UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

PAUL PROUTY,
Appellant,

v.

GENERAL SERVICES ADMINISTRATION,
Agency.

DOCKET NUMBER
DE-0752-12-0396-I-1

DATE: March 11, 2013

William L. Bransford, Esquire, Debra L. Roth, Esquire, and Julia H. Perkins, Esquire, Shaw, Bransford & Roth, P.C.Washington, D.C., for the appellant.

Floyd Allen Phaup, II, Esquire, and Sara Ryan, Esquire,Washington, D.C., for the agency.

BEFORE
Patricia M. Miller
Administrative Judge

INITIAL DECISION

INTRODUCTION

Paul Prouty (appellant) filed a timely appeal of the General Services Administration's (agency) decision to separate him from his Senior Executive Service (SES) position,and the federal service, effective June 25, 2012, for alleged misconduct.Initial Appeal File (IAF), 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.

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

ANALYSIS AND FINDINGS

Procedural Background

At the time of his removal, the appellant was a member of the SES and Regional Commissioner, ES-0340-00, with the Rocky Mountain Region (Region 8), Public Buildings Service (PBS), duty stationed in Lakewood, Colorado. IAF, Tab 16, p. 21. On April 19, 2012, Linda Chero, Acting Commissioner, PBS,[1] issued to the appellant a notice of proposed removal for conduct unbecoming a federal employee supported by four specificationsand premised upon an Office of Inspector General (OIG) deficiency report. IAF, Tab 16, pp. 59-63.Chero's proposed removal related to the planning and execution of the PBS's Western Regional Conference (2010 WRC)held October 25-29, 2010, at the M Resort Hotel Casino and Spa Las Vegas (M Resort) in Henderson, Nevada. *Id.*[2]In response to the notice, the appellant submitted a May 7, 2012, written reply and provided an oral reply on May 9, 2012. IAF, Tab 16, pp. 28-48. On June 22, 2012, Susan Brita, Deputy Administrator[3], issued a decision affirming the charge and removing the appellant effective June 25, 2012. IAF, Tab 16, pp. 23-26.

On June 28, 2012, the appellant filed this appeal and requested a hearing. IAF, Tab 1. I convened a prehearing conference on September 20, 2012, duringwhich I ruled on witnesses and exhibits. IAF, Tab 46. I accepted for adjudication the issue of whether the agency has proven its charge of conduct

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[1] Chero was a member of the career-SES.

[2] The proposed removal notes the dates as October 24-28, 2010, while the OIG deficiency report uses the dates October 25-29, 2010. The report noted that the morning of October 25 and all of October 29 were travel days. IAF, Tab 16, p. 73. For completeness, I am using the dates listed in the deficiency report.

[3] The Deputy Administrator is a non-career SES position.

unbecoming a federal employeeby a preponderance of the evidence. I also accepted for adjudication the appellant's claim of harmful procedural error, including violations of his due process rights under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999) and *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011).The appellant did not raise any other affirmative defenses, such as prohibited personnel practices under 5 U.S.C.§ 2302(b).

I convened a hearing September 26 to 28, 2012, in Lakewood, Colorado. 9/26/12 Hearing Transcript (HT); 9/27/12 HT; and 9/28/12 HT. The record closed on September 28, 2012,after the parties presentedtheir closing arguments. 9/28/12 HT, pp. 87-124. I have made my decision after considering all of the evidence and argument in the record.

Legal Standard

Under 5 U.S.C. § 7543, a member of the SES may be removed or suspended only for "misconduct, neglect of duty, or malfeasance." The agency has the burden to prove the merits of its case by a preponderance of the evidence.[4]Proof of one or more specifications supporting a charge is sufficient to sustain the charge. *SeeGreenburgh v. Department of the Army,* 73 M.S.P.R. 648, 657 (1997), *review dismissed*, 119 F.3d 14 (Fed. Cir. 1997) (Table).

Under 5 U.S.C. § 7701(b)(3), the Board has authority to mitigate penalties imposed against a member of the SES. Accordingly, the agency must establish that it considered all relevant factors and exercised management discretion within the tolerable limits of reasonableness.*See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). However, because the appellant occupied a position in the SES, the agency is not required to establish that removal was taken for the

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[4]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).

efficiency of the service. *See Shenwick v. Department of State*, 92 M.S.P.R. 289, 296 (2002).[5]

Factual Background

In proposing and implementing the appellant's removal, Chero and Brita relied upon the OIG deficiency report's description of "questionable and excessive expenditures" involving the 2010 WRC. IAF, Tab 16, pp. 23-26; 59.The OIG had found that (1) "spending on conference planning was excessive, wasteful, and in some cases impermissible"; (2) the agency "failed to follow contracting regulations in many of the procurements associated with the WRC and wasted taxpayer dollars"; (3) the agency "incurred excessive and impermissible costs for food at the WRC"; (4) the agency "incurred impermissible and questionable miscellaneous expenses"; and (5) the agency's "approach to the conference indicates that minimizing expenses was not a goal." IAF, Tab 16, pp. 71-72.

In the notice of proposed removal, the agency charged that the appellant knew or should have known about the questionable and excessive expenditures and prevented them because of: (1) his permanent career position as Region 8 Regional Commissioner; (2) his 2009 detail to the positionof Acting Commissioner;(3) his status as a Head of Contracting Authority (HCA);and (4) his participation in a March 8-11, 2010 planning meeting for the October 2010 WRC. IAF, Tab 16, p. 60.

To understand the complex events underlying this action, it is necessary to review: (1) the supervisory lines of authority involving the appellant; (2) the duties the appellant performed for the agency in 2009 and 2010; (3) the functions delegated to the regions of the PBS; (4) the standard operating procedures that

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[5] The notice of proposed removal incorrectly cited the efficiency of the service standard. IAF, Tab 16, p. 62.

developed over fifteen years involving the WRC; and (5) events in 2009 and 2010 surrounding the planning and implementation of the 2010 WRC.

The following facts are undisputed unless otherwise noted. The appellant began his federal service and employment with the agency in 1975, having first served as an intern with the agency in 1971. His career had predominately been in the PBS. The appellant became a member of the career SES in 1995 when he was appointed to the position of Assistant Regional Administrator, Region 1. In 1998, the appellant was reassigned to the position of Regional Commissioner, Region 8. 9/27/12 HT, pp. 3-6.The appellant had 39 years of federal service at the time of his removal. IAF, Tab 16, p. 21.

All of the Regional Commissioners of the PBS were career members of the SES and peers who reported to the Regional Administrators, who were non-career members of the SES. 9/27/12 HT, p. 184-85. 9/28/12 HT, p. 73-74. A parallel group of Regional Commissioners for the Federal Acquisition Services (FAS) were located in each region; they were also members of the career-SES whoreported to the Regional Administrators. *Id*.

During the time period relevant to this appeal, James Weller was the Regional Commissioner of Region 7, duty stationed in Fort Worth, Texas. Robin Graf was the Regional Commissioner of Region 10, duty stationed in Portland, Oregon. Finally, James Neely was the Regional Commissioner of Region 9, duty stationed in Sacramento, California. 9/28/12 HT, p. 4.

As described in the appellant's position description, Regional Commissioners served "under the operational control of" and were "accountable and report[ed] to the Regional Administrator." IAF, Tab 16, p. 221. Accordingly, the appellant's immediate rating official was Susan A. Damour, Regional Administrator, Rocky Mountain Region. Until 2009, Damour was a member of the non-career SES. In 2009, her position was downgraded to a non-career GS-15. 9/27/12 HT, pp. 12-13. Damour, nonetheless, remained the

appellant's immediate supervisor and initial rating official for his performance appraisal. 9/27/12 HT, pp. 20-21; 9/28/12 HT, p. 75.

During the time period relevant to this appeal, Region 9 did not have in place a non-career SES Regional Administrator. Consequently, Neely was acting Regional Administrator for Region 9 as well as PBS Regional Commissioner until 2011 when a non-career SES Regional Administrator was appointed. 9/28/12 HT, p. 46. As explained further below, theOIG deficiency report found Neely and Region 9 responsible for the questionable spending, contracting, and procurement activities involving the 2010 WRC.

Robert Peck, a non-career member of the SES, was Commissioner of the PBS and duty stationed in Washington, D.C. Peck was the appellant's second-line supervisor as well as the second-line supervisor to all 11 of the PBS Regional Commissioners. Peck testified that as Commissioner, he was:

> responsible to the Administrator of General Services and is also responsible for the -- as we used to say, the design, construction, leasing, property management of an inventory that's owned by GSA and leased by GSA on behalf of about a hundred federal agencies and about a million federalemployees.
>
> So, the job is to manage both operations and policy for the Public Buildings Service, and in -- that's done through 11 geographic regions, and, in concert, as I said, with the Administrator and also with 11 politically-appointed regional administrators.

