

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
NORTHEASTERN REGIONAL OFFICE**

DIANA M. RUBENS,  
Appellant,

DOCKET NUMBER  
PH-0707-16-0151-J-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: February 1, 2016

Conor D. Dirks, Esquire, Debra L. Roth, Esquire, Julia H. Perkins, Esquire,  
Washington, D.C., for the appellant.

Edith W. Lewis, Esquire, Columbia, South Carolina, Jonathan Smith,  
Esquire, Bedford, Massachusetts, Shelley D. Cutts, Esquire, Phoenix,  
Arizona, for the agency.

**BEFORE**

William L. Boulden  
Chief Administrative Judge

**FINAL DECISION**

On January 11, 2016, appellant, a former career, non-probationary Senior Executive Service (SES) Director for the Department of Veterans Affairs (VA's) Veterans Benefits Administration (VBA), Philadelphia Regional Office (Philadelphia VARO), who has more than 28 years of VA service, timely electronically filed an appeal from her January 6, 2016 removal from the SES and transfer to the General Schedule (GS) 15, step 1, position of Regional Assistant Director, Houston VARO, based upon alleged misconduct. Appeal File (AF), Tab

1.<sup>1</sup> Appellant's salary was decreased from \$181,497.00 to \$123,775.00 per annum by the transfer. AF, Tab 42 (subtab 3, exhibit 1). The Board has jurisdiction under 38 U.S.C. § 713(d)(2)(A), (g)(1)(A) and 5 U.S.C. § 7701. *See* 5 C.F.R. §§ 1210.1, 1210.2(a).<sup>2</sup> The appellant's requested hearing was held on January 27 and 28, 2016. Testimony was provided in-person, by videoconferencing, and, in one instance, by telephone (with the consent of the parties). The hearing was open to the public and press except for brief periods when testimony was elicited concerning third party misconduct. Non-press observers watched the hearing via videoconferencing from our conference room.

This appeal received expedited review as required by 38 U.S.C. § 713(e), which meant, among other things, that the appeal could not be suspended, dismissed without prejudice, or stayed, and the undersigned was required to issue a decision within 21 days after the appeal was filed. 38 U.S.C. § 713(e)(3-4); 5 C.F.R. §§ 1210.1(c), 1210.3(a)(3-4). It also meant that mitigation of the penalty was not authorized. It further means that this decision is final and is not subject to any further appeal. 38 U.S.C. § 713(e)(2); 5 C.F.R. §§ 1210.1(d), 1210.20(b).

Both sides' representatives performed admirably under the difficult expedited review process, and the agency cooperated as required by 38 U.S.C.

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<sup>1</sup> This is the second time that the agency has taken this action; the charge and specifications are virtually the same. Appellant's appeal from the first action was dismissed as moot when the agency unilaterally cancelled the action. *See Rubens v. Department of Veterans Affairs*, MSPB Docket No. PH-0707-16-0081-J-1 (Final Decision, Dec. 2, 2015). The first appeal file is referred to throughout this decision as FAF. The evidence file in the two appeals is the same but for the addition of transcripts of Office of Inspector General (OIG) witness interviews, which had not been provided in the first case. *See* AF, Tab 25 (page 5 n.1).

<sup>2</sup> Appellant moved for dismissal, arguing that the actions had not yet been effected. AF, Tabs 47, 49, 52. The agency opposed the motion. AF, Tab 50. I DENIED the motion because I found the actions were effective immediately upon issuance of the January 6, 2016 decision letter and had not been cancelled. AF, Tab 53. The appellant testified that as of the second day of the hearing, no Standard Form (SF)-50 had been issued to reflect her demotion and transfer and she still was being paid her SES salary. She further testified that she was told by the Houston VARO that she eventually will be issued an overpayment notice.

§ 713(e)(6) to ensure that this appeal was expedited. For the following reasons, the agency's action is REVERSED.

### ANALYSIS AND FINDINGS

#### Appellant's constitutional challenge to 38 U.S.C. § 713 may not be heard by the Merit Systems Protection Board

I note preliminarily that appellant is preserving a constitutional challenge to 38 U.S.C. § 713, based upon, among other things, her view that the expedited review process violated her right to due process of law based on her property right interest in her employment. AF, Tabs 1 (appeal form), 25 (second written reply), 45; FAF, Tab 1 (pages 14-30) (first written reply).<sup>3</sup>

Section 713 was enacted as section 707(a)(1) of the Veterans Access, Choice and Accountability Act of 2014, Pub. L. 113-146, Title VII, 128 Stat. 1754, which was effective upon the President's signature on August 7, 2014. Before the enactment of 38 U.S.C. § 713, appellant, as a career, non-probationary SES member, would have been entitled to the procedures set forth in 5 U.S.C. § 7543<sup>4</sup> and 5 C.F.R. § 752.604, along with the Board's ordinary adjudication process.<sup>5</sup> *See* 5 U.S.C. § 7543(d).

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<sup>3</sup> In her second written reply, appellant incorporated all of her first written reply. *See* AF, Tab 25 (page 6).

<sup>4</sup> Under section 7543(b), an employee is entitled to, among other things, no less than 7 days within which to present an oral and/or written reply to an agency's proposed adverse action. By contrast, section 713 requires neither that an SES employee be given notice of a proposal to remove or reassign her, nor that she be given an opportunity to reply to such a proposed action. However, under the agency's August 28, 2014 "Expedited Senior Executive Removal Authority" policy (Expedited Removal Policy), an SES employee may reply in writing, but not orally, within 5 business days after receiving a "Pending Action Memorandum" along with the agency's "evidence file." AF, Tab 42 (subtab 3, exhibit 2, para. 7e(2)).

<sup>5</sup> Prior to its amendment in 1981, the SES adverse action provision stated that an agency could take action only "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7543(a) (West 1980). In 1981, Congress amended this provision to state that an agency could take action against an SES employee only for "misconduct, neglect of duty, [or]

Constitutional due process generally requires that a tenured federal employee be put on notice of all the evidence being used against her and have the opportunity to respond to it. *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011); *Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, 165-67, ¶¶ 9-12 (2012). *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (essential requirements of due process are notice and an opportunity to respond).

Appellant also incorporated the Board's constitutional concerns, which it expressed when promulgating its section 713-implementing regulations. FAF, Tabs 1 (page 145). The Board stated that:

[T]he MSPB questions the constitutionality of any provision of law that prohibits Presidentially-appointed, Senate confirmed Officers of the United States<sup>6</sup> from carrying out the mission of the agency to which they were appointed and confirmed to lead.

79 Fed. Reg. 48942 (Aug. 19, 2014).<sup>7</sup>

Finally, appellant asserts that the lack of Board or court review of an administrative judge's decision violates the appointments clause, Article II, Section 2, cl. 2, and Article III of the U.S. Constitution, and the separation of powers doctrine.<sup>8</sup>

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malfeasance...." Pub. L. No. 97-35, 95 Stat. 357, 758 (1981). *See Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 598 (1996). The Board ordinarily may mitigate an SES employee's penalty pursuant to 5 U.S.C. § 7701(b)(3) (added by Senior Executive Service Improvements Act, Pub. L. No. 102-175, 105 Stat. 1222 (1991)). *See Hillen v. Department of the Army*, 72 M.S.P.R. 369, 370 n.4 (1996).

<sup>6</sup> *See* 5 U.S.C. § 1201 (MSPB Board Members appointed by President and confirmed by Senate).

<sup>7</sup> *See also* Board's August 1, 2014 letter to the President, in which they reiterated these concerns. <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1068653&version=1072950&application=ACROBAT>.

<sup>8</sup> These issues are currently pending before the U.S. Court of Appeals for the Federal Circuit in *Helman v. Department of Veterans Affairs*, 2015-3086. *See* FAF, Tab 1 (pages 36-159).

However, the Board has long-held that while, as an administrative tribunal, it has the authority to adjudicate a constitutional challenge to an agency's application of a federal statute, it has no power to determine the constitutionality of a federal statute in-and-of-itself.<sup>9</sup> *Bayly v. Office of Personnel Management*, 42 M.S.P.R. 524, 525-26 (1990); *May v. Office of Personnel Management*, 38 M.S.P.R. 534-538 (1988). Therefore, I may not consider appellant's constitutional challenges to 38 U.S.C. § 713.

#### The September 28, 2015 Office of Inspector General (OIG) Report

In March 2015, the Chairman and Ranking Member of the House Committee on Veterans' Affairs and the Chairman and Ranking Member of the Senate Committee on Veterans' Affairs requested the VA OIG to investigate allegations concerning appellant based upon an anonymous complaint that alleged, among other things, that appellant improperly received \$288,206.77 in relocation expenses for transferring from VBA Headquarters, in Washington, D.C., to the position of Director, Philadelphia VARO. Because this raised questions about potential abuse of the permanent change of station (PCS) program VBA-wide, the OIG was also requested to conduct a broader review of the program. AF, Tab 5 (page 12).

The OIG issued an administrative investigation report on September 28, 2015, entitled "Inappropriate Use of Position and Misuse of Relocation Program and Incentives." *Id.* (page 7).<sup>10</sup> In its report, the OIG found that appellant, who had been the Deputy Undersecretary for Field Operations, in Washington, D.C., volunteered to become Director, Philadelphia VARO, and was reassigned to that position, effective June 1, 2014. The OIG concluded that the Philadelphia VARO

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<sup>9</sup> I am mindful that in *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2136 n.5 (2012), the U.S. Supreme Court called this distinction "dubious," but found that it need not decide whether the Board's view of its own power was correct.

<sup>10</sup> The report is publically available. <http://www.va.gov/oig/pubs/VAOIG-15-02997-526.pdf>.

was a position of far lesser scope and responsibility (VA SES payband 3 – the lowest), but appellant maintained her salary (at VA SES payband 1 – the highest)<sup>11</sup> in this new position. *Id.* (page 16). However, the OIG found nothing improper with appellant’s retention of her VA payband 1 salary.<sup>12</sup>

In its report, the OIG concluded that the agency paid appellant \$274,019.12 related to her PCS move from Washington, D.C. to Philadelphia and that these relocation-related payments and reimbursements<sup>13</sup> were generally allowable under Federal and VA policy, with a few minor discrepancies. AF, Tab 5 (page 16). Appellant did not receive a retention or relocation incentive based upon her reassignment.

However, the OIG also found that appellant “inappropriately used her position of authority for personal and financial benefit when she participated personally and substantially in creating the Philadelphia VARO vacancy and then volunteering for the vacancy.” AF, Tab 5 (page 10) (emphasis supplied). Specifically, it found that she used her position to “coerce” the incumbent of the Philadelphia VARO to be reassigned from that position so that she could be reassigned thereto. The OIG reached the same conclusion regarding appellant’s subordinate and fellow SES member, Kimberly Graves, who was reassigned from

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<sup>11</sup> SES members are paid within the limits of one of two paybands, depending upon whether or not the agency’s SES performance appraisal system has been certified by the Office of Personnel Management. *See* 5 C.F.R. §§ 534.401-403; 5 C.F.R. part 430, subparts C-D; <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2016/executive-senior-level>. However, the VA has instituted an internal 3-payband system within the required paybands, which makes salary differentials based upon the relative responsibility of various SES positions. AF, Tab 16 (page 55).

<sup>12</sup> There is no law, rule, or regulation pursuant to which a reassignment from one SES position to another for non-disciplinary or non-performance must, or even may, reduce an SES employee’s pay. *See* 5 U.S.C. §§ 3395(a)(1-2), 5383; 5 C.F.R. §§ 317.901, 534.404; 5 C.F.R. part 534, subpart D. As noted above, the VA’s SES payband system is its own creation.

<sup>13</sup> They included travel, transportation, and relocation expenses: moving and temporary storage of household goods, per diem, travel and temporary housing/living expenses for appellant and her dependent, home selling assistance through the VA’s appraised value offer (AVO) program, and relocation income tax expenses. AF, Tab 5 (pages 16, 19).

Director, VBA Eastern Area Office, in Philadelphia, on October 19, 2014, to Director, St. Paul VARO. AF, Tab 5 (page 35).

The OIG report noted that appellant had been interested in the Philadelphia position since it became vacant in 2011, but her reassignment was not supported at that time by upper management. She was again interested in Philadelphia in 2014, in part, because she grew up in Delaware - Philadelphia was “near home.” *Id.* (page 27).

