

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 50

Docket No. CH-0731-09-0578-I-1

**James A. Scott,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

May 9, 2011

Jeffrey Letts, Esquire, Trenton, New Jersey, for the appellant.

Darlene M. Carr and Robert J. Girouard, Esquire, Washington, D.C., for
the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the decision of the Office of Personnel Management (OPM) to direct his removal and take other suitability actions pursuant to 5 C.F.R. part 731. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision, and REMAND the case for further adjudication of the appellant's claim of prohibited discrimination. OPM's decision is NOT SUSTAINED.

BACKGROUND

¶2 On January 23, 2006, the appellant received a conditional excepted service appointment to a Human Resources Specialist position with the Defense Finance Accounting Service (DFAS). Initial Appeal File (IAF), Tab 6, Subtab 2r. According to the Standard Form (SF) 50 recording the appointment, the appellant's continued employment was subject to successful completion of a background security investigation and favorable adjudication. *Id.* However, because the appellant had already been granted a security clearance during his previous employment in the U.S. Army, and there had not been a break in service of greater than 24 months, DFAS, in accordance with agency policy, granted reciprocity to the prior security clearance determination and did not conduct or request a new suitability investigation. IAF, Tab 18, Attachment A at 2-3. On January 23, 2008, the appellant was converted to a career appointment in the competitive service. IAF, Tab 6, Subtab 2q.

¶3 In February 2008, the appellant's wife applied for a Civilian Pay Technician position with DFAS. *Id.*, Subtab 2j. During the processing of her application, a DFAS personnel security specialist discovered that her résumé, which purported to list her job duties with previous employers in the private sector, included duties that she did not perform and contained terms associated exclusively with Federal employment, such as FEGLI, OPM, and "thrift savings plan." *Id.* DFAS referred the matter to OPM, and in the course of the subsequent investigation, the appellant admitted to writing his wife's résumé. *Id.*

¶4 By letter dated April 8, 2009, OPM informed the appellant that, pursuant to 5 C.F.R. part 731, it had found him unsuitable for any covered position¹ in the Federal service based on a charge of deception and fraud in connection with his wife's application. *Id.*, Subtab 2c. OPM further indicated that, in accordance

¹ Title [5 C.F.R. § 731.101](#)(b) defines a "covered position" as "a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service."

with [5 C.F.R. § 731.202\(c\)](#), it had considered additional factors it deemed pertinent to the case, but that the only consideration deemed pertinent was the nature and seriousness of the offense. *Id.* OPM further informed the appellant that it had taken the following actions: (1) directed DFAS to remove him from the rolls within 5 days of receipt of its decision; (2) cancelled any reinstatement eligibility obtained from his appointment or any other eligibilities he may have had for covered positions; and (3) debarred him from competition for, or appointment to, any covered position for a period of 3 years. *Id.* DFAS effected his removal on April 13, 2009. *Id.*, Subtab 2a.

¶5 The appellant filed a timely appeal with the Board. IAF, Tab 1. In addition to contesting the charge and suitability determination, he argued that, as a matter of law: (1) OPM has not been delegated the authority to base a suitability action solely on post-appointment conduct; (2) the regulation at [5 C.F.R. § 731.202\(b\)\(3\)](#), concerning the charge of “material, intentional false statement, or deception or fraud in examination or appointment,” applies only to an individual’s own application for employment; and (3) the “integrity of the service” standard under [5 C.F.R. § 731.201](#) exceeds OPM’s statutory authority. *See* IAF, Tabs 8, 13, 19. He also raised a claim of discrimination based on race and/or color (African-American/black). IAF, Tabs 1, 19. Following a hearing, the administrative judge issued an initial decision in which he rejected the appellant’s legal arguments, sustained the charge and suitability determination, and found that the appellant failed to prove his discrimination claim. IAF, Tab 24 (Initial Decision). On September 21, 2009, the appellant filed a petition for review, reiterating the arguments he raised below. Petition for Review File (PFR File), Tab 1.