9/27/12 HT, p. 183. During the time period when Neely was Acting Regional Administrator in Region 9, Peck functioned as Neely's immediate supervisor.

It is important to note thatNeely and the appellant were peers who reported up their supervisory chain of command to Peck. Thus the appellant as Region 8's Regional Commissioner had no direct supervisory authority over Neely as Region 9's Regional Commissioner.[6]

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[6] As a non-career member of the SES, Peck was summarily dismissed from his position and the federal service upon the issuance of the OIG deficiency report.

As described in his position description, the appellant's duties and responsibilities as Regional Commissioner included directing, managing and coordinating "all public buildings and real property programs and activities in the region." IAF, Tab 16, p. 221. The Regional Commissioner:

> [e]stablishes goals and objectives and continually appraises status of programs and activities against planned objectives. Prepares and executes annual plans and budgets for assigned programs consistent with established policies; and administers and controls fund and personnel.

IAF, Tab 16, p. 222. The Regional Commissioner also serves as:

> [T]he top advisor to the Regional Administrator and other GSA regional/central office officials on all matters relating to real property programs in the region. Participates fully in development of overall regional policy and nationwide public buildings and real property programs and policies.

Id. The Regional Commissioners were allocated budgets which they managed and had delegated to them contracting and procurement authorities.

GSA is headed by an Administrator who is appointed by the President and confirmed by Congress. As such, the Administrator encumbers a non-career position serving at the will of the President. Whenever the Administrator's position is vacant, an Acting Administratoris selected to serve pending the appointment of a new Administrator.

Upon the inauguration of President Barack Obama on January 20, 2009, the appellant agreed to serve on a detail to Washington, D.C. as Acting Administrator. The appellant's duties included running the agency during the transition period until a new Administrator was appointed and confirmed. The appellant was detailed to the position of Acting Administrator from January 21, 2009 to December 18, 2009, at which time he returned to his position as Region 8's Regional Commissioner in Lakewood, Colorado. IAF, Tab 16, pp. 200-216.Martha Johnson was appointed as Administrator in February of 2010 and

remained in that position until her resignation on April 2, 2012.[7] On April 2, 2012, Daniel Tangerhlini was appointed Acting Administrator and continues to serve in that capacity as of the date of this decision.

On February 17, 2009, the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111-5) was passed by Congress and signed into law by the President, shortly after the appellant became Acting Administrator. The PBS was allocated 5.5 billion dollars which needed to be obligated no later than October 1, 2011.Most of the appellant's time was spent testifying before Congress, and meeting with representatives from Congress and the White House concerning Recovery Act work. 9/27/12 HT, p. 6.The appellant designated a career employee, Scott Connor, to act as Regional Commissioner for Region 8, PBS. 9/27/12 HT, pp. 7-9.Consequently, while he was Acting Administrator in 2009, the appellant had minimal involvement with Region 8. 9/27/12 HT, pp. 7-9. After returning to Region 8, throughout 2010 the appellant remained actively involved in national level policies and program matters supporting Johnson as she began her term as Administrator. 9/27/12 HT, p. 6.Therefore, the appellant appointed Connor to be his Deputy Commissioner to assist with Region 8 functions. *Id.*

Damour corroborated that the appellant's time in 2010 was predominately taken up with assisting Johnson's transition into her role as Administrator and overseeing Region 8's distribution of 459 million dollars in Recovery Act funds. Damour explained that Region 8 was the third largest recipient of Recovery Act funds out of the eleven Regions, but was the second smallest region. According to Damour, this was far "above and beyond the normal activities" the region conducted"[s]o we had our work cut out for us." 9/28/12 HT, p. 77. The appellant was also involved with several national level initiatives and with

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[7]Johnson resigned upon the issuance of the OIG deficiency report.

assisting the new Region 1 Commissioner, Kathy Kronopolus,adjust to her new position. 9/28/12 HT, pp. 77-78.

As explained by the appellant in undisputed testimony, the agency had a culture of holding conferences and employee recognition events.The agency is a 9 billion dollar business and needed to frequently train staff. The appellant found that conferences, if appropriately designed, were important for sharing information, providing training, improving business practices that were ever changing, and improving communications among employees spread across a broad geographic area. The agency conducted some training by video or telephonically, but that was not effective with larger groups.9/27/12 HT, pp. 23-25.

Peck also testified about the agency's use of conferences as a standard business practice:

> [C]onducting conferences to get GSA's business done is definitely part of the way GSA gets its work done, and the reason I say it that way is that GSA is a national organization with, as I said, 11 regions and 200-some field offices.
>
> And so, to try to get people on the same sheet of music in terms of how they get their work done – more importantly, for me at least, given the way I like to manage, to try to get people to transmit to each other best practices, finding ways to get their work done well. You could do some of that by email, some of it by blogs, some it by websites, and some of it, you've got to get people face-to-face together. So, I'd say that's a part of the way GSA was trying to get its business done and improve its work.

9/27/12 HT, p. 190.

Graf, the former Regional Commissioner of Region 10, testified about the history of the WRC. Graf was appointed the head of Region 10 in 1997. 9/28/12 HT, pp. 39-43.Graf explained that the PBS' WRC was a fifteen-year traditionwhen the 2010 WRC was held in Henderson.In the 1980's, Region 10 of the PBS was eliminated and merged into Region 9. In 1991, the merger of regions was reversed, and Region 10 was reestablished again out of Region 9.

After the 1991 split, Regions 9 and 10 decided to continue to coordinate and share best practices on property management by means of an annual meeting. The annual meetings later expandedto include leasing and other activities. 9/28/12 HT, pp. 39-43. In 1999, Region 8 was invited to join the annual meetingandRegion 7 joinedin 2000. The annual meeting then became known as the WRC. As the WRC evolved, presentations and participantsfrom the national level of GSA wereincluded. 9/27/12 HT, pp. 25-26 and 9/28/12 HT, pp. 41-43.

Beginning in 2004, the WRC moved from an annual to a bi-annual meeting.9/28/12 HT, p. 42. Because the WRC was considered successful and effective, there were discussions in early to mid-2000 about expanding it to include other regions (Eastern and Central). Ultimately, it was decided that it would make the conference too large, turning it into a convention. Instead, consideration was given to other regionsconvening their own conferences. 9/28/12 HT, pp. 41 and 43;9/27/12 HT, pp. 25-26.

The appellant and Weller (former Region 7 Regional Commissioner) testifiedthat aside from the coordination and training elements to the WRC, the conferences also focused on team building and networking efforts among the regions. The PBS Regional Commissioners were concerned that the WRC was rich in content, with a focus on ensuring that all presentations were well done, of a high quality, and effective.Accordingly, since early 2000, dry-runs were a regular part of WRC planning process for quality control of conference content. The need for dry-runs arose out of some poor presentations made in previous conferences. During the dry-runs, the planning team would critique and provide feedback to the presenters. 9/27/12 HT, pp. 35-37; 9/28/12 HT, pp. 13, 53-54.

Over the years, a standard method for organizing the WRC developed with the four regions rotating the responsibility for hosting the conference; the regions were not co-hosts. 9/27/12 HT, pp. 28-31. Historically, the Administrator did not have any detailed involvement in the actual planning of the WRC. 9/27/12 HT, pp. 23-25.The host region was allocated the funds for the WRC by the Office of

the Administrator. Consequently, the host region was responsible for managing the conference budget and all procurementand contracting activities. If additional funds were required for the WRC, a request was made to the Office of the Administrator for additional funds or the host region asked the other three regions to contribute funds. 9/27/12 HT, pp. 18-19; 28-31. In the case of the 2008 WRC, the appellant and Region 8 staff were responsible for these hosting activities and had been allocated funds for the conference by the Office of the Administrator; for the 2010 WRC, Jeff Neely and Region 9 staff were responsible for the hosting activities and management of funds. 9/27/12 HT, pp. 28-31.

The role of the non-host regions was to provide input and support for the planning process as needed and requested by the host region. The costs for flights, hotels and per diem were the responsibility of the region where the conference participants were employed. 9/27/12 HT, p. 29. On average, there were approximately 300 participants. The appellant explained that the goal was to pick the "best and the brightest" from each region to attend the conference and then share information back in home regions. 9/27/12 HT,pp. 86-87.

The appellant explained that usuallythe host region selected the location for the WRC within its region. For the 2008 WRC, the appellant and his staff had initially selected Denver, Colorado. However, the Administrator expressed a preference that the conference be held in New Orleans, Louisiana. 9/27/12 HT, pp. 250-51. By convening the conference in New Orleans, Region 8 employees attending the WRC incurred travel and per diem expenses that otherwise would not have been incurred had the WRC remained in Denver. Nonetheless, the Administrator determinedthat it was important for the agency to support the post-Katrina economic recovery efforts of New Orleans even if it resulted in a more expensiveWRC. 9/27/12 HT, pp. 29-31; 37; 248-249.

