UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD D. TARR,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DC-0752-10-0910-I-1

DATE: April 19, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Edward H. Passman, Esquire, and Daniel T. Raposa, Esquire, Washington, D.C., for the appellant.

Charles Lohmeyer, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

FINAL ORDER

The agency has filed a petition for review of the initial decision mitigating the penalty of removal to a 14-day suspension. For the reasons set forth below,

---

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

we REVERSE the portion of the initial decision finding that the maximum reasonable penalty is a 14-day suspension. Instead, we mitigate the penalty of removal to a 60-day suspension. We affirm the remainder of the findings in the initial decision as modified by this Final Order.

BACKGROUND

Effective September 3, 2010, the agency removed the appellant from his GS-14 Supervisory Transportation Specialist position with the Pipeline and Hazardous Materials Safety Administration (PHMSA) based upon three charges.[2] Initial Appeal File (IAF), Tab 8, Vol. 1 at 19-25. First, the agency charged the appellant with misuse of government property, alleging that: (1) the appellant used a government-owned computer to access websites and download electronic media that contained sexually explicit material without authorization; and (2) the appellant "improperly spent, expended or otherwise obligated government funds for an improper purpose" by using an agency provided satellite service to access and download photographs and videos of a sexually explicit nature and to manage/maintain a private business, which cost the government approximately $5,000.[3] *Id*. at 19. Second, the agency charged the appellant with violation of the agency's internet policy based on the appellant's alleged use of agency internet resources to download and collect sexually explicit materials in violation of DOT H 1350.2, paragraph 14.105(b)(2)(g). *Id*. Finally, the agency charged the appellant with improper conduct, alleging that the appellant engaged in unprofessional relationships with Cady Han and Cathy Xiaoyan Gu, who provided

---

[2] It is undisputed that the alleged misconduct occurred during a 6-week international inspections trip. Initial Appeal File, Tab 8, Vol. I at 19, 31, 33, 35.

[3] The proposal notice included specifications under the charges of misuse of government property and violation of the agency internet policy concerning the appellant's alleged use of a government-owned computer and agency internet resources to manage/maintain a private business for commercial purposes, i.e, Tarr's Card Shop on E-bay, which were not sustained by the deciding official. IAF, Tab 8, Vol. I at 19-25, Vol. II at 378-380.

interpretation and other professional services related to official PHMSA activities, by sending e-mails of a personal nature and gifts. *Id.* at 20.

The appellant filed a Board appeal of his removal. IAF, Tab 1. After holding a hearing, the administrative judge merged Charges 1 and 2 and sustained both the merged charge and the charge of improper conduct. IAF, Tab 19, initial decision (ID) at 4-5. The administrative judge found the agency proved a nexus between the appellant's misuse of government property and the efficiency of the service, but not with respect to the improper conduct charge. ID at 5-9. Regarding the penalty, the administrative judge found that "[u]nder the circumstances of this appeal . . . the maximum reasonable penalty is a 14-day suspension." [4] ID at 11. In reaching this conclusion, he considered the seriousness of the appellant's misconduct and his status as a supervisor, as well as the appellant's 18 years of discipline-free service and reputation as a "talented" employee. ID at 10. Further, the administrative judge found that the deciding official's determination regarding the appellant's purported lack of remorse was "inconsistent with the record evidence." ID at 11.

The agency has filed a petition for review challenging, inter alia, the administrative judge's mitigation of the penalty. Petition for Review (PFR) File, Tab 1. The appellant has responded in opposition. PFR File, Tab 4.

---

[4] The administrative judge noted the agency's assertion in its closing argument that the Board should demote the appellant in the event the Board found the penalty of removal too harsh. ID at 11. To avoid any confusion, we clarify that the agency representative specifically pointed out that the deciding official did not indicate that he would have selected a lower penalty and expressly stated that the agency "does not suggest that it is indicating a lesser penalty." *See* Hearing Transcript (HT) at 34, 336-37, 340; IAF, Tab 8, Vol. I at 24, Vol. II at 378-80; *see also* PFR File, Tab 1 at 18. Consequently, we find that the agency has not expressed a desire for a lesser penalty to be imposed based on fewer charges.