¶6 Meanwhile, on October 7, 2009, OPM moved for the Board to reopen the appeals of *Aguzie v. Office of Personnel Management*, MSPB Docket No. DC-0731-09-0261-R-1, and *Barnes v. Office of Personnel Management*, MSPB Docket No. DC-0731-09-0260-R-1. The Board had previously remanded *Aguzie* and *Barnes* to obtain briefing on the question of whether, when OPM directs the

removal of a tenured employee under [5 U.S.C. § 7511\(a\)\(1\)](#) for suitability reasons pursuant to 5 C.F.R. part 731, the removal action is subject to the requirements of 5 U.S.C. chapter 75, subchapter II, including the statutory grant of appeal rights at [5 U.S.C. § 7513\(d\)](#). *Aguzie v. Office of Personnel Management*, [112 M.S.P.R. 276](#) (2009) (*Aguzie I*); *Barnes v. Office of Personnel Management*, [112 M.S.P.R. 273](#) (2009). On October 15, 2009, the Board granted OPM's motion and consolidated *Aguzie* and *Barnes* for briefing of the issue before the full Board. In a separate order, issued that same day, the Board added the instant appeal to the consolidation. PFR File, Tab 3. The Board subsequently added a fourth appeal, *Hunt-O'Neal v. Office of Personnel Management*, AT-0731-09-0240-I-1, over the objections of OPM. See *Hunt-O'Neal v. Office of Personnel Management*, [116 M.S.P.R. 286](#) (2011). The appellant objected to the October 15, 2009 consolidation order, arguing that the Board should first address the substantive issues in his case. PFR File, Tabs 5, 10.

¶7 The Board identified the issue raised in *Aguzie I* and *Barnes* for oral argument and issued a Federal Register notice soliciting amicus briefs. 75 Fed. Reg. 20,007 (Apr. 16, 2010); 75 Fed. Reg. 29,366 (May 25, 2010) (extending filing deadline). After receiving briefs from the parties and amici, the Board held oral argument on October 18, 2010. On January 26, 2011, the Board severed both the instant appeal and *Hunt-O'Neal* from the consolidation, and issued its decision in *Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#) (2011) (*Aguzie II*), finding that an OPM-directed suitability removal of a tenured employee is appealable under [5 U.S.C. § 7513\(d\)](#), and subject to the "efficiency of the service" standard of 5 U.S.C. § 7513(a).

ANALYSIS

¶8 As an initial matter, we find that the suitability actions on appeal lie within our jurisdiction under [5 U.S.C. § 7513\(d\)](#). It is undisputed that, at the time of his removal, the appellant had served more than 1 year of current continuous service

in his Human Resources Specialist position. IAF, Tab 6, Subtabs 2a, 2q, 2r. Consequently, he was a tenured employee for purposes of 5 U.S.C. chapter 75, subchapter II. See [5 U.S.C. § 7511](#)(a)(1)(A)(ii); *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341-42 (Fed. Cir. 2002). His removal, though ostensibly directed pursuant to 5 C.F.R. part 731, is therefore subject to the requirements of chapter 75, subchapter II, including the efficiency of the service standard under [5 U.S.C. § 7513](#)(a) and the guarantee of appeal rights at [5 U.S.C. § 7513](#)(d). See *Aguzie II*, [116 M.S.P.R. 64](#), ¶ 31. Furthermore, our jurisdiction under 5 U.S.C. § 7513(d) extends to the other actions resulting from OPM's negative suitability determination. See *id.*, ¶¶ 31-35.