As part of its investigation, the OIG reviewed records concerning the VBA’s reassignment and promotion to the SES of seven GS-15 employees, and its reassignment of 15 SES employees in fiscal years 2013, 2014, and 2015. It concluded that during these three fiscal years, VBA management had improperly used moves of senior executives as a method to justify annual salary increases and had used the PCS program to pay moving expenses<sup>14</sup> for these employees. *Id.* (page 25). According to the report, Danny Pummill, then-Principal Deputy Under Secretary for Benefits, told OIG investigators it was “probably true” that the VBA had used salary increases and relocation incentives<sup>15</sup> as “a way to get around pay freezes and bans on performance bonuses.” AF, Tab 5 (page 22).

Annual salary increases related to the reassignments totaled about \$321,000.00, and PCS relocation expenses totaled about \$1.3 million. *Id.* The OIG concluded that VBA also had paid \$140,000.00 in unjustified relocation incentives during this period because the positions had not been advertised, or had been advertised but no candidates had been considered, or the justification

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<sup>14</sup> Travel and transportation expenses of a reassigned employee may be reimbursed so long as the reassignment “is not primarily for the convenience or benefit of the employee.” *See* 5 U.S.C. § 5724(h). Relocation expenses may be paid to an employee who is reassigned “in the interest of the government.” 5 U.S.C. § 5724a. The reassignment need not be involuntary to qualify under either statute.

<sup>15</sup> A relocation incentive may be paid in return for a length-of-service agreement only if the position to which an employee is reassigned is likely to be difficult to fill in the absence of the bonus. 5 U.S.C. § 5753(b)(1); 5 C.F.R. § 575.201. The reassignment need not be involuntary.

had been approved long after the incentives had been posted in vacancy announcements. *Id.* (page 24). In total, the VBA spent about \$1.8 million on the reassignments. While it did not question the need to reassign some staff to manage a national network of VARO's, the OIG concluded that VBA inappropriately utilized VA's PCS program for the benefit of its SES workforce. *Id.* (page 25).

The OIG report stated that the OIG had made criminal referrals to the U.S. Attorney's Office, District of Columbia, regarding appellant and Graves "regarding official actions orchestrated" by them.<sup>16</sup> AF, Tab 5 (page 35). It also provided 12 recommendations to the VA to increase oversight of VA's PCS program and to determine the appropriate administrative actions to take, if any, against appellant, Graves and other senior VBA officials based upon their roles in the reassignments of appellant, Graves, Robert McKenrick (who had been Director, Philadelphia VARO), and Antione Waller (who had been Director, St. Paul VARO). Specifically, it identified Allison Hickey (Under Secretary for Benefits (USB), Pummill, and Beth McCoy (Deputy Under Secretary for Field Operations), for possible administrative action. In particular, the OIG report concluded that McCoy, along with appellant, had pressured Waller to accept a reassignment to Baltimore. In its response to the OIG report, the VA agreed that the Deputy Secretary would confer with various VA offices about possible actions to be taken against these employees. AF, Tab 5 (pages 35-36). No actions have been taken against USB Hickey, a political appointee who has since resigned, or against Pummill or McCoy.

It is important to underscore preliminarily, that in their MSPB hearing testimony, both Pummill and USB Hickey vigorously defended the VBA reassignment program, and Pummill specifically denied having admitted to the

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<sup>16</sup>The referrals were declined. AF, Tab 43. <http://www.govexec.com/management/2015/12/feds-wont-press-criminal-charges-against-former-va-senior-executives/124792>.



OIG that VBA used SES reassignments to sidestep salary and bonus caps. He testified that an OIG investigator had taken his comment in this regard out of context. USB Hickey's and Pummill's views of the OIG report might be expected since they are criticized therein. But the criticism testified to by Deputy Secretary Sloan D. Gibson, summarized on pages 14-16 of this decision, was unexpected.

#### Other background

In an October 15, 2015 letter to the Honorable Jeff Miller, Chairman of the House Committee on Veterans' Affairs, Deputy Secretary Gibson requested that the Committee's scheduled October 21, 2015 hearing be postponed or limited in scope in light of the VA's referral of the appellant's and Graves's cases for possible criminal action. AF, Tab 26 (pages 30-31).

In an October 20, 2015, follow up letter to Chairman Miller, Deputy Secretary Gibson indicated, among other things, that "[i]t is critical that I be afforded the opportunity to review the evidence and make the necessary decisions [concerning possible discipline against appellant and Graves] independent of undue external influence." *Id.* (pages 32-33).

By memorandum dated December 3, 2015, Deputy Secretary Gibson notified appellant that her transfer from the SES to a GS-15 position was pending, based upon misconduct; specifically, a charge of "Failure to Exercise Sound Judgment" supported by two specifications. AF, Tab 1 (pages 9-11). She was provided with the required five days within which to respond in writing, and was granted an extension of time.

Appellant submitted a written reply through counsel, dated December 17, 2015, in which she denied the charge and specifications, challenged the penalty, raised a number of issues and defenses, and enclosed a number of exhibits. AF, Tab 25. As noted above, appellant incorporated her first written reply (FAF, Tab 1 (pages 14-30)), into her second reply.

By memorandum dated January 6, 2016, Deputy Secretary Gibson sustained the charge and both specifications by preponderant evidence, and the penalty.<sup>17</sup> He stated that he carefully considered appellant's reply before taking the action. AF, Tab 1 (pages 12-14).

Legal issues and burdens

Appellant disputes the charge and specifications, she challenges the penalty as unreasonable under the circumstances, and she raised two affirmative defenses. AF, Tabs 1, 25; FAF, Tab 1 (first written reply) (pages 14-30). The law on penalty and affirmative defenses are set out toward the end of this decision.

Pursuant to 38 U.S.C. § 713(a)(1)(B), the VA Secretary may transfer a member of the SES to a GS position if the Secretary determines, among other things, that the misconduct of the executive warrants such action. The transfer may be to any GS grade for which the individual is qualified and that the Secretary determines is appropriate. *Id.* Notwithstanding any other provision of law, including the requirements of section 3594 of title 5, any individual transferred to a GS position under subsection (a)(2) shall, beginning on the date of such transfer, receive the annual rate of pay applicable to such position. 38 U.S.C. § 713(b)(1). In its Expedited Removal Policy memorandum, the VA stated that for an employee, such as appellant, who did not hold a GS position immediately prior to her last SES appointment, her pay will normally be set at step 1 of the GS position to which she is transferred. AF, Tab 42 (subtab 2, exhibit 2, para. 7e(7)).

The agency bears the burden of proving that the appellant engaged in misconduct and the VA Secretary's determination as to such misconduct shall be

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<sup>17</sup> He was acting under delegated authority from the Secretary of Veterans Affairs, as documented in an August 28, 2014 memorandum which stated that the authority could not be redelegated. AF, Tab 42 (subtab 3, exhibit 3). I note that in the absence of an agency policy barring the practice, it is permissible for one person to act as both the proposing and deciding official. *O'Neil v. Department of Transportation*, 12 M.S.P.R. 212 (1982).

sustained only if the factual reasons for the charges are supported by preponderant evidence.<sup>18</sup> 5 C.F.R. § 1210.18(a).<sup>19</sup>

As relevant here, the term “misconduct” includes “neglect of duty” and “malfeasance.” 38 U.S.C. § 713(g)(2). *See* 5 C.F.R. § 1210.2(d). “Neglect of duty” is not defined in section 713, but has been held to require proof of “a failure to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit.” *Thomas v. Department of Transportation*, 110 M.S.P.R. 176, ¶ 9 (2008); *see also Mendez v. Department of Treasury*, 88 M.S.P.R. 596, ¶ 26 (2001).

“Neglect of duty” is defined by the agency’s Expedited Removal Policy to include the “failure to provide appropriate oversight, supervision, or control over matters or personnel that are assigned to or are the responsibility of the Senior Executive.” AF, Tab 42 (subtab 3, exhibit 2, para. 6k). Thus, this is not a neglect of duty case.

“Malfeasance” is also undefined in section 713, but generally means “the wrongful or unjust doing of some act which the doer has no right to perform....”<sup>20</sup> Under the agency’s Expedited Removal Policy, malfeasance is defined as “an act that is legally unjustified, harmful, or contrary to law,” and includes, but is not limited to conduct, actions, or inactions that are unbecoming a member of the

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<sup>18</sup> I note that the agency’s Expedited Removal Policy memorandum states that the burden of proof to sustain an action under 38 U.S.C. § 713 shall be only “substantial evidence.” AF, Tab 42 (subtab 3, exhibit 2, paras. 6q, 6s). Section 713 does not proscribe any particular burden of proof. However, the Board was required to issue regulations to “establish and put into effect a process to conduct expedited reviews” under section 713(d). 38 U.S.C. § 713 Note (d)(1). Having done so, the Board’s regulatory burden of proof predominates. The agency does not dispute this. AF, Tab 43.

<sup>19</sup> Preponderant evidence is defined as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q).

<sup>20</sup> <http://thelawdictionary.org/malfeasance/>.

SES, conduct, actions, or inactions that negatively impact the VA or detract from the VA's mission, and intentionally or negligently violating the law or VA policy. AF, Tab 42 (subtab 3, exhibit 2, para. 6i).

In any event, by way of analogy, I note that the Board has held that proving "misconduct, neglect of duty, and malfeasance" regarding SES charges under 5 U.S.C. § 7543(a), does not require proof of intent to commit an offense. *Baracker v. Department of the Interior*, 70 M.S.P.R. at 600. In other words, this is not a specific intent case.

The basic reassignment timeline (see AF, Tab 23 (pages 96-107))<sup>21</sup>

From February through March 2014, a vacancy announcement was issued and reissued for a vacancy created by the retirement of the Director, Los Angeles VARO. A detailee filled the vacancy for about 60 days beginning on April 7, 2014. AF, Tab 24 (pages 5-8).

On June 1, 2014, McKenrick was reassigned from Director, Philadelphia VARO to Director, Los Angeles VARO. Also on June 1<sup>st</sup>, appellant was reassigned from Deputy Undersecretary for Field Operations in Washington, D.C., to Director, Philadelphia VARO.

On July 27, 2014, Waller was reassigned from Director, St. Paul VARO to Director, Baltimore VARO. On October 19, 2014, Graves was reassigned from Director, VBA Eastern Area Office in Philadelphia, to Director, St. Paul VARO.

The Charge, "Failure to Exercise Sound Judgment," is SUSTAINED

A generic charge, such as this one, has no specific elements of proof; rather, it is established by proving that appellant committed the acts alleged in support of the broad label. *Cf. Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 9 (2010) (consuming alcohol in government vehicle was conduct unbecoming). In this way, an agency may describe actions that constitute misbehavior in narrative form. *Id.* However, a general charge must be described

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<sup>21</sup> See also AF, Tab 6 (pages 106, 112, 117, 119).

in sufficient detail to allow an appellant to make an informed reply. *Cf. Cross v. Department of the Army*, 89 M.S.P.R. 62, 68 (2001) (changing subordinate's appraisal without notice to employee was conduct unbecoming); *Colbert v. U.S. Postal Service*, 93 M.S.P.R. 467, 471 (2002) (narrative charge acceptable so long as it describes misbehavior).

Moreover, a charge need not fail because a portion of a narrative description is not proven. *Cf. Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, ¶¶ 6-7 (1997). Additionally, as the court stated in *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990), "where more than one event or factual specification is set out to support a charge ... proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge." *Id.*

Where the agency has used a generic label for its charge, the Board must look to the specification to determine what conduct the agency is relying on as the basis for its proposed action. *Lachance v. Merit Systems Protection Board*, 147 F.3d 1367, 1372 (Fed. Cir. 1998); *Boltz v. Social Security Administration*, 111 M.S.P.R. 568, ¶ 16 (2009). In resolving the issue of how a charge should be construed and what elements require proof, the Board examines the structure and language of the proposal notice and the decision notice. *Boltz*, 111 M.S.P.R. 568, ¶ 16; *George v. Department of the Army*, 104 M.S.P.R. 596, ¶ 7 (2007), *aff'd*, 263 F. App'x 889 (Fed. Cir. 2008); *see Lachance*, 147 F.3d at 1373 (relying in part on decision notice in construing the charge).

Deputy Secretary Gibson explained the crux of the charge in the Pending Action Memorandum as follows:

By involving yourself in aspects of McKenrick's and Waller's reassignments, after expressing interest in relocating to Philadelphia, you created the appearance that you were facilitating these reassignments, at least in part, for personal reasons rather than for legitimate business reasons. Your failure to recognize this and extricate yourself from official involvement in these reassignments has caused me to question your judgment. Your actions have the potential to cause the American public to lose trust in the

Department to make sound business decisions in the best interests of Veterans.