The appellant explained that in August of 2009, while he was Acting Administrator, the question arose of the propriety of holding the 2010 WRC in the Las Vegas area. The press had reported a conflict between President Obama

and U.S. Senator Harry Reid of Nevada over the perception that federal agencies were being discouraged from scheduling conferences in resort locations such as Orlando, Florida, and Las Vegas, Nevada. 9/27/12 HT, pp. 40-41 and IAF, Tab 41, pp. 35-37.

On August 4, 2009, Neely sent an email to the appellant inquiring:

> Is this really an issue? I do stuff in vegas [sic] a lot, cuz [sic] it is cheap to stay and cheap to fly. Also, the 2010 wrc [sic] is set and booked for vegas [sic]. Trying to read smoke signals and I am not good at that.

IAF, Tab 41, p. 35. Neely included in the body of the email the text of a *Congressional Quarterly Today* release entitled “Reid Pushes Workaround for Hot Spot Travel Ban.” *Id.*

The appellant explained that Neely raised this issue with him as Acting Administrator because “this was full-blown politics″ it was a matter at the highest level and “Neely needed guidance.” 9/27/12 HT, pp. 44-45, 48.There appeared to be a political conflict occurring over conferences and the economy was not strong. 9/27/12 HT, p. 39.

The appellant consulted with Michael Robertson, a political appointee and liaison with the White House who was assigned to GSA, whose job it was “to make sure that I was consistent with the administration’s message.” 9/27/12 HT, p. 46. The appellant explained:

> So I kept -- we had people not only Jeff, but our business involved Las Vegas. Jeff has a -- had a field office there, federal supply, Federal Acquisition Service had work there. So people are saying, what's the story? What are we doing? And I kept telling Michael, you've got to give me something I can say. And I'm sure he said something to along the lines of, keep doing what you're doing. Which was his code to me is, we're not stopping. If it makes sense to do something in Vegas you keep doing stuff in Vegas. So that's what I articulated to Jeff.

9/27/12 HT, pp. 45-46.

After returning to Region 8, in January 2010, the appellant, Weller, Graf and Neely revisited the issue of whether to hold the 2010 WRC. The appellant explained that:

> Early in 2010 obviously the economy was not in good shape. We were on a continuing resolution. That was one side. That was the concern. The other side was we were in the middle of RA [Recovery Act]. We had lots of lessons to learn, we had lots of training. So there was plenty of reason to have the conference . . . So that was one part that we thought we needed to revisit. And then also there was a conversation about, we knew that the optics of Las Vegas were problematic. Some of us had some concerns about going to Vegas. We knew the reason that people wanted to go there was it's a very expensive place to fly to, and a very expensive place to stay, and a very -- a very inexpensive place to fly to, inexpensive place to stay, inexpensive place for food and the like. But we were very uncomfortable as senior executives with the idea of going to Las Vegas.
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> So we floated [it]. We had a conversation. We said, should we go?

9/27/12 HT, pp. 38-39. Neely was asked to check with the national office for the PBS, headed up by Peck. 9/27/12 HT, pp. 40-41. The appellant continued:

> Jeff was to find out from central office if we were still authorized to have it in Las Vegas, and still authorized to have a conference of that size considering the economy and funding . . . it was incumbent upon us to go back say hey, we're funded for this. Is it still a good idea?

Id. The appellant expected Neely to contact Peck's deputy, Tony Costa, the Deputy Commissioner for PBS. 9/27/12 HT, p. 41. The appellant did not affirmatively confirm in 2010 with Neely that he had checked with the PBS's national office but "there was a great deal of central office participation at the conference that obviously they supported it." 9/27/12 HT, p. 65. In addition, the appellant had known Neely for twenty years and had no reason to double check with Neely because "[h[e was tenacious on follow-through." 9/27/12 HT, p. 42. Finally, the appellant stated that in 2012 prior to his notice of proposed removal, "I talked to Jeff after we were all put on administrative leave and he said he absolutely got approval from Tony Costa." 9/27/12 HT, p. 65.

The head of the planning team for the 2008 WRC was Jonna Larsen from Region 8.9/27/12 HT, p. 35. As the 2008 WRC host region, all procurement decisions were made by Region 8 and contracting was overseen by Larsen's supervisor, G.W. Emge, Region 8 Director of Client Solutions. 9/27/12 HT, pp. 33-34.

Both the appellant and Larsen testified that originally Larsen and Emge were to assist Region 9 with planning the 2010 WRC. Patty Roberts and Donna Shepherd of Region 9 were leading the planning effort. As Region 9 began planning the conference, Larsen found that her knowledge and talents were not being used. 9/27/12 HT, p. 252. As Larsen explained regarding Roberts, "[w]e're a little bit like oil and water, to be honest, and I kind of -- she's a strong personality, and I knew we probably weren't going to have a lotof input on the agenda items." *Id*. Consequently, Larsen assigned Christopher Gomez to the planning committee in her place due to his graphics and artistic talents and organizational skills. When the appellant returned to Colorado in 2010, Larsen met with him and advised him of her actions, which he approved. 9/27/12 HT, pp. 49, 251-254.

In unrebutted testimony, Gomez credibly testified that he met with the appellant a few times in 2010 about the WRC, but never briefed the appellant, or anyone else in Region 8, regarding anypurchasing, contracting or procurement decisions. 9/26/12 HT, pp. 228-230. Gomez stated that prior to just before the hearing, he had never seen nor had any knowledge about the Region 9 credit authorizations by Diana Lee, who was the purchasing official for Region that list purchases being made "per C. Gomez." 9/26/12, pp. 230-234 and IAF, Tab 16, pp. 123, 125, 135-139, 141-143. Gomez emphasized that;

> [a]t the time, I had no obligation/authority for the United States Federal Government. I was a contract employee and absolutely knew that at no time could I obligate money on behalf of the federal government . . .My understanding was that all of the conference expenses minus travel fees would be paid for by the Pacific Rim

> Region[Region 9]. So all of the major contracting with the hotel, AV company, food and beverage, all of that would be paid for by the Pacific Rim Region.

9/26/12, pp. 231-232.

To resolve credibility issues, 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' opportunity and capacity to observe the event or act in question; (2) the witness' character; (3) any prior inconsistent statement by the witness; (4) a witness' bias, or lack of bias; (5) the contradiction of the witness' version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness' version of events; and (7) the witness' demeanor. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). I found Gomez's testimony to be extremely credible. His was unwavering, detailed, precise and forthright, and his testimony was consistent with other evidence showing the delegation of contracting and procurement authority to Neely and Region 9.

The appellant attended only one 2010 WRC planning meeting which took placeat the M Resort from March 8-11, 2010, approximately three months after his return to Region 8 from his detail to the position of Acting Commissioner.9/27/12 HT, p. 59. Over the three days, the appellant recalled attending an afternoon session and a morning session. 9/27/12 HT, pp. 50-51. Christopher Gomez was there. *Id.* The appellant was not present for all of the discussions. 9/27/12 HT, p. 52.He explained, "I know that they had lots of work to do. I was just there for primary -- primarily one reason and that was to make sure that the training and the conference was going to warrant us" spending money sending staff to the event. 9/27/12 HT, pp. 50-51. The appellant recalled that "they covered a long list of training which I thought was relevant and

important, and I -- based on that, I was comfortable that we were making the right decision to continue to participate." *Id.* The appellant recalled that:

> [they] also had a presentation from a couple of organizations on team-building options. . . I know it was two different options that were being discussed so they were, in my mind, they were just talking about we're going to do team building which was fine and here's some things that we're thinking about. What are your thoughts? We had an initial thought on the bike one. It was something different than we were familiar with, and so we had some concerns over whether or not we could legally do it.

9/27/12 HT, pp. 52-53. Graf was there and initially brought up legal concerns about whether they could donate bicycles. *Id.* Region 9 said they would look into the legality of the proposal. The appellant stated that there were no discussions or decisions about a contract during the meeting he attended; only discussions about ideas for team building. 9/27/12 HT, pp. 53-54. It was Region 9's decision to make and "when the Region 9 made the decision and did the contracting, the expectation is they did the appropriate contracting." 9/27/12 HT, p. 54. It is undisputed that the appellant did not play any role in Region 9's procurement and contracting activities. 9/27/12 HT, p. 55. It was his understanding that the conference budget for approximately 300 attendees was $250,000 and that any team building activities was within that budget. Staying within the overall budget was his concern. *Id.* The $250,000 did not include travel, per diem and hotel costs. *Id.*

Under *Hillen*, I found the appellant's testimony to be extremely credible. The appellant testimony was detailed, precise and forthright. It was also consistent with the summary of his OIG statement discussed and consistent with the standard practice of the host region taking lead on organizing the conference.

