UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 74

Docket No. AT-0752-13-0583-I-1

Debra J. Chandler,

Appellant,

v.

Department of the Treasury,

Agency.

September 18, 2013

Brandon Baseman and Kenneth Moffett, Jr., National Treasury Employees Union, Washington, D.C., for the appellant.

Gregory S. Prophet, Esquire, and Jessica L. Bachman, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Vice Chairman Wagner issues a separate opinion
concurring in part and dissenting in part.
Chairman Grundmann issues a separate concurring opinion.

OPINION AND ORDER

¶1 This matter is before the Board on interlocutory review of a number of discovery-related rulings. For the reasons set forth below, we AFFIRM these rulings AS MODIFIED and RETURN the case to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-14 Senior Tax Analyst for the agency's Internal Revenue Service (IRS), appealed the agency's decision to furlough her for 5 to 7 days. Initial Appeal File (IAF), Tab 1, Tab 4 at 14. The appellant served the agency a number of discovery requests, *see* IAF, Tab 9 at 7-13, and the agency filed a motion for a protective order to protect itself from what it described as the "harassment, annoyance, undue burden and expense" of responding to the requests. *Id.* at 4. The agency explained that "the vast majority of the information sought" by the appellant was "overly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence," and that the requests sought information "related to management's discretionary budgetary determinations." *Id.* at 4-5. The agency specifically challenged requests for documents 1-7 and 9-16. *Id.* at 6. The agency did not raise any specific objections to the appellant's interrogatories and requests for admissions, and the administrative judge limited her certified rulings to the request for documents. IAF, Tab 9 at 4-6, Tab 18. The appellant responded in opposition to the agency's motion. IAF, Tab 13.

¶3 During an in-person status conference with the parties, the administrative judge informed them of her rulings on the pending discovery matters. The appellant moved for an interlocutory appeal, and the administrative judge granted the motion.[1] *Id.*, Tab 17. The administrative judge subsequently issued an order

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[1] The National Treasury Employees Union moved to intervene or file an amicus brief, but the administrative judge reserved her ruling on the matter for after the Board's ruling on the interlocutory appeal. IAF, Tab 17; *see id.*, Tab 5. After the administrative judge certified her rulings as an interlocutory appeal, the appellant moved to file briefs on the interlocutory appeal, and the American Federation of Government Employees moved to file an amicus brief regarding the interlocutory appeal. IAF, Tabs 21, 22. We have considered these requests, but in the interest of expediting this proceeding, we DENY them without prejudice.

explaining all of her rulings and certifying her rulings for interlocutory review.[2] *Id.*, Tab 18. She found that her discovery rulings involved an important question of law or policy about which there was a substantial ground for difference of opinion and that an immediate ruling would materially advance the completion of the proceeding, or the denial of an immediate ruling would cause undue harm to a party. *Id.* at 7. She further found that the issue presented is of such importance to the appeal that it required the Board's immediate attention.[3] *Id.* Pursuant to 5 C.F.R. § 1201.93(c), the administrative judge exercised her authority to stay all further proceedings while the interlocutory was pending before the Board. IAF, Tab 18 at 8.

ANALYSIS

The administrative judge properly certified her discovery rulings for interlocutory review.

¶4 The furlough action at issue was based on the March 1, 2013 Sequestration Order issued by the President requiring across-the-board reductions in federal spending pursuant to the Balanced Budget and Emergency Deficit Control Act, as amended. IAF, Tab 4 at 35; *see* 2 U.S.C. § 901a. Under directions from the

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[2] The administrative judge noted that the proper procedure to address these matters would have been for the agency to respond to the discovery request with objections, as appropriate, and then, if necessary, for the appellant to file a motion to compel. *See* 5 C.F.R. § 1201.73(b), (c); IAF, Tab 18 at 1 n.2. However, both parties had already submitted their arguments addressing the discovery dispute, so to expedite the process the administrative judge treated the submissions as if the appellant had originally filed a motion to compel. IAF, Tab 18 at 1 n.2. After the administrative judge certified her ruling, the agency explained that it timely responded to the appellant's discovery request and provided a copy of its response. IAF, Tab 19. The matters before us on interlocutory appeal are not affected by the agency's submission, and, like the administrative judge, we will treat this matter as though it arose from a motion to compel.

[3] The administrative judge noted that the entire group of 27 IRS furlough cases then pending at the Atlanta Regional Office depended on the resolution of this issue. IAF, Tab 18 at 7.

Office of Management and Budget referenced by the President in his Order, the Department of the Treasury and its components, including the IRS, were required to reduce spending by 5 percent for the fiscal year ending on September 30, 2013. IAF, Tab 4 at 35, 40, 48, 96. Because the budget reductions needed to be accomplished between March 1, 2013, and the end of the fiscal year on September 30, 2013, they necessitated reductions in spending of approximately 9 percent according to the Office of Management and Budget. *Id.* at 36. Given that furloughs have affected numerous employees at the IRS and other federal agencies, and that adjudication of these appeals will likely involve at least some of the same issues as presented in this interlocutory appeal, we agree with the administrative judge as to the significance of the certified discovery rulings and find that this matter is appropriate for review on an interlocutory appeal. 5 C.F.R. § 1201.92; *see King v. Department of the Air Force*, 2013 MSPB 62, ¶ 7.

Standard of review

¶5 "Furlough" means the placing of an employee in a temporary status without duties and pay because of a lack of work or funds or other nondisciplinary reasons. 5 U.S.C. § 7511(a)(5); 5 C.F.R. § 752.402. A furlough of 30 days or less is appealable to the Board under 5 U.S.C. chapter 75. 5 U.S.C. § 7512(5); 5 C.F.R. § 752.401(a)(5). A furlough of more than 30 days is appealable to the Board as a reduction-in-force (RIF) action under 5 C.F.R. § 351.901. Agencies must conduct furloughs of more than 30 days according to the RIF procedures of 5 C.F.R. part 351, and the Board will review such actions to determine whether the agency properly invoked and applied the RIF regulations. *Williams v. Tennessee Valley Authority*, 24 M.S.P.R. 555, 557 (1984); 5 C.F.R. § 351.201(a)(2). Agencies may conduct furloughs of 30 days or less without following RIF procedures. Such actions are reviewable by the Board under the "efficiency of the service" standard of 5 U.S.C. § 7513(a). *Clerman v. Interstate Commerce Commission*, 35 M.S.P.R. 190, 192 (1987); *see* 5 C.F.R. § 752.403.

Both RIFs and adverse action furloughs, however, are taken for the same types of nondisciplinary reasons. *See Hastie v. Department of Agriculture*, 24 M.S.P.R. 64, 75 (1984), *overruled on other grounds by Horner v. Andrzjewski*, 811 F.2d 571, 574-77 (Fed. Cir. 1987).

¶6 Although the law now distinguishes between adverse action furloughs and RIF furloughs based on their length, that was not always the case. Section 14 of the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387, provided that, with respect to preference eligibles, furloughs of whatever length constituted adverse actions that must meet the efficiency of the service standard and were appealable to the Civil Service Commission, the Board's predecessor agency. It was only later that the Civil Service Commission issued regulations distinguishing between furloughs based on their length, with furloughs of 30 days or less being covered by adverse action procedures and amenable to the general efficiency of the service standard, and furloughs of more than 30 days requiring specific RIF procedures and being appealable for review of adherence to those procedures. 5 C.F.R. §§ 351.201(a), .901(a); 5 C.F.R. §§ 752.101, .103(b)(3), .201(b)(3), .203 (1977). Thus, the Civil Service Commission maintained the appeal rights for all furloughed employees while prescribing additional procedural protections for employees subjected to more lengthy furloughs. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, § 204(a), preserved the Civil Service Commission's distinction between furloughs of varying duration with regard to procedural protections and appeal rights but, consistent with the Veterans' Preference Act of 1944, continued to recognize that any placement of an employee in a temporary nonwork, nonpay status is a furlough regardless of its length. 5 U.S.C. §§ 7511(a)(5), 7512(a)(5). In other words, all furloughs are fundamentally the same type of action brought for the same types of reasons even though the procedures for conducting a furlough and the attendant appeal rights may vary depending on its duration.

