UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 185

Docket No. NY-0752-06-0267-I-1
NY-0752-06-0266-I-1

Jacques E. Lamour,

Scott Rosebery,

Appellants,[1]

v.

Department of Justice,

Agency.

August 10, 2007

Alan E. Wolin, Esq., Jerold Wolin, Esq., Jericho, New York, for the appellants.

Docia M. Casillas, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Chairman McPhie issues a separate dissenting opinion.

[1] These cases arise from the same incident and the agency's documentation, as well as the appellants' responses, are virtually identical. In view of these similarities, the Board finds that issuing a consolidated decision in these appeals will expedite their processing and will not adversely affect the interests of the parties. The Board therefore CONSOLIDATES these cases on its own motion. *See* 5 C.F.R. §§ 1201.36.

OPINION AND ORDER

¶1 The agency has filed petitions for review of the August 3, 2006 initial decisions that reversed the appellants' indefinite suspensions. For the reasons set forth below, we GRANT the petitions for review, VACATE the initial decisions, but still REVERSE the appellants' indefinite suspensions.

BACKGROUND

¶2 On April 17, 2006, the agency notified the appellants, GS-08 Senior Officer Specialists at the agency's Bureau of Prisons' Metropolitan Detention Center (MDC) in Brooklyn, New York, that it changed their duty stations from the MDC to their home addresses. Initial Appeal File (IAF), Tab 7, Subtab 4f.[2] On May 4, 2006, the agency proposed the appellants' indefinite suspensions pending the results of an agency Office of Inspector General (OIG) investigation concerning the appellants' alleged use of unnecessary force and criminal assault against an inmate. *Id.*, Subtabs 1, 4d-4e. The appellants, who were represented by the same law firm, made oral and written replies in which they explained that they were involved in a physical altercation while helping other officers subdue and escort an inmate to another unit, but they both "vigorously denied partaking in any physical assault involving an inmate" and noted that the agency's documentation did not indicate that anyone was physically hurt.[3] *Id.*, Subtabs 4b-4c. The appellants asserted that, "other than the possible complaint of an inmate, there is no evidence to establish cause to believe that the actions in the proposal occurred," and that a long indefinite suspension without pay would have a disastrous effect on their ability to provide for their families and would also

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[2] The records in both appeals, for the purposes of citations thereto, are identical.

[3] The appellants' written replies indicate that their counsel requested the agency's supporting documentation for the proposed actions, but the agency apparently provided only a single page letter from the OIG in response to the requests. IAF, Tab 7, Subtabs 4c, 4e.

threaten foreclosure on their homes. *Id.*, Subtab 4c. The agency indefinitely suspended the appellants, effective June 16, 2006, because the deciding official, Paul Laird, Warden of the MDC, found that the serious nature of the allegations against the appellants made retaining them in the MDC inappropriate until after the issues were resolved. *Id.,* Subtab 4a. "[B]ecause the criminal investigation could be quite lengthy," Laird also claimed that "retaining [the appellants] in a paid status does not meet the efficiency of the service." *Id.*

¶3 The appellants filed timely appeals in which they argued that the agency had not established a nexus between their suspensions and the efficiency of the service, the suspensions were contrary to the agency's actions in more egregious cases, the agency failed to establish reasonable cause to believe that they had committed a crime for which a sentence of imprisonment may be imposed, the suspensions had no ascertainable end, and indefinite suspensions without pay would financially ruin them. IAF, Tab 1. The agency replied that an allegation that the appellants criminally assaulted an inmate was very serious in light of their responsibilities as correctional officers and that "maintaining the Appellant[s] in any paid position until the final disposition of the investigation would be inappropriate, as [they] would continue to have contact with inmates." IAF, Tab 7, Subtab 1. Accordingly, the agency argued that indefinitely suspending the appellants promoted the efficiency of the service. *Id.*

¶4 After reviewing the agency's file, the AJ issued a notice stating that, because the fact that the OIG was investigating the appellants was not sufficient to provide reasonable cause to believe that either of the appellants committed a crime for which a sentence of imprisonment may be imposed, she believed that the appellants' indefinite suspensions should be reversed and that there was no point in holding hearings. IAF, Tab 9. Subsequently, the appellants withdrew their requests for hearings and requested decisions on the written record. *Id.*, Tab 10. The agency replied that, because it did not attempt to summarily suspend the appellants with a shortened notice period under the crime provision of 5 U.S.C.