The appellant did not attend the October 12-15, 2010dry-run for the WRC due to a business conflict. He also did not attend theWRC from October 25-29, 2010 because it conflicted with a family obligation in Colorado.9/27/12 HT, p. 59.

In December 2010, Britaheard concerns about “possible excessive expenditures and employee misconduct” in connection with the 2010 WRC.[8] IAF, Tab 39, Exhibit EEE. Brita contacted the agency’s OIG and requested an investigation.*Id*. Throughout 2011, the OIG conducted its review. On January 31, 2012, and February 12, 2012, the OIG issueddraft deficiency reports regarding the 2010 WRC, which Brita and other senior managers reviewed. IAF, Tab 39, Exhibit EEE.

Initially, the OIG had not interviewed the appellant as part of its investigation into the 2010 WRC. After issuing the draft report, on March 23, 2012, the OIG interviewed the appellant and a memorandum summarizing the appellant’s interview is contained in the record. IAF, Tab 16, pp. 92-94. The summary is an unsworn statement and the OIG did not provide the appellant with an opportunity to review the summary. *Id*. and 9/27/12 HT, pp. 67-68. The appellant reviewed the summary at the hearing and testified that he found it to be generally accurate. 9/27/12 HT, pp. 67-68. The appellant testified that “in their introductory remarks” the OIG investigator’s stated that “we're here on behalf of the Administrator and the IG and it's going to be a really quick interview because you weren't at the conference.” 9/27/12 HT, p. 68.

The summary of the appellant’s interview is consistent with his hearing testimony. The OIG interviewed the appellant “regarding his involvement and knowledge of” the 2010 WRC. IAF Tab 16, p. 92. The appellant stated that “this situation is sad for GSA, but he doesn’t know the details of this investigation.” IAF Tab 16, p. 94. He told the OIG agents about the history of the WRC and

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[8] The parties presented testimony about how Brita heard about the 2010 WRC. While I acknowledge this issue was of interest to the parties, how Brita learned of the allegations about the 2010 WRC is not material to the outcome of this appeal; what is relevant and material is the undisputed fact that Brita heard allegations of improprieties involving the 2010 WRC, which she then referred to the OIG for investigationin her role as the Deputy Administrator.

"need for collaboration" among the regions. IAF Tab 16, p. 92. The appellant explained to them that "the decision to hold the conference in Henderson was a Region 9 decision, and he believed the reason was because it would be inexpensive. Prouty stated that in selecting the site, the cost versus the 'optics' has to be considered and he would be concerned of the 'optics,' but it was their decision." *Id.* The appellant described "the WRC planning meeting as consisting of approximately 4 Regional Commissioners for around one day. Christopher Gomez was the Region 8 liaison for the WRC and he had a peripheral role in the planning of the conference. Prouty stated C. Gomez was mostly there as an advisory and because he is creative. Prouty stated he was not really involved in the 2010 WRC and C. Gomez would brief him as needed on the conference planning." IAF Tab 16, p. 92. The appellant also told the investigators that "Patty Roberts was the WRC lead for Region 9. . . . C. Gomez was the liaison from Region 8 and served as the communications and marketing guy." IAF Tab 16, p. 92. "In regard to the WRC preplanning and use of funds, Prouty believed that they would've received some sort of legal opinion on any of the decisions. Prouty was not familiar with the vendors used for the WRC and didn't know who was responsible for making those choices. Prouty recalled there was a discussion regarding being covered by a legal opinion on the bike teambuilding." IAF Tab 16, p. 93.

The appellant advised the OIG that "he was aware that coins were given to people at the conference as recognition and were related to all the hard work performed during" the Recovery Act projects. IAF Tab 16, p. 93. "Prouty stated that the work he observed performed by GSA employees on ARRA projects was truly amazing and the coin was a way to say thank you and recognize the work." IAF Tab 16, p. 93. "He was not aware of any other recognition or awards during the conference." IAF Tab 16, p. 93. Prouty told the OIG about other rumors he heard about the 2010 WRC, concerning food, hospitality rooms, and room upgrades, but he had no first-hand knowledge about the issues since he did not

attend the conference. IAF Tab 16, p. 93. "Prouty didn't know what the budget was for the conference. When asked by SA Gomez if he was aware the amount spent on the conference may have been around $850,000, then Prouty stated that seemed high and would seem they probably went over budget." IAF Tab 16, p. 93.

The appellant told the OIG that he"likes Jeff Neely and regards him as a friend. Prouty described Neely as very smart and did very good work for Region 9. . . Prouty was not aware of any rumors of Neely mixing personal travel with business travel." IAF Tab 16, p. 93. "Prouty stated that it's just not good enough to sit in your office, but it is necessary that employees learn something at these conferences and training. Prouty believed it is important to be creative in these conferences because if they are done in the old style, then it's not beneficial and employees tune out. Prouty stated that GSA has to be innovators, and some walk close to the line, but you have to know where the line is." IAF Tab 16, p. 94.

The appellant testified that the OIG summary was not accurate when it stated he made the following comments: "Prouty went to one planning session for the WRC and he was not impressed initially" (IAF Tab 16, p. 92); "Prouty believed the team building exercise was great training" (IAF Tab 16, p. 93); and"Prouty was informed the bike teambuilding was a good idea" (*Id.*) The appellant credibly testified that he never said he was not initially impressed by the planning sessions because he "thought it was in its infancy" when he was at the March 2010 planning meeting. 9/27/12 HT, p. 70. While he thought "team building was a good idea," he did not have enough information to form an opinion on whether the type of team building exercises being discussed at the March 2010 planning meeting were a good idea. 9/27/12 HT, pp. 71-72.

On March 29, 2012, the OIG sent a memorandum to Brita responding to questions presented by the Office of the Administrator regarding the 2010 WRC. The OIG informed Brita that:

> Jeff Neely approved the expenditures for the conference based on a budget he was provided and extra funds he added from Region 9's budget, as indicated in his March 15, 2011 interview and in the attached email from Mr. Neely directing staff to obligate more money for the WRC.

IAF, Tab 38, pp. 9 and 15.[9]

Four days later, on April 2, 2012, the OIG issued its final management deficiency report. IAF, Tab 16, pp. 68-86. In the executive summary, the OIG found with regards to the 2010 WRC:

> Many of the expenditures on this conference were excessive and wasteful and that in many instances GSA followed neither federal procurement laws nor its own policy on conference spending. Conference costs included eight off-site planning meetings and significant food and beverage costs. The cost of the conference was over $820,000. . .

IAF, Tab 16, p. 71.

Aside from the March 23, 2012, OIG interview summarized above, the final deficiency report does notmention the appellant. IAF, Tab 16, pp. 68-86; 92-94.In addition, the appellant's late interview did not result in any changes to the report.IAF, Tab 16, pp. 68-86; Tab 39, Exhibit EEE; and 9/27/12 HT, p. 73.

On April 19, 2012, Chero proposed the appellant's removal. IAF, Tab 16, pp. 59-63.[10]Graf and Weller also were issued notices of proposed removal that, with a few variations, were otherwise identical to the appellant's notice. IAF, Tab 28, pp. 36-45.

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[9] A copy of the March 15, 2011 statement by Neely to the OIG was not submitted into the record of this appeal.

[10] The parties placed into the record much evidence on the issue of whether individuals outside of the agency were improperly involved in the decision to propose the appellant's removal. While I acknowledge this question was of interest to the parties the appellant did not raise any affirmative defenses, such as prohibited personnel practices. Consequently, this issue is not relevant to the factual and legal outcome of this appeal.

Chero's proposal notice was premised on the contention that the appellant "knew or should have known" about the "questionable and excessive expenditures" with regards to the 2010 WRC. *See*, 9/26/12 HT, p. 85. The agency asserts that a July 13, 2011 email exchange involving the appellant, Neely, Weller and Graff "acknowledges your involvement in the decision making of allactivities associated with the conference."IAF, Tab 16, p. 61;pp. 96-98.

The appellant and Graf testified about the e-mail exchanges. In 2011, Neely advised the appellant, Graf, and Weller that he, Region 9, and the 2010 WRC were the subject of a review by the OIG. Since the draft OIG report was not issued until 2012, the appellant was not aware of the focus and scope of the OIG'sinvestigation. 9/27/12 HT, p. 59 and IAF, Tab 16, p. 94. Specifically, the appellant was completely unaware in 2011 of the allegations of excessive expenditures and procurement and contracting improprieties resulting in the 2010 WRC costing over $800,000.00. *Id*.

On July 13, 2011, Neely first wrote a messageregarding the "WERC and the IG report":

> Spoke to bob [sic] 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 get slapped around a bit but no other wrc events will be involved.
>
> Guess we really have to figure out how to do the werc 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 (gpm, procurement, etc).