¶7 We observe that chapter 75 furloughs are short term solutions to transitory problems, such as budgetary shortfalls, and that they have only a temporary effect on an individual's employment status. RIF actions, on the other hand, including lengthy furloughs, are more suited to long-term changes in an agency's function or workload, and they have the potential for more lasting or even permanent effects on an individual's career. We see no indication that Congress intended lesser protections for employees affected by more severe personnel actions or that it intended greater scrutiny of temporary measures that agencies take in response to acute situations such as the government-wide furloughs in response to the 2013 sequestration. Rather, it appears from the legislative history described above that the opposite is true. Nevertheless, in light of the basic similarities between RIF and adverse action furloughs, we find that RIF principles are instructive in determining the scope of the Board's review of adverse action furloughs and what it means for a furlough of 30 days or less to be taken for the "efficiency of the service."[4]

¶8 Although the agency is always responsible for proving that an adverse action promotes the efficiency of the service, we find that the analysis of this issue must depend on the problem that the adverse action was meant to address. Furloughs are unique among adverse actions because by definition they are taken for nondisciplinary reasons and are generally used to address work or funding shortages or other matters that are not personal to the affected employee. 5 U.S.C. § 7511(a)(5); *cf. Butler v. Department of the Interior*, 10 M.S.P.R. 25, 27 (1982) (a RIF action may be invalid if motivated by reasons personal to the employee). The Board has found that an agency satisfies this standard in a furlough appeal by showing, in general, that the furlough was a reasonable management solution to the financial restrictions placed on it and that the agency

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[4] Although we find it helpful to refer to RIF cases for guidance, our decision would be the same even if we considered only chapter 75 statutes, regulations, and case law.

applied its determination as to which employees to furlough in a "fair and even manner." *Clark v. Office of Personnel Management*, 24 M.S.P.R. 224, 225 (1984). By "fair and even manner," we take the Board's decision in *Clark* to mean that the agency applied the adverse action furlough "uniformly and consistently" just as it is required to apply a RIF. *See* 5 C.F.R. § 351.201(b). This does not mean that the agency is required to apply the furlough in such a way as to satisfy the Board's sense of equity. Rather, it means that the agency is required to treat similar employees similarly and to justify any deviations with legitimate management reasons. *See* 5 C.F.R. § 752.404(b)(2) ("When some but not all employees in a given competitive level are being furloughed, the notice of proposed action must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough."). Which employees are similarly situated for purposes of an adverse action furlough will be decided on a case-by-case basis, but the Board will be guided by RIF principles in making that determination. *See id*. (applying RIF competitive level principles to adverse action furloughs).

¶9 Finally, we find that the Board's efficiency of the service determination does not encompass agency spending decisions per se, including spending on personnel matters. *See Schroeder v. Department of Transportation*, 60 M.S.P.R. 566, 570 (1994) (even if the agency might have avoided a RIF had it manipulated its budget in a different manner, it is within the agency's broad management discretion to take action to avoid a budget deficit, and the Board lacks the authority to look behind the agency's decision to remedy that deficit); *Griffin v. Department of Agriculture*, 2 M.S.P.R. 168, 171 (1980) (the agency's decision to replace certain employees with private contractors was a matter committed by law to agency discretion and was unreviewable by the Board in the context of a RIF proceeding); *see generally* 5 U.S.C. §§ 301, 302, 305. Nor does it encompass an agency's decision to allocate furlough days in a certain manner among employees who are not similarly situated. *See Waksman v. Department of Commerce*,

37 M.S.P.R. 640, 645-56 (1988), *aff'd sub nom. Harris v. Department of Commerce*, 878 F.2d 1447 (Fed. Cir. 1989) (Table) (an agency has broad discretion to avoid a deficit by conducting a RIF, and the Board will not second guess an agency's decision to reorganize its work force as it lacks authority to review the management considerations underlying that exercise of discretion). Such matters belong to the judgment of agency managers, who are in the best position to decide what allocation of funding will best allow the agency to accomplish its mission. *Cf. Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981) (agencies have primary discretion in managing their own workforces). What the efficiency of the service determination does encompass are issues relating to the uniform and consistent application of the furlough, including whether the agency used a furlough to target employees for personal reasons, *see Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 200-01 (1980), or attempted to exempt certain employees from the furlough without legitimate management reasons, *see Phelps v. Department of Labor*, 25 M.S.P.R. 30, 31-32 (1984).

The administrative judge's discovery rulings are affirmed in part and reversed in part.

¶10 Discovery is the process by which a party may obtain relevant information from another person or a party that the other person or party has not otherwise provided. 5 C.F.R. § 1201.72(a). Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. *Id.*; *see Ryan v. Department of the Air Force*, 113 M.S.P.R. 27, ¶ 15 (2009); *Mc Grath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 7 (1999). What constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be resolved in favor of the movant absent any undue delay or hardship caused by such request. *Ryan*, 113 M.S.P.R. 27, ¶ 15; *Mc Grath*, 83 M.S.P.R. 48, ¶ 7. Discoverable information is not without boundaries however, and the requesting party must ultimately show that the information

sought is relevant or is likely to lead to relevant evidence. 5 C.F.R. § 1201.72(b).

¶11 The appellant's request for documents consisted of sixteen requests, many with subparts. IAF, Tab 9 at 7-10. Four of those requests have been resolved, and therefore only twelve remain at issue. IAF, Tab 13 at 2-3.

Request 1

¶12 In request 1, the appellant seeks "[a]ll records, discussion papers, documentation, e-mail, fax, post-it notes, etc." related to employees who have been hired and employees paid overtime since the time the agency announced its intention to conduct a furlough. IAF, Tab 9 at 7. According to the appellant, this information is relevant because it does not promote the efficiency of the service to furlough experienced employees in order to reduce costs and then hire new employees, which adds to costs, and it is not fair to furlough some employees and provide others with overtime. IAF, Tab 13 at 2.

¶13 The administrative judge denied this request, finding that it "concern[s] management considerations underlying the agency's exercise of its discretion in determining whether the cost savings should be applied to personnel costs and how much should be applied to other expenses." IAF, Tab 18 at 4. The administrative judge found that such matters are not subject to Board review. *Id.* We agree with the administrative judge's determination as to matters related to hiring new employees, but we disagree with her as to matters related to payment of overtime.

¶14 As for the information regarding the hiring of new employees, we find that this pertains solely to spending matters within the agency's sound discretion, i.e., whether the agency could have made different spending decisions to avoid or lessen the furloughs. *See Schroeder*, 60 M.S.P.R. at 570. It is therefore irrelevant and not reasonably calculated to lead to relevant evidence. Although the agency's alleged decision to award certain employees overtime may be characterized as a spending decision as well, we find that it might also be

relevant to whether the agency applied the furlough uniformly and consistently. Specifically, if the agency used overtime payments to relieve certain employees but not others of the financial consequences of the furlough, this may be sufficient to show that the furlough did not meet the efficiency of the service standard. Request 1 is therefore GRANTED as to the overtime payments only.

Request 2

¶15 Request 2 seeks information related to the cost of conducting the furlough, including mailings, travel, overtime, staff hours, and other direct and indirect costs related to conducting the furlough. IAF, Tab 9 at 7. The appellant argues that information on the cost of implementing the furlough is necessary to determine whether the furlough promotes the efficiency of the service. IAF, Tab 13 at 2.

¶16 The administrative judge denied this request as well, also on the basis that it concerns spending matters within the agency's sound discretion. We agree. The wisdom of the agency's spending decisions is not at issue. Request 2 is DENIED.

