UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 65

Docket No. CH-0752-09-0322-I-2

Jodi E. Silberman,

Appellant,

v.

Department of Labor,

Agency.

June 24, 2011

Jodi E. Silberman, Niles, Illinois, pro se.

Edward V. Hartman, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that sustained a single charge of unprofessional behavior, found that the appellant did not prove any of her affirmative defenses, and affirmed a 30-day suspension without pay. For the reasons set forth below, we GRANT the petition for review, and REVERSE the 30-day suspension.

BACKGROUND

¶2 The appellant received a 30-day suspension from her Equal Opportunity Specialist position based on a single charge of unprofessional behavior with two

underlying specifications.[1] *See Silberman v. Department of Labor*, MSPB Docket No. CH-0752-09-0322-I-1, Initial Appeal File (IAF), Tab 9, Subtabs 4a (suspension SF-50), 4b (Decision on Proposed Suspension), 4u (Notice of Proposed Suspension). In the proposal notice, the agency alleged in narrative specifications that the appellant, in part, engaged in the following misconduct: (1) On December 14, 2007, the appellant interrupted a conversation between her supervisor, Darlene Pickett, and Shirley D. Thomas, stating that the human resources department is not telling the truth and they are out to get the complainant; the appellant then pointed a finger in Ms. Pickett's face, called her a liar while using a loud voice, and also called District Director Kraak a liar; and (2) on January 8, 2008, while Ms. Pickett was conducting a case update meeting, the appellant loudly interrupted Ms. Pickett's instruction that a certain case should be investigated by asking her where she got her law degree. When Ms. Pickett responded that she did not have a law degree, the appellant allegedly stated, "I know you are not an attorney [and] that is why you don't know anything." *Id.*, Subtab 4u. The proposal notice also indicated that the appellant had previously received a 14-day suspension for unprofessional conduct from October 1 to October 14, 2007, and a notice of official reprimand for unprofessional conduct on July 6, 2006. *Id.* The proposal notice did not identify the agency's intention to rely on any other prior misconduct by the appellant.

¶3 The appellant filed a Board appeal, which was dismissed without prejudice. *See* IAF, Tabs 1, 15. The appeal was refiled and the administrative judge held a hearing on December 9-10, 2009. *Silberman v. Department of Labor*, MSPB Docket No. CH-0752-09-0322-I-2, Initial Appeal File (IAF-2), Tab 1; *see* Hearing Transcript (HT). The administrative judge issued an initial decision that

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[1] Although there were originally three specifications in the Notice of Proposed Suspension, the deciding official, District Director Margaret Kraak, only sustained the first two specifications. *See* IAF, Tab 9, Subtab 4b.

sustained the charge and two specifications upheld by the deciding official, found that the appellant did not meet her burden regarding any of her affirmative defenses, and concluded that the 30-day suspension was a reasonable penalty. IAF-2, Tab 36. The appellant filed a petition for review and the agency filed a response. Petition for Review (PFR) File, Tabs 1, 3. The appellant filed further submissions. *See* PFR File, Tabs 4-15.

ANALYSIS

The 30-day suspension cannot be sustained because the agency violated the appellant's due process rights.[2]

¶4 The appellant argued below that the agency committed harmful procedural error and violated the collective bargaining agreement (CBA) when Ms. Kraak considered, without giving notice to the appellant, five memoranda to the file prepared by Ms. Pickett, which documented prior instances of similar misconduct by the appellant.[3] IAF-2, Tabs 20 at 2, 25 at 1. In her closing argument, below, the appellant further contended that Ms. Kraak's reliance upon these memoranda was a violation of due process. HT at 343-48. In the initial decision, the administrative judge addressed these claims together and concluded that the appellant failed to prove them. *See* IAF-2, Tab 36 at 7-9. In her petition for review, the appellant asserts, in part, that the administrative judge erroneously applied precedent of the U.S. Court of Appeals for the Federal Circuit on ex parte communications in denying these claims. PFR File, Tab 1.

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[2] To the extent that the Board is required by 5 U.S.C. § 7702(a)(1) to render a decision on the appellant's affirmative defense of discrimination, the Board affirms the initial decision. *See Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987). The initial decision, therefore, is the Board's final decision on the appellant's discrimination claims.

[3] Given our finding of a violation of due process, it is unnecessary for the Board to determine whether Ms. Kraak's ex parte consideration of the appellant's alleged uncharged misconduct also constituted harmful procedural error or a violation of the CBA.

¶5 Our reviewing court has held that, 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 v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). In *Stone*, 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 reasoned:

> The introduction of new and material information by means of *ex parte* communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond. When deciding officials receive such *ex parte* communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. Procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information.