§ 7513(b)(1), but instead gave them 30-days' advance written notice, it was not required to establish reasonable cause to believe that the appellants had committed a crime for which a sentence of imprisonment may be imposed in order to indefinitely suspend them. *Id.*, Tab 13. The agency therefore contended that, because it gave the appellants 30-days' notice, the only standard it was required to meet was the efficiency of the service standard. *Id.*

¶5 On the written record, the administrative judge (AJ) found that the agency had not presented any evidence regarding the incident that was the subject of the OIG investigation and had failed to cite any statute, regulation, or rule that gave it the authority to indefinitely suspend a tenured employee under the circumstances presented. IAF, Tab 14, Initial Decision (ID). The AJ reversed the appellants' indefinite suspensions because the agency failed to establish reasonable cause to believe that either of the appellants committed a crime for which a sentence of imprisonment may be imposed. *Id.*

¶6 The agency filed timely petitions for review (PFRs), asserting that it granted the appellants interim relief and arguing that the AJ erred in imposing the reasonable cause standard in this case because the agency did not use a shortened notice period to suspend the appellants. Petition for Review File (PFRF), Tab 1. The agency contends that there are two different kinds of indefinite suspensions, those effected with a shortened notice period, for which the agency must establish reasonable cause to believe that the employee committed a crime for which a sentence of imprisonment may be imposed, and those in which the employee is given 30 days' advance notice, for which the agency must only establish that the action was taken to promote the efficiency of the service. *Id.* at 5. The appellants filed replies arguing that the AJ applied the proper standards in reaching her decisions and that the agency presented no evidence to substantiate that they committed any misconduct or that their indefinite suspensions would promote the efficiency of the service. PFRF, Tab 4.

ANALYSIS

¶7 Section 7513(a) of title 5 of the United States Code provides that an agency may take an adverse action, such as suspending an employee for more than 14 days, only for such cause as will promote the efficiency of the service. An employee against whom the adverse action is proposed is entitled to at least 30 days' advance written notice of the action, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1).

¶8 After the agency submitted its PFRs, the U.S. Court of Appeals for the Federal Circuit ruled that an agency that provides an employee with 30 days' advance notice may indefinitely suspend an employee pending an investigation of the employee's possible criminal conduct without establishing reasonable cause to believe that the employee committed a crime for which a sentence of imprisonment may be imposed. *Perez v. Department of Justice*, 480 F.3d 1309, 1311 (Fed. Cir. 2007). Thus, because the agency in the instant matter proposed the appellants' indefinite suspensions on May 4, 2006, more than 30 days before its June 15, 2006 decisions to suspend them, it could indefinitely suspend the appellants pending the results of the OIG investigation without establishing that it had reasonable cause to believe that they had committed a crime for which a sentence of imprisonment could be imposed. *Id.*; IAF, Tab 7, Subtabs 4a, 4d. Accordingly, the Board cannot reverse the appellants' indefinite suspension on the basis of the agency's failure to establish that it had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment may be imposed. We therefore GRANT the agency's petition for review and VACATE the August 3, 2006 initial decisions issued with respect to these appeals.