Request 3

¶17 Request 3 seeks information related to the agency's decision to proceed with the furlough while in the midst of bargaining with the National Treasury Employees Union (NTEU), the exclusive representative of IRS employees. IAF, Tab 8 at 7-8. The appellant argues that an understanding of why the adverse action was taken even though the appellant's representative was negotiating over the furlough is relevant to whether the furlough promoted the efficiency of the service. IAF, Tab 13 at 2.

¶18 The administrative judge denied request 3 on the basis that the agency's negotiations with the NTEU are not relevant to the pending issues before the Board. IAF, Tab 18 at 4-5. We agree. Any remedy for a violation of the appellant's collective bargaining rights rests with the negotiated grievance

procedure or the Federal Labor Relations Authority.[5] *Filipczyk v. United States*, 386 F. App'x 973, 976 (Fed. Cir. 2010). Request 3 is DENIED.

Request 6

¶19 Request 6 seeks information related to nonbargaining unit employees who were not identified for or subjected to the furlough, or who had an option to take different days off, or were allowed to work overtime during the period from the first furlough day to the last. IAF, Tab 9 at 8. The appellant argues that this information is necessary to determine whether the furloughs were conducted in a fair and even manner. IAF, Tab 13 at 2.

¶20 The administrative judge found that the information concerning other agency employees not subject to the furlough was discoverable but that the information concerning whether other employees had the option to take different days or work overtime was not discoverable. IAF, Tab 18 at 5. As discussed above, a furlough must be conducted in a uniform and consistent manner, and we therefore agree that the length of the furlough imposed on similarly situated employees is relevant. *See Clark*, 24 M.S.P.R. at 225; 5 C.F.R. § 752.404(b)(2). We also find, for the reasons explained in connection with discovery request 1, that information regarding overtime payments may be relevant to this determination. We therefore disagree with the administrative judge, and we find that this information is discoverable. As for information relating to whether some employees were allowed greater flexibility than others in scheduling their furlough days, we agree with the administrative judge that this information is irrelevant and is unlikely to lead to the discovery of relevant evidence. It pertains to management decisions regarding scheduling of the furlough, which are matters

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[5] Nor is the appellant's request reasonably calculated to lead to evidence relating to retaliation for union activity. The appellant was not engaged in union activity; her representative was.

outside the Board's jurisdiction.[6] An agency need not show that its furlough-related decisions were the best decisions, but only that they promoted the efficiency of the service. *See* 5 U.S.C. § 7513(a). Therefore, request 6 is GRANTED only as to the identity of nonbargaining unit employees who were not furloughed and to the payment of overtime to nonbargaining unit employees.

Request 9

¶21 Request 9 seeks information related to the hiring of certain contract employees since the agency announced its intention to furlough current employees, noting certain specific individuals by name or title. IAF, Tab 9 at 8. The administrative judge denied this request on the basis that it concerns a spending decision within the agency's sound discretion. IAF, Tab 18 at 4; *see Griffin*, 2 M.S.P.R. at 171.

¶22 Without reaching the issue of whether such information might be discoverable in general, we affirm the administrative judge's decision on narrower grounds. Specifically, the appellant has not explained how any of the individuals named in request 9 have any connection with her position. This appellant is not a class representative of the other "appellants" to whom she refers in this request. Nor do the Wage and Investment Research contractors whom the appellant identifies have any apparent connection to her Senior Tax Analyst position in particular. For these reasons alone, request 9 is DENIED.

Request 10

¶23 Request 10 seeks information related to the amount of bonuses and awards paid to management officials from October 1, 2012, to the present. IAF, Tab 9 at 9. The appellant explains that such information is relevant because it would not be fair and even if agency managers were given awards to make up for

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[6] An analogous situation would be an appellant in a suspension action contesting the day on which the suspension commenced. While the Board could review the suspension action itself, it would not have jurisdiction to hear a claim about the date on which the agency commenced the suspension.

salaries lost during the furlough. IAF, Tab 13 at 3. The administrative judge denied request 10, finding that it sought information underlying management's exercise of its discretion regarding whether cost savings should be assigned to personnel or to other expenses. IAF, Tab 18 at 4.

¶24 However, we agree with the appellant that information about whether some agency employees were afforded bonuses for the purpose of compensating them for income lost by the furlough would be relevant to whether the furlough was uniformly and consistently implemented. Thus, information about bonuses is subject to discovery by the appellant. However, because the Presidential Order regarding sequestration was not issued until March 1, 2013, and the agency did not propose furloughing the appellant until April 22, 2013, we find that the relevant time period for this request began no earlier than March 1, 2013. *See* IAF, Tab 4 at 31, 35. Request 10 is GRANTED for the time period beginning on March 1, 2013.

Request 11

¶25 In request 11, the appellant seeks information related to "the amount the IRS will continue to expend on items that could have been cut but may not have been such as conferences, hiring's [sic], management travel, training, etc." IAF, Tab 9 at 8. The appellant argues that this information is relevant because furloughing employees "while possibly not cutting other programs would not be a fair and even manner to shed costs." IAF, Tab 13 at 3.

¶26 The administrative judge denied request 11 on the basis that it sought only information relating to the agency's spending decisions. We agree. *See Schroeder*, 60 M.S.P.R. at 570. Request 11 is DENIED.

Request 12

¶27 In request 12, the appellant seeks information related to "other alternatives considered," including allowing employees to select their furlough days, allowing employees who want to serve furlough days for other employees to do so, and soliciting the input of bargaining unit employees into the furlough decision. IAF,

Tab 9 at 9. The appellant argues that this information is necessary to determine "whether the furloughs were conducted in a manner that best promoted the efficiency of the service," and whether alternatives to closing the agency for entire days were considered. IAF, Tab 13 at 3.

¶28 The administrative judge denied request 12, finding that it concerns management considerations underlying the agency's exercise of its discretion in determining what categories of spending should be reduced. IAF, Tab 18 at 4. We agree. *See Schroeder*, 60 M.S.P.R. at 570. We further note that the appellant has not identified a legal basis for the requirement that the agency show that its action *best* promoted the efficiency of the service, and we are unaware of such a requirement. Consistent with our ruling on request 8, we find that the law only requires that an agency action promotes the efficiency of the service. *See* 5 U.S.C. § 7513(a). Request 12 is DENIED.

Request 13

¶29 Request 13 seeks information related to "how [the agency] followed the adverse action/oral reply process in applying the Douglas factors and/or [Internal Revenue Manual]." IAF, Tab 9 at 8. The appellant argues that this information is vital because "[t]he process of how a furlough is done can be just as important as the deciding factors to implement such an action." IAF, Tab 13 at 3.

¶30 The administrative judge granted this request in part and denied it in part. IAF, Tab 18 at 5-7. She found that the factors for assessing the reasonableness of a penalty articulated by the Board in *Douglas*, 5 M.S.P.R. at 305-06, do not apply to furlough appeals.[7] *Id*. The administrative judge therefore concluded that the requested information about the application of the *Douglas* factors is not reasonably calculated to lead to the discovery of admissible evidence. IAF, Tab

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[7] The administrative judge noted that, although *Douglas* factor 6, the consistency of the penalty, may arguably apply to furloughs, it is encompassed within the issue of whether the agency administered the furlough uniformly and consistently. IAF, Tab 18 at 7 n.6.

18 at 7. The administrative judge further found, however, that the appellant is entitled to information regarding "the specific process under 5 U.S.C. § 7513 that the agency applied when implementing the action against her." *Id*.