IAF, Tab 16, p. 98. Copying the appellant and Graf, Weller responded to Neely:

> Jeff-very sad. Can I share in this with you? This was a group decision supported by CO.
>
> Amazing.
>
> Jim

Id. The appellant wrote in response to the comments of Weller and Neely:

> I totally agree with Jim. This isn't right or fair. A sad day for the agency. Looking forward to the discussion. Hang in there Jeff.

Id.

The appellant explained that when responding to Neely, he believed the concern over the 2010 WRC was that a conference was held at all, and in Las Vegas, reflecting the conflicts that had arisen in 2009. The appellant noted that the joint decision he understood Weller to be referencing was the decision in January 2010 to continue to hold a conference and to keep it in Las Vegas. 9/27/12 HT, pp. 40; 59-66.In turn, Weller testified that when he wrote the July 13 email response to Neely, he "was under the assumption that this disciplinary action was over having the conference in Las Vegas" and he had no knowledge of the actual basis of the OIG investigation. 9/28/12 HT, pp. 18-19.

The agency argued that the appellant's testimony was not credible. To support its contention, it points to the appellant's involvement in aspects of planning the 2010 WRC such as suggesting a union representative who could attend the conference, suggesting they include the Federal Acquisition Service in their efforts, and the fact he was copied on emails discussing the design of a coin, and a talent show for the WRC. The agency asserts this must lead to an inference that the appellant was fully aware, or should have been aware, of all of the details of the 2010 WRC and the inappropriate activities of Neely and Region 9.IAF, Tab 41, Exhibits 3-14.

I do not find the agency's argument to be persuasive and find the appellant's testimony credible under *Hillen*. Specifically, since the draft OIG report was not issued until 2012 and the appellant had no knowledge of the basis for the OIG investigation, I find it credible that he thought in 2011 the concerns over the WRC were the fact a conference was held at all and it was in the Las Vegas area. The appellant's demeanor throughout his testimony was forthright, detailed and precise. I found his testimony entirely credible. In turn, given that the OIG determined that Neely was responsible for the improprieties described in

the deficiency report, I find unpersuasive the agency's argument that this exchange evidences the appellant's actual knowledge and responsibility for Neely and Region 9's improper actions.

In proposing the appellant's removal, Chero also referenced the appellant's status as a Head of Contracting Activity (HCA)in finding him responsible for the misconduct identified in the OIG deficiency report.IAF, Tab 16, pp. 59, 62. The appellant explained that the HCA is the person responsible for a specific organization's contracting.9/27/12 HT, pp. 8-9. The appellant was the HCA for Region 8, while Neelywas the HCA for Region 9. *Id.* In his role as a Regional Commissioner, he had no authority over Neely and Region 9's contracting and procurement activities. *Id.*

The appellant explained that while he had overall responsibility for procurement and contracting for Region 8's PBS, he did not make every procurement and contracting decision, but that his duty was:

> to make sure we had the necessary processes in place and the necessary controls in place. And we had an acquisition exec by the name of Dick Hogue who was terrific at what he did. And his responsibility was to make sure that our contracting met all rules, regulations, and laws.

9/27/12 HT, p. 9.

When the appellant became Acting Administrator, the HCA for each region was the Regional Administrator. After consulting with the Regional Commissioners and Regional Administrators, the appellant decided to delegate the HCA role to the Regional Commissioners.[11]As explained by the appellant:

> one of the things that we said was the HCA and the regional offices, that was a job that was being handled by regional administrators.

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[11]The notice of proposed removal and decision to remove were drafted in a manner that could be understood to assert the appellant committed misconduct as Acting Administrator by changing the HCA delegation. During the hearing, Chero confirmed that she was not charging the appellant with misconduct in this regard. 9/26/12 HT, p. 83.

> And while they're people with immense talent, they come to the job as political appointees. And they come to the job often times with very little, if any experience in our business. And it just didn't seem right to us to put those people in that very difficult position, nor do we think it would necessarily result in the right decisions for the Agency. So we made the decision that the careerist, the regional commissioners would be the HCA. Although they would continue to report to the Regional Administrator's who have some oversight responsibility leadership involvement, it's just the careerist would have the responsibility for the business.

9/27/12 HT, pp. 10-11.

Johnson left this delegation in place when she became Administrator. 9/27/12 HT, p. 12. Tangerhlini revised the policy and returned the HCA role to the Regional Administrators, but Damour delegated the HCA function back to the two Regional Commissioners under her authority. 9/28/12 HT, p. 74.Nonetheless, the shifting delegation of the HCA role would not have made a difference with the 2010 WRC since Neely was Acting Regional Administrator and was already Region 9's HCA. Finally, since at all times relevant to this appeal the HCA was delegated to each region, the record is devoid of any evidence that the appellant as either Acting Administrator or as Region 8 Regional Commissioner knew or should have known of Neely's and Region 9's improper expenditures and improper contracting and procurement activities.

With these initial findings, I address below thefour specifications of alleged misconduct the agency relied upon in its proposal to remove the appellant from the federal service.

<u>The agency has failed to prove the charge of conduct unbecoming a federal employee by a preponderance of the evidence.</u>

The SES is a corps of elite Federal managers held to a very high standard of conduct.*Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 602 (1996). As explained by the U.S. Court of Appeals for the Federal Circuit in *Berube v. General Services Administration*:

> The Civil Service Reform Act (CSRA), as amended, contains multiple provisions governing adverse action by an agency against an employee in the SES. Section 3592 provides, with certain exceptions not relevant here, for removal of a career appointee from the SES to a civil service position outside the SES "at any time for less than fully successful executive performance as determined under subchapter II of Chapter 43 of this Title." 5 U.S.C. Sec. 3592(a)(2) (1982) (Subchapter II of Chapter 43, 5 U.S.C. Secs. 4311-4315, describes the performance appraisal systems for the SES.). An agency may also remove an SES employee under section 7543 for: "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." In contrast to removal under section 3592, which is removal from the SES to a civil service position, removal under section 7543 means removal from the civil service.

Berube v. General Services Administration, 820 F.2d 396, 397-398 (Fed. Cir.1987). An SES employee's actions or inactions related to his job performance may or may not amount to misconduct, neglect of duty, or malfeasance depending on the circumstances. When they do not, the agency must proceed under section 3592. When they do, the agency may proceed under section 7543.*Id.*

In the notice of proposed removal, Cherocharged the appellant with the misconductunder section 7543 of conduct unbecoming a federal employee relying upon four specifications.IAF, Tab 16, 59-63. In order to prove a charge of conduct unbecoming, the agency is required to demonstrate that the appellant engaged in the underlying conduct alleged in support of the generic charge. *Raco v. Social Security Administration*, 117 M.S.P.R. 1, 2011 MSPB 87, ¶ 7, citing *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, 2010 MSPB 69, ¶ 9 (2010). In addition, where, as here, the agency has employed a generic label for the charge, the Board must look to the specifications to determine what conduct the agency is relying on as the basis for its proposed action. *Lachance v. Merit Systems Protection Board*, 147 F.3d 1367, 1372 (Fed. Cir. 1998); *Boltz v. Social Security Administration*, 111 M.S.P.R. 568, ¶ 16 (2009). When resolving the issue of how a charge should be construed and what specific elements require proof, the Board examines the structure and language of the proposal notice and

the decision notice. *Boltz*, 111 M.S.P.R. 568, ¶ 16; *George v. Department of the Army*, 104 M.S.P.R. 596, ¶ 7 (2007), *aff'd*, 263 F. App'x 889 (Fed. Cir. 2008); *see Lachance*, 147 F.3d at 1373 (relying in part on decision notice in construing the charge). If, but only if, the charge is ambiguous, the testimony of a deciding official may also be considered to determine the true nature of the charge. *See Lachance*, 147 F.3d at 1373. Finally,a general charge may be sustained as long as the reasons for the proposed action were described in sufficient detail to allow the employee to make an informed reply. *See Cross v. Department of the Army*, 89 M.S.P.R. 62, 68 (2001).

Thegravamen of most of the specifications in the agency's notice of proposed removal are the actions of subordinate employees from various Regions and the actions of Neely, who part of the time was subordinate to the appellant and part of the time a peer. Therefore, I find the essence of the misconduct charge is most analogous to in some respects to a failure to properly supervise subordinates. *See Raco*, at ¶ 18 (analogizing a charge of conduct unbecoming to a violation of time and attendance policies).