AF, Tab 1 (page 10).

Thus, appellant is charged with creating the appearance that she facilitated<sup>22</sup> the reassignments of McKenrick and Waller, at least in part, for personal reasons; that is, her desire to be reassigned to Philadelphia, rather than for legitimate business reasons, because she involved herself in aspects of McKenrick's and Waller's reassignments. And, she failed to exercise sound judgment because she did not recognize the appearance she created and accordingly extricate herself from official involvement in these reassignments.

In *Special Counsel v. Nichols*, 36 M.S.P.R. 445, 455 (1988), the Board held that in analyzing alleged violations of government ethics regulations (now 5 C.F.R. § 2635.105(b)), it would examine appearance of impropriety allegations against an objective standard based on the facts of each case. In another words, the question is whether actions would appear improper to a reasonable observer with knowledge of the relevant facts under the circumstances.

#### The agency's position on the charge

Deputy Secretary Gibson, a veteran and an obviously very strong advocate for veterans, testified that he was nominated by the President and confirmed by the Senate about two years ago. Among his many duties as the VA's Chief Executive Officer, he functions as the "point person" for SES matters. In what I found to be compellingly forthright testimony,<sup>23</sup> Deputy Secretary Gibson stated that he found there was a "gulf between the conclusions of the OIG report and the evidence in the file." He further testified that "if you are looking to me to defend the OIG report, you are looking at the wrong person."

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<sup>22</sup> Facilitate means "to make easier or less difficult; help forward ...; to assist the progress of...." <http://dictionary.reference.com/browse/facilitating>.

<sup>23</sup> See generally *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 459 (1987) (witness credibility factors).

Deputy Secretary Gibson testified that in his December 9, 2015 written statement to the U.S. House Committee on Veterans Affairs, he stated that the VA was “very disturbed to find that the underlying evidence does not support the report’s findings with respect to people,”<sup>24</sup> and that there were “significant gaps between the rhetoric in the report and the relocated employees’ testimony.” In fact, he stated that both McKenrick and Waller initiated the discussions that led to their reassignments (although Waller later felt pressured [but not by appellant] to go to Baltimore rather than to Philadelphia). *See* AF, Tab 29 (exhibit L, pages 52-54).

Deputy Secretary Gibson testified that he further stated to Congress that there was no evidence to support the notion that appellant’s and Graves’s reassignments to McKenrick’s and Waller’s former positions were “improper or contrary to law.” He also confirmed in his testimony that he had stated to Congress that the OIG could not identify any law, rule, or regulation that was violated by the moving expenses paid to appellant or Graves. I note that he also stated to Congress that the gap between the rhetoric and the evidence in the report had created unreasonable expectations regarding possible future disciplinary actions. *See* AF, Tab 29 (exhibit L, pages 52-54).

Deputy Secretary Gibson also testified that after he first reviewed the OIG report, he asked his staff if he “was missing something” (because he did not find many of its conclusions supported). For example, he did not find that McKenrick or Waller were coerced into leaving their positions or that there was any basis for the criminal referrals of appellant or Graves. He also testified that he did not find any evidence that appellant had intentionally manipulated the system in order to be reassigned to Philadelphia. Had he found such intent, he testified, this would

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<sup>24</sup> He stated, though, that he was concerned about the various processes and programs at issue here and has made significant changes thereto.

have constituted an actual ethical violation, and based on that, he would have removed appellant from federal service.

Deputy Secretary Gibson further testified that SES members are held to a high standard and that even the appearance of impropriety by such an employee is a serious matter. On the witness stand, he described appellant as a “skilled manager and a highly capable and competent senior leader” for whom he has “high regard.” Nevertheless, he concluded that appellant had engaged in “sustained involvement” in McKenrick’s and Waller’s reassignments, and then received relocation benefits when she was reassigned to Philadelphia. This, he concluded, created an appearance that the reassignments were effected for reasons other than the best interests of veterans; that is, at least in part for appellant’s personal benefit. Accordingly, he concluded that appellant’s creation of this appearance constituted an error of judgment on her part.

Specification 1 is SUSTAINED in PART

In specification 1, the agency alleged that:

In February 2014, Robert McKenrick, Director of the Philadelphia VA Regional Office (VARO), expressed interest in being reassigned to the Los Angeles VARO. In March 2014, you expressed interest in being reassigned to the Philadelphia VARO once the position was vacant. In April and May 2014, you participated in facilitating McKenrick’s<sup>25</sup> relocation at government expense. You signed a document titled ‘Executive Transition Plan’ recommending McKenrick for relocation to Los Angeles. You directed your subordinate, Graves, to contact McKenrick to discuss his reassignment benefits and to encourage McKenrick to ask appropriate questions about what his pay would be upon relocation. You also signed a document approving a \$20,000 recruitment incentive<sup>26</sup> for McKenrick

On or about June 1, 2014 you were reassigned from your position as Deputy Under Secretary for Field Operations to the position

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<sup>25</sup> For ease of reading, many quotes have been altered by using only last names.

<sup>26</sup> Actually, a relocation incentive.



previously occupied by McKenrick. Pursuant to this reassignment you received relocation benefits, including reimbursement for moving expenses and participation in a program that guaranteed the sale of your home.

By failing to fully extricate yourself from activities surrounding McKenrick's relocation and then by accepting a reassignment to McKenrick's former position and relocation benefits from the Department, you created the appearance that these transactions were approved for reasons other than the best interests of Veterans. I consider this a failure to exercise the sound judgment I expect from a Senior Executive.

AF, Tab 1 (pages 9-11).

Here, the agency specifies that in April and May 2014, appellant "participated in facilitating" McKenrick's reassignment in three ways: by signing an Executive Transition Plan (ETP), by directing Graves to contact McKenrick to discuss his reassignment benefits and to encourage him to ask appropriate questions about his salary upon reassignment, and by signing (and thereby approving) a \$20,000.00 relocation incentive form for McKenrick.

In light of Deputy Secretary Gibson's testimony (above) about his view of the charge and the shortcomings of the OIG report, the agency is not pursuing a theory that appellant coerced or even pressured McKenrick or Waller into being reassigned, or that she created the Philadelphia vacancy so that she could be reassigned thereto. AF, Tabs 42, 43, 60, 68. In fact, Willie Clark, the then-Western Area Director, testified that he checked with McKenrick who told him that he had wanted to go to Los Angeles, which was contrary to rumors Clark had heard.

Chronological OIG documentation regarding appellant's and McKenrick's reassignments

It is important to preliminarily underscore that pursuant to 5 U.S.C. § 3395(a)(1-2) and 5 C.F.R. § 317.901(b-c), a permanent, career SES employee may be reassigned to any SES position for which he or she is qualified. However, for reassignments, such as those at issue here, which are outside of an

SES employee's commuting area, the agency must consult with the employee on the reasons for, and the employee's preferences with respect to, the proposed reassignment. Following such consultation, the agency must (unless waived by the SES employee) provide him or her with written notice, including the reasons for the reassignment, at least 60 days before the effective date of the reassignment. *Id.*

As noted above, appellant had been the Deputy Under Secretary for Field Operations, a VA SES payband 1 position, since January 2008. In that position, she was responsible for 57 Regional Offices and four Field Offices. According to the OIG report, her appointment as the Director of the Philadelphia VARO was to a payband 3 position. AF, Tab 9 (page 31).

As also indicated above, appellant had been interested in the Director, VARO Philadelphia position since as early as 2011 when it became vacant, but her reassignment was not supported at that time by upper management. She was interested in Philadelphia, in part, because she grew up in Delaware - Philadelphia was "near home." AF, Tab 5 (page 27).

By email message dated September 11, 2013, Christopher Holly, VBA Deputy Chief of Staff, told Tamara Shelton and Jeannette Jones, Corporate Senior Executive Management Office (CSEMO) Human Resources Specialists, to not post the "LA RO Dir" job, as USB Hickey was going to do a directed reassignment, although, "unfortunately, ... [he did] not have a name yet." AF, Tab 14 (page 69). According to an August 2013 email message from Holly, an earlier interview process had not born fruit. AF, Tab 14 (page 66).

In an email string from February 2014, Graves and David Leonard, Director, Detroit VARO, discussed that McKenrick was interested in the Director, Los Angeles VARO position, and that while this was "great for LA," "it would leave ... [Graves] searching for Philly." Graves responded with, "Yup...." AF, Tab 14 (pages 82-86).

By email message dated March 13, 2014, Graves asked McKenrick to call her as she had “some info on L.A.” AF, Tab 23 (page 7).

On March 18, 2014, Holly sent an email message to Shelton and Jones stating that “[w]e are going to fill the LA RO position with a non-competitive reassignment. No need to do the ERB [Executive Resources Board<sup>27</sup>].” AF, Tab 14 (page 67).

Also on March 18, 2014, McKenrick informed Graves by email message that within an hour of finishing his telephone conversation with Western Area Director Clark, rumors were being circulated by employees to the effect that he was being reassigned to Los Angeles. AF, Tab 23 (page 4).

On March 20, 2014, in an email message to USB Hickey, appellant stated that she had expressed to Principal Deputy Under Secretary Pummill her “desire to take advantage of the Philly Director opening. For me.” AF, Tab 7 (93). That evening, USB Hickey sent appellant a responsive email message, in which she stated that she had spoken to Pummill in light of her earlier email message, and had informed him that:

I think the world of you and will support you any way you need or want[,] believing that you have given more than is humanely possible to me and to this organization. You have ... [given a] heroic effort for so very long. I am so very appreciative of your leadership and all you have done to help me and so many others.

*Id.* Hickey went on to say that:

Please know that in this decision for you – I will be all in to help and make it happen. I would like to talk to you about it all to understand better if I could have helped before now to take better care of you.

You are one amazing leader and woman.

Allison.

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<sup>27</sup> Executive Resource Boards make competitive SES selection recommendations. 5 U.S.C. § 3393(b).

*Id.* The following day, Hickey asked appellant by email message, “[W]hen can I expect to see Philly open?” *Id.* (page 92).

By email message dated March 25, 2014, an employee told McKenrick that reliable sources within the VA had advised him that McKenrick was leaving Philadelphia. The employee also told him that his reassignment would not stop him from filing various suits and complaints against McKenrick. AF, Tab 23 (page 11).

On an April 3, 2014 Justification and Authorization of Recruitment and Relocation Incentives Form (Form 10016), Clark recommended that McKenrick be provided with a relocation incentive payment of \$20,000.00. The form was concurred in by the Director of the Office of Human Resources on April 17, 2014, and approved by USB Hickey without a date indicated. AF, Tab 6 (pages 34-36).

On an undated memorandum, USB Hickey requested that the Secretary approve McKenrick’s relocation incentive payment. She stated that he was highly qualified and that recruitment efforts had been negatively impacted by the high cost of living in the Los Angeles area. AF, Tab 6 (pages 31-33).

By email message dated April 6, 2014, the Executive Management Officer, VBA Eastern Area Office, forwarded to Graves “documents needed to get ... [appellant’s] [relocation] package moving forward.” He stated to Graves that when he had completed section II of the ETP he “simply made it read as though ... [appellant] needs [to] become familiar with the dynamics/issues” [of Philadelphia] and to “address performance and establish relationships all specific to Philadelphia.” AF, Tab 18 (page 76-77).<sup>28</sup>

By email messages dated April 7, 2014, Graves forwarded a copy of these documents to appellant while the Executive Management Officer sent them for

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<sup>28</sup> The document read “as though” appellant needed to become familiar with Philadelphia VARO issues, relationships, etc., because as the Deputy Under Secretary for VBA Field Operations, she obviously already was aware of them.

approval to the CSEMO. AF, Tab 18 (page 78). The package included a cover memorandum for the signature of USB Hickey to the Secretary, recommending approval of appellant's reassignment. *Id.* (page 79). Graves was the nominating official on appellant's ETP. *Id.* (page 84).

In an April 8, 2014 ETP, Clark nominated McKenrick for appointment as the Director of VBA's Los Angeles VARO. Clark signed the ETP as the Rating Official on April 8<sup>th</sup>, appellant recommended approval as the Reviewing Official on April 9<sup>th</sup>, and COS Riojas approved the ETP on May 12<sup>th</sup>. AF, Tab 20 (pages 35-37). Appellant's April 9<sup>th</sup> signature is one of the discrete acts with which she is charged.