¶9 In this case, we need not decide whether the actions on appeal satisfy the efficiency of the service standard under [5 U.S.C. § 7513](#)(a) because we agree with the appellant that OPM lacked any legal authority to take or direct the actions in the first instance. In particular, we find that OPM does not have the authority under 5 C.F.R. part 731 to make suitability determinations or to take or direct suitability actions against an individual based solely on conduct occurring after his admission into the competitive service.²

² Because we reverse OPM's decision on this basis, we need not and do not decide whether the regulation at [5 C.F.R. § 731.202](#)(b)(3), concerning the charge of "material, intentional false statement, or deception or fraud in examination or appointment," is limited in scope to an individual's own examination or appointment. We note, however, that OPM's reliance on *Kissner v. Office of Personnel Management*, [792 F.2d 133](#) (Fed. Cir. 1986), is misplaced. In *Kissner*, our reviewing court found that the Board properly sustained a charge under [5 C.F.R. § 731.202](#)(b)(3) based on a finding that the appellant had, prior to the appointment under investigation, made false statements on his application forms for a different position. *Id.* at 134. It does not follow from this that OPM may base a suitability action against an individual based on his falsification of another individual's employment application. With regard to the appellant's third legal argument, the Board has found that the term "integrity of the service," as used in [5 C.F.R. § 731.202](#), is part of the "efficiency of the service" standard under [5 U.S.C. § 3301](#)(1), and is not a separate ground for taking a suitability action. See *Aguzie II*, [116 M.S.P.R. 64](#), ¶ 25 n.8; *Doerr v. Office of Personnel Management*, [104 M.S.P.R. 196](#), ¶ 10 (2006).

¶10 OPM has expressly defined the scope and purpose of its suitability regulations at [5 C.F.R. § 731.101\(a\)](#), which states in relevant part:

The purpose of this part is to establish criteria and procedures for making determinations of suitability and for taking suitability actions regarding employment in covered positions . . . pursuant to [5 U.S.C. § 3301](#), E.O. 10577 (3 CFR, 1954-1958 Comp., p. 218), as amended, and 5 CFR 1.1, 2.1(a) and 5.2. Section 3301 of title 5, United States Code, directs consideration of “age, health, character, knowledge, and ability for the employment sought.” E.O. 10577 (codified in relevant part at 5 CFR 1.1, 2.1(a) and 5.2) directs OPM to examine “suitability” for competitive Federal employment.^[3] This part concerns only determinations of “suitability,” that is, those determinations based on a person’s character or conduct that may have an impact on the integrity or efficiency of the service.

Id. (footnote added). Taken in isolation, the reference to “determinations based on a person’s character or conduct” could be read to include conduct that takes place after an individual’s appointment. However, the regulation must be read as a whole. *See, e.g., Acting Special Counsel v. Sullivan*, [6 M.S.P.R. 526](#), 550 (1981). It is evident from the preceding sentences of the regulation that OPM’s authority under 5 C.F.R. part 731, though concerned with matters of character and conduct, extends only to those suitability determinations and actions pursuant to [5 U.S.C. § 3301](#) and Executive Order 10,577, as amended, in particular those portions codified at [5 C.F.R. §§ 1.1](#), 2.1(a), and 5.2.

¶11 We examine these authorities in turn. First, [5 U.S.C. § 3301](#) provides that the President may:

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of the service; [and]
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought[.]

³ Curiously, the exact words “‘suitability’ for competitive Federal employment” do not appear in [5 C.F.R. §§ 1.1](#), 2.1(a), or 5.2, or elsewhere in Executive Order 10,577 as amended.