ANALYSIS

The agency has not demonstrated any error in the administrative judge's finding that it failed to show a nexus between the improper conduct charge and the efficiency of the service.

On review, the agency disagrees with the administrative judge's finding that it failed to prove a nexus between the appellant's improper conduct and the efficiency of the service. PFR File, Tab 1 at 4-7. It reasserts that the deciding official lost trust and confidence in the appellant and that his actions compromised the objective posture that must be maintained by any safety regulatory entity. *Id.* However, the administrative judge found that the agency failed to prove that the appellant's nominal gift giving and personal relationships with Ms. Han, a contract translator for a company regulated by the agency, and Ms. Gu, an employee of a company that organizes conferences, which was not a regulated entity within the agency's inspection authority, impaired his ability to objectively inspect regulated entities or diminished the agency's confidence in his ability to perform his duties, or even explained how the alleged off-duty misconduct affected the agency's mission. *See* ID at 6-7; HT at 57, 59-60, 86, 89-106; IAF, Tab 8, Vol. I at 35-39. These findings are supported by the weight of the record evidence and the applicable law, and therefore we discern no reason to disturb them. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (declining to disturb the initial decision where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same).

The administrative judge correctly found that the agency's penalty determination was not entitled to deference and exceeded the tolerable limits of reasonableness.

When the agency proves fewer than all of its charges, the Board may mitigate the penalty to the maximum reasonable penalty, so long as the agency has not indicated that it desires a lesser penalty if all of the charges are not sustained. *See Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *Gray v. U.S. Postal Service*, 97 M.S.P.R. 617, ¶ 11 (2004). In addition, an agency cannot impose discipline where there is no nexus between the charged misconduct and the efficiency of the service. *See Moten v. U.S. Postal Service*, 42 M.S.P.R. 282, 289 (1989) (where the agency failed to prove a nexus between the sustained charge and the efficiency of the service, the Board did not sustain the penalty of removal); *Monterosso v. Department of the Treasury*, 6 M.S.P.R. 684, 687-90 (1981) (the Board did not sustain the penalty of removal where the agency failed to prove a nexus between the sustained charges and the efficiency of the service). Thus, the improper conduct charge should not have been a factor in assessing the appropriate penalty. Accordingly, we discern no error in the administrative judge's application of the principle articulated in *Lachance* and *Gray* regarding the Board's penalty assessment where an agency proves fewer than all of its charges to the facts of the instant case where the agency failed to establish a nexus between all of its charges and the efficiency of the service. *See Doe v. Department of Justice*, 113 M.S.P.R. 128, ¶ 36 (2010) (citing *Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650-51 (1996)) (applying the principles applicable to Board penalty review where an agency fails to prove all of the specifications under a charge to the situation where an agency fails to prove a nexus between one of its specifications and the efficiency of the service).

The Board may mitigate to the maximum reasonable penalty if all of an agency's charges may not be considered in assessing the penalty so long as the agency has not indicated a desire that a lesser penalty be imposed on fewer charges. Alternatively, the Board may impose the penalty selected by the agency

if it determines, after balancing the mitigating and aggravating factors, that the agency has justified its penalty selection as the maximum reasonable penalty. *Lachance*, 178 F.3d at 1260; *Parker v. U.S. Postal Service*, 111 M.S.P.R. 510, ¶ 6 (2009). The Board may not disconnect its penalty determination from the agency's managerial will and primary discretion in disciplining its employees. *Spencer v. U.S. Postal Service*, 112 M.S.P.R. 132, ¶ 8 (2009).

On review, the agency reasserts that the deciding official properly weighed and analyzed each of the *Douglas* factors and that the administrative judge improperly substituted his judgment for that of the agency and erred in mitigating the penalty to less than the maximum reasonable penalty. PFR File, Tab 1 at 8-14. We disagree.