¶9 Nevertheless, even with 30 days' advance notice, the agency was still required to meet the remaining requirements of 5 U.S.C. § 7513, which, in pertinent part, provide that an agency may suspend an employee for a period in

excess of 14 days only for such cause as will promote the efficiency of the service and that the agency must provide written notice stating the specific reasons for the appellants' indefinite suspensions. *Perez*, 480 F.3d at 1311. In addition to the statutory requirements set out in subchapter II of chapter 75, sufficient notice of the basis for an agency's proposed action against a tenured employee also implicates due process requirements guaranteed by the 5th Amendment to the U.S. Constitution. U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *see LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."). The Board has stated that "fundamental due process requires that the tenured public employee have 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'" *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 666 (1994) (quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)). In *Barresi*, an indefinite suspension case in which the agency shortened the required notice period under the "crime exception" of 5 U.S.C. § 7513(b)(1), the Board went on to note, "In this regard, due process mandates that notice be sufficiently detailed to provide a meaningful opportunity to be heard." *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970)). In a recent case involving an indefinite suspension, the Federal Circuit to a similar approach to the question of the specificity required for the agency's notice of its charges against an employee under 5 U.S.C. § 7513. With respect to an employee's indefinite suspension following the revocation of the appellant's security clearance, the court determined that general notice of the reasons for the security clearance revocation was insufficient. *Cheney v. Department of Justice*, 479 F.3d 1343, 1353 (Fed. Cir. 2007). The court found that the agency's notice to Cheney that he had "inappropriately queried or caused to be queried Law Enforcement Databases" was "akin to informing Mr. Cheney that his security clearance had been

suspended because he had robbed a bank, without telling him where the bank was and when he had robbed it." *Id.* at 1352. Furthermore, in a case involving a Border Patrol Agent whom the agency indefinitely suspended after his indictment, the Federal Circuit stated that, when a charge of criminal conduct arises in a context in which the credibility of key parties is necessarily in question, the agency must assure itself that it has a sound basis for acting, and it quoted *Greene v. McElroy*, 360 U.S. 474, 496 (1959) for the following proposition:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Dunnington v. Department of Justice, 956 F.2d 1151, 1157 (Fed. Cir. 1992).

¶10 In the instant appeal, the agency's suspension proposals only noted that the appellants were being investigated by the OIG for allegations of use of unnecessary force and criminal assault against an inmate, IAF, Tab 7, Subtab 4d, and the record does not reflect that the appellants ever received any of the agency's evidence against them regarding the alleged misconduct that was the basis for the OIG investigation. When the appellants' representative requested supporting documentation for the agency's proposed actions, the only information which the agency provided was a single-page letter from the OIG which noted, without explanation, that the appellants were among four subjects of an investigation concerning allegations of use of unnecessary force and criminal assault against an inmate. *Id.*, Subtabs 4c, 4e. However, other than naming the 4 subjects of the investigation, the OIG letter offered no details concerning the alleged assault, such as when or where it allegedly occurred or the name of the inmate involved in the incident. *Id.*, Subtab 4e. Although each appellant responded to the agency's proposal, they did not have a chance to respond to the

agency's evidence, they were put in the position of having to guess at the specific reasons for their indefinite suspensions, and there is nothing in the record to indicate that they guessed correctly. *Id.*, Subtab 4c. Thus, the proposal letter, which merely informed the appellants that they were being investigated for criminal assault of an inmate without describing the circumstances surrounding the alleged assault, was insufficiently detailed to provide the appellants notice of the charges against them and, consequently, the agency denied the appellants a meaningful opportunity to be heard. *See Barresi*, 65 M.S.P.R. at 666. Accordingly, the record shows that the agency violated the appellants' rights to due process in effecting their suspensions, and the Board cannot sustain these actions. 5 U.S.C. § 7701(c)(2).

¶11 In addition to the due process implications, the agency's failure to provide any evidence to establish some basis to believe that the appellants exerted unnecessary force against an inmate also implicates the agency's burden of proving that the appellants' suspensions promote the efficiency of the service. To show that an indefinite suspension promotes the efficiency of the service, the agency must establish a nexus between an employee's alleged misconduct and the efficiency of the service. *Dunnington*, 956 F.2d at 1155, 1158. The nexus requirement, for the purpose of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified by Kruger v. Department of Justice*, 32 M.S.P.R. 71, 76 n.3 (1987).