¶31 We agree with the administrative judge that, because furloughs are not disciplinary in nature, *see* 5 C.F.R. § 752.402, the *Douglas* factors are not applicable to an agency's decision in a furlough appeal. IAF, Tab 18 at 5-7. As noted by the administrative judge, this is consistent with other nondisciplinary matters where the Board does not apply the *Douglas* factors. *See Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1566-67 (Fed. Cir. 1985); *see* IAF, Tab 18 at 6. Accordingly, any information about the application of the *Douglas* factors to the appellant's furlough would not be relevant or likely to lead to the discovery of relevant evidence, and the administrative judge properly denied it. However, we also agree with the administrative judge that information regarding the specific process under 5 U.S.C. § 7513 applied by the agency would be relevant to issues of due process and harmful procedural error. *See* 5 U.S.C. § 7701(c)(2). Request 13 is therefore GRANTED as to the specific processes that the agency applied under 5 U.S.C. § 7513 and the Internal Revenue Manual.

Request 14

¶32 In request 14, the appellant seeks information related to an Executive Order directing the IRS to conduct a furlough of its employees. IAF, Tab 9 at 9. The administrative judge ordered the agency to produce, if it exists, the Executive Order directing IRS to conduct a furlough, but she directed the appellant to provide a further explanation of the remaining information requested so as to allow her to make a determination of the propriety of the request. IAF, Tab 18 at 5. We agree with the administrative judge's determination. Request 14 is GRANTED as to any Executive Order directing the IRS to conduct a furlough. As to the remainder of the appellant's request, we refer this matter back to the

administrative judge to rule on in the first instance in light of this Opinion and Order and any additional explanation that the appellant provides.

Request 15

¶33 Request 15 seeks information related to the Business Operating Division's "[p]rojected allocation for 2011, 2012, and 2013, and Actual expenditures for FY 2011, 2012, and 2013." IAF, Tab 9 at 9-10. The appellant argues that this information is necessary to determine whether the furlough was done in a fair and even manner by cutting all programs evenly because employees should not be required to take the disproportionate share of the sequestration cuts. IAF, Tab 13 at 4.

¶34 The administrative judge denied this request on the basis that it concerns unreviewable management considerations related to the agency's allocation of funding. IAF, Tab 18 at 4. We agree. *See Schroeder*, 60 M.S.P.R. at 570. Request 15 is DENIED.

Request 16

¶35 In request 16, the appellant seeks information related to fourteen specific decisions made by the IRS centering on how and why it chose the specific days for the furlough and the ramifications of those decisions on agency operating costs and efficiencies. IAF, Tab 9 at 10. The appellant again asserts that this information is necessary to determine whether "the furlough was in fact done in a manner that best promoted the efficiency of the service." IAF, Tab 13 at 4.

¶36 The administrative judge denied request 16, finding that the documents sought concern the agency's discretion in structuring the furlough, which is not subject to Board review. *Id.* We agree. Once again, it is beyond the scope of Board review whether the furlough was conducted in a manner that *best* promotes the efficiency of the service. There are many ways in which agency management could have structured the furlough, and it is not the Board's place to select from among them. Rather, the issue before the Board is whether the furlough was "in general" taken for such cause as promoted the efficiency of the service according

to the standard set forth above. *See Clark*, 24 M.S.P.R. at 225. Request 16 is DENIED.

ORDER

¶37 For the reasons set forth above, we AFFIRM IN PART and REVERSE IN PART the administrative judge's discovery rulings. We RETURN this matter to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.

SEPARATE OPINION OF ANNE M. WAGNER,
CONCURRING IN PART AND DISSENTING IN PART

in

Debra J. Chandler v. Department of the Treasury

MSPB Docket No. AT-0752-13-0583-I-1

¶1 My colleagues hold that much of the information sought by the appellant in discovery in this case relates to matters that are not subject to Board review and not discoverable because agency management has the discretion to make spending decisions as it deems best and, therefore, that information about whether the agency could have made different spending decisions to avoid or lessen the furloughs is irrelevant. Majority Opinion (Maj. Op.), ¶¶ 9, 13, 16, 22, 26, 34. In so concluding, they summarily disregard the plain language of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (CSRA or Act), establishing statutory requirements underlying furlough appeals, as well as the long-established standard set forth by the Board in its prior case law on furloughs, and, instead, invoke regulatory reduction-in-force (RIF) principles as grounds for departing from the express statutory provisions governing the Board's review of furloughs of 30 days or less and other adverse actions under chapter 75 of the CSRA. Although agreeing with my colleagues as to certain of the appellant's discovery requests, *see* discussion infra, I respectfully dissent from their opinion insofar as it unmoors our review of this furlough appeal from its clear statutory foundation.

¶2 The CSRA defines certain adverse actions as appealable to the Board, including removals, suspensions for more than 14 days, reductions in grade, reductions in pay, and furloughs of 30 days or less. 5 U.S.C. §§ 7512, 7513(d), 7701. The Act further mandates that all of these actions, including furloughs of 30 days or less, may only be taken for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). Thus, an employee such as the appellant who

is furloughed for 30 days or less may appeal that action to the Board under 5 U.S.C. § 7701. 5 U.S.C. § 7513(d). Under 5 U.S.C. §§ 7513 and 7701(c)(1)(B), a furlough will be sustained only if the agency can prove by preponderant evidence that it promotes the efficiency of the service. Conversely, the decision to furlough will not be sustained if the appellant shows, by preponderant evidence, (1) harmful error in the application of the agency's procedures used in arriving at the decision; (2) that the decision was based upon a prohibited personnel practice; or (3) that the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2). The Board has long held that the efficiency of the service standard in a furlough case is met by showing that the furlough is a reasonable[1] management solution to the financial restrictions at issue, and that the agency applied its determination as to which employees to furlough in a fair and even manner. *See Clark v. Office of Personnel Management*, 24 M.S.P.R. 224, 225 (1984).

¶3 A party may use the Board's discovery process to obtain "relevant information needed to prepare [its] case," which "includes information that appears reasonably calculated to lead to the discovery of admissible evidence." 5 C.F.R. §§ 1201.74, 1201.72(a). Admissible evidence is evidence "that tends to prove or disprove the existence of an alleged fact," and that is "of such a character (e.g., not unfairly prejudicial or based on hearsay) that the court should

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[1] At one point in its opinion, the majority states that "the wisdom of the agency's spending decisions is not at issue." Maj. Op., ¶ 16. I agree. The well-established standard for Board review is simply whether those decisions were "reasonable." That said, I fundamentally disagree with the majority's view that the Board is somehow unable or not in a position to assess the reasonableness of the agency's decisions in this context. In exercising our statutory authority to review adverse actions under 5 U.S.C. §§ 7513 and 7701, we routinely review the reasonableness of agency decision-making and, I would note, in this regard, that a reasonableness standard is not a particularly high bar such that our review of the agency's spending decisions would threaten to put us in a position of "second guessing" or micromanaging an agency's operational decisions. Nor do I discern anything about the nature of an agency's budget allocation process that would render it inaccessible to third-party review.

receive it." Black's Law Dictionary 576 (7th ed. 1999). Thus, in the context of this appeal, discoverable information includes any information reasonably calculated to lead to evidence that tends to prove or disprove that the furlough was (1) a reasonable management solution to financial restrictions; (2) implemented in a fair and even manner; (3) obtained through harmful error; (4) based on a prohibited personnel practice; or (5) not in accordance with law. What constitutes relevant information in discovery is liberally interpreted, and uncertainty should be resolved in favor of the movant absent undue delay or hardship caused by such request. *Ryan v. Department of the Air Force*, 113 M.S.P.R. 27, ¶ 15 (2009); *Mc Grath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 7 (1999).

¶4 Applying the above principles to the instant case, there can be no dispute that the agency bears an *evidentiary* burden to demonstrate that its decision to furlough was a reasonable management solution to financial restrictions and implemented in a fair and even manner. 5 U.S.C. § 7701(c)(1)(B). Further, under the CSRA, an appellant may rebut the agency's evidence as to the reasonableness and fairness of the furlough and also challenge the furlough by proving harmful error, prohibited personnel practices, or that it was not in accordance with law. 5 U.S.C. § 7701(c)(1)(B). Thus, under the Board's regulations, the appellant is clearly entitled to seek discovery of information relating to the reasonableness and fairness of the furlough and to any of the aforementioned affirmative defenses. 5 C.F.R. §§ 1201.71-1201.73. An appellant's access to discoverable information is especially important where, as here, the agency is likely to be in sole possession of the evidence necessary for the appellant to support her case. *Russo v. Department of the Navy*, 85 M.S.P.R. 12, ¶ 6 (1999).