First, we agree with the administrative judge's finding that the deciding official incorrectly concluded that the appellant lacked remorse for his misconduct and used that purported lack of remorse to conclude that the appellant lacked rehabilitative potential. *See* ID at 10-11. The deciding official largely based his analysis on the appellant's failure to use the precise words that he believed the appellant should have used to express his remorse. The deciding official testified that "[t]hroughout [the hour and 20 minutes oral response], I don't believe I heard him say 'I'm sorry for these things that I committed. These are terrible things. This is a clear violation of the Government policy. I'm a supervisor. I should have known better.' I mean he didn't choose any of these words." Hearing Transcript (HT) at 25; *see id.* at 69-70. The appellant's oral response to the proposed removal may have been defensive at times, however, his responses to his first- and second-line supervisors during an initial meeting concerning his misconduct and his oral and written responses to the proposed removal action included acknowledgements of wrongdoing, expressions of

remorse, and assurances that the misconduct would not be repeated.[5] *See* HT at 123-125, 175; IAF, Tab 8, Vol. I at 27-42. The Board has abandoned deference to an agency's penalty determination where the deciding official has misjudged the appellant's rehabilitative potential. *See Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 21, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006) (unpublished).

Also relevant to our penalty analysis is the agency's failure to prove the actual amount of the expense incurred from the appellant's misuse of government property. As stated above, the second specification of the misuse of government property charge indicates that the appellant improperly used the government-owned air card "which cost the government approximately $5,000." IAF, Tab 8, Vol. I at 19. A careful review of the record reveals, however, that the agency did not make an independent determination regarding the amount of government funds the appellant expended in accessing sexually explicit material. *See* HT at 220; IAF, Tab 8, Vol. I at 44-64, Vol. II at 86-88, 240-271. The agency's Chief Information Officer testified that the agency could not make a determination concerning the amount of the charges incurred due to legitimate versus unauthorized use of the air card. HT at 220. "[B]ecause he was accessing the DOT network and so forth while he was on official travel . . . there was definitely a percentage of that cost that was official business use, but because they couldn't determine how much time was spent viewing the pornography, [they could not determine] what that charge actually would be." *Id.* The bills for using the air card only show the appellant's total megabyte usage and the total fees incurred for his use of the international air card. IAF, Tab 8, Vol. II at 112-114.

---

[5] To the extent that the agency disagrees with the administrative judge's factual findings, we note that the Board must defer to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

The record is void of documents presenting calculations of the amount of air card fees the appellant incurred from accessing sexually explicit material or the precise quantity of sexually explicit material that the appellant downloaded on his government computer. The agency's investigative report of the appellant's computer usage contains information regarding the appellant's online pornography account, which includes his total usage since he opened the account, but does not distinguish between downloads on his government computer versus other computers. *See* IAF, Tab 8, Vol. I at 48. Further, the drafters of the investigative report opined that the appellant used his government computer for "mostly legitimate purposes." *Id.* at 52. We note that the agency did not prohibit the appellant from using his government computer for any personal use. According to the deciding official, the appellant was permitted to use his government computer and government assets within "an amount allowable for personal use." IAF, Tab 8, Vol. I at 20.

The only document in the record that includes any estimated calculation of the appellant's unauthorized use is the written admission/agreement that the appellant drafted pursuant to settlement discussions. HT at 123, 125, 174-176; IAF, Tab 8, Vol. I at 31, 33, Vol. II at 106, 126. This document reflects that the appellant offered to repay the agency $5,000 as part of a potential settlement. IAF, Tab 8, Vol. I at 106. The agency cannot rely upon statements provided by the appellant during settlement discussions as a basis for imposing discipline.[6] *See Frank v. Equal Employment Opportunity Commission*, 90 M.S.P.R. 458, ¶ 4 n.2 (2001).