¶12 The agency asserted that the appellants' indefinite suspensions promoted the efficiency of the service because of the financial burden on the agency of maintaining the appellants in a paid duty status pending the conclusion of a lengthy investigation. IAF, Tab 7, Subtab 4d. The agency further asserted that,

"[b]ased on the seriousness of these allegations, [the deciding official found] that it is not in the best interest of the public or the Bureau to retain [the appellants] in an active duty status while the investigation of these matters is pending." IAF, Tab 7, Subtab 4d. However, aside from the mere fact that the OIG was investigating the alleged incident, the agency offered no evidence to establish that it had any basis to believe that the allegations against the appellants were sufficiently credible to justify the agency's belief that the appellants' actions were contrary to the requirements of their positions.[4]

¶13 Given the agency's interests in the welfare of the prisoners in its custody and in the need to maintain order among the prison population, the agency clearly has a legitimate interest in investigating allegations that its employees have committed misconduct that may have jeopardized those interests. Further, an allegation regarding a correctional officer's use of unnecessary force against an inmate that is sufficiently credible to justify further investigation might establish the clear and direct relationship between that correctional officer's suspension and the agency's legitimate interest in investigating the alleged misconduct.

¶14 However, we note that correctional officers, such as the appellants, may be required to exert force against an inmate as part of their normal duties; thus, the fact that the OIG was investigating such an incident and the fact that the appellants have apparently conceded that they forcefully restrained an inmate are,

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[4] The agency's proposal letters stated, "Based on the Office of Inspector General's acceptance of this investigation, there is cause to believe the allegations against you could be credible." IAF, Tab 7, Subtab 4d. However, the agency failed to present evidence regarding any standards the OIG may have applied in determining whether to accept the matter for investigation, and the agency's reliance on the OIG's mere acceptance of the matter for investigation "would be violative of the due process principles requiring the agency to provide an explanation of its evidence, and a fair opportunity to respond." *Barresi*, 65 M.S.P.R. at 666 (an agency could not use an investigative report to establish its charges in hindsight where the agency representatives who effected the indefinite suspension were unaware of the contents of the report and the report was not provided to the appellants as a basis for the agency's action).

without more, insufficient to establish any basis to conclude that the exertion of force called into question the appellants' ability or willingness to properly execute the duties of their position. *See, e.g., Craig v. Office of Personnel Management*, 92 M.S.P.R. 449, ¶ 11 (2002) (correctional institution employees are charged with maintaining security of the institution and must be prepared to use physical control in situations where necessary, such as in fights among inmates or assaults on staff). In fact, correctional officers may be punished for their failure to exert appropriate force when dictated by the circumstances. *See Cotton v. Department of Justice*, 53 M.S.P.R. 397, 404-05 (the Board sustained a correctional officer's 30-day suspension for failing to use force to immediately restrain an inmate who had struck and injured another officer), *aff'd*, 985 F.2d 584 (Fed. Cir. 1992) (Table). Thus, while the agency may choose to investigate incidents in which its correctional officers exert force against inmates, we find that an agency cannot meet its burden of establishing that suspending a correctional officer without pay during the course of such an investigation promotes the efficiency of the service where the agency has failed to establish any basis to believe that the employee's actions were contrary to the normal and proper execution of his duties.

¶15 In its PFRs, the agency maintained "that the appellant[s'] indefinite suspension[s] promoted the efficiency of the service because the alleged misconduct at issue clearly involved [their] law enforcement duties and raised serious and legitimate concerns about the safety of correctional staff, inmates, and the general public." PFRF, Tab 1 at 9-10. The agency offered no evidence, however, regarding the actual allegations made against the appellants. Ultimately, without some basis to explain why the agency believed that the particular exertion of force at issue in these appeals was contrary to the requirements of the appellants' positions, the agency cannot establish the necessary relationship between the appellants' suspensions and the OIG's investigation into the alleged misconduct. Accordingly, we find that the agency

has failed to establish that the appellants' indefinite suspensions promote the efficiency of the service.[5]