On a Strategic Communication Review form dated May 5, 2014, CSEMO Human Resource Specialist Jones recommended that appellant be reassigned to the Director, Philadelphia VARO position with no loss of pay upon McKenrick's reassignment from that position to Director, Los Angeles VARO. On the form, Jones noted that the Philadelphia VARO position had not been announced for competition. She also noted that appellant had been responsible for the oversight of 56 regional and 4 area offices since 2008, with an annual salary \$181,497.00 (VA payband 1), while the Director, Philadelphia VARO position was only a VA payband 3 position, which ordinarily entitled the incumbent to a maximum annual salary of \$167,00.00. COS Riojas initialed the form on May 6<sup>th</sup> without comment. AF, Tab 22 (pages 99-102).

On an attached May 5<sup>th</sup> memorandum to the COS, through the Assistant Secretary for Human Resources and Administration, Sheila Hickman, Acting Executive Director, CSEMO, noted that USB Hickey recommended that appellant be non-competitively reassigned to the Philadelphia position. She also noted that while appellant was being reassigned from a payband 1 to a payband 3 position, appellant possessed "exceptional leadership" abilities which were needed in Philadelphia. AF, Tab 7 (page 43). On page 2 of this memorandum, COS Riojas initialed his approval of appellant's reassignment to the Philadelphia position

with no loss of pay, and the proposed ETP, and he signed the memorandum on May 6, 2014. *Id.* (page 44).

By memorandum dated May 5, 2014, Hickey sought COS approval for McKenrick's reassignment to the Director, Los Angeles VARO. Hickman noted that the agency had advertised the position four times, but now USB Hickey recommended that McKenrick be non-competitively appointed. Hickman also recommended that McKenrick receive a salary increase from \$163,620.00 to \$167,000.00 (not the \$171,801.00 recommended by the VBA), a \$20,000.00 relocation incentive, and that an attached ETP (the one signed by appellant) be approved. COS Riojas approved the recommendations on May 12, 2014. AF, Tab 9 (pages 54-55, 56-57).

The attached Retention/Relocation Service Agreement (RRSA), which included a \$20,000.00 payment in return for McKenrick's commitment to serve at least one year in the Los Angeles position, was signed by McKenrick, and the date appears to be sometime in April 2014. The agreement was also signed by Clark on May 20 or 21, 2014, and signed afterward by appellant (undated). The form states that it is valid only when signed by the employee, the recommending official and the approving official. AF, Tab 9 (page 58). Appellant's signature on this form is the second discrete act with which she is charged.

By "consultation" memorandum dated May 15, 2014, Hickman informed appellant that the COS was considering reassigning her outside of her commuting area to the Director, Philadelphia VARO position, because he had identified her as an executive who possessed "the unique background and credentials necessary to succeed in this critical position." AF, Tab 22 (pages 102-103). Hickman further indicated that the agency desired to "foster position and geographic mobility as one approach for filling critical leadership positions." *Id.*

In the memorandum, Hickman stated that the reasons for the proposal to reassign appellant were that:

the Philadelphia Region is responsible for the effective operations and administration of nearly \$4.1 billion in benefits and services to over 825,000 veterans and beneficiaries in eastern ... [Pennsylvania], southern New Jersey and Delaware, through a staff of approximately 957 employees. It is critical that the ... VBA fill this key position with an Executive who has the background and experience necessary to manage the Philadelphia Regional Office.

*Id.* Appellant acknowledged receipt of the memorandum on May 15<sup>th</sup>. *Id.* (page 103).

By memorandum dated May 15, 2014, appellant responded to the consultation regarding reassigning her to the Philadelphia VARO, by stating that she preferred full relocation services, salary retention, and immediate action/offer of the job. AF, Tab 22 (page 104). In an undated and unsigned memorandum, appellant was advised that she would be reassigned with no loss of pay, that she would receive all PCS benefits to which she was entitled and eligible under the federal travel regulations, and she could be immediately reassigned if she waived the 60-day notice period. AF, Tab 21 (page 28).

Also by “consultation” memorandum dated May 15, 2014, Hickman informed McKenrick that the COS was considering reassigning him outside of his commuting area to the Director, Los Angeles VARO position, because he had identified him as an executive who possessed “the unique background and credentials necessary to succeed in this critical position.” AF, Tab 9 (pages 59-60). Hickman further indicated that the agency desired to “foster position and geographic mobility as one approach for filling critical leadership positions.” *Id.*

In the memorandum, Hickman stated that the reasons for the proposal to reassign McKenrick were that:

the Los Angeles Regional Office manages an annual operating budget of over \$27 million and is responsible for the effective operations and administration of benefits and services to over 706,000 veterans and beneficiaries in the southern California area, through a staff of approximately 278 employees. It is critical that the ... VBA fill this key position with a Director who has the

background and experience necessary to manage the Los Angeles Regional Office.

*Id.*

On May 15, 2014, appellant and Graves had an exchange of email messages which began with a discussion of position paybands, following which appellant informed Graves that McKenrick should have received his relocation paperwork to sign, and Graves assured appellant that she would “make sure he got his stuff and gets it done.” AF, Tab 7 (pages 100-101). Appellant followed by stating:

and make sure that he asks the questions he needs to ask about pay – since once it got over there, we can’t know what they did.....don’t want surprises.....

And indicate preferences for relo[cation allowances] to make sure they are dropped – whether that is house hunting, home buying, home selling, home storage.....etc., as I’m not sure what preferences the document is alluding to, and asking Jones was not helpful!!

AF, Tab 7 (page 100). Graves then informed appellant that McKenrick was in a meeting and was supposed to call her back. *Id.* This email string constitutes the third discrete act with which appellant is charged.

McKenrick acknowledged receipt of his “consultation memorandum on May 19<sup>th</sup>. AF, Tab 9 (page 60). By memorandum also dated May 19<sup>th</sup>, he responded to the consultation memorandum by stating that he understood the challenges of finding a dedicated, qualified leader for the Los Angeles position due to his service on an ERB panel which considered applicants for the position, following which he discussed the recruitment challenges with appellant. He further stated that he had told appellant that “in keeping with the Under Secretary’s ‘All In’ philosophy, if directed to the LA RO, ... [he] would not refuse the reassignment.” AF, Tab 9 (page 61).

McKenrick further indicated that he desired to have a salary increase to the maximum allowed for the Los Angeles payband, a relocation incentive, all relocation benefits associated with moving his family, and that he would waive



the notice period, but he had concerns about not being in conflict with his upcoming reserve military duty period. He also indicated that he believed that his Director, Philadelphia VARO position had been a VA payband 2, not 3, position. He also expressed concerns that he been presented with a relocation service agreement form to sign seven weeks prior to May 19<sup>th</sup> and at that time he had not been fully aware of his options (seemingly indicating that he had agreed to too little). AF, Tab 14 (pages 137-138).

By May 19, 2014 email message with the subject line of “R.M to LA,” from appellant to Pummill, with a copy to Graves and several others, appellant stated that:

I checked in with McKenrick to see if he had completed his paperwork that matched the copy of mine I shared this morning. My concern was that I hadn't heard from HR [Human Resources], and it may be that they are awaiting his paperwork. He indicated he was completing it now.

As he went on talking about money issues – only being bumped to max[imum] to band at Level 3 station (LA) with a small increase in pay, and the fact that the bonus was \$20K for the relo[cation], he indicated he hadn't been aware of how high the cost of living was going to be – I realize I cannot be involved in these discussions any further.

I suggested that he could indicated [sic] in the ‘Preferences’ that he receive a relo[cation] bonus over multiple years, but I couldn't tell him how that would play out.

We concluded the call, and I called Graves to tell her I could not be engaged in the conversation with him, that she and Clark would need to work with you and McCoy.

I would remind you that he called me about going to LA – after watching several ERB's that he sat on result[ed] in no new Director. He was ready to raise his hand to help the organization and he thought he could be helpful from a leadership standpoint. I find myself in the uncomfortable position of having an opportunity to return to the field when he vacates Philly. For that reason, I can't engage further with McKenrick on these issues.

AF, Tab 7 (pages 97-98).

McCoy responded that day that if McKenrick was paid at the level at which he was requesting (\$171K), he would be the highest paid director in a payband 3 position, and would be earning more than the Western and Central Area Directors. *Id.* (page 98).

By notice dated May 27, 2014, Hickman directed McKenrick's reassignment from Director, Philadelphia VARO (VA payband 3), to Director, Los Angeles VARO (VA payband 3), no earlier than 60 days from the date of the notice (unless he waived the notice period.). He was advised that if he refused the directed reassignment, he would face removal. AF, Tab 9 (pages 62-63).

By notice dated May 27, 2014, Hickman also directed appellant's reassignment from Deputy Under Secretary for Field Operations (payband 1), to Director, Philadelphia VARO (VA payband 3), no earlier than 60 days from the date of the notice (unless she waived the notice period.). She was advised that if she refused the directed reassignment, she would face removal. AF, Tab 22 (pages 105-107). Appellant accepted the reassignment that day and waived the 60-day notice period. *Id.* (page 107).

In a May 27, 2014 email message from appellant to Graves, appellant advised her that McKenrick was going to finalize his reassignment package for his move from the Philadelphia VRO to the Los Angeles VRO. About two hours later, Graves responded by email message, stating "Woo hoo! Have you talked with him about dates?" AF, Tab 22 (page 73). Appellant responded within the half-hour by stating, "Remember – I can't be in the middle his move – so you may want to check with Clark." Two hours later, Graves replied with "Got it." *Id.* (page 87).

By memorandum dated May 29, 2014, Pummill recommended that USB Hickey approve appellant's participation in the AVO home buying program. To justify this request, he noted the complexity of the Philadelphia VARO's mission, its \$4.1 billion in annual benefits paid, and the need for someone with appellant's experience in the Director's position. On an attached approval form, a further

justification was added – appellant would not accept her reassignment without the AVO program.<sup>29</sup> The form was signed on May 29, 2014 by McCoy, the Assistant Deputy Under Secretary for Field Operations; the Director, Office of Human Resources; the Director, Office of Resource Management; and USB Hickey. A final approval of the AVO program for appellant was signed on June 3, 2014 by COS Riojas. AF, Tab 7 (pages 51-53, 55-58).<sup>30</sup>

Stipulations and admissions regarding appellant's and McKenrick's reassignments

McKenrick could not testify due to medical reasons, but the parties stipulated that in February 2014, he initiated contact with appellant and Leonard, Detroit VARO Director, regarding the Los Angeles VARO position, and that on May 15, 2014, he contacted appellant for assistance with the relocation process. AF, Tab 77.

The agency admitted that the ETP signed by appellant was not an official recommendation for reassignment, nor did it constitute approval of McKenrick's reassignment. It also is not the reassignment recommendation referred to in USB Hickey's memorandum submitted to COS Riojas. AF, Tab 78.

The agency also admitted that appellant did not have the authority to direct the reassignment of any member of the SES and did not approve McKenrick's reassignment. Instead, COS Riojas gave final approval for McKenrick's reassignment, his \$20,000.00 relocation incentive, and his salary increase. AF, Tab 78.

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<sup>29</sup> In a May 29, 2014 memorandum, appellant stated that she would not accept the Philadelphia VARO reassignment without the AVO, and that the median home price for Alexandria, Virginia, was \$800,000.00. AF, Tab 17 (page 25).

<sup>30</sup> There is a further justification package in the file from Hickman, dated June 3, 2014, sent to the COS which explains that appellant did not initially request the AVO program, but had done so later. The cover form was dated May 29, 2014 by Jones. COS Riojas approved the request on June 3<sup>rd</sup>. AF, Tab 22 (pages 108-110). The OIG found this after-the-fact approval to be problematic. AF, Tab 5 (page 8).

Based on the above, it is obvious at the start that the ETP was not a recommendation by appellant for McKenrick's reassignment to Los Angeles, as alleged. However, in my view, this is not a fatal variance. Additionally, appellant's signature on the RRSA did not, in fact, approve McKenrick's \$20,000.00 relocation incentive, as alleged. This alone is also not fatal.

The RRSA signed by appellant did not facilitate McKenrick's reassignment because it was invalid as premature

Clark testified that McKenrick signed the RRSA sometime in April 2014 (the day is illegible), he (Clark) signed it on May 20 or 21, 2014, and appellant signed it sometime thereafter. Appellant testified that she signed the RRSA sometime after Clark signed it. She assumed that she did not date the document because it was something a staff member had asked her to sign in a hurry. Deputy Secretary Gibson testified that he assumed that appellant did not put a date on the RRSA when she signed it because she did not want to leave a "paper trail."

In any event, not only was the RRSA not an approval of McKenrick's \$20,000.00 relocation incentive, as alleged, it was actually invalid because, as explained below, such VA agreements may only be entered into after an SES reassignment is approved at the highest levels. Therefore, appellant's signature did not, in fact, facilitate McKenrick's reassignment.