It is axiomatic that the interpretation of a statute begins with the language of the statute itself. *Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#), 1148 (Fed. Cir. 1999). Here, it is evident from the plain language of the statute that it is concerned solely with regulating the admission process and determining the fitness of applicants. See *Aguzie II*, [116 M.S.P.R. 64](#), ¶ 23; see also [5 C.F.R. § 731.101](#)(a) (noting that [5 U.S.C. § 3301](#) “directs consideration of ‘age, health, character, knowledge and ability for the *employment sought*’”) (emphasis added). As we discussed in *Aguzie II*, the statute does not preclude OPM from making an after-the-fact determination that a tenured employee was improperly admitted or was unfit at the time he applied. *Id.*, ¶¶ 23-24; see also [5 C.F.R. § 5.2](#)(a) (authorizing the Director of OPM to determine “after appointment” whether the civil service rules and regulations were met with respect to that appointment); [5 C.F.R. § 731.105](#)(d) (authorizing OPM to make suitability determinations and take or direct suitability actions against an “employee,” defined at [5 C.F.R. § 731.101](#)(b) as an individual who has completed the first year of a subject-to-investigation appointment). It does not follow, however, that OPM may base a suitability determination solely on conduct occurring after an individual’s admission into the competitive service,⁴ and there is nothing in the language of the statute that would authorize such a determination.

¶12 Nor do we find any language in the pertinent sections of Executive Order 10,577, as amended, authorizing OPM to base a suitability determination or action solely on conduct occurring after the appointment process is complete. Title [5 C.F.R. § 1.1](#) is not itself a grant of authority but rather a general limitation on the scope of the Civil Service Rules:

The rules in this subchapter shall apply to all positions in the competitive service and to all incumbents of such positions. Except

⁴ We note that a probationary period is considered part of the examination process. See *Brandt v. Department of the Air Force*, [103 M.S.P.R. 671](#), ¶ 20 n.7 (2006); *Scalera v. Department of the Navy*, [102 M.S.P.R. 43](#), ¶ 10 (2006); [5 C.F.R. §§ 1.3](#)(c), 212.301.

as expressly provided in the rule concerned, the rules in this subchapter shall not apply to positions and employees in the excepted service.

Title [5 C.F.R. § 2.1](#)(a) constitutes a delegation of authority to OPM to conduct competitive examinations for admission to the competitive service:

OPM shall be responsible for open competitive examinations for admission to the competitive service which will fairly test the relative capacity and fitness of the persons examined for the position to be filled. OPM is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

See also [5 U.S.C. § 1302](#)(a) (providing that OPM, “subject to the rules prescribed by the President . . . shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service”). While [5 C.F.R. § 2.1](#)(a), in conjunction with [5 U.S.C. § 1302](#), authorizes OPM to establish standards for suitability, we find no indication that the scope of that authority extends beyond the examination process leading to admission into the competitive service.⁵

¶13 Finally, [5 C.F.R. § 5.2](#) provides that the Director of OPM may “secure effective implementation of the civil service laws, rules, and regulations, and all Executive orders imposing responsibilities on the Office,” by means including the following:

Investigating the qualifications and suitability of applicants for positions in the competitive service. The Director may require appointments to be made subject to investigation to enable the Director to determine, after appointment, that the requirements of law or the civil service rules and regulations have been met.

⁵ Here, the appellant had completed his probationary period at the time he allegedly falsified his wife’s employment application. We do not decide at present whether OPM may take a suitability action based on post-appointment conduct occurring during the probationary period.

Thus, pursuant to this rule, OPM may investigate the suitability of applicants and investigate and determine the propriety of an appointment. The rule specifically allows for OPM to make the necessary determination after the appointment has taken place. *See Aguzie II*, [116 M.S.P.R. 64](#), ¶ 23. However, the rule unambiguously provides that the subject matter of such an investigation or determination is the act of appointment itself. Conduct occurring after the appointment process is complete, such as the conduct at issue in this case, would not lie within the scope of such an investigation or determination.⁶

¶14 We note that the authority citation for 5 C.F.R. part 731 also includes [5 U.S.C. § 7301](#), which provides in general terms that the President “may prescribe regulations for the conduct of employees in the executive branch.” *See also* 74 Fed. Reg. 30,459, 30,460 (June 26, 2009) (citing [5 U.S.C. § 7301](#)). This statute, unlike the other authorities discussed above, refers generally to the conduct of employees, and it may be that the President could, pursuant to [5 U.S.C. § 7301](#), issue an Executive Order authorizing OPM to make suitability determinations and take or direct suitability actions based on post-admission or post-appointment conduct. However, the President has not issued such an order, and he has not delegated to OPM the authority to prescribe regulations other than those necessary to carry out existing statutes and rules imposing responsibilities on the office. *See* [5 C.F.R. § 5.1](#). In any event, [5 C.F.R. § 731.101\(a\)](#), which expressly defines the scope and purpose of 5 C.F.R. part 731, makes no reference