Stone, 179 F.3d at 1376.

¶6 However, the court stated:

> [N]ot 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.

Stone, 179 F.3d at 1376-77.

¶7 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. *Stone*, 179 F.3d 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*.

¶8 In *Stone*, the court further found that the Supreme Court, in the seminal case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985),

> expressly noted that the need for a meaningful opportunity [to respond] . . . is important in enabling the agency to reach an accurate result for two reasons. First, dismissals for cause will often involve factual disputes and consideration of the employee's response may help clarify such disputes. In addition, even if the facts are clear, "the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect."

Stone, 179 F.3d at 1376 (quoting *Loudermill*, 470 U.S. at 543). The Federal Circuit thereafter concluded that "the Supreme Court expressly recognized that the employee's response is essential not only to the issue of whether the allegations are true, but also with regard to whether the level of penalty to be imposed is appropriate." *Id*.

¶9 The record here shows that Ms. Kraak was interviewed during the investigation of a factually related discrimination complaint filed by the appellant, and completed an EEO Investigative Affidavit under penalty of perjury. IAF-2, Tab 35, Exhibit XX-6-7. In the affidavit, Ms. Kraak acknowledged that she was the deciding official in the 30-day suspension at issue in this appeal. She stated, in response to question 34 ("On what facts did you base your decision that [the] Complainant would receive this discipline?"), the following:

> The facts that I relied on in making the decision are the Notice of Proposed Suspension issued by Darlene Picket [sic] on March 28, 2008. In that memo it describes Ms. Silberman's unprofessional conduct on two separate dates (December 14, 2007 and January 8, 2008). Both incidents were witnessed by other employees in the Chicago District Office. The more disruptive and threatening of the

> two incidents occurring on January 8, 2008 (Attachment 5b). I took into account Ms. Silberman's prior discipline including the 14 day suspension and the written reprimand (Attachment 8 and 8a).
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> . . . .
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> I also took into fact [sic] the Douglas Factors (Attachment 6). Considering each factor and determining its relevance.

Id. Ms. Kraak further clarified this response in question 40 ("Did she [the appellant] have prior discipline on which you relied in this discipline?"), where she stated the following:

> Ms. Silberman has had prior discipline relative to unprofessional conduct. From July 13, 2005 to May 22, 2006 there were five separate instances where the immediate supervisor wrote a memo regarding Ms. Silberman's unprofessional conduct. On June 30, 2006, Ms. Silberman had another incident and she was issued a written reprimand on July 7, 2006 (Attachment 13). On March 20, 2007 she again engaged in unprofessional conduct and was subsequently suspended for 14 days (Attachment 8 and 8a). After that suspension, there were 2 additional incidents (Attachment 13) [Ms. Silberman] was issued a written reprimand describing the [sic] to the file with regard to the conduct.

Id. The administrative judge determined that the information contained in the five memoranda concerned the appellant's history of rude and disrespectful behavior, that Ms. Kraak's statements were made in response to a question regarding the appellant's prior discipline, and that there was no indication that Ms. Kraak relied upon this information in determining whether to sustain the charge. IAF-2, Tab 36 at 8. The administrative judge further found that Ms. Kraak properly considered the information only in her determination of the penalty as part of the appellant's past work record and ability to get along with fellow workers under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981), and, in that sense, the five memoranda were merely cumulative under *Stone* because they supported the conclusion that the appellant had a propensity to engage in rude and disrespectful conduct in her past work history. *Id.* at 8-9. The administrative judge also determined that this information did not place

undue pressure on Ms. Kraak to rule in a certain way because she had previously disciplined the appellant by a 14-day suspension for the same type of misconduct. *Id.* at 9.

¶10 Although the administrative judge did not specifically cite our precedent on this issue, it appears that he may have relied, in part, on a line of Board cases holding that, where ex parte information does not relate to the charge itself, but relates instead to the penalty, we would not consider such an error as a denial of due process of law to be analyzed under the factors set forth in *Stone*; rather we would analyze the error by applying the harmful error standard in our analysis of the penalty factors. *See Ward v. U.S. Postal Service*, 112 M.S.P.R. 239, ¶ 10 (2009); *Biniak v. Social Security Administration*, 90 M.S.P.R. 682, ¶ 10 (2002); *Groeber v. U.S. Postal Service*, 84 M.S.P.R. 646, ¶¶ 9-11 (2000), *aff'd*, 13 F. App'x 973 (Fed. Cir. 2001); *Westmoreland v. Department of Veterans Affairs*, 83 M.S.P.R. 625, ¶¶ 8-12 (1999). However, the Federal Circuit recently overruled this precedent in *Ward* and has directed the Board to consider ex parte communications with regard to penalty as a *Stone* due process violation. *See Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011).