In a May 22, 2014 email message, Shelton asked Natasha Rudolf, a VBA HR Specialist, to please send Jones a:

"blank, unsigned ... [RRSA] for McKenrick. It needs to be signed at the same time as the 'Notice of Reassignment to Position' that we plan to send tonight or tomorrow AM.

AF, Tab 57 (exhibit FF, page 44). After Rudolf asked if this was a new requirement, Shelton replied in a May 23<sup>rd</sup> email message, that:

You cannot require an employee to sign ... [an RRSA] prior to final approval – there has not been a change to any process. Until McKenrick signs the final notice of reassignment, no [RRSA] may be

enforced. It should be dated for the same date, or on a date soon after, the signature on the reassignment notice.

*Id.* (page 43).

By email message dated May 28, 2014, Jones asked McKenrick to sign a new RRSA, which, she noted, “must be resigned by all parties.” AF, Tab 57 (exhibit DD, page 38). McKenrick signed a new RRSA on May 28, 2014, but no other signatures are on the form (it called for Clark and the appellant to sign). *Id.* (page 41). Among the extensive paper record in this case, there is no fully executed RRSA for McKenrick. Therefore, it appears that he received \$20,000.00 without ever agreeing in writing to any period of service. This, and the lack of an RRSA discussed under specification 2, undercuts the agency’s position that an RRSA is an essential requirement of the SES reassignment process.

Accordingly, the agency has established only that appellant signed an RRSA form that did not give final approval for McKenrick’s relocation incentive payment, as alleged; that, at most, she attempted to facilitate McKenrick’s reassignment by signing an invalid form; but that a completed form was not a required step in the reassignment process for McKenrick or Waller, as the Deputy Secretary believed it was. These facts are simply too far removed from what was alleged to sustain this part of the specification.

#### Testimony regarding appellant’s and McKenrick’s reassignments

Deputy Secretary Gibson testified that the ETP which appellant signed on April 9, 2014, was an official, formal, and required step in McKenrick’s reassignment to Los Angeles; there would be “no reassignment without an ETP.” He described the May 15, 2014 email string between appellant and Graves as evidence of appellant’s substantive engagement in McKenrick’s relocation process. Deputy Secretary Gibson testified that it was clear from the March 20, 2014 email string between appellant and USB Hickey, that she expected appellant was going to Philadelphia. He noted that following this, appellant’s and

McKenrick's reassignment packages moved forward together in a parallel manner, and that this troubled him. He testified that the parallel processing was or added to "the appearance problem" because McKenrick's reassignment had not yet been approved. He assumed, though, that USB Hickey knew about the parallel processing, and acknowledged that even had appellant extricated herself, the parallel processing might have continued.

Deputy Secretary Gibson also testified that he wished Pummill had directed appellant and Graves to extricate themselves. He believes that failing to have done so demonstrated poor oversight by Pummill, about which he was not pleased, but that it was not a judgment issue as far as he was concerned.

He further emphasized that in appellant's May 15<sup>th</sup> and 27<sup>th</sup> email strings with Graves, she (appellant) had expressed discomfort with being involved with McKenrick's move, and stated that she could not be in the middle of it. Therefore, Deputy Secretary Gibson testified, appellant herself recognized the inappropriateness of her actions. He emphasized that even after appellant recognized the problem on May 5<sup>th</sup>, she signed the RRSA for McKenrick after that date.

Deputy Secretary Gibson testified that USB Hickey showed concern for her people, and that, had he been in her position, he also would have supported appellant's desire to be reassigned to Philadelphia. However, he believes that USB Hickey should have counseled appellant to extricate herself from the process (of McKenrick's reassignment).

USB Hickey testified that she had been the USB since her confirmation on June 6, 2011, until her resignation four and one-half years later. She is a retired U.S. Air Force general officer, and made clear through her emotional and very credible testimony that she was, and is, passionate about veterans' issues. She testified that her goal had been to help with a benefits claims backlog and she moved the process from paper to an electronic system. Her management philosophies were "all in," and "make a difference."

She read the OIG report and was “confused how they concluded that anything wrong was done,” and she thought her OIG interview was conducted in an unfair manner. In any event, however, USB Hickey testified that she would make the same decisions about reassignments today as she did during the period at issue because her regional directors had had “problems with moving.” USB Hickey wanted to have the “right person at the right time for the mission,” so she contracted out for the creation of a transition plan. The report she received cited her SES corps as her biggest issue.

USB Hickey also testified that she took into account personal desires when making reassignment decisions, as it was good leadership to do so. She testified that among the steps she took was to create an assistant’s position to support appellant and to support succession planning. Beth McCoy had been appellant’s assistant.

USB Hickey also testified that some of their 56 VARO’s performed poorly, including Baltimore and Los Angeles; Baltimore being the worst of all the VARO’s, which led to White House, Congressional, and media interest. She testified that many VARO’s had vacant director slots or only acting directors for long periods. She encouraged directors to help, but people did not want to go to problem offices. Therefore, she testified, volunteers to do so were her “heroes.”

USB Hickey testified that she had tried hiring a leader from outside of the VA for the Philadelphia VARO several years ago, and she had chosen McKenrick. She testified that although he was a “very good leader,” his appointment did not work out because he had limited knowledge of VBA’s systems. She noted that Philadelphia is one of VBA’s most complex VARO’s because it has one of only four Pension Centers in the country, and it also had been experiencing many problems. There had been an OIG report into problems and both she and Pummill had come to Philadelphia to look into the problems.

Therefore, when she heard that McKenrick was willing to go to Los Angeles, which was less complex and was not experiencing problems, she agreed

to his reassignment. USB Hickey testified that she disagreed with the OIG report's conclusion that McKenrick was a poor performer; rather, he had been faced with "too much, too fast for a non-VA person." She noted that his performance appraisal in Philadelphia had graded him as merely "satisfactory," but that, by policy, this grade is provided for all new VA employees.

USB Hickey further testified that one day, after she already knew that McKenrick was going to be reassigned from Philadelphia, she and appellant were talking about various VARO's, and Hickey asked her who was going to be reassigned to Philadelphia, and appellant said, "off the cuff," that she would be "willing to do it." USB Hickey thought to herself, "that would work," but because she viewed this as "going from the frying pan into the frying pan," she thought appellant might be joking. She testified that she was not certain exactly when this conversation took place, but it was after Hickey already knew that McKenrick was going to be reassigned.

With regard to the March 20<sup>th</sup> email string between herself and appellant, USB Hickey testified that appellant had looked "down," and Hickey learned that appellant had been sobbing in Pummil's office. Once she realized from this email string that appellant wanted to be reassigned to Philadelphia, USB Hickey raised the idea with the Secretary, Undersecretary, and the COS, and they "greenlighted it."

USB Hickey testified that the COS is the approving official for SES reassignments and relocation incentives, and that she did not have the authority to approve such actions. She testified that COS Riojas had no questions about appellant's and McKenrick's reassignments. She further testified that using directed reassignments had been VBA practice because after someone committed to moving, they had already had "one chance" to say "no," but once the reassignment was directed, the employee would be removed if they refused to move.



She further testified that she did not and does not believe that appellant did anything improper regarding McKenrick's reassignment. She also had not been concerned that appellant's and McKenrick's reassignment paperwork ran in a parallel manner. She testified that the "paperwork follows the decisions" in these cases. USB Hickey also testified that she did not know that appellant stayed involved with McKenrick's or Waller's reassignments, but she does "not know how she could have gotten away from it." She agreed that if one has an interest in a matter, one should recuse himself or herself. However, she would not acknowledge in her testimony that appellant had a personal interest in these matters.

Pummill, a career SES employee, testified that he had been the Principal Deputy USB in 2014 and now serves as the Acting USB. He testified that he did not get involved with negotiating McKenrick's relocation package. He reiterated USB Hickey's views about McKenrick's problems in Philadelphia and why he was right for Los Angeles. Pummill confirmed in his testimony that USB Hickey told him that appellant was "burned out" and, therefore, was interested in Philadelphia. He also confirmed that when appellant talked to him about this, she was sobbing and worried that she was letting down the VA. Pummill testified that appellant was the strongest leader with whom he had ever worked. He testified that one of the reasons for appellant's desire to be reassigned was that her mother was ill. He also testified that he did not see anything wrong with seeking a reassignment for personal reasons.

Pummill also testified that Graves, as the Eastern Area Director, supervised the two most troubled VBA regions; Baltimore and Philadelphia. He wanted her reassigned and agreed with McKenrick going to Los Angeles, where he is doing well, and with appellant going to Philadelphia. He testified that he would make the same decisions today, and that the decision to reassign appellant was in the best interest of veterans. Pummill confirmed that appellant told him that she was not comfortable with doing the paperwork for McKenrick's reassignment.

Clark testified that the Los Angeles VARO Director position was hard to fill and that McKenrick had witnessed this through his participation on an ERB. At one point they had made a selection for the job, but the candidate “backed out.” As previously indicated, Clark testified that McKenrick told him that he wanted to go to Los Angeles. *See* AF, Tab 37 (exhibit F).

Leonard, who had served as Acting Director of the Los Angeles VARO in 2013, testified that he spoke with McKenrick about going there on March 24, 2014, and he (Leonard) believed that the move would be great for that office, as McKenrick was detail-oriented and would work well with the office Assistant Director. *See* AF, Tab 57 (exhibit Q).

Appellant presented emotional testimony about her rise in the VA from a GS-7 position to the SES and her desire to “give back and to serve.” She testified that her Deputy Undersecretary position, which she had held from January 2008 through June 2014, had been “all encompassing,” as she oversaw and represented 56 VBA regions. She rarely worked less than 10-to-12 hour days and sometimes got up at night to do work. In 2011, the Philadelphia VARO became vacant and she thought of being reassigned there, but management said “no.” She testified that her mother lived in Dover, Delaware, which was actually not much closer to Philadelphia than to Washington, D.C. However, her mother now is in an assisted living facility in Wilmington, Delaware (which is closer to Philadelphia).

Appellant testified that on February 24, 2014, McKenrick called her “out of the blue” about the Los Angeles VARO Director position, after he served on an ERB which was convened to attempt to fill the position. He told her he could help the VA by taking the position and that it also would be good for his family. She noted this conversation on her calendar. AF, Tab 57 (exhibit NN, page 82). She also testified that she told Pummill, Graves, and Clark about McKenrick’s call.

Appellant further testified that after she confirmed with McKenrick that he was serious, she then told Clark to start the reassignment process. She reiterated

USB Hickey's views about McKenrick's difficulties in Philadelphia and why he was a good fit for Los Angeles.

She also testified that she took a vacation in mid-March 2014, during which she spent time thinking about the soon-to-be Philadelphia vacancy, but feared that would be seen as having let the VA down. She then saw Pummill on March 20<sup>th</sup>, cried, and told him that she wanted to be reassigned to Philadelphia. This led to the March 20<sup>th</sup> email message from USB Hickey to appellant that is described above. AF, Tab 7 (page 93). Appellant testified that she and USB Hickey met later and Hickey supported her going to Philadelphia. The following day, USB Hickey told her that COS Riojas also supported the move. Appellant's calendar entry from March 21<sup>st</sup> supports her testimony. AF, tab 57 (exhibit NN, page 95).

Appellant further testified that during a national training event on May 7, 2014, USB Hickey announced to VBA managers (including McKenrick and Waller) that the COS had approved appellant's reassignment to Philadelphia.

Appellant testified that her desire to go to Philadelphia was not for personal reasons and that it had nothing to do with her mother, despite what the OIG report concluded. She also reiterated that McKenrick's reassignment to Los Angeles was for the best interest of veterans.

With regard to the May 15<sup>th</sup> email string which is the basis for the allegation that she directed Graves to contact McKenrick to discuss his reassignment benefits and to encourage him to ask appropriate questions about what his pay would be upon relocation, appellant testified that she had received her May 15<sup>th</sup> "consultation" memorandum and she was confused by it because it indicated that Philadelphia was a payband 3 station. However, she thought that it was actually a payband 2 station. This is why the email string begins with a discussion of paybands. Graves thought it should be payband 2 also, according to the appellant. Appellant also testified that she was concerned by this because, at

that point in time, she did not know if her salary would be retained when she was reassigned.