¶16 We recognize that it is possible that the agency chose not to provide any evidence regarding the allegations against the appellants in order to protect the integrity of the OIG investigation into potentially criminal misconduct by the appellants. However, an agency that decides that it is more important to protect the integrity of its investigation by withholding evidence regarding the alleged misconduct of an employee, rather than providing such evidence to allow the employee to make a meaningful reply to a proposed adverse action or to prove that the agency's action against the employee promotes the efficiency of the service, should understand that it runs the risk that such a decision might preclude the agency from having its action against the employee sustained by the Board. Nevertheless, as the U.S. Supreme Court has stated, "[I]n those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Loudermill*, 470 U.S. at 544-45.

ORDER

¶17 Accordingly, we ORDER the agency to CANCEL the appellants' indefinite suspensions effective June 16, 2006. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete these actions no later than 20 days after the date of this decision.

¶18 We also ORDER the agency to pay the appellants the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this

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[5] This finding is based on the specific context of this case as discussed above and does not in any manner imply that indefinitely suspending an employee pending completion of an agency investigation into credible allegations of serious misconduct could never promote the efficiency of the service when there is no related criminal proceeding.

decision. We ORDER the appellants to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellants the undisputed amount no later than 60 calendar days after the date of this decision.

¶19 We further ORDER the agency to tell each appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellants, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶20 No later than 30 days after the agency tells the appellants that it has fully carried out the Board's Order, either appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if he believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶21 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. The agency is ORDERED 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. The checklists are also available on the Board's webpage at http://www.mspb.gov/mspbdecisionspage.html.

¶22 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

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

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). 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 is available at the court's website, http://fedcir.gov/contents.html. 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.

FOR THE BOARD:

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Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Scott Rosebery v. Department of Justice,
MSPB Docket No. NY-0752-06-0266-I-1;

and

Jacques Lamour v. Department of Justice,
MSPB Docket No. NY-0752-06-0267-I-1

¶1 For the reasons given below, I do not agree with my colleagues' decision to reverse the appellants' indefinite suspensions.

BACKGROUND

¶2 After providing 30 days' advance notice and a right to respond, the agency, the Bureau of Prisons, indefinitely suspended the appellants from their Correctional Officer positions while it investigated allegations that they had used excessive force to control an inmate. Initial Appeal File (IAF) (Rosebery), Tab 7, Subtab 4A; IAF (Lamour), Tab 7, Subtab 4A. On appeal, the administrative judge reversed the suspensions. She found that to prevail, the agency was required to show that it had reasonable cause to believe that the appellants had committed a crime for which a sentence of imprisonment may be imposed, and that the agency failed to make that showing. IAF (Rosebery), Tab 14; IAF (Lamour), Tab 14.

¶3 The agency argues in its petition for review that it was not required to show that it had reasonable cause to believe that the appellants had committed a crime for which a sentence of imprisonment may be imposed because it did not invoke the shortened notice period at 5 U.S.C. § 7513(b). After the agency filed its petition for review, the Board's reviewing court ruled that an agency is required to show that it had reasonable cause to believe an employee committed a crime for which a sentence of imprisonment may be imposed *only* if the agency

invoked the shortened notice period under section 7513(b) before imposing an indefinite suspension. *Perez v. Department of Justice*, 480 F.3d 1309 (Fed. Cir. 2007).

¶4 The majority vacates the initial decisions pursuant to *Perez*. The majority goes on to hold that the agency violated the appellants' due process rights. The majority holds, in the alternative, that the appellants' indefinite suspensions do not promote the efficiency of the service. The majority thus reverses the appellants' indefinite suspensions.

DISCUSSION

¶5 The relevant statute provides as follows:

> (a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> (b) An employee against whom an action is proposed is entitled to . . . at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action[.]

