, the breakfasts provided at the actual WRC, there was no training. They weren't authorized to pay for those breakfasts. And they certainly weren't authorized to pay $34 to $40 for breakfast. It was very excessive, well over per diem. There was no authority for the receptions. None. They just wanted to have a reception. It's not a meal. There was no training and it wasn't a break. Now, [the appellant] wanted to say that the Monday reception was where the coins were given out. Okay. Well, maybe….But even if that was an awards ceremony, for which you can have light refreshments, this is where they had the sushi and the crudités and the various pasta bars and the Beef Wellington and the other items listed. It goes well beyond any definition of light refreshments, which, as you saw, was similar to what we used to get in the old days when airplanes would give us food. Peanuts, soda, chips…that kind of food. It's not Beef Wellington, it's not sushi, it's not pasta bars. That is lavish. That is private sector lavish.

Tr., Vol. II at 148-149.

The agency likewise argued that the appellant knew or should have known that the agency's own regulations prohibited the use of government funds to

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[9] The agency argued that the appellant should have been aware that food and drinks served during the "dry run" meeting were also excessive and improper. The agency did not reference the meals served during the "dry run" in any of the four specifications of its charge, or elsewhere in its notice of proposed removal, however. *See Rodriguez v. Department of Homeland Security*, 117 M.S.P.R. 188, 192 (2011) (the Board may only sustain an agency action on the basis of charges that were actually brought). Moreover, the agency provided no evidence that these meals were intended to model the food at the conference itself, such that the appellant was afforded a preview of what would be served there.

purchase or rent items of clothing, such as t-shirts, vests, and tuxedoes, as personal gifts or mementos at an internal agency conference such as the WRC, as opposed to one designed for external, marketing purposes, Tr., Vol. II at 149-150, and yet there he was, as a designated "ambassador," wearing one of the vests in question on the conference stage. Tr., Vol. II at 79.

Again, the appellant's own explanations as to why none of these practices could reasonably have raised any alarm remain largely unconvincing. As already noted, the otherwise plausible notion, put forward by the appellant and others, that the lavishness and ubiquity of the agency-supplied food was assumed to be part of what was cheaply available in Las Vegas, is undermined by testimony from these same witnesses that the food was qualitatively and quantitatively indistinguishable from past conferences, suggesting, instead, that riding roughshod over applicable travel regulations was more the "norm" than otherwise. The appellant's assertion that the vests, tuxedos, and other items were necessary for "operational efficiency of the conference," Tr., Vol. II at 79, is likewise suggestive of a spare-no-expense ethos.

However, as previously set forth, the agency did not charge the appellant with failing to bring these improprieties and excesses to light in some way after the fact, but with allowing them to occur in the first place. AF, Tab 5, p. 49. *See Rodriguez*, 117 M.S.P.R. at 192. Although, as noted, the appellant evidently reacted with little surprise when actually faced with these practices at the conference, the record does not establish that he had knowledge of them prior to that event, at which stage it was no longer possible for him to have "controlled" or "stopped" them, as the agency charged, even had he been motivated to do so.

In sum, as none of the agency's four specifications are supported by preponderant evidence, I find that the agency has not established its charge of conduct unbecoming a Federal employee.

The appellant did not establish his claims of harmful error.

The appellant raised three separate claims of harmful procedural error. In the first he alleged that "new and material information was introduced to the deciding official that had not been in the notice of proposed removal. Specifically, the removal letter contends that Appellant had a reason and obligation to question contracting decisions based on what he allegedly witnessed at the WRC. This information is absent from the notice of proposed removal and Appellant did not have an opportunity to address this contention in his response." AF, Tab 22, p. 6.

Pursuant to *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999), ex parte communications that introduce new and material information to the deciding official violate the due process guarantee of notice and a meaningful opportunity to respond to agency action, entitling an employee to a new, constitutionally correct procedure. In determining whether an ex parte communication introduced new and material information, the Court considered (1) whether the information is merely cumulative, (2) whether the employee knew of and had an opportunity to respond to the information, and (3) whether the communication would likely result in undue pressure upon the deciding official to rule in a particular manner, noting that the ultimate inquiry is whether the ex parte communication is "so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Id*.