Appellant further testified that she did not understand what the memorandum meant by “preferences,” and she was afraid that McKenrick, who had just five days within which to respond, would not know either. She did not want him to be surprised. She testified that she told Graves in the email message to check on these questions for McKenrick, as this was his first VBA move. Graves then offered to make sure that McKenrick “gets it done.” Appellant denied that she had “directed” Graves to do this, as alleged, but rather, “suggested” she do so. She believed that helping McKenrick was a sign of good leadership. She also testified that she was not sure why she had used the word “dropped” in conjunction with “relocation allowances,” but she was not asking Graves to tell McKenrick to drop his request for allowances.<sup>31</sup>

Following this, McKenrick contacted appellant to follow up about what Jones informed him “preferences” meant. AF, Tab 37 (exhibit P). Appellant and McKenrick spoke, probably the next day, and he asked about why his salary was going to be lower than he had thought. Appellant testified that McKenrick was “questioning the finances,” and she thought that “he was saying that he might not be able to handle it, salary-wise.” Appellant testified that they both were “uncomfortable” during this phone call, and she told him that she would speak to Pummill. She testified that this was the impetus for her May 19<sup>th</sup> email message to Pummill, in which she told him that she realized that she could “not be involved in these discussions anymore.” She also told Pummill that McKenrick had initiated the discussions about going to Los Angeles, because she wanted to remind Pummill that his move “was not something that she had orchestrated.”

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<sup>31</sup> Graves, a close friend of the appellant’s for more than 20 years, testified that she had no memory of what is described in this email string.

AF, Tab 7 (pages 97-98). Appellant testified that the OIG investigators did not ask her about these email strings.

With regard to the ETP which appellant signed on April 9, 2014, she noted that Clark was the recommending official, she was the reviewing official, and COS Riojas, the approving official. She testified that it was a new standard form which was to be given to new SES employees to document what they should be doing in their first 90 days; it was not a reassignment recommendation, as alleged. She agreed that the ETP is a required part of the paperwork for a reassignment, but she believed such forms were merely “ministerial.”

Appellant acknowledged in her testimony that had McKenrick not been reassigned, she would not have been reassigned to Philadelphia, and she would have remained in Washington, D.C. For example, appellant testified about an email string from late May, 2014, in which she asked for a “push” on her reassignment paperwork, and was told that her move to Philadelphia could not take place until McKenrick “officially agree[d]” to his reassignment. AF, Tab 65 (exhibit 12). She also expressed concern about what would happen if McKenrick did not timely respond to his reassignment notice. AF, Tab 65 (exhibit 14). She also stated in a May 14, 2014 email message to Shelton that she was “interested in ... [her] package to move to Philly RO Director, which is closely tied to the current Philly Director, Robert McKenrick, moving to the LA Director.” AF, Tab 65 (exhibit 18). However, appellant denied in her testimony putting pressure on anyone in order to clear the way for her reassignment.

#### Conclusions regarding specification 1

As testified to forcefully by Deputy Secretary Gibson, the OIG investigation led to unreasonable expectations of consequences for appellant. Ultimately, appellant was not prosecuted, and the agency agreed that she did not coerce, or even pressure, McKenrick or Waller into being reassigned, and she did not manipulate the system to create a vacancy in Philadelphia in order that she

could be reassigned thereto. Additionally, there was nothing unlawful about reassigning appellant to a former subordinate's position.

Moreover, I note that appellant's receipt of relocation, travel, and moving expenses was lawful, she received no relocation incentive payment upon her reassignment to Philadelphia, and her retention of her VA SES payband 1 salary was lawful (in fact, required), irrespective of whether or not the Philadelphia job was a step down for her. Thus, most of the clouds hanging over appellant's reassignment to Philadelphia faded away like a mirage upon close scrutiny.

Additionally, USB Hickey passionately testified that she recommended all of the reassignments at issue here for the best interests of the VA and veterans. She also emphasized that an employee's personal interest in going to a location does not rule out relocation benefits. She is correct in this assessment because, as summarized in the background to this decision, under the law, a reassignment may not be primarily for the convenience or benefit of the reassigned employee; being of some convenience or benefit to the reassigned employee does not mean that the reassignment is not in the best interest of the government.

But, all of this does not answer the question of whether or not appellant created an appearance of impropriety. Based on all of the above, I find it is clear that appellant had a personal interest in being reassigned to Philadelphia; whether for family reasons or because she was "burned out" in her Washington, D.C., position, or because she stood to receive significant relocation benefits. The excitement expressed in the May 27, 2014 email message by appellant's longtime friend Graves ("Woo hoo!"), when it was clear that McKenrick was, in fact, going to be reassigned from Philadelphia, underscores that appellant's reassignment to Philadelphia had a personal component. That appellant also had professional reasons (the good of the VA and veterans) is laudable and beyond doubt, but it does not eliminate her personal motivation, and therein lies the conflict which created the appearance of impropriety.

Appellant acknowledged in her testimony that her reassignment to Philadelphia was contingent upon McKenrick's reassignment to Los Angeles, and her inquiries about what would happen if McKenrick did not timely respond to various deadlines set out in the reassignment paperwork, makes clear that appellant was anxious about whether or not McKenrick would, at the end of the day, actually be reassigned.

As set out in her May 19<sup>th</sup> email message to Pummill and her email message of May 27<sup>th</sup> to Graves, appellant recognized the inherent conflict created by discussing with McKenrick the amounts of his potential relocation benefits and the pay raise he might receive upon reassignment, and she tried to extricate herself from those discussions. The conflict that she recognized at that point was obviously between the interest of the VA in paying as little as possible to a reassigned employee, and her personal interest in having McKenrick agree to the terms of the reassignment and to leave Philadelphia.

However, what appellant did not seem to understand was the conflict between her personal desire to go to Philadelphia and any actions she took to facilitate McKenrick's reassignment, because her facilitation could appear to have been due to her personal interest in McKenrick's reassignment, not because his reassignment was in the best interest of VA and veterans. The fact that the idea of McKenrick's reassignment to Los Angeles clearly began with himself, and not with appellant, does not eliminate the appearance of impropriety.

Appellant has argued that once the decision to reassign McKenrick was agreed to at the highest levels of the VBA and the VA in late March 2014, her actions thereafter were merely ministerial, and also that they were taken to effect the wishes of USB Hickey, Pummill, and COS Riojas. But, the fact that these officials had decided that McKenrick's reassignment was in the best interest of the VA and veterans does not eliminate appellant's personal interest in going to Philadelphia. Additionally, it is clear that McKenrick's reassignment could have fallen through despite upper management's desires.

There is no dispute that appellant signed McKenrick's ETP on April 8, 2014, after she had expressed an interest in going to Philadelphia, and before McKenrick's reassignment was assured. It is also not disputed that, despite the relatively minor significance of this form (it did not involve money or a pay raise), it was a required part of an SES reassignment package. Therefore, appellant's signature on the ETP form did facilitate McKenrick's reassignment from Philadelphia.

With regard to the May 15<sup>th</sup> email string with Graves, I do not find it significant whether appellant "directed" or "suggested" that Graves contact McKenrick about how to complete paperwork about his Los Angeles pay level and various relocation incentives. I have no doubt that appellant, as she testified, was trying to assist McKenrick with the reassignment process because it was good to do so from a leadership perspective. However, appellant's involvement clearly facilitated McKenrick's reassignment; McKenrick called her shortly after her email discussion with Graves with more questions, and he completed his paperwork on May 19<sup>th</sup>, indicating his preferences for salary and benefits. I realize that McKenrick initiated this call and appellant wisely recused herself thereafter; but it was too late.

Based on the above, it is clear that appellant's email discussion with Graves took place after appellant had expressed an interest in going to Philadelphia, and before McKenrick's reassignment was assured, and her direction or suggestion that Graves inform McKenrick how to complete his paperwork facilitated McKenrick's reassignment from Philadelphia.

In conclusion, I agree with Deputy Secretary Gibson that appellant should have recused herself from all involvement in McKenrick's reassignment and that by not doing so on these two specified occasions, she created the appearance of impropriety, and in so doing, failed to exercise sound judgment.

Specification 2 is NOT SUSTAINED

In specification 2, the agency alleged that:



In March 2014 you expressed interest in being reassigned to the Philadelphia VARO. You knew the Regional Office Director in St. Paul, MN, Waller, had expressed interest in this position. On or about May 14, 2014, you approved a financial relocation incentive for Waller to fill the Baltimore VARO vacancy.

On or about June 1, 2014 you were reassigned from your position as Deputy Under Secretary for Field Operations to the position of Director at the Philadelphia VARO. Pursuant to this reassignment you received relocation benefits, including reimbursement for moving expenses and participation in a program that guaranteed the sale of your home.

By failing to fully extricate yourself from activities surrounding Waller's relocation, and then by accepting a reassignment to the Philadelphia VARO and relocation benefits from the Department, you created the appearance that these transactions were approved for reasons other than the best interests of Veterans. I consider this a failure to exercise the sound judgment I expect from a Senior Executive.

AF, Tab 1 (pages 9-11).

Here, the agency specifies that appellant "participated in facilitating" Waller's reassignment in one way: by approving a relocation incentive for him on May 14, 2014.

Chronological documentary evidence from the OIG report

In an exchange of email messages in early March 2014, Graves discussed a relocation incentive for Baltimore and stated that appellant had told her that an incentive greater than 25% was more than had been previously discussed. AF, Tab 14 (pages 72-74).

In a May 14, 2014 email message from the Executive Management Officer for the VBA Eastern Area Office, to and copied to various employees, including Graves, he stated that:

Natasha – attached is VA Form 10016 [for Waller] signed by Graves as well as the Relocation Service Agreement (SA needs Diana's signature).

Dave/Dwayne – could you get Diana’s signature on the attached Relocation Service Agreement and provide back to the folks on this email?

AF, Tab 6 (page 70). Seven minutes later, the Executive Assistant for the Office of Field Operations responded by enclosing the RRSA signed by appellant. *Id.*

Waller signed the RRSA on May 13, 2014; in return for serving in Baltimore for 36 months, the VA agreed to pay him \$36,740.00 each year for three years. Graves was the recommending official and appellant signed the form, apparently as the approving official. They both signed the RRSA on May 14, 2014. AF, Tab 24 (page 13).

On a Justification and Authorization of Recruitment and Relocation Incentives form, Graves recommended on May 14, 2014 that USB Hickey approve a relocation incentive of \$36,740.00, payable over three years to Waller (the terms on the RRSA agreement which Waller, Graves, and appellant had signed). In the memorandum, Graves stated that Baltimore VARO leadership position turnover had been extremely high and that recruitment for the Director’s position had been particularly challenging. She further stated the new Director must be a proven leader. AF, Tab 24 (page 14).

Graves further asserted that a 22%-of-salary incentive was needed in order “to attract a proven candidate to relocate into a high cost of living area and provide continuity of operations/leadership.” She also stated that Waller was “an experienced leader and knowledgeable of the operations of a large Regional Office.” *Id.* (page 16). The memorandum was concurred in for the Director, Office of Human Resources on June 20, 2014, and approved by USB Hickey on the same day. *Id.* (pages 15-16).

By “consultation” memorandum dated June 25, 2014, Hickman, Acting Executive Director, CSEMO, informed Waller that COS Riojas was considering reassigning him outside of his commuting area to the Director, Baltimore VARO position, because he had identified him as an executive who possessed “the

unique background and credentials necessary to succeed in this critical position.” AF, Tab 14 (pages 143-144). She further indicated that the agency desired to “foster position and geographic mobility as one approach for filling critical leadership positions.” *Id.*

In the memorandum, USB Hickey stated that the reasons for the proposal to reassign Waller were that:

the Baltimore Regional Office is responsible for the effective operations and administration of nearly \$4.1 billion in benefits and services to over 470,000 veterans and beneficiaries in the state of Maryland totaling over \$62 million in monthly payments. It is critical that the ... VBA fill this key position with a Director who has the background and experience necessary to manage the Baltimore Regional Office.

*Id.* Waller acknowledged receipt of the memorandum on June 27<sup>th</sup>. *Id.* (page 144).

In a memorandum he also signed on June 27<sup>th</sup>, Waller stated that the proposed relocation incentive would cause him severe financial hardship. AF, Tab 24 (page 12). In an undated and unsigned response, the agency informed Waller that he would be reassigned with no loss of pay, that his relocation incentive would be \$40,000.00 payable in two installments in return for a one-year service agreement, he would receive AVO benefits, and he could be reassigned at once if he waived the 60-day notice period. AF, Tab 24 (page 28).