As the Board held in *Miller v. Department of Health andHuman Services*, a supervisorcannot be held responsiblefor the improprieties of subordinate employees unless he actually directed or had knowledge of and acquiesced inthe misconduct. *See Miller v. Department of Health andHuman Services,* 8 M.S.P.R. 249, 252 (1981); *Mauro v. Department of the Navy,* 35 M.S.P.R. 86, 91 (1987).In applying the "knowledge and acquiescence" standard, considerationis given to the following factors: (1) the knowledge the supervisor has, or should have, of the conduct of subordinates;(2) the existence of policies or practices within the supervisor's agency or division which relate to the offendingconduct; and (3) the extent to which the supervisor has encouraged or acquiesced in these practices and/or thesubordinates' misconduct. *Mauro,* 35 M.S.P.R. at 91;*Miller*, 8 M.S.P.R. at 252-253. In addition, as the Board stated in *Miller*, "[t]he greater the duty a supervisor has to control those employees who actuallycommitted the

improprieties, the less specific knowledge of the misconduct the supervisor will be required tohave. Where it has been shown that the supervisor has direct control over the employees committing the violation,the supervisor's general knowledge of relevant factors imposes an affirmative duty to investigate further."8 M.S.P.R. at 253.

In the proposal notice,Cheroclaimed that "[t]here were a number of questionable and excessive expenditures during and in preparation for the 2010 WRC." IAF, Tab 16, p. 59. I note that there are two parts to each of the specifications– either the appellant knew of the "questionable and excessive expenditures" and thus engaged in misconduct personal to him, or the appellant should have known about "the questionable and excessive expenditures" and prevented them from occurring, i.e., he failed to properly supervise subordinates under the *Miller*standard. *Id.*

Cherotestified that the evidence she relied upon was the OIG'sdeficiency report, which included an interview of the appellant,Region 9's credit card transactions, and email traffic among the four Regional Commissioners, Weller, Graf, Neely and the appellant. 9/26/12 HT, p. 7, 18 and IAF, Tab 16,59-63. While preparing the proposed removal, Chero had asked "if additional information was available that" that she could utilize in making the decision, but she was told by the human resources office that she "was provided everything that was available." 9/26/12 HT, p. 7.

As I advised the parties during the hearing, there are evidentiary issues with the OIG deficiency report. Except for a few discrete receipts and costs summaries, the agency failed to submit into the record most of the evidence underlying the OIG's conclusions. Therefore, the OIG's report constitutes multiple levels of hearsay. The agency stated at the hearing that it was unable to submit information because of ongoing criminal investigations not involving the appellant. However, at no time during the processing of this appeal did the agency request a stay because material evidence needed to support the agency's

disciplinary action against the appellant could not be submitted into the appeal record due to ongoing criminal investigations. 9/26/12 HT, pp. 17-22.

An assessment of the probative value of hearsay evidence such as the OIG deficiency report necessarily depends on the circumstances of each case. *Coles v. U.S. Postal Service*, 118 M.S.P.R. 249, 2012 MSPB 77, ¶ 13 (2012) citing *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). The Board evaluates the probative value of hearsay under the factors set forth in *Borninkhof* by considering various factors that include the availability of persons with firsthand knowledge to testify at the hearing, whether the out-of-court statements were sworn, whether the declarants were disinterested witnesses to the events and whether their statements were routinely made, the consistency of the out-of-court statements with other statements and evidence, whether there is corroboration or contradiction in the record, and the credibility of the out-of-court declarant. *Adamsen v. Department of Agriculture*, 116 M.S.P.R. 331, 2011 MSPB 49, ¶ 16 (2011) citing *Vojas v. Office of Personnel Management*, 115 M.S.P.R. 502, 2011 MSPB 9, ¶ 13 (2011); *see alsoSocial Security Administration v. Long,* 113 M.S.P.R. 190, 2010 MSPB 19, ¶26-27,(2010) (citing *Borninkhof*, 5 M.S.P.R. at 87). For purposes of this decision, I am assuming *arguendo* that the OIG's report is an accurate summary of the underlying documentary evidence, recognizing that the specific details underlying the summary conclusions found in the report were not submitted into the record.

The agency has failed to prove specification one by preponderant evidence.

In specification one, Chero chargedthat as Acting Administrator and Region 8 Commissioner, the appellant should have controlled expenses related to the planning of the WRC whichthe agency contended were clearly excessive.Cheroclaimed the appellant knew or should have known "this conduct was improper"given his position as "Regional Commissioner/Acting Administrator" and because of "the participation of those in your chain of command." IAF, Tab 16, p. 60.As found above, the established business practice

at the agency for the WRC was for the Office of the Administrator to provide budget allocations to the host region to plan and implement the WRC. The host region was headed up by a member of the SES. Since procurement and contracting authorities were delegated to each region, the host region took responsibility for all planning, procurement, and contracting activities. Implicit in this structure was the assumption that the host career SES Regional Commissioner, in this instance Neely, was conducting agency business in accordance with applicablelaws, rules and regulations. As found by the OIG, rather than relying upon the funds allocated by the Administrator for the WRC, Neely was reallocating funds under his control within his own region to cover costs that exceeded the funds allocated for the 2010 WRC. IAF, Tab 38, pp. 9 and 15.

Specification one has several subparts. First, Cheroclaimed the appellant should have limited the number of planning meetings and that the number of planning meetings and employees attending were excessive and resulted in unnecessary expense to the government. Relying upon the OIG report, Chero claimed "the total cost of the planning meetings exceeded $130,000.00 including travel expenses and catering costs."IAF, Tab 16, p. 60. However, the OIG report does not contain an itemized breakdown of meeting costs by region and by meeting date.IAF, Tab 16, p. 60 and Tab 38, p. 10.

It is undisputed that there were four planning meetings in 2009 for the 2010 WRC and four planning meetings in 2010. Four meetings occurred in 2009 while the appellant was on detail as Acting Administratorand, based on prior practice, the Administrator had no direct role in the detailed planning of the WRC. Additionally, based on an OIG summaryRegion 8 was not involved in any of the 2009 planning meetings, and there is no evidence the appellant learned of the 2009 meetings from Region 8 staff. Tab 38, p. 10. According to the OIG summary, three employees from the central office of the PBS (Lisa Daniels, Stacy Buchele, and Philip Klokis) attended the 2009 meetings, but there is no evidence

they had any communications with the appellant as Acting Administrator and they were under the supervisory chain of Peck as head of the PBS. *See*, IAF, Tab 38, p. 10. In addition, three employees from Regions 7 and 10 attended the 2009 meetings. Applying the *Miller* criteria, as Acting Administrator, the appellant was ultimately in the chain of command of all of the employees who attended the 2009 planning meetings. There were also in place policies and regulations governing travel and per diem expenses. However, there were several levels of supervisors, some of whom were members of the SES, between the appellant and the individuals who attended the meetings. Travel and budget authorities were delegated to the regions which had assigned to them two levels of SES supervisors (Regional Commissioners and Regional Administrators). Given the appellant's higher level in the supervisory chain of command, he had no reason to know the details of the meetings and travel activities – that obligation belonged to supervisors at the regional level. Accordingly, the agency has failed to establish that with regards to the 2009 meetings, the appellant "actually directed or had knowledge of and acquiesced inthe misconduct" alleged by the agency.

In 2010, after the appellant returned to his position as Region 8Commissioner, Cheroclaimedthe appellant should have limited the number of Region 8 employees attending planning meetings because the costs were excessive. IAF, Tab 16, p. 60. However, based on the OIG information provided to the agency, only the appellant attended the March 8-11, 2010, and only one Region 8 employee, Sarah Hoffman, attended the August 16 to 19, 2010 meeting. Tab 38, p. 10**.** There is no evidence in the recordof the actual costs and expenses for the attendance by two Region 8 employees to these meetings. Accordingly, I find the agency has failed to establish by a preponderance of the evidence that the

appellant and Hoffman'sexpenses were excessive. IAF, Tab 16, p. 60 and Tab 38, p. 10.[12]

The OIG summary showed that six Region 8 employees (Buddington, Camp, Engel, Horne, Owens and Warner) attended the dry run of the 2010 WRC in Henderson from October 12-15, 2010, but the evidence shows at least four of the six were making presentations at the conference.IAF, Tab 37, pp. 57-62 and Tab 38, p. 10. As found above, unrebutted evidence shows that the dry runs of the WRC wereconsidered necessary and essential to insure quality presentations and had been agency practice for several years. In addition, there is no evidence in the record of the actual breakdown of costs and expenses for these employees to attend the dry run. Accordingly, I find the agency has failed to establish by a preponderance of the evidence that the dry run was an unreasonable expenditure of agency funds and that Region 8 employees' expenses were excessive. IAF, Tab 16, p. 60 and Tab 38, p. 10.