⁶ On several occasions, the Board has erroneously suggested in dicta that the scope of a suitability investigation may include post-appointment conduct. *See Gamble v. Department of the Army*, [111 M.S.P.R. 529](#), ¶ 11 (2009) (“A suitability inquiry is directed toward whether the ‘character or conduct’ of a candidate *or current employee* is such that employing or continuing to employ [him] would adversely affect the efficiency of the service.”); *Upshaw v. Consumer Product Safety Commission*, [111 M.S.P.R. 236](#) (2009) (same); *Patton v. Department of the Treasury*, [94 M.S.P.R. 562](#), ¶ 12 (2003) (same). *See also Patton*, [94 M.S.P.R. 562](#), ¶ 12 (in “conducting an updated [background investigation], the agency is entitled to examine . . . the events that have occurred in the applicant’s life since the completion of the last [background investigation].” We modify these decisions accordingly.

to 5 U.S.C. § 7301, and refers only to suitability determinations and actions pursuant to 5 U.S.C. § 3301 and 5 C.F.R. §§ 1.1, 2.1(a), and 5.2.

¶15 OPM contends that its regulations at 5 C.F.R. part 731 should nonetheless be interpreted to permit the suitability actions on appeal. *See* IAF, Tab 14. However, as we explained in *Garza v. Office of Personnel Management*, [83 M.S.P.R. 336](#) (1999), the Board does not owe deference to agency litigation positions unsupported by regulations, rulings, or administrative practice. *Id.*, ¶¶ 12-13 (citing *Bowen v. Georgetown Univ. Hosp.*, [488 U.S. 204](#), 212-13 (1988)).⁷ As discussed above, the interpretation advanced by OPM is inconsistent with the expressly stated purpose of 5 C.F.R. part 731. Furthermore, OPM has not provided “substantial evidence of a consistent policy, either internally applied or publicly announced,” that would permit suitability determinations or actions based on conduct occurring after admission into the competitive service. *See Garza*, [83 M.S.P.R. 336](#), ¶ 12 (quoting *Parker v. Office of Personnel Management*, [974 F.2d 164](#), 168 (Fed. Cir. 1992)). Accordingly, we decline to follow OPM’s interpretation of the regulations at issue in this case. *See Evans v. Office of Personnel Management*, [59 M.S.P.R. 94](#), 104 (1993) (the Board will decline to give effect to OPM’s interpretation of a regulation where there are compelling reasons to conclude that such interpretation is erroneous, unreasonable, or contrary to the law which it purports to interpret).

¶16 Because we find that OPM had no legal authority to take the suitability actions on appeal, its decision cannot be sustained. *See* [5 U.S.C. § 7701\(c\)\(2\)\(C\)](#);

⁷ OPM erroneously cites *Folio v. Department of Homeland Security*, [402 F.3d 1350](#), 1355 (Fed. Cir. 2005), for the proposition that its interpretation of the suitability regulations, though expressed only in its brief, is entitled to deference. Because OPM was not a party in *Folio*, its interpretation did not, as in this case, constitute a “*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack.” *See Auer v. Robbins*, [519 U.S. 452](#), 462 (1997) (citing *Bowen*, 488 U.S. at 212, internal quotation marks omitted). Furthermore, in *Folio*, the court granted “special deference” to OPM’s interpretation of [5 C.F.R. § 731.501](#) on the grounds that it was “seeking broader review by its reviewing entity,” i.e., the Board. *Id.* That rationale does not apply in this case.