¶5 Here, the appellant seeks information relating, inter alia, to employees who have been hired and paid overtime since the announcement of the furlough, the cost of conducting the furlough, the hiring of contract employees since the

announcement of the furlough, the amount of money the agency will continue to expend on items that could have been cut but may not have been cut, the timing of the agency's decision to furlough while in the midst of collective bargaining, as well as bonuses and awards paid to management officials. The above information is clearly reasonably calculated to lead to the discovery of evidence tending to prove or disprove that the furlough was a reasonable management solution to financial restrictions and implemented in a fair and even manner. *See Ryan*, 113 M.S.P.R. 27, ¶ 15; *Mc Grath*, 83 M.S.P.R. 48, ¶ 7. It may also lead to the discovery of evidence that the action was based on harmful error or a prohibited personnel practice, or was not in accordance with law.

¶6 In largely finding such information irrelevant to the appellant's claims, the majority effectively jettisons the statutory efficiency of the service standard, as well as the Board's longstanding "reasonable management solution" and "fair and even manner" standards, by analogizing to RIF cases and holding that agency management has almost unfettered discretion in making spending decisions that are not reviewable by the Board in a case falling under 5 U.S.C. chapter 75.[2] In particular, my colleagues hold that the efficiency of the service standard "must depend on the problem that the adverse action was meant to address," without any support for doing so in the language of chapter 75, which sets forth a single efficiency of the service standard. Maj. Op., ¶ 8. However, the majority has not shown that Congress intended in the Civil Service Reform Act to equate furloughs of 30 days or less with RIFs, or that the Office of Personnel

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[2] In a separate concurring opinion, Chairman Grundmann objects to this characterization of the majority's opinion and maintains, instead, that the majority does recognize limitations on an agency's discretion to conduct a chapter 75 furlough. However, I believe that, in holding that much of the information that the appellant seeks through discovery is irrelevant because it concerns an exercise of management discretion, this decision has the ultimate effect of diminishing the agency's burden to prove, and impeding the appellant's ability to lodge an affirmative defense to, this particular adverse action.

Management (OPM) intended its regulation to equate the two. Where the majority sees "no indication" that Congress intended to differentiate between the two, Maj. Op., ¶ 7, I see the plain language of the statute wherein Congress expressly excluded RIFs from the efficiency of the service standard and the Board's statutory review authority, while making the furloughs of 30 days or less explicitly subject to those requirements.

¶7 It is worth noting here that the Board's jurisdiction over RIF appeals derives entirely from OPM's regulations which define the scope of the Board's review of such actions. *See Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, ¶ 7 (1999) (the Board's jurisdiction over RIF actions is not statutory but derives from regulation). Thus, an agency in a RIF case need only show by preponderant evidence that there is a legitimate management reason for the action, i.e., a reason for the RIF that is listed under OPM's regulations. *See McMillan v. Department of the Army*, 84 M.S.P.R. 476, ¶ 5 (1999). As long as a RIF is legitimately conducted for one of the reasons identified in the regulation, it will not be disturbed absent a clear abuse of discretion or a substantial departure from applicable procedures. *Cross v. Department of Transportation*, 127 F.3d 1443, 1447 (Fed. Cir. 1997). This deferential standard was specifically created by OPM and set forth in its Federal Personnel Manual (FPM) to be applied to RIFs. *See Griffin v. Department of Agriculture*, 2 M.S.P.R. 168, 171 n.3 (1980). The majority has provided little basis, other than the fact that furloughs and RIF actions are both nondisciplinary and generally triggered by a shortage of funds, for importing a deferential RIF concept from the FPM into the standard for proving an action under chapter 75.[3] In fact, the majority's decision opens the

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[3] The Chairman contends that the source of the "fair and even manner" standard set forth in *Clark* is *Griffin*, a RIF case, and that this demonstrates a "connection" between RIFs and furloughs. However, I note that even in *Clark*, the Board implicitly recognized a distinction between RIFs and furloughs under chapter 75 by using a "compare" or "cf." signal in citing to *Griffin*, thereby indicating that the RIF principle was analogous, but not identical. *See Clark*, 24 M.S.P.R. at 225.

door to the denial of discovery requests in other chapter 75 cases, such as removals and reductions in grade or pay, when requests for information in those cases also involve management considerations of discretion.

¶8 I recognize that OPM's regulations provide that, when some but not all employees in a given competitive level are being furloughed, the notice of proposed action must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. *See* 5 C.F.R. § 752.404(b)(2). However, section 752.404(b)(2)'s reference to competitive levels does not constitute a substantive reason to link furloughs of less than 30 days to RIFs, nor does this regulation otherwise alter the statutory efficiency of the service standard which the Board must follow in furlough cases. Rather, it merely addresses the *procedures* an agency must follow in providing notice of a furlough, requiring a greater explanation from the agency when a furlough may appear, on its face, to be unfair. Furthermore, the regulatory requirement that the agency provide a justification for treating comparable employees differently does not support the majority's limitation on the scope of the Board's review in furlough appeals. Maj. Op., ¶¶ 8-9. On the contrary, it comports with the view that the Board may look into the manner in which a furlough is imposed to insure that it was a reasonable management solution to financial restrictions and implemented in a fair and even manner.

¶9 In sum, there is simply no statutory support for the majority's assumption that, because a shortage of funds may give rise to either a RIF or a furlough of less than 30 days, the legal precepts applicable to the Board's regulatory authority to review RIF cases limit our statutory review of furloughs of 30 days or less. *See* Maj.Op., ¶ 7. However, assuming arguendo that analogizing the instant furlough case to a RIF appeal is appropriate, I would nevertheless disagree with the majority's denial of the appellant's discovery requests insofar as it appears to be based upon the erroneous premise that the Board's adjudicatory authority in

RIF cases amounts to nothing more than rubber stamping an agency's decision. *Id.*

¶10 In *Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195 (1980), a seminal decision in the Board's law on RIFs, the appellant challenged the agency's RIF action alleging that it was a pretext for removing her for personal reasons. While acknowledging an agency's discretion in organizing its operations, the Board nonetheless said that it would not "allow the circumvention of adverse action procedures where the 'reorganization' has no substance and is in reality a pretext for summary removal." *Id.* at 200. The Board thereafter held that, in a RIF appeal, the agency bears the evidentiary burden to prove by preponderant evidence that it undertook the RIF for any of the reasons in 5 C.F.R. § 351.201(a), and that the employee may rebut such a showing with evidence challenging the bona fides of the agency's alleged reasons for the RIF. *Id.* at 201.

¶11 Since *Losure*, the Board has rigorously applied the evidentiary principles announced therein. For example, in *Rosen v. Interstate Commerce Commission*, 20 M.S.P.R. 574 (1984), the Board found that, while the agency's RIF notice was admissible, it was not sufficient to establish by preponderant evidence that the agency's claimed shortage of work was the reason underlying the RIF. *Id.* at 577. Rather, the Board said that it would "examine all of the evidence under *Losure* to determine if the agency failed to meet its burden of showing that the RIF was based upon a shortage of work." *Id.* In doing so, the Board rejected the agency's claim of shortage of work, finding it to be undermined by the fact that the agency was creating positions in the appellant's division at the same time that it was conducting the RIF. *Id.* at 577-78. The Board also found that a conclusory statement by the agency's Director of Personnel to the effect that the RIF was undertaken in response to a reduced regulatory role of the Commission was not sufficient to carry the agency's burden in the face of the appellant's challenge. *Id.* at 578; *see Douglas v. Department of the Interior*, 41 M.S.P.R. 575, 580

(1989) (agency submission of document setting forth its authority to conduct a RIF is insufficient to meet burden of proof).