Chero claimed the appellant should have called the excessive number of planning meetings and employees to the attention of his peers. IAF, Tab 16, p. 60. First, as found above, the agency has failed to establish that the appellant knew about the number of planning meetings Neely and Region 9 convened in 2009 and 2010. Second, the agency also has failed to establish that the appellant should have known about the number of meetings in 2009, particularly while he was serving as Acting Administrator. Applying *Miller*, the 2009 and 2010 planning meetings were within Neely's authority to organize and convene. The appellant was not Neely's direct or second line supervisor in 2009 and the appellant had no supervisory authority over Neely in 2010. Accordingly, the

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[12] The OIG summary does not list Gomez as attending any of the planning meetings; however, there was testimony from Gomez and the appellant that Gomez was present at some of the 2010 planning meetings. The agency failed to explain this discrepancy. *See*, Tab 38, p. 10.

agency has failed to establish that the appellant had direct control over Neely and the Region 9 "employees committing the violation" triggering an "affirmative duty to investigate" or that the appellant "actually directed or had knowledge of and acquiesced inthe misconduct" of Neely and Region 9. *See Miller*, 8 M.S.P.R. at 252-253. Consequently, I find the agency has failed to prove this element of specification one by a preponderance of the evidence.

Finally, with regards to specification one,Chero placed substantial reliance on the appellant's attendance at the March 2010 planning meeting to prove misconduct:

> Considering your attendance at the March 8-11, 2010 "Pre-Planning Meeting" you were aware of the various activities related to the conference. The meeting minutes included language such as "lighthearted awards will be given out, something more to do with contribution at the conference." The minutes also reflect that audio visual needs were discussed in addition to the pros and cons of going with Delta 4 versus non-profit. During the meeting, there was a discussion regarding the cost of the team building exercise, exhibits, coins and other expenditures. Clearly from your participation in the March 8-11, 2010 pre-planning meeting, you knew the costs that would be expended. You had an obligation to ensure that all the activities supported the mission of the agency, minimize all expenses related to this conference and in regard to the expenses sought by your peers. Given your position as Regional Commissioner/Acting Administrator, 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 prohibited.

IAF, Tab 16, p. 60.

I find the agency has failed to prove its contention that by attending the March 2010 planning meeting the appellant knew about all of the planning details for the 2010 WRC. As found above, the agency has failed to prove the appellant had any actual knowledge that Neelyand Region 9 planning efforts involved spending funds beyond those allocated by the Administrator's office. Most of the costs incurred by Neely and Region 9 occurred in 2010 when the appellant was not in the supervisory chain of command for Region 9. Applying *Miller*, the

agency has failed to establish that based on the March 2010 planning meeting, the appellant had direct control over Neely and Region 9 "employees committing the violation" triggering an "affirmative duty to investigate" or that the appellant in his supervisory capacity over subordinate employees "actually directed or had knowledge of and acquiesced inthe misconduct" of Neely and Region 9 employees. *See Miller*, 8 M.S.P.R. at 252-253. Consequently, I find the agency has failed to prove this element of specification one by a preponderance of the evidence.

In summary,based on the above, I find the agency has failed to prove specification one by a preponderance of the evidence.

The agency has failed to prove specification two by preponderant evidence.

In specification two, Chero claimed that based on the OIG report more than $140,000.00 was spent on catered food and beverages for the 2010 WRC. Chero asserted that the costs incurred exceeded the per diem amount permitted for attendees for food.Cherocharged that the appellant "allowed this violation and despite your position as Acting Administrator/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 were excessive and in some cases impermissible spending." IAF, Tab 16, pp. 60-61.

Chero cited the July 13, 2011 email from the appellant to Neely discussed in detail above as proof of the appellant's "involvement in the decision making of all activities associated with the conference." IAF, Tab 16, p. 61. However, as found above, the agency misinterpreted this email. The record is devoid of any evidence that the appellant or anyone from Region 8 for that matter, had any involvement with the procurement of food for the conference or had any knowledge of the procurement contracts entered into by Region 9. Given the delegation of authority to each region for procurement and contracting activities,

the agency failed to provide any evidence that the appellant should have known that Neely was not exercising his delegated authorities in accordance with applicable laws, rules or regulations. Applying *Miller*, the agency has failed to establish that the appellant had direct control over Neely and Region 9 "employees committing the violation" triggering an "affirmative duty to investigate" or that the appellant in his supervisory capacity over subordinate employees "actually directed or had knowledge of and acquiesced inthe misconduct" of Neely and Region 9 employees. *See Miller*, 8 M.S.P.R. at 252-253. Consequently, I find the agency has failed to prove specification two by a preponderance of the evidence.

<u>The agency has failed to prove specification three by preponderant evidence.</u>

In specification three,Cheroclaimed the appellant failed to prevent impermissible spending and violations of various procurement laws, rules and regulations and applicable comptroller general and GSA orders and "failed to curtail the participation of others in prohibited activities." *Id.*Specifically, Cheroasserted the appellant failed to prevent the following expenditures: (1) over $1,800.00 spent to purchase 19 vests for regional ambassadors and other employees; (2) over $300.00 to rent three tuxedos; (3) over $8,000.00 spent to improperly purchase mementos for attendees including yearbooks "and other items"; (4)over $6,325.00 in commemorative coins and velvet boxes given to all conference participants for their work on the Recovery Act; and (5) approximately $6,000.00 for canteens, shirts for a team-building exercise, and "other unnecessary items."IAF, Tab 16, p. 61.

Chero charged the appellant knew or should have known of these asserted impermissible expenditures "[g]iven the participation of employees in your chain of command and briefings you received from the Region 8's planning coordinator regarding the planning of the WRC."IAF, Tab 16, p. 61.

However, except for the coins discussed below, the record is devoid of any evidence that the appellant had any actual knowledge about any of the

expenditures Chero identified as prohibited activities. Region 9 was responsible for procuring the items. The agency failed to show Gomez played a role in the procurement decisions or the expenditure of these funds or that the appellant was otherwise advised by Region 9 of the expenses they were incurring. 9/26/12 HT,pp. 230-35. In turn, Region 9, like all other regions, had delegated procurement and contracting authorities. Therefore, the appellant had no direct oversight over Neely's activities in either of his roles as Acting Administrator, or as Region 8's Regional Commissioner. In fact, it was Peck as Neely's direct supervisor who had the obligation to provide oversight of Neely's activities. Applying *Miller*, the agency has failed to establish that the appellant had direct control over Neely and Region 9 "employees committing the violation" triggering an "affirmative duty to investigate" or that the appellant in his supervisory capacity over subordinate employees "actually directed or had knowledge of and acquiesced inthe misconduct" of Neely or of Region 9 employees. *See Miller*, 8 M.S.P.R. at 252-253.

The evidentiary basis for the agency's claim that the "coins" were inappropriate was a single paragraph finding in the OIG deficiency report, which stated:

> GSA spent $6,325 on commemorative coins "rewarding" all conference participants(as well as all regional employees who did not attend the conference) for their workon Recovery Act projects, along with velvet boxes to hold the coins. These did notqualify as permissible awards because the coins' design, which appears below, showsthat they were intended to be mementos of the WRC.

IAF, Tab 16, p. 82. Based on the limited evidence in the record before the Board, the OIG's finding that the coins were mementos, and thus not permissible, was based solely on the design of the coins. The OIG report contains no affidavits or other sworn testimony regarding the coins.

There is a long history of the agency using coins as recognition for performance, including in the IG's office. IAF, Tabs 39 and 41. It is undisputed

that the use of coins as commemoratives, however, was not permissible. The appellant testified that the purpose of the coins was to recognize the outstanding performance of the employees in Regions 7, 8, 9 and 10 for their efforts in timely committing Recovery Act funds while also continuing regular ongoing business. As explained by the appellant:

> It was -- that was a conversation at the planning meeting I went to, and we were right in the middle of the recovery work, $5 billion worth of work, and there really hadn't been any conversations about extraordinary efforts that our employees had exhibited in order to get that work done. And I was particularly sensitive to that because as the acting administrator, I had to testify on the Hill when we found out that we got $5.5 billion additional money, and I was asked a specific question. "Mr. Prouty, can you guarantee that your agency can do this?" And I'm not stupid, so I said, "Yes," but not for a minute did I think that that was going to be easy, and we immediately asked if we could get additional people which we got a few. We asked if we could get any relief from the regulations. We were told no. So our people based on the charge that we were doing something great for the country, putting people back to work, great for the economy, really went above and beyond anything that any of us could have imagined. And it was -- all of the RCs certainly were mindful that we owed a great deal to those people for what they did. And so we said, we need to recognize them. Now, we all had the authority and probably the money to give them all cash, but that's – in the economic times, that wasn't what we deemed to be appropriate. So we decided we were going to give coins, and we'd given coins in the Agency -- I'd used coins before. I know others have. We now know the IG has used coins. And we made a decision to give coins for singular purpose which was for the work that people did on the recovery.