Stephen v. Department of the Air Force, [47 M.S.P.R. 672](#), 683-84 (1991) (an action will be reversed as being "not in accordance with law" if the agency's action is unlawful in its entirety, i.e., if there is no legal authority for the action). Our holding in no way alters the fact that a tenured employee may be disciplined for falsification of employment documents. *See, e.g., Cameron v. Department of Justice*, [100 M.S.P.R. 477](#), ¶ 13 (2005) (falsification of employment documents amounts to serious misconduct and warrants removal). However, it is the prerogative of the employing agency to pursue or not pursue such action against the appellant.

¶17 Although we reverse the actions on appeal, we find that further adjudication is necessary to resolve the appellant's claim of race and/or color discrimination. *See Schibik v. Department of Veterans Affairs*, [98 M.S.P.R. 591](#), ¶ 11 (2005) (an appellant has the right under [5 U.S.C. § 7702\(a\)](#) to a decision on a claim of discrimination even when the Board has already determined that the action appealed must be reversed on other grounds). In finding the discrimination claim unproven, the administrative judge relied on the appellant's failure to identify a comparator employee outside his protected group. However, the Board has since clarified that comparator evidence is not essential to a prima facie case of disparate treatment discrimination. *Davis v. Department of the Interior*, [114 M.S.P.R. 527](#), ¶¶ 6-8 (2010). While evidence of discrimination may include proof that similarly situated employees outside the protected class were treated differently, an appellant may also prevail on a discrimination claim by introducing evidence: (1) that the agency lied about its reason for taking the action; (2) of inconsistency in the agency's explanation; (3) of failure to follow established procedures; (4) of general treatment of minority employees or those who engage in protected activity; or (5) of incriminating statements by the agency. *See id.*, ¶ 8. Accordingly, we remand the appeal to afford the appellant the opportunity to present such evidence. *See Aguzie II*, [116 M.S.P.R. 64](#), ¶ 37.

ORDER

- ¶18 We REVERSE the initial decision and REMAND the appeal to the Central Regional Office for further adjudication of the appellant's discrimination claims.
- ¶19 We ORDER OPM to cancel its decision letter of April 8, 2009, and to direct the employing agency to restore the appellant effective April 13, 2009. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984); *Brackins v. Office of Personnel Management*, [60 M.S.P.R. 260](#), 263 (1993); *cf. Aldridge v. Department of Agriculture*, [111 M.S.P.R. 670](#), ¶ 25 (2009) (ordering agency to cancel involuntary retirement pending adjudication of appellant's discrimination claim on remand). OPM must complete these actions no later than 20 days after the date of this decision.
- ¶20 We also ORDER OPM to direct the employing agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. *See Brackins*, 60 M.S.P.R. at 263. We ORDER the appellant to cooperate in good faith in the employing agency's effort to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the employing agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.
- ¶21 We further ORDER OPM and the employing agency to tell the appellant promptly in writing when they believe they have fully carried out the Board's Order and to describe the actions they took to carry out the Board's Order. The appellant, if not notified, should ask OPM and/or the employing agency about their progress. *See* [5 C.F.R. § 1201.181](#)(b).
- ¶22 No later than 30 days after both OPM and the employing agency tell the appellant that they have fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal to resolve any disputed compliance issues. The petition should

contain specific reasons why the appellant believes that OPM and/or the employing agency have not fully carried out the Board's Order, and should include the dates and results of any communications with OPM and/or the employing agency. [5 C.F.R. § 1201.182\(a\)](#).

¶23 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 employing 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.

¶24 The Board's regulations provide that a request for attorney fees must be made within 60 days of after issuance of a final decision. [5 C.F.R. § 1201.203\(d\)](#). In this case, the time limit for filing such a request will not begin to run until the decision on remand is final. *See Aldridge*, [111 M.S.P.R. 670](#), ¶ 23 n.4.

FOR THE BOARD:

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



DFAS CHECKLIST

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

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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