In the present case, the appellant cites the following language from the agency's Notice of Removal, as evidence that the deciding official relied upon new and material information: "You further state that you neither took part in nor knew anything about, nor had any reason to question, the contracting associated with the conference. However, you attended the 2010 WRC and, based on things that you witnessed during the conference, you not only had a reason, but an obligation to question contracting decisions." AF, Tab 5, p. 14.

As previously noted, the agency's notice of proposed removal does not include reference to an "obligation to question contracting decisions," arising from the appellant's attendance at the WRC, and thus the inclusion of this language in the notice of decision appears to constitute an ex parte addition to the agency's charge. It is clear from the record, however, that the appellant not only knew of and had an opportunity to respond to this additional aspect of the agency's charge, but did, in fact, respond to it. In his written response to the notice of proposed removal, under the heading, "Allegation that Mr. Weller Should Have Known About and Prevented Contract Abuses," the appellant stated:

> Mr. Weller should also not be faulted for failing to realize there were contract abuses while he was attending the conference. Numerous GSA senior executives attended the conference and did not raise any questions concerning the expenditures at issue. Robert Peck, the PBS Commissioner, and Mr. Neely's supervisor, attended much of the conference and stated that the training value of the conference was so good that the east coast regions should do the same thing.

AF, Tab 5, p. 44-45. Accordingly, I find that the ex parte communication in question did not introduce new and material information, and thus did not constitute a due process violation.

The appellant further alleged that the agency engaged in harmful procedural error by utilizing a proposing official who was not the appellant's supervisor. AF, Tab 22, p. 7. The record reflects that the agency's proposing official, Linda Chero, served as Regional Commissioner for Region 3 of the agency's Federal Acquisition Service (FHS) during the time period in question. Tr., Vol. I at 10. Although Ms. Chero testified that she also served as Acting PBS Commissioner for some unspecified period, which would have placed her in the appellant's supervisor chain, even assuming she was not the appellant's supervisor at the time she proposed his removal, the appellant has not alleged that her assignment to this role violated any agency internal rules or regulations. I am aware of no authority for the proposition that, in the absence of such a violation, it was error for the agency to select Ms. Chero as proposing official, and the

appellant has provided none. *Cf. Tom v. Department of the Interior*, 97 M.S.P.R. 395, 414-415 (2004); *Fidelibus v. Defense Logistics Agency*, 24 M.S.P.R. 198, 200 (1984).

Finally, the appellant alleged it was harmful error for Susan Brita to serve as deciding official in this case, as "she was the whistleblower and worked with the IG for months to shape [its] report. As a result, she could not provide an impartial review of the facts of this case." AF, Tab 22, p. 7.

It is well-established, however, that "the mere fact that a deciding official was fully apprised of, and had concurred in, the desirability of taking an adverse action before considering the appellant's response to the proposed notice was an insufficient basis on which to find a due process violation or harmful error in the absence of specific allegations indicating that the agency's choice of the deciding official made the risk of unfairness to the appellant 'intolerably high.'" *Martinez v. Department of Veterans Affairs*, 119 M.S.P.R. 37, 40-41 (2012). The appellant has raised no such specific allegations, here. Accordingly, while it is undisputed that Ms. Brita was involved in initiating the IG investigation, reviewed its initial findings, and supported the initiation of adverse action proceedings against the appellant, these circumstances, standing alone, do not establish that her selection as deciding official generated an intolerably high risk of unfairness for the appellant.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **June 20, 2012**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust

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

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

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

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

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to 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.

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/_____
Ronald J. Weiss
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 11, 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 Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important

because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, 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.

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 review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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 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.

DFAS CHECKLIST

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

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

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.