9/27/12 HT, pp. 75-76. Both Weller and Graf testified consistently with the appellant regarding the intent in creating and distributing the coins. 9/28/12, pp. 10-11; pp. 51-52.I find the appellant’s, Weller, and Graf testimonies to be credible under *Hillen*. The appellanttestimony was unwavering, detailed, precise and forthright. His explanation of the purpose of the coins was corroborated by Weller’s and Graf’s. It is also consistent with the summary of his OIG statement that the coins were a way to recognize the “truly amazing” work performed by

agency employees on Recovery Act projects.IAF Tab 16, p. 93. As sworn statements, the testimonies of the appellant, Weller, and Graft are entitled to greater probative weight than the summary, unsworn, hearsay conclusions submitted in the OIG report. Therefore, I find the coins were issued as recognition of the employees' performance and were not merely impermissible mementos. Accordingly, I find the agency has failed to prove this element of specification three and, in turn, I find the agency has failed to prove specification three by a preponderance of the evidence.

The agency hasfailed to prove specification four by preponderant evidence.

In specification four,Cheroalleged that the appellant failed in his role as a HCA and as Acting Administrator and Regional Commissioner to control excessive spending that he "knew or should have known would waste taxpayer dollars." IAF, Tab 16, pp. 61-62.

Chero charged that the agency awarded a $75,000.00 contract to "Most Valuable Performers" (Delta 4) to provide a team building session that including the purchase and building of 24 bicycles. When the training was completed, the bicycles were to be donated. Even though the contractor owned the bicycles, GSA selected the recipient of the donation, a local Boys and Girl Club. The minutes from the March 8-11, 2010 planning meeting indicate a discussion of whether to contract with Delta 4 or another non-profit entity. The agency charged that the discussion and later procurement of Delta 4 "was improper and failed to follow procurement policies" and that based on the appellant's position as Acting Administrator and Regional Commissioner, along with his presence at the planning meeting, he knew or should have known about the improper procurements and should have acted to prevent the contract that resulted in excessive spending. IAF, Tab 16, pp. 61-62.

I find the record is devoid of any evidence that the appellant knew that Neely or Region 9 engaged in improper procurement and contracting activities. As of the date of the 2010 March planning meeting, no procurements had yet

occurred for team building activities. As found above, the appellant and Graff raised the question of obtaining legal guidance prior to proceeding. Neely later provided assurances that after the March planning meeting, he obtained legal review for the activities prior to contracting. 9/27/12 HT, p. 57; 9/28/12 HT, pp. 49- 51. Finally, as the OIG advised Brita, it was Neely "who approved the expenditures for the conference based on a budget he was provided and extra funds he added from Region 9's budget." IAF, Tab 38, p. 15.Applying *Miller*, the agency has failed to establish that the appellant had direct control over Neely and the Region 9 "employees committing the violation" triggering an "affirmative duty to investigate" or that the appellant in his supervisory capacity over subordinate employees "actually directed or had knowledge of and acquiesced inthe misconduct" of Neely and the Region 9 employees. *See Miller*, 8 M.S.P.R. at 252-253.

In summary, I find the agency has submitted insufficient evidence to prove actionable misconduct by the appellant and therefore has failed to prove specification four.

Aside from the specifications discussed in detail above which I found to be unproven misconduct under *Miller*, Chero made the following generalized statements in the notice of proposed removal that the appellant failed to meet "an obligation to ensure that all the activities supported the mission of the agency, minimize all expenses related to this conference," and lacked "prudent judgment" and failed to lead his organization with "strong leadership skills, good judgment, and proper conduct." IAF, Tab 16, pp. 6061. I do not address these penalty factors because the agency has failed to prove misconduct under *Miller*. In the alternative, if the agency actually asserts that these are additional acts of misconduct (i.e. failure of leadership, failure to exercise programmatic oversight, and failure to protect the interest of the taxpayer) theseconcerns explained in a conclusory mannerin the notice of proposed removal relate to performance rather than misconduct. *Berube,* 820 F.2d at 397-398. Accordingly, the agency is

obligated to proceed under 5 U.S.C. § 3592(a)(2) governing SES performance issues.

In summary, since the agency has failed to submit sufficient evidence to meet its burden of proving any of the four specifications, it has failed to prove the charge of conduct unbecoming a federal employee by a preponderance of the evidence.

Due process and harmful error claims

The appellant raised claims of due process violations under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999)involving twodocuments. Under *Stone*, when a deciding official receives new and material information by means of ex parte communications, “then a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure.” *Stone*, 179 F.3d at 1377. In that case, the deciding official received ex parte memoranda recommending removal of the employee after the employee had received a notice of proposed removal. *Id*. at 1372. The court also stated that, “not every ex parte communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the appellant to an entirely new administrative proceeding. Only ex parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice.”*Id*. at 1376-77.

In *Stone*, the Federal Circuit relied upon certain factors in determining whether ex parte communications introduce new and material information: (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 ex parte communications would likely result in undue pressure upon the deciding official to rule in a particular manner. *Id.* at 1377. 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*.

Credit card payment authorizationsby Region 9 were attached to the OIG report given to the appellant as part of his notice of proposed removal. IAF, Tab 16, pp. 123-25; 135-38; and 141-44. The appellant alleged that the agency's reliance upon these credit card authorizations by Region 9 was a violation of his due process rights under *Stone* because he did not understand that the agency was interpreting the Region 9 receipts in a manner to claim that he knew or should have known about Region 9's improper procurement activities.

It is undisputed that the appellant was provided a copy of the Region 9 receipts and the OIG report relied upon them in part as proof of improper expenditures. Chero's notice of proposed removal specifically relied on this portion of the OIG report regarding improper expenditures. Therefore, the appellant was on clear notice that the agency was relying upon the credit card receipts as part of its proposed adverse action. Accordingly, I find no violation of due process has occurred with regard to Region 9's credit card receipts.

The second document the appellant alleged violated his due process rights under *Stone*was a July 14, 2011 email exchange between Peck and Graf which, it is undisputed, was not part of the notice of proposed removal documentation provided to the appellant and which the appellant first received during the discovery process for this appeal. IAF Tab 37, pp. 43-44; 9/27/12 HT, pp. 63-64. The July 14, 2011 email, however, was merely an extension of the exchanges in the July 13, 2011 email discussed in detail above.Therefore, I find the July 14 email was merely cumulative and did not cause Brita,assuming she relied upon it, to experience undue pressure to rule in a particular manner. Accordingly, the July 14 email does not constitute a due process violation.

Finally, the appellant claimed that his due process rights had been violated because Brita, the deciding official, also instigated the OIG investigation upon which his removal was based and concurred with the deficiency report. The Board has held that it would be a violation of due process "to allow an individual's basic rights to be determined either by a biased decisionmaker or by

a decisionmaker in a situation structured in a manner such that [the] 'risk of unfairness is [i]ntolerably high.'" *Martinez v. Department of Veterans Affairs*, -- M.S.P.R. --, 2012 MSPB 121, ¶ 6 (2012) quoting *Svejda v. Department of the Interior*, 7 M.S.P.R. 108 (1981) *Id*. at 111 (quoting *Withrow v. Larkin*, 421 U.S. 35, 58 (1975)). The Board has previously concluded that the mere fact that the 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 proposal 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*, at ¶ 7 citing *Beatty*, 20 M.S.P.R. at 438; *see Baldwin*, 26 M.S.P.R. at 387. The burden is on the appellant to establish actual bias or an intolerable risk of unfairness. *Id*. I find the appellant has failed to meet his burden. While it is undisputed that Brita was involved in initiating the OIG investigation, reviewed the OIG's initial findings, and was supportive of the initiation of an adverse action against the appellant, the record evidence does not establish that the selection of Brita as the deciding official made the risk of unfairness to the appellant "intolerably high."

CONCLUSION

In summary, based on all of the above findings, I find the agency has failed to submit into the Board's record sufficient evidence to prove by a preponderance of the evidence the charge of conduct unbecoming a federal employee.Therefore, given this lack of evidence, the agency's action removing the appellant from the federal service must be reversed.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **June 25, 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 theappellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of Regional Commissioner, ES-0340-00. 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__________________

Patricia M. Miller
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 15, 2013**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if

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

BOARD REVIEW

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

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

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

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

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115 (eff. Nov. 13, 2012), the Board normally will consider only issues raised in a timely filed petition or cross petition for

review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h) (eff. Nov. 13, 2012), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any

table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

JUDICIAL REVIEW

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

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

If your petition to the court "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D)," you may file your petition for review with the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The right to file a petition for review to any of these courts is limited to the two year period beginning on the December 27, 2012 effective date of the Whistleblower Protection Enhancement Act.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703(b)(1)(B) (5 U.S.C. § 7703(b)(1)(B)). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information about the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about the other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

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