¶12 Similarly, in *Hoffman v. Department of Housing & Urban Development*, 22 M.S.P.R. 564 (1984), the Board declined to accept at face value the agency's claims that the appellant's position had been abolished to meet a budgetary ceiling on the number of employees and because of the elimination of specific functions within the organization. Instead, where evidence indicated that the appellant's position was restructured under another name, the Board said that it must "pierce the veil of the *bona fides* of abolishing that particular position to determine if the stated reason for the RIF is legitimate." *Id.* at 566. In doing so, it relied on unrebutted testimony at the hearing that the appellant's office was projected to be at or below its full-time permanent ceiling prior to the RIF, *id.* at 567, as well as evidence showing that the appellant's functions were still needed and being performed by another employee of the same grade as the appellant in overturning the RIF action. *Id.* at 567-68.

¶13 Beyond requiring that agencies meet their burden to prove by preponderant evidence the legitimacy of the underlying reasons for a RIF action, the Board has demonstrated a similar disinclination to defer to the manner in which an agency has conducted a RIF. A clear statement of the Board's approach in this regard appears in *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 492 (1997), where the appellant alleged, inter alia, that he was qualified for, and should have been reassigned to, another position as part of the RIF. The administrative judge agreed. *Id.* In its petition for review, the agency claimed that the administrative judge erred in (1) failing to accord deference to the agency's decision as to an employee's qualifications in determining assignment rights in a RIF; (2) subjecting the agency's determination to a preponderance of the evidence standard because to do so was inconsistent with such deference; and (3) conducting a de novo review of the agency's qualifications determination. *Id.* In response, the Board stated as follows:

> The administrative judge, of course, had no authority to depart from the evidentiary standard employed by the Board in RIF appeals, and he correctly declined to do so. By statute, the Board may sustain the agency's action only if the action is supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B). Moreover, the agency's argument that its qualifications determination is entitled to deference is not supported by precedent.
>
> In a RIF appeal, the Board conducts a de novo review to determine whether the agency has proven by a preponderance of the evidence that it properly applied the RIF regulations. The proper application of RIF regulations is a substantive right, not a mere procedural entitlement. [citations omitted.]
>
> . . . [B]ased on a reading of the plain language of the disputed regulation, we find that, in a RIF appeal, . . . the clear language of the regulation does not require the Board to afford the agency's determination deference and, even assuming that it did, such deference would be inconsistent with the statutory preponderance of the evidence standard of review that the Board is obligated to apply in RIF appeals.

Id.; *see McKenna v. Department of the Navy*, 105 M.S.P.R. 373, ¶ 11 (2007) ("In determining whether the agency afforded the appellant his proper assignment rights [in a RIF], the Board must conduct a de novo review to determine whether the agency has shown by a preponderance of the evidence that the appellant" was not qualified for assignment to another position.).

¶14 If anything, the foregoing cases demonstrate that the Board's review of RIF actions is not an empty process that effectively amounts to rubber stamping agency decisions. On the contrary, both with regard to the question of establishing the bona fides of the RIF action and with the manner in which a RIF action is conducted, the Board has clearly demonstrated that its adjudicatory process remains intact, which means holding agencies to their burdens of proof and persuasion and providing appellants with an opportunity to rebut the agency's evidence.

¶15 In significantly narrowing the scope of the Board's statutory authority to review furloughs, the majority relies on Board RIF cases reciting the principle

that it will not "second guess an agency's decision to reorganize its workforce as it has no authority to review the management considerations which underlie the exercise of discretion." *See La Bonte v. Department of Commerce*, 23 M.S.P.R. 534, 537 (1984). However, in *La Bonte*, the Board also stated that it was "clear that an agency must show by a preponderance of the evidence that a RIF was undertaken for legitimate management reasons." I recognize that the former statement has eventually transmuted in our case law to stand for the proposition that once an agency demonstrates by preponderant evidence the bona fides of a RIF, the Board lacks authority thereafter to review "management considerations" underlying it. But parsing out the difference between "legitimate management reasons" and "management considerations" is no small feat. Indeed, in *Salazar v. Department of Transportation*, 60 M.S.P.R. 633 (1994), it is evident that there is no bright line in this regard. There, the appellant argued that the agency did not have a bona fide reason to conduct the RIF based on a shortage of funds and that its actual reason for the RIF was to break up the newly-certified union. *Id.* at 640. The administrative judge found that, once the agency showed that it properly invoked the RIF regulations for bona fide reasons, "the Board lacks the authority to hear an assertion that the agency committed a prohibited personnel practice by abolishing certain positions . . . ." On review, the Board disagreed, saying that, "while neither the Board nor an employee may dictate to an agency the means it must use to remedy a funding shortage, the Board does have the authority to determine whether it is the funding shortage or union animus that has caused the agency to conduct a RIF." *See also Schroeder v. Department of Transportation*, 60 M.S.P.R. 566, 571 (1994). Thus, even if the majority is correct in analogizing this furlough appeal to a RIF appeal, I would still find that the information that the appellant seeks is, for the most part, discoverable insofar as it is likely to lead to evidence that will tend to prove or not prove that the

furlough was a reasonable management solution to financial restrictions and was conducted in a fair and even manner.[4] *See Clark*, 24 M.S.P.R. at 225.

¶16 With regard to the appellant's specific discovery requests at issue in this appeal, the record shows that the agency ordered the appellant to serve 5 furlough days between May 24, 2013, and August 30, 2013, with the possibility of 2 additional days, if necessary. Initial Appeal File (IAF), Tab 1. In her initial appeal, filed on May 27, 2013, the appellant alleges that the agency's decision to impose furloughs was improper because (1) it failed to pursue savings measures as an alternative to furloughs; (2) its announced budget figures and savings do not clearly support the need for furloughs; (3) the furloughs will have a negative impact on enforcement; (4) the furloughs will have a negative impact on taxpayer services; (5) nonbargaining unit employees who are not performing functions that are as critical to the agency's mission are not required to make the same financial sacrifice; (6) the agency violated the appellant's due process rights; (7) the due process violation requires that the action be overturned regardless of the merits of

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[4] In affirming the administrative judge's ruling on document request no. 6 regarding the alleged flexibility afforded certain employees in scheduling furlough days, the majority finds that the information is irrelevant because it "pertains to the manner in which the agency conducted the furlough." Maj. Op., ¶ 20. I disagree. First, the Board has long held that, in exercising its statutory authority to review furloughs, the Board must look at whether the furlough was carried out in a "fair and even" manner. *See Clark*, 24 M.S.P.R. at 225. Second, it ignores an appellant's statutory right to challenge the manner in which a furlough was implemented by alleging harmful error, prohibited personnel practices, or otherwise not in accordance with law. 5 U.S.C. § 7701(c)(2). Third, it seems inconsistent with the majority's view elsewhere expressed that the Board will look to see if the agency applied the furlough uniformly and consistently. Maj. Op., ¶ 8. While finding the majority's reformulation of *Clark's* "fair and even manner" language to be unnecessary and unsupported, I nevertheless interpret it to mean that the majority would in fact exercise jurisdiction over claims relating to the manner in which the furlough was conducted. Finally, it seems incongruous to me to assert that we could possibly review a furlough decision without reaching the manner in which it is carried out, as if the idea of a furlough exists apart from its particulars, i.e., who is affected, the number of days, and its scheduling.

the action; and (8) the furloughs will cost the agency about $61,000 per employee while saving just $1,800 in salary costs. IAF, Tab 1 at 6.