Furthermore, even if the appellant's settlement offer could be considered, his calculations were based upon his total data usage during the 6-week business trip, thereby including his authorized work-related usage and his alleged

[6] Furthermore, the amount the appellant proposed to repay as part of a potential settlement further supports the finding that he was remorseful and willing to accept responsibility for his actions.

unauthorized usage related to accessing sexually explicit material and e-mails to Misses Han and Gu, as well as e-mails regarding his E-bay business. *See* HT at 243-246; IAF, Tab 8, Vol. II at 106. Regarding the appellant's air card usage, the deciding official did not sustain specifications related to the appellant's alleged maintenance of a private business using government assets. IAF, Tab 8, Vol. I at 20. Nonetheless, he sustained the second specification, which states that the $5,000 reflects fees incurred from the appellant's alleged management and maintenance of a private business as well as his accessing and downloading of sexually explicit photographs and video. *Id.* at 19.

In sum, while we agree with the administrative judge's decision to sustain the second specification concerning the appellant's misuse of government property through his use of the air card, the record does not support a determination regarding the specific dollar amount of that misuse. The lack of support for the dollar amount of the misuse – a key provision of the specification – provides further support for the re-examination of the agency's penalty. *Cf. Doe*, 113 M.S.P.R. 128, ¶ 36 (an agency's failure to establish all of the supporting specifications under a charge may require, or contribute to, a finding that the penalty is not reasonable); *Payne*, 72 M.S.P.R. at 650-51 (same).

The maximum reasonable penalty for the sustained misconduct is a 60-day suspension.

The administrative judge properly found that the appellant's misconduct was serious and, as a supervisor, he may be held to a higher standard of conduct. ID at 10. Although the Board has upheld the removal of supervisory and non-supervisory employees who have accessed sexually-explicit material on government-owned computers, in those cases the employees also committed other serious acts of misconduct.[7] Here, the appellant's misconduct was limited in

[7] *See, e.g., Social Security Administration v. Steverson*, 111 M.S.P.R. 649 (2009) (upholding the removal of an administrative law judge based upon four charges

nature and duration. There is no evidence that he misused his government computer and air card other than during his six-week business trip to China. In addition, unlike other employees disciplined for misusing government property in accessing sexually explicit material, the appellant's misconduct occurred solely while he was off-duty. Furthermore, as discussed above, the appellant has shown remorse for his actions and has demonstrated a strong rehabilitative potential. These factors all lead us to concur with the administrative judge that the penalty of removal exceeds to tolerable limits of reasonableness.

The agency has asserted that, if the Board found the penalty of removal too severe, the appellant should be demoted. PFR File, Tab 1 at 15; HCD. It relies upon the Board's decision in *Martin v. Department of Transportation*, 103 M.S.P.R. 153 (2006), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007) [8] where the Board ordered the demotion of a supervisor to a non-

---

including, but not limited to, off-duty conduct unbecoming an administrative law judge, off-duty misuse of government equipment in storing sexually-oriented material on his government-issued computer and in maintaining a private business, and lack of candor), *aff'd*, 383 F. App'x 939 (Fed. Cir. 2010); *Byrnes v. Department of Justice*, 91 M.S.P.R. 551 (2002) (upholding the removal of an Assistant United States Attorney based on three charges including, but not limited to, lying about unauthorized use of personal computers assigned to other staff members and his possession of a government-owned laptop, failure to follow department and office policies regarding plea agreements, and violation of department policy by accessing pornographic websites using a government-owned computer); *Scarberry v. Department of the Army*, 23 M.S.P.R. 246 (1984) (upholding the removal of a supervisor for using government facilities, equipment and manpower for other than government business, i.e., printing pornography, as well as for on-duty maintenance of a private business), *aff'd*, 770 F.2d 182 (Fed. Cir. 1985) (Table).