On a second Justification and Authorization of Recruitment and Relocation Incentives form, Graves recommended on May 14, 2014 that USB Hickey approve a one-time relocation incentive for Waller of \$40,000.00, in return for a one-year service agreement. In the memorandum, Graves again stated that the Baltimore VARO leadership position turnover had been extremely high and that recruitment for the Director’s position had been particularly challenging. She further stated the new Director must be a proven leader. AF, Tab 24 (pages 22-

23).<sup>32</sup> The memorandum was concurred in by the Director, Office of Human Resources on July 11, 2014, and approved by USB Hickey on the same day. *Id.* COS Riojas approved the \$40,000.00 amount on the form on July 14<sup>th</sup>. *Id.*

Waller's AVO participation was approved by Director, Office of Human Resources; Director, Office of Resource Management; and USB Hickey on June 10<sup>th</sup>, 16<sup>th</sup>, and 20<sup>th</sup>, respectively. A signature block for appellant is blank. AF, Tab 15 (page 28). Waller ultimately opted out of the AVO program, which cost the VA a \$2,396.25 cancellation fee. AF, Tab 14 (pages 45-46).

On a June 24, 2014 memorandum to the COS, through the Assistant Secretary for Human Resources and Administration, Hickman stated that USB Hickey recommended that Waller be non-competitively reassigned to the Baltimore position. She also noted that while Waller was being reassigned from a payband 3 to another payband 3 position, he possessed "exceptional leadership" abilities which were needed in Baltimore. Therefore, she recommended that he be given a 19.6% pay raise from \$139,638.00 to \$167,000.00, and a \$36,740.00 relocation incentive. AF, Tab 15 (pages 17-19). On June 24, 2014, on page 3 of this memorandum, COS Riojas initialed his approval of Waller's reassignment to the Baltimore position with a pay increase to \$167,000.00, a relocation incentive (of unspecified amount), and participation in the AVO program. *Id.* (page 19).

In an undated memorandum, USB Hickey recommended that the Secretary approve Waller's appointment to the Baltimore position. A similar justification to the one above was spelled out in the memorandum. AF, Tab 7 (pages 30-32).

In a July 11, 2014 memorandum, USB Hickey recommended that the Secretary approve Waller for a \$40,000.00 relocation incentive payable in two six-month installments in return for a 12-month service agreement. A similar justification to the one above was spelled out in the memorandum. On page 3 of

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<sup>32</sup> It appears that Graves's portions of this form were unchanged from the version approved in June.

the memorandum, USB Hickey justified Waller's relocation incentive by noting his extensive Regional Office Director experience in St. Paul since 2010, and his exceptional leadership abilities throughout his VBA career. AF, Tab 7 (pages 34-35).

By memorandum dated July 14, 2014, Hickman sought the COS's approval for Waller's \$40,000.00 relocation incentive payment to be paid in two instalments in return for his one-year service agreement. Hickman noted Waller's concerns about the financial impact upon his family of moving from Minnesota to Baltimore. The Assistant Secretary for Human Resources and Management concurred in the recommendation on July 14<sup>th</sup> and COS Riojas approved the recommendation the same day. AF, Tab 15 (pages 5-6).

By notice dated July 14, 2014, Hickman directed Waller's reassignment from Director, St. Paul VARO (VA Pay Band 2), to Director, Baltimore VARO (VA Pay Band 3), no earlier than 60 days from the date of the notice (unless he waived the notice period.). He was advised that if he refused the directed reassignment, he would face removal. AF, Tab 24 (pages 25-26). Waller accepted the reassignment that day and waived the 30-day notice period. *Id.* (page 37).

#### Testimony regarding Waller's reassignment

Deputy Secretary Gibson testified that appellant was the senior person to sign Waller's RRSA and that by doing so, she facilitated the Philadelphia vacancy by "redirecting" Waller from his original choice of Philadelphia to Baltimore. He agreed that others were involved in this "redirection" as well. He further testified that the RRSA was an "essential step" in Waller's relocation. Deputy Secretary Gibson also testified that he believed appellant knew Waller wanted to go to Philadelphia when she signed this form on May 14, 2014.

USB Hickey testified that once she heard from either appellant or Pummill that Waller was interested in Baltimore, she "jumped on it." She testified that he had performed very well as the St. Paul VARO Director, but he had ties to

Maryland and Baltimore, had a “background in diversity,” and was “absolutely the right guy for that job.” She testified that Waller “had Baltimore oozing out of him.” She realized that the move to Baltimore was good for Waller personally, but she also wanted the Baltimore VARO to do well. USB Hickey testified that she spoke with Waller in early June 2014 to thank him for volunteering for Baltimore.

USB Hickey further testified that she had no idea that Waller had any interest in being reassigned to Philadelphia until an OIG investigator told her this, but that had she known, she would “have said ‘no.’” She testified that she already had talked to the then-Deputy Secretary and COS Riojas about Waller going to Baltimore and had also informed Congress. USB Hickey testified that she disagreed with the OIG’s finding that the Baltimore VARO was less complex than the St. Paul VARO, because the Baltimore office’s problems made it the more complex office of the two.

USB Hickey also testified that she did not know that Waller had told people he did not want to go to Baltimore, and she did not know that Pummill told him that he would be fired if he did not go. USB Hickey testified that she did know that Waller was “underwater” on his home in St. Paul, so his financial situation was “tough.” She also knew that he had “pushed back” about the amount of money he would receive in the reassignment. Therefore, she instructed her staff to “do what it takes to get it done.” She herself did not get involved in negotiations over money.

The agency stipulated that Pummill negotiated relocation benefits with Waller, including a salary increase. AF, Tab 78. Pummill testified that he was very involved with Waller’s move because he had wanted more money. He testified that appellant had updated him on Waller’s negotiations and that “it got stuck.” *See, e.g.*, AF, Tab 65 (exhibits 8, 10). He further testified that COS Riojas would not approve more than \$40,000.00 for Waller and that he (Pummill) then told Waller that “he was going” or he would be disciplined. Pummill

testified that Baltimore had been “a mess,” and that Waller has done a great job there. Therefore, he would make the same decision today.

Appellant denied on the stand that she was involved in Waller’s desire to go to Philadelphia, and she testified that she did not know that Waller had expressed an interest therein. All she knew was that at some time, Graves and McCoy had discussed whether or not Waller would consider Philadelphia. However, she agreed that the transcript of her OIG interview indicates that she was involved and she did know. She emotionally testified that she has read and reread the transcript many times, and then explained how she had not been shown relevant documents by the OIG investigator, was not represented, was not advised as to what they were investigating, and that she often let them, essentially, put words into her mouth. AF, Tab 30 (pages 289-290). At the end of her interview, she felt ambushed, she testified. For reasons that are explained below, it is not necessary to resolve this conflict, but there certainly is strong evidence that appellant was heavily involved in June 2014 with Waller’s relocation package for Baltimore. *See* AF, Tab 65 (exhibits 8, 10).

Graves agreed in testimony that there had been a short period of time in mid-March 2014 during which she and Waller discussed Philadelphia, after McCoy asked her to call Waller to see if he had any interest. AF, Tab 36 (exhibit O). However, after that time, all of the discussions were about Baltimore, as he told Graves that he was not really interested in the East Coast unless it was to go to Baltimore.

Graves further testified that on April 3, 2014, Waller shared with her an email message he had sent to appellant in which he committed to going to Baltimore. AF, Tab 57 (exhibit V).<sup>33</sup> Graves testified that she and appellant spoke with Waller about relocation incentives, but they needed Pummill’s help after negotiations had broken down.

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<sup>33</sup> Thus, Waller had made a commitment to go to Baltimore well before the RRSA at issue here.

Waller testified that he and his wife have family ties in Baltimore and Maryland. He testified that, at his own initiative, he called Graves in mid-March about Baltimore, and that on April 25<sup>th</sup>, he sent Graves his resume for her to consider. AF, Tab 57 (exhibit Z). On April 28<sup>th</sup>, he sent an email message progress report concerning Baltimore. AF, Tab 57 (exhibit AA). Waller also testified that he had not told Graves that he was interested in Philadelphia; rather, she has asked him about it. He also testified that he told her shortly thereafter that they could “move out” on Philadelphia, but was told by her in late March that “Philly was out,” and that she would tell him some time later “why,” as they had to “wait for some dominos to fall.”

Waller further testified that he was then told by Graves that Philadelphia was “off the table” and that he met with Graves and appellant in April and spoke about possible Baltimore incentives. In June, he spoke with Pummill who told him that COS Riojas said that the maximum incentive would be \$20,000.00 (paid twice). Waller agreed that he did not receive the incentive payment on the RRSA signed by appellant on May 14, 2014.

#### Conclusions regarding specification 2

As with the RRSA under specification 1, the May 14<sup>th</sup> RRSA never went into effect. Therefore, appellant’s signature did not, in fact, facilitate Waller’s reassignment to Baltimore, although she must have thought she was facilitating it. The amount to be paid to Waller under the agreement was rejected by upper management, and ultimately a relocation incentive of \$40,000.00, paid in two annual installments, was approved. Waller testified that he received that amount but that “there might not be” an RRSA covering the \$40,000.00 amount, and that he could not recall signing a new RRSA. I note that there is no such RRSA in the vast paper record in this case. Therefore, it appears that Waller received \$40,000.00 without ever agreeing in writing to serve in Baltimore for a specified period of time. Therefore, a signed RRSA was not a vital requirement for Waller’s reassignment.



However, even more importantly, appellant testified, and it was undisputed, that her reassignment to Philadelphia was not contingent on Waller's reassignment to Baltimore. In other words, had Waller's reassignment to Baltimore fallen through for some reason, such as a disagreement over money, this would have had no impact on appellant's reassignment to Philadelphia. USB Hickey testified she did not know anything about Waller going to Philadelphia and that, had she known, she would have said "no." Therefore, I find that it was never a matter of "either Waller or appellant" for Philadelphia. Clearly, USB Hickey, a very strong supporter of the appellant, was never going to support Waller's reassignment to Philadelphia once she knew of appellant's interest. Therefore, even if appellant did facilitate Waller's reassignment to Baltimore, there simply was no real or reasonable appearance of a conflict between his interests and hers.

The implication in the OIG report, and the focus of Deputy Secretary Gibson's testimony, was the notion that only by sending Waller to Baltimore did Philadelphia remain open for appellant. Therefore, in his view, she had needed to "divert" Waller from Philadelphia. But when considering all the evidence from an objective point of view, there is no evidence to support even the appearance that this was the case.

Instead, it is true that Waller had to be reassigned from St. Paul in order that Graves could be reassigned thereto. And, while one may assume that the appellant, who is Graves's close friend, wanted to see St. Paul open up for Graves, appellant is not charged with having manipulated the system in order to facilitate that outcome, or creating an improper appearance that she did so. Rather, she is charged with creating the appearance that she facilitated Waller's reassignment to Baltimore in order to "divert" him from Philadelphia so that she could be reassigned to Philadelphia.

The disconnect between Graves's reassignment and appellant's is underscored by the fact that Graves expressed her frustration to appellant on June

5, 2014, as evidenced by a calendar note on that date, in which appellant wrote: “Kim G. ‘done.’” AF, Tab 57 (exhibit NN, page 91). Appellant testified that Graves was frustrated as Eastern Area Director, and that it was only after this date that Graves became a candidate for reassignment.

Harmful procedural error and a due process violation were not proven

Appellant raised two affirmative defenses for which she bears the burden of proof by preponderant evidence. 5 C.F.R. §§ 1210.18(b-c). *See* 5 U.S.C. § 7701(c)(2); 38 U.S.C. § 713(d)(2)(A). Specifically, she asserts that the agency committed harmful procedural error by not following subparagraph 7e(3) of the Expedited Removal Policy because, she asserts, Deputy Secretary Gibson did not give “full and impartial consideration” to her reply and all of the evidence of record as required by that subparagraph, as his decision was predetermined due to political pressure placed on the VA. Appellant also asserts that the agency did not follow subsection 7(c)(3) of its Expedited Removal Policy, because that subsection requires that a “Recommending Official” package be presented to the Deputy Secretary before a Pending Action Memorandum is prepared, but there was no such package prepared in this case. Rather, the Deputy Secretary based his Pending Action Memorandum solely upon the OIG report. Appellant also asserts that the Deputy Secretary’s predetermination violated her right to due process.

Harmful procedural error, as an affirmative defense, is defined as “error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.” 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). Harmfulness may not be presumed. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

First, even it was an error to not prepare a “Recommending Official” package for the Deputy Secretary before he issued a Pending Action Memorandum, I do not find that the cure of the error likely would have caused

the agency to reach a different conclusion. Deputy Secretary Gibson demonstrated a mastery of the facts and had discounted much of the OIG investigation. Therefore, I do not find that another level of review by a Recommending Official would have changed his view of the case.