5 U.S.C. § 7513.

I. Reasonable cause to believe that the appellants committed a crime for which a sentence of imprisonment may be imposed

¶6 I agree with the majority that in light of *Perez*, the initial decisions in these cases cannot stand. It is undisputed that the agency did not invoke the shortened notice period under 5 U.S.C. § 7513(b) before it suspended the appellants. Accordingly, the agency was not required to show that it had reasonable cause to believe that the appellants had committed a crime for which a sentence of imprisonment may be imposed.

II. Due process

¶7 I do not agree with the majority that the agency violated the appellants' due process rights. According to the majority, when the agency proposed the appellants' suspensions they received only a copy of a letter from the Inspector General (IG) stating that they were under investigation for alleged use of unnecessary force and assault against an inmate. The majority notes that the agency did not provide the appellants with "any of the agency's evidence," and that the IG's letter did not contain details about the incident under investigation such as the name of the inmate or the time and place of the alleged incident. The majority concludes that as a result, the appellants did not receive minimum due process before they were suspended.

¶8 Contrary to the majority opinion, the appellants did not have a right to receive "the agency's evidence" before they were suspended. Due process ordinarily requires prior notice of the reason for a proposed adverse action, "an *explanation* of the agency's evidence," and the right to respond. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)) (emphasis supplied). Moreover, the foregoing elements are not ironclad. "[D]ue process is flexible and calls for such procedural protections *as the particular situation demands*." *Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614, ¶ 15 (2003) (*quoting Gilbert v. Homar*, 520 U.S. 924, 930 (1997)) (emphasis supplied). Thus, the question of whether an employee has received minimum due process "must be resolved by considering the surrounding circumstances." *Ray v. Department of the Army*, 97 M.S.P.R. 101, ¶ 13 (2004). When considering the surrounding circumstances, it is appropriate to distinguish between a proposal to terminate employment permanently, in which case the requirements of due process may be more comprehensive, and a proposal to suspend an employee temporarily, in which case the requirements of due process are generally less demanding. *Gilbert*, 520 U.S. at 930.

¶9 Here, the agency did not propose to terminate the appellants' employment permanently, but instead proposed a temporary suspension. Furthermore, the proposed suspension was to be indefinite, pending completion of the agency's investigation into allegations of use of unnecessary force and assault against an inmate. An indefinite suspension is "not based upon provable misconduct" but upon the agency's examination into the alleged misconduct. *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 665 (1994). The appellants understood precisely what incident involving a disruption among the inmates was being investigated, insofar as during the 30-day advance notice period they filed detailed responses to the proposals which the deciding official fully considered. IAF (Rosebery), Tab 7, Subtabs 4A, 4C; IAF (Lamour), Tab 7, Subtabs 4A, 4C. It is unclear what additional process the majority believes was constitutionally due prior to the imposition of the temporary suspensions. I would find that the agency provided the appellants with minimum due process.

III. Efficiency of the service

¶10 I disagree with the majority's alternative finding that the appellants' indefinite suspensions do not promote the efficiency of the service. *See* 5 U.S.C. § 7513(a). The agency argues that in light of its unique mission -- corrections -- and work environment -- a highly secure prison -- it must sometimes suspend a Correctional Officer while it investigates allegations of misconduct. Specifically, the agency contends that the unusual "interpersonal dynamics" among inmates and staff in the "tight, stressful … confines" of a prison make it unwise to retain, in the workplace, a Correctional Officer against whom a credible allegation of use of excessive force is made. According to the agency, if the Correctional Officer continues to work inside the prison while the agency investigates the allegation, the Officer's co-workers are apt to question the Officer's "judgment" and "motivation," with potentially grave consequences. Further, inmates and

their families may rightly question the safety of the inmates and the "integrity" of the prison system. IAF (Rosebery), Tab 13 at 5-6; IAF (Lamour), Tab 13 at 5-6.