¶17 On July 3, 2013, the appellant, through a union representative, filed her discovery request, which included 16 requests for production of documents, 9 interrogatories, and 5 requests for admissions. IAF, Tab 9, Exhibit A. In the Order and Certification of Interlocutory Appeal, the administrative judge determined that the appellant's document requests 1, 2, 3, 6, 9, 10, 11, 12, 13, 14, 15, and 16 are at issue. IAF, Tab 18 at 2. She noted that the agency's objections to the requests are generally predicated on the arguments that (1) the requests are vague, overbroad, and overly burdensome; and (2) the requests relate to the agency's discretionary budgetary determinations, which are not within the Board's authority to review. *Id*.

Document Request No. 1

¶18 In request 1, the appellant seeks "[a]ll records, discussion papers, documentation, e-mail, fax, post-it notes, etc. to reflect a) Appellants hired as well as b) Appellants paid overtime since the Agency announced its intention to furlough Appellants." IAF, Tab 9, Exhibit A at 1. In its July 23, 2013 Discovery Response, the agency objected to request 1 in its entirety on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is over-burdensome, vague, and irrelevant. IAF, Tab 19, Exhibit A at 1. In the Agency's Motion for Protective Order, the agency also argues that request 1 relates to its discretionary budget determinations and the Board has no authority to review such management considerations, citing *Griffin*, 2 M.S.P.R. at 170-72. *Id*., Tab 9 at 2.

¶19 The appellant argues that request 1 seeks relevant evidence relating to whether the agency conducted the furloughs in a "fair and even manner," citing *Clark*, 24 M.S.P.R. at 225. IAF, Tab 13 at 2. Specifically, the appellant contends that

> [i]t is not a fair and even manner to furlough employees, then provide some of the employees with overtime (sometimes as early as the next day) in order to make up lost salary caused by the furlough. It would also not promote the efficiency of the service to furlough experienced employees in order to cut down on salary and then hire new, untrained employees, which simply added additional salary, and additional needs to furlough employees on more days.

Id. The administrative judge finds that request 1 concerns unreviewable management considerations within the agency's discretion in determining whether the cost savings should be applied to personnel costs. *Id*., Tab 18 at 4.

¶20 I agree with the majority's determination that the agency should provide a response to the appellant's request for information related to overtime awarded to employees. Maj. Op., ¶ 14. The Board has the authority to review factors that bear upon whether an agency's furlough determination was a "reasonable management solution" to an agency's financial restrictions and whether it was applied to employees in a "fair and even manner." *Clark*, 24 M.S.P.R. at 225. I disagree, however, with the majority's decision to deny the appellant's request for information related to newly hired employees brought into service during the furloughs. Maj. Op., ¶ 14. The potential relevance of this type of information is analogous to the agency's decision to award overtime to some employees. Thus, while an agency may well be able to justify the need to bring in new employees to meet mission requirements while otherwise furloughing its workforce or to treat some employees differently than other employees, the information sought by the appellant in request 1 could lead to the discovery of admissible evidence that the furlough was not a reasonable management solution to financial restrictions that was carried out in a fair and even manner. Therefore, I would order the agency to respond to both parts of this request.

<u>Document Request No. 2</u>

¶21 In request 2, the appellant seeks documents evidencing the cost of conducting the furlough, including: (a) mailings, (b) travel, (c) overtime, (d) staff hours, and (e) other direct and indirect costs related to the furlough.

IAF, Tab 9, Exhibit A at 1. The agency objected to this request on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is over-burdensome, vague, and irrelevant. IAF, Tab 19, Exhibit A at 2. The agency also asserted in its Motion for Protective Order that the Board has no authority to review such management considerations under *Griffin*. *Id*., Tab 9 at 2. The appellant contends that she is entitled to know the costs of implementing the furlough to determine if it actually promoted the efficiency of the service. *Id*., Tab 13 at 2. In addition, the appellant claims in her petition for appeal that the furloughs are unreasonable because they will have a negative impact on tax enforcement and will cost the agency $61,000 per employee while realizing a savings of just $1,800 per employee. *Id*., Tab 1. The administrative judge finds that request 2 concerns unreviewable management considerations within the agency's discretion in determining whether the cost savings should be applied to personnel costs. *Id*., Tab 18 at 4.

¶22 The majority agrees with the administrative judge's determination. Maj. Op., ¶ 16. I respectfully dissent from this determination because the agency bears the evidentiary burden of demonstrating that its decision to furlough employees was a "reasonable management solution" to resolve financial restrictions. *Clark*, 24 M.S.P.R. 225. The requirement to prove that a furlough is a reasonable solution plainly permits some evaluation of its effectiveness in realizing budgetary savings to the agency and that it is not counterproductive. In bringing furloughs of 30 days or less under chapter 75 adverse action procedures, there is no indication that Congress intended this type of adverse action to be subjected to a lower evidentiary standard. Thus, the appellant should be permitted to discover information to rebut the agency's claims that the imposition of the furloughs will improve its budgetary shortfall.

Document Request No. 3

¶23 In request 3, the appellant seeks documentation explaining why the agency made a decision to proceed with furloughs while in the middle of bargaining with

the exclusive representative of its bargaining unit employees. IAF, Tab 9, Exhibit A at 1-2. The agency objected to this request on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is over-burdensome, vague, and irrelevant. IAF, Tab 19, Exhibit A at 2. The agency also asserted in its Motion for Protective Order that the Board has no authority to review such management considerations under *Griffin*. *Id*., Tab 9 at 2. The appellant argues that she is entitled to know "why the adverse action was taken against [her], even though [her] representative was in active negotiation with the Agency over the furlough days." *Id*., Tab 13 at 2.

¶24 The majority agrees with the administrative judge's determination denying this request. Maj. Op., ¶ 17. I respectfully dissent from this determination. In adjudicating a chapter 75 adverse employment action, the Board does entertain claims that the action was taken in retaliation for union activity. To the extent that the appellant so alleges, I would find that this request is reasonably calculated to disclose admissible evidence, and I would order the agency to respond to it. *See Gath v. U.S. Postal Service*, 118 M.S.P.R. 124, ¶ 13 (2012) (remanding an appeal to adjudicate the appellant's affirmative defense of retaliation for protected union activity).

Document Request No. 6

¶25 In request 6, the appellant seeks documents reflecting the position, title, grade, series, and number of all nonbargaining unit employees who were not subjected to furloughs, had an option to take different days, or were allowed to work overtime during the period between the first furlough day and the last furlough day. IAF, Tab 9, Exhibit A at 2. The agency objected to this request on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is over-burdensome, vague, and irrelevant. IAF, Tab 19, Exhibit A at 2. The agency also asserted in its Motion for Protective Order that the Board has no authority to review such management considerations under *Griffin*. *Id*., Tab 9 at 2.

¶26 The appellant contends that request 6 seeks discoverable information because, "[i]n order to determine whether the furloughs were conducted in a fair and even manner, the Agency should be required to provide information on non-bargaining unit employees and the methods in which their salaries have also been affected." IAF, Tab 13 at 2. The administrative judge finds that request 6 concerns unreviewable management considerations within the agency's discretion in determining whether the cost savings should be applied to personnel costs. *Id.*, Tab 18 at 4.

¶27 The majority grants this request in part, finding that the identity of nonbargaining unit employees who were not furloughed or who received overtime is discoverable, but that information concerning whether some employees were allowed greater flexibility than others in scheduling their furlough days is not discoverable. Maj. Op., ¶ 20. I concur with the majority's decision to order disclosure of the overtime information, but I dissent from its determination to not order discovery of whether some employees were afforded greater flexibility in scheduling their furlough days. This information is analogous to the information sought in request 1. While an agency may be able to justify that it treated some types of employees differently while imposing the furloughs to meet its mission requirements, the information sought by the appellant in request 6 could lead to the discovery of admissible evidence that the agency did not impose them in a fair and even manner. Therefore, I would order the agency to respond to this request.