With regard to predetermination, Deputy Secretary Gibson testified most credibly that he was not influenced by outside pressure in taking the action against appellant. He testified that he receives outside inquiries from Congress and others every day.<sup>34</sup> He also testified that the VA is “constantly under fire” and subject to “misinformation and innuendo” from which he “insulates” himself. He further testified that he “completely compartmentalized” appellant’s case, as evidenced by the fact that the pressure he received was to remove appellant, which he did not do.

Appellant testified tearfully that she believes the OIG report was biased due to Congressional pressure, amplified through the press, that she is an easy target, and that the VA felt it had to use section 713, which is not fair, is too fast, and does not allow for depositions.

Based upon Deputy Secretary Gibson’s testimony, I do not find that he predetermined the outcome. He granted appellant an extension of time within which to reply to the Pending Action Memorandum and he clearly had read every word of the OIG investigation, all of the witness interview transcripts, and both of appellant’s replies. I also do not find that he succumbed to pressure to use the expedited process. He testified that it was his policy to use the expedited process in all SES removal cases, although he agreed that in general he believed it was bad policy to have different processes for different types of employees. Therefore, I find neither a harmful procedural error nor a constitutional predetermination problem.

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<sup>34</sup> At AF, Tab 36 (exhibits G-J), are a number of Congressional press releases related to appellant’s case.

The penalty was unreasonable under the circumstances

The Board generally analyzes the agency's penalty selection, including penalties assessed to members of the SES, under the statutory "efficiency of the service" standard, as interpreted by *Douglas* and its progeny. *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280, 307-08 (1981). See 5 U.S.C. § 7701(b)(3) (Board may mitigate penalty imposed on SES employees). That general rule places the burden of proving the reasonableness of the agency's penalty selection on the agency. *Id.*; see also 5 C.F.R. § 1201.56(b)(1). However, in interpreting 38 U.S.C. § 713, the Board concluded that the efficiency of the service standard and *Douglas* do not apply, and that the express statutory language creates a rebuttable presumption in favor of the VA Secretary's discretion to select the appropriate penalty. 79 Fed. Reg. 63031, 63032 (Oct. 22, 2014).

Thus, proof of the charged misconduct shall create a presumption that the imposed penalty was warranted. However, the appellant may rebut this presumption by establishing that the penalty was unreasonable under the circumstances of the case. If she does so, the agency's action must be reversed because mitigation of the penalty by the administrative judge is not authorized. 5 C.F.R. §§ 1210.18(a), (d).<sup>35</sup>

In his notice of pending action, Deputy Secretary Gibson stated that:

In determining the level of penalty to impose as a result of your misconduct, I have considered a number of factors. As a senior executive, it is imperative to the efficient operation of the Department that you exercise sound judgment at all times. By involving yourself in aspects of McKenrick's and Waller's reassignments, after expressing interest in relocating to Philadelphia, you created the appearance that you were facilitating these reassignments, at least in part, for personal reasons rather than for

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<sup>35</sup> In counsel's closing argument, appellant preserved an objection to this presumption provision, arguing that the Board's statutory interpretation is erroneous since the burden of proof is and should always be on the agency under civil service law.

legitimate business reasons. Your failure to recognize this and extricate yourself from official involvement in these reassignments has caused me to question your judgment. Your actions have the potential to cause the American public to lose trust in the Department to make sound business decisions in the best interests of Veterans. I gave serious consideration to removing you from federal service. However, although I have lost confidence in your ability to function effectively as a Senior Executive, your 27 years of service to the American public and your unblemished disciplinary record have convinced me that potential exists for your rehabilitation and that you should not be removed from federal service. Rather, you should be demoted. By placing you in a position of reduced authority, I hope to prevent future instances of this type of misconduct, while still providing you the opportunity to serve our nation's Veterans.

AF, Tab 1 (page 10). Deputy Secretary Gibson did not add anything further regarding the penalty in his decision letter.

In his testimony, the Deputy Secretary stated that he believes appellant can still be of great service to veterans in Houston, away from the Philadelphia environment, where she would fill a vacancy, and that he decided on the grade and step of the demotion because of the seriousness of the charge, despite his realization that appellant's reassignment to Houston would necessarily involve the payment of moving expenses.

USB Hickey testified that appellant cares deeply about veterans, is the daughter of a Pearl Harbor survivor, is mature and experienced, and is good with the press and in giving testimony. She and Pummill offered absolutely glowing assessments of appellant's work ethic, performance, and character. Deputy Secretary Gibson was also complementary of appellant as a senior leader. USB Hickey noted just one past negative incident in appellant's career involving a derogatory comment she had written about a Congressional staffer during a visit to the Philadelphia VARO.

In her reply to the first Pending Action Memorandum (which she incorporated into this appeal), appellant asserted that the proposed removal from

the SES and transfer to a non-SES position (and particularly to GS-15, step 1) was unreasonable given her long career and stellar record of service.<sup>36</sup> She noted that her career began (in 1987) as a GS-7 Veterans Claims Examiner.<sup>37</sup> She highlighted that she was a 2006 Presidential Rank Award recipient, based on her duties as the Director of a VBA Area Office. (First reply, exhibit 9). She stated that this prestigious award memorialized a career burgeoning with Special Act Awards, performance awards, and hard-earned, incremental promotions. She argued that marring her career by transferring her out of the SES would be a disservice to veterans who rely on her leadership and experience, as would succumbing to Congressional pressure to discipline her. She also underscored a number of recent outstanding performance appraisals. (First reply, exhibits 10-12).

Appellant argued that when considering that the VA did not charge her with any actual ethical violation or any non-appearance wrongdoing, her glowing evaluations should provide ample reason to find that the penalty of stripping her membership in the SES is wholly unreasonable, particularly in light the absence of any prior permanent disciplinary record. She also argued that she did not hide any of her actions, and that USB Hickey, Pummill, and COS Riojas never expressed any concerns about them.

Creating an appearance of impropriety is a serious charge and senior managers are held to a higher standard of conduct than other employees. *See Coons v. Department of the Navy*, 15 M.S.P.R. 1, 5 (1983); *Walcott v. U.S. Postal Service*, 52 M.S.P.R. 277, 284 (1992). However, the above mitigating matters, coupled with the fact that only one of two specifications has been sustained based on just two discrete acts (out of four), and that appellant did eventually recognize the appearance of impropriety issue, would ordinarily incline me to seriously

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<sup>36</sup> The first reply is at FAF, Tab 1 (pages 14-30) (and attached exhibits).

<sup>37</sup> Appellant's resume is at AF, Tab 23 (pages 14-16).

consider mitigation of the penalty. I am mindful, though, that mitigation is not authorized under section 713 and that appellant must overcome a presumption of reasonableness in this case, which I am uncertain she has done, even considering her strong evidence and argument regarding the penalty. However, I need not decide this question, as I find that there is a significant problem created by the inconsistent treatment of a comparable employee, and that this makes the penalty unreasonable under the circumstances.

The comparable employee issue<sup>38</sup>

The consistency of an agency-imposed penalty with those imposed on other employees for the same or similar offenses is a factor in determining the reasonableness of the penalty. *See, e.g., Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010).

To establish disparate penalties, an appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar to those in the comparator's case. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). If she demonstrates that the charges and circumstances surrounding the charged behavior of another employee are substantially similar, then the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶ 10 (2010); *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 6.

To trigger the agency's burden, the appellant must show that there is enough similarity between both the nature of the misconduct and the comparator

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<sup>38</sup> Appellant presented evidence and testimony about the misconduct of two SES employees, which was committed off of government property and not in the Washington, D.C., area (one involved work-related misconduct; the other, a self-reported driving-related issue). The first resulted in a reprimand by a deciding official other than Deputy Secretary Gibson; the other, which Gibson was unaware of until shortly before the appellant's hearing, resulted in no agency action. I find these employees and matters not similar enough to be compared to appellant and her misconduct.

employee to conclude that the agency treated similarly-situated employees differently. Factors, such as whether she and the comparator were in the same work unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time, may be considered when examining these questions. *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 & n.4 (2012); *Lewis*, 113 M.S.P.R. 657, ¶¶ 12, 15. Other relevant considerations include whether the agency actually treated similarly-situated employees differently, whether the difference in treatment was knowing and intentional, whether the agency began levying a more severe penalty for an offense without giving notice of a change in policy, and whether an imposed penalty was appropriate for the sustained charges. *Lewis v. Department* 113 M.S.P.R. 657, ¶ 15 & n.4 (noting that these factors are consistent with the court's rationale in *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009)).

As indicated above, USB Hickey, McCoy, and Pummill were cited in the OIG report for possible disciplinary action, along with appellant and Graves. It concluded that McCoy and appellant (erroneously) had pressured Waller into his Baltimore reassignment. USB Hickey was a political appointee and, therefore, she cannot be compared to appellant. Graves faced action very similar to that faced by appellant. However, it is undisputed that McCoy and Pummill have not been disciplined and, in fact, have been promoted. Because of my findings regarding McCoy, I need not reach the issue of Pummill.

The agency stipulated that McCoy put pressure on Waller to accept a reassignment to Baltimore. It also stipulated that McCoy participated in facilitating the appellant's reassignment to Philadelphia, after which McCoy accepted a promotion to appellant's former Deputy Under Secretary for Field Operations position. AF, Tab 78.

McCoy testified that she had been appellant's assistant before appellant was reassigned to Philadelphia. She knew that she would be considered for appellant's position, and she was selected to replace appellant. However, since



McCoy was on a detail to Washington, D.C., she did not need to relocate. Further, McCoy testified that this reassignment was a promotion for her. It came with an \$18,000.00 per annum pay raise according to Deputy Secretary Gibson's testimony.

On May 29, 2014, McCoy facilitated appellant's reassignment to Philadelphia by signing a form as the Assistant Deputy Undersecretary for Field Operations, thereby recommending approval of appellant for the AVO (home selling) program. AF, Tab 7 (page 56). Even though this action helped facilitate appellant's June 1<sup>st</sup> reassignment to Philadelphia because, as explained above under specification 1, appellant would not accept the reassignment without the AVO program, and McCoy was interested in appellant's position, McCoy, a career SES employee, testified that she was not disciplined for taking this action.

Based on the above, I find that McCoy's situation is virtually identical to appellant's. McCoy facilitated appellant's reassignment by recommending approval of the final matter to be resolved before appellant could be reassigned. Once appellant was reassigned, McCoy stepped into appellant's former position with a sizable pay raise. This creates the precise appearance of impropriety which appellant created. Therefore, like appellant, McCoy should have recused herself. Additionally, as an aggravating matter, McCoy, unlike appellant, actually pressured Waller to go to Baltimore. Therefore, the burden shifts to the agency to prove that there was a legitimate reason for the difference in treatment of McCoy by a preponderance of the evidence before the penalty can be upheld.

Deputy Secretary Gibson testified that he has no intent to discipline McCoy because Pummill, not McCoy, had the authority "to effect the position vacated" by appellant, and McCoy did not receive relocation benefits. I do not find that these are meaningful distinctions. First, although she did not relocate, McCoy had a sizable pay raise to lose if appellant's reassignment fell through. Additionally, regardless of who had authority over appellant's position, the

appearance of impropriety on McCoy's part stands. Finally, unlike McCoy, the agency agreed that appellant did not pressure anyone into being reassigned.

In conclusion, I find that appellant has rebutted the presumption that the penalty was reasonable. If section 713 did not prohibit it, I would mitigate the penalty. However, because that it not allowed, the only option is to reverse the action outright. 5 C.F.R. §§ 1210.18(a),(d).

### **DECISION**

The agency's action is REVERSED.

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William L. Boulden  
Chief Administrative Judge

### **NOTICE TO APPELLANT**

Pursuant to 38 U.S.C. § 713(e)(2), this decision is final and not subject to any further appeal.

### **ORDER**

I ORDER the agency to cancel appellant's removal from the SES and her transfer to the General Schedule (GS) 15, step 1, position of Regional Assistant Director, Houston VARO, and to restore the her effective January 6, 2016. *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.

I 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. I 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 this

Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, I ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

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.

#### **ATTORNEY FEES**

You may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date of this decision. Pursuant to 5 C.F.R. § 1210.20(d)(2), any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

#### **ENFORCEMENT**

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency. Pursuant to 5 C.F.R. § 1210.20(d)(1), the procedures in 5 C.F.R. Part 1201, Subpart F, not those in Part 1210, apply to any such petition.





## **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.