¶11 In *Ward*, the agency removed the appellant for shouting at his supervisor, acting in a manner that she perceived as threatening, and disobeying her instruction to remain in her office. *Ward*, 634 F.3d at 1276. The notice of proposed removal only referenced the charged misconduct and did not reference any other misconduct by the appellant. *Id.* At hearing, the deciding official testified that before making his decision, he spoke to three supervisors and a manager who discussed prior incidents in which the appellant exhibited loud, belligerent and intimidating behavior. *Id.* The deciding official further admitted that the appellant's "recurring pattern of behavior" affected his penalty determination. *Id.* The Board affirmed the appellant's removal and considered the agency's consideration of the ex parte information as harmful procedural error. Upon review, the Federal Circuit reversed the Board's holding, ruling

instead that, under *Stone*, the appellant's due process rights fully apply to an agency's penalty decision. *Id.* at 1279-80. The court remanded the appeal for a determination of whether the ex parte communications at issue there were new and material information. *Id.* at 1280.

¶12 In the instant appeal, the agency argued below that five memoranda considered by Ms. Kraak were cumulative and not new and material information because they were merely background that could properly be considered under several *Douglas* factors. However, the record shows that the information extended beyond Ms. Kraak's general background understanding of the appellant's work history, inability to get along with her supervisor and co-workers, and potential for rehabilitation. As noted above, the undisputed record shows Ms. Kraak testified in her affidavit that, in making her decision to discipline the appellant, she considered, as prior discipline, that the appellant had engaged in several additional instances of rude and disrespectful behavior between July 2005 and May 2006. IAF-2, Tab 35, Exhibit XX-6-7. We find that this information cannot be considered merely cumulative because, although it is similar in nature to the charged misconduct and the prior discipline cited in the notice of proposed action, it concerned specific incidents of alleged misconduct of which the appellant was not given notice and an opportunity to respond.[4] *See Stone*, 179 F.3d at 1376 (procedural due process guarantees are not met if the

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[4] We are unaware of any precedent concerning whether ex parte information of alleged misconduct may be cumulative under *Stone* merely because it is similar in nature to allegations already contained in the agency's notice of proposed action. However, we note that the cases that have found ex parte information cumulative have involved incidents where the deciding official received information related to incidents already identified in the agency's notice of proposed action. For example, this case is unlike the situation where the deciding official initiated ex parte communication that only confirmed or clarified information already contained in the record. *See Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001) (finding no *Stone* violation when the deciding official conducted investigatory interviews and communications to confirm or clarify allegations in the pending charges).

employee has notice only of certain charges or portions of the evidence relied upon by the agency). Furthermore, the Federal Circuit has noted that, ex parte communication is plainly material when the deciding official has admitted that the information influenced his penalty determination. *See Ward*, 634 F.3d at 1280 n.2. Similarly, Ms. Kraak's specific identification of the five memoranda as factors in her decision shows that the five memoranda were material to her decision in this case.

¶13 Finally, the administrative judge's determination that the consideration of the ex parte information did not place undue pressure on Ms. Kraak does not preclude a finding of denial of due process. IAF-2, Tab 36 at 9. In *Ward*, the court clarified that the undue pressure factor is only one of several enumerated factors and is not the ultimate inquiry in the *Stone* analysis. *See Ward*, 634 F.3d at 1280 n.2. The court added that, although ex parte communications of a type likely to result in undue pressure may make it more likely that an appellant was deprived of due process, the lack of undue pressure may be less relevant to finding a constitutional violation where the deciding official admits that the ex parte communication influenced his penalty determination. *Id.*

¶14 Accordingly, we find that the deciding official's ex parte consideration of the five memoranda undermined the appellant's constitutional due process guarantee of notice (both of the charges and of the agency's evidence) and of the opportunity to respond. Consequently, the 30-day suspension must be reversed and this matter remanded to the agency to afford the appellant constitutionally correct procedures.

ORDER

¶15 We ORDER the agency to rescind the 30-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶16 We also ORDER the agency to pay the appellant 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 decision. We ORDER the appellant 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 appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶17 We further ORDER the agency to tell the 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 appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶18 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant 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).

¶19 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.

¶20 This is the final decision of the Merit Systems Protection Board in this appeal with regard to the appellant's discrimination claims. 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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, 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.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

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.