¶11 The agency's concerns are valid. A prison is a "unique setting," where the government's paramount interest is in "maintain[ing] order" and "prevent[ing] violent altercations among a population of criminals." *United States v. Mayes*, 158 F.3d 1215, 1214 (11th Cir. 1998); *see also Piscottano v. Murphy*, 317 F.Supp.2d 97, 111 (D. Conn. 2004) (the government has a highly significant interest in maintaining the "security of [a prison] unit" and the "health, safety, [and] welfare of the public staff or inmates"). The "need to replace [correctional] officers who are using unnecessary [or] excessive force against inmates is obvious." *Higgins v. Jefferson County*, 344 F. Supp. 2d 1004, 1008 (W.D. Ky. 2004). Moreover, officials in charge of a prison do not have the luxury of "wait[ing] until harm results" before taking an action against prison staff who may be creating a dangerous condition. *Leon v. State Personnel Board*, 2003 WL 57367, *4 (Cal App. 6th Dist. 2003).

¶12 In light of the foregoing, I would hold that when the administrators of a federal prison receive a credible allegation of serious misconduct by a Correctional Officer and reasonably conclude that they cannot allow the Correctional Officer to continue working in a prison setting while they perform an investigation, whether an indefinite suspension pending the outcome of the investigation promotes the efficiency of the service is a mixed question of fact and law. Although the majority finds that the agency has not shown a direct connection between the allegations against the appellants and their ability to carry out their normal duties while the agency conducts its investigation, the agency has not been given a fair opportunity to meet its burden of proof under 5 U.S.C. §§ 7513(a) & 7701(c)(1)(B). Instead, the administrative judge truncated the proceedings below, and the record is not developed. *See* IAF (Rosebery), Tabs 9, 10 (the appellant withdrew his request for a hearing after the administrative judge informed him that she intended to rule in his favor without a

hearing); IAF (Lamour), Tabs 9, 10 (same). These appeals should be remanded for findings and conclusions on whether indefinitely suspending the appellants promotes the efficiency of the service. It is inappropriate to decide these cases against the agency on the current record, given that the administrative judge did not permit development of the record based on the assumption -- which turned out to be incorrect under the subsequent *Perez* decision -- that the appellants must prevail as a matter of law.

¶13 To the extent the majority suggests that indefinitely suspending an employee pending completion of an agency investigation into credible allegations of serious misconduct could never promote the efficiency of the service when there is no related criminal proceeding, I disagree. It is well-established that 5 U.S.C. § 7513 permits an agency to suspend an employee indefinitely, "pending criminal proceedings *or* agency inquiry," when "an agency believes that an employee's retention on active duty could result in damage to federal property, be detrimental to governmental interests, or be injurious to the employee, his fellow workers, or the public." *Jones v. Department of the Navy*, 48 M.S.P.R. 680, 689 (1991) (emphasis supplied), *aff'd on recon.*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992).

¶14 Finally, I do not agree with the majority's suggestion that under circumstances such as those presented here, the agency's only course if it wants to keep an employee out of the workplace during an investigation is to put the employee on paid leave. The statement in *Loudermill* upon which the majority relies in this section of its opinion -- that when an agency is concerned about an employee's continued presence in the workplace pending completion of an investigation it can "suspend" the employee with pay -- merely describes, in dicta, an option available to an agency. *See Engdahl v. Department of the Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990) (the court's discussion in *Loudermill* of the employer's option of placing an employee on paid leave was dicta). Neither the Constitution nor statute requires a federal employer that is concerned about an

employee's presence in the workplace to place the employee on paid leave while it conducts an investigation. *Id.*

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Neil A. G. McPhie
Chairman

DFAS CHECKLIST

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

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

   a. Employee name and social security number.
   b. Detailed explanation of request.
   c. Valid agency accounting.
   d. Authorized signature (Table 63)
   e. If interest is to be included.
   f. Check mailing address.
   g. Indicate if case is prior to conversion. Computations must be attached.
   h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

   a. Must provide same data as in 2, a-g above.
   b. Prior to conversion computation must be provided.
   c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.