Document Request No. 9

¶28 In request 9, the appellant requests documentation identifying individuals who entered into contract employment with the agency since it announced its intention to furlough current employees noting some specific individuals by name or by title and office. IAF, Tab 9, Exhibit A at 2. The agency objected to this request on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is over-burdensome, vague, and irrelevant. IAF, Tab 19, Exhibit A at 2. The agency also asserted in its Motion for Protective

Order that the Board has no authority to review such management considerations under *Griffin*. *Id*., Tab 9 at 2.

¶29 The appellant contends that request 9 is relevant because "[i]t is not a fair and even manner to furlough employees, then provide contractors with new jobs. . . . Some of these contractors were even doing bargaining unit work, which could have been done by salaried employees, had they not been sent home without pay." IAF, Tab 13 at 3. The administrative judge finds that request 9 concerns unreviewable management considerations within the agency's discretion in determining whether the cost savings should be applied to personnel costs. *Id*., Tab 18 at 4.

¶30 The majority agrees with the administrative judge's determination. Maj. Op., ¶ 22. I respectfully dissent from this determination. The potential relevance of this type of information is analogous to information sought in request 1, i.e., the agency's decision to award overtime to some employees and to hire new employees. Thus, while an agency may be able to justify the need to bring in contractor employees to meet its mission requirements while it is imposing furloughs, the information sought by the appellant in request 9 could lead to the discovery of admissible evidence that the furlough was not a reasonable management solution to financial restrictions that was carried out in a fair and even manner. Therefore, I would order the agency to respond to this request.

Document Request No. 11

¶31 In request 11, the appellant requests documentation identifying the amount the agency will continue to expend on items that could have been cut but have not been cut such as conferences, hirings, management travel, training, etc. IAF, Tab 9, Exhibit A at 3. The agency objected to this request on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is over-burdensome, vague, and irrelevant. IAF, Tab 19, Exhibit A at 5. The agency also asserted in its Motion for Protective Order that the Board has no

authority to review such management considerations under *Griffin*. *Id*., Tab 9 at 2.

¶32 The appellant asserts that request 11 may lead to admissible evidence because "it is important to know whether all programs had their budgets cut by 5%. This includes money spent on extraneous programs." IAF, Tab 13 at 3. The administrative judge finds that request 9 concerns unreviewable management considerations within the agency's discretion in determining whether the cost savings should be applied to personnel costs. *Id*., Tab 18 at 4.

¶33 The majority agrees with the administrative judge's determination. Maj. Op., ¶ 26. I respectfully dissent from this determination because the information sought is reasonably calculated to lead to the discovery of evidence tending to prove or disprove that the furlough was a reasonable management solution to financial restrictions and implemented in a fair and even manner. While the agency may well be able to prove that the efficiency of the service is promoted by not reducing its expenditures on a particular program, the appellant should be entitled to receive information in discovery and to question in her appeal whether the agency's exercise of its discretion on budgetary matters was reasonable under the circumstances.

<u>Document Request Nos. 12, 15, and 16</u>

¶34 I concur with the majority's conclusion to deny requests 12, 15, and 16 to the extent that the appellant seeks information for the purpose of obtaining evidence that the furlough was the best option to promote the efficiency of the service. The governing standard of review in this appeal is whether the furlough was a reasonable management solution to the financial restrictions placed upon it, not whether it was the best solution. I further concur with my colleagues that the appellant's request 15 for the agency's Business Operating Division's projected allocations and actual expenditures for FY 2011 and FY 2012 is not reasonably calculated to lead to admissible information as the only fiscal year at issue here is 2013. I would remand the question of the discoverability of such information for

FY 2013 to the administrative judge for further development as to the appellant's explanation as to its relevancy.

Document Request Nos. 10, 13, and 14

¶35 I also concur with the majority's decision to grant, in part, requests 10, 13, and 14. Information related to bonuses and awards paid to management personnel during the period of the furloughs, the specific process under 5 U.S.C. § 7513 applied by the agency in implementing the furloughs, and any Executive Order issued directly to the IRS to conduct the furlough is properly discoverable because it may reveal admissible evidence to prove or disprove that the furlough was a reasonable management solution to financial restrictions and was implemented in a fair and even manner.

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Anne M. Wagner
Vice Chairman

CONCURRING OPINION OF CHAIRMAN SUSAN TSUI GRUNDMANN

in

Debra J. Chandler v. Department of the Treasury

MSPB Docket No. AT-0752-13-0583-I-1

¶1 I join in the majority opinion. I write separately to address the Vice Chairman's separate opinion.

¶2 The separate opinion relies heavily on *Clark v. Office of Personnel Management*, 24 M.S.P.R. 224 (1984), which it describes as "longstanding" precedent. Although *Clark* is a rather old case and, for that reason, can be fairly described as "longstanding," this does not equate to the issue and the standard that it set forth as being well-established. Until now, the Board has seen very few chapter 75 furlough appeals and has therefore had little occasion to revisit the standard announced in *Clark* or to define its contours more precisely. This is highlighted by the separate opinion's inability to identify a single instance in which Board has applied *Clark's* "fair and even manner" standard in the 30 years since it was issued. Nor does the separate opinion look behind *Clark* to consider the source of the standard. The source, as identified by the Board in *Clark*, was *Griffin v. Department of Agriculture*, 2 M.S.P.R. 168 (1980), a reduction-in-force (RIF) appeal. Thus, *Clark* establishes the very connection between RIFs and chapter 75 furloughs that the separate opinion seeks to avoid.[1] Moreover, it supports the majority's finding that "fair and even" means "uniform and consistent" among similarly situated employees—the regulatory standard for RIFs. 5 C.F.R. § 351.201(b). I would note that "uniform and consistent" is in no way at odds with "fair and even." Rather, it is a more precise rendering of

[1] I agree with the point in the separate opinion that RIF cases are not the same thing as chapter 75 furloughs and that the Board in *Clark* cited to RIF law by way of analogy. The fact remains that this analogy supports the majority opinion.

the same standard. Indeed, it is difficult to see how a limitation of the Board's review to issues of "fairness" amounts to any limitation at all. If the Board is to apply *Clark* in a meaningful way, it must define "fairness" and "evenness" more precisely. The majority opinion does just that, providing a practical, workable standard of review that is fully supported by the law.

¶3 The separate opinion criticizes the majority on the basis that it "jettisons" the efficiency of the service standard and arrives at a decision that amounts to the "rubber-stamping" of chapter 75 furlough actions. I disagree because, as the majority explains, there are definite limitations to an agency's discretion in conducting chapter 75 furloughs. Specifically, the Board will reverse a chapter 75 furlough if the agency fails to show that it applied the furlough uniformly and consistently among similarly situated employees as a reasonable response to work or funding shortages, or if the appellant can show that the agency's action was the result of harmful procedural error, constituted a prohibited personnel practice under 5 U.S.C. § 2302(b), or was not in accordance with law. *See* 5 U.S.C. § 7701(c)(2).

¶4 The separate opinion also reminds the majority that the Board's RIF review standard is not meaningless. To that effect, it provides some examples of cases in which the Board has reversed agency RIF actions. I agree that the Board's RIF review standard is not meaningless, but neither is the efficiency of the service standard set forth in the majority opinion. If similar appeals were to come to the Board in the context of chapter 75 furloughs, they would be reversed under that standard or under a 5 U.S.C. § 7701(c)(2) affirmative defense. *See Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 492 (1997) (the appellant's RIF separation was the result of harmful procedural error); *Hoffman v. Department of Housing & Urban Development*, 22 M.S.P.R. 564, 566-68 (1984) (the agency failed to show that it was faced with the alleged work

shortage that it used to justify the RIF);[2] *Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 200-01 (1980) (the agency used the RIF to target the appellant for personal reasons).

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Susan Tsui Grundmann
Chairman

[2] In this case, the agency has justified its furlough based on a shortage of funds. There does not appear to be a serious dispute that the agency faced a funding shortage as a result of sequestration.