[8] On review, the agency argues that the administrative judge focused upon the specific facts in *Martin* instead of the essence of the decision and that "*Martin* more appropriately stands for upholding an agency decision when the 'agency has not indicated that it would have imposed a lesser penalty for the sustained misconduct.'" PFR File, Tab 1 at 15. We disagree with this interpretation. In *Martin*, the Board explained that the administrative judge misconstrued the testimony of the deciding official as stating that the agency expressed a desire for a lesser penalty to be imposed if the charge of misuse stood alone. *See Martin*, 103 M.S.P.R. 153, ¶¶ 3, 10. Further, the Board upheld the penalty of demotion because it found that the agency's chosen

supervisory position based solely upon his misuse of his government-owned computer in accessing 71 sexually explicit pictures during duty hours. *See id.*, ¶ 2; PFR File, Tab 1 at 15-16.

Both Martin and the appellant were supervisors held to a higher standard of conduct and were expected to set examples for others in the work place. *See Martin*, 103 M.S.P.R. 153, ¶ 10. However, unlike Mr. Martin, the appellant only engaged in off-duty misconduct and his misconduct does not rise to the level of regular or excessive misuse. *See* IAF, Tab 8, Vol. I at 37; *Martin*, 103 M.S.P.R. 153, ¶¶ 2, 13. In addition, the *Martin* decision does not reflect that either the administrative judge or the deciding official found Mr. Martin's potential for rehabilitation to be a significant mitigating factor, which is a significant mitigating factor in this appeal. *See Martin*, 103 M.S.P.R. 153, ¶ 12. Finally, unlike Mr. Martin the appellant has no prior disciplinary record during his 18 year career.[9]

We acknowledge that, unlike the situation in *Martin*, the appellant here expended government funds incidental to his accessing sexually explicit material on his government-owned computer via a government-owned air card. However, the agency did not place great emphasis on the appellant's expenditure of government funds. *See* IAF, Tab 8, Vol. I at 19-25, Vol. II at 378-80. Both in his testimony and in the decision notice, the deciding official focused upon the appellant's accessing sexually explicit material on a government-owned computer and the appellant's alleged improper and unprofessional relationships with Misses

---

penalty fell within the tolerable limits of reasonableness, not because the agency had not expressed a desire for a lesser penalty to be imposed on fewer charges. *Id.*, ¶ 13. Furthermore, as discussed above, the Board need not defer to the agency's penalty determination in this appeal because we find the agency-chosen penalty does not fall within the tolerable limits of reasonableness.

[9] We also note that unlike the situation in *Martin*, the agency has not cited to a table of penalties to support its penalty determination. HT at 310-312; IAF, Tab 8, Vol. I at 23.

Gu and Han.[10] *See* HT at 7-114; IAF, Tab 8, Vol. I at 19-25. We further note that, on review, the agency does not contend that the appellant's expenditure of government funds in using the air card heavily weighed into its penalty determination.[11] *See* PFR File, Tab 1. Therefore, we do not assign significant weight to the appellant's expenditure of government funds incidental to his computer use.[12]

As noted above, the administrative judge mitigated the agency's removal penalty to a 14-day suspension. While we agree with the administrative judge that the agency's removal action exceeded the tolerable limits of reasonableness, we do not concur with the administrative judge that a 14-day suspension is the maximum reasonable penalty. Such a relatively minor penalty fails to properly recognize the nature and seriousness of the appellant's misconduct and fails to appreciate that, as a supervisor, the appellant may be held to a higher

---

[10] Here, the deciding official afforded significant weight to the deterrence of others and the message the selected penalty would send to staff, customers and clients regarding the agency's tolerance of the appellant's misconduct, especially with regard to the appellant's improper conduct arising from his relationships with Misses Gu and Han. HT at 47-48; IAF, Tab 8, Vol. I at 24. However, the Board has held that an agency may not impose a disciplinary action to make an example of an employee. *Harper v. Department of the Air Force*, 61 M.S.P.R. 446, 448 (1994).

[11] In the initial decision, the administrative judge found as a mitigating factor that the appellant paid the agency $5,000 in restitution for his inappropriate use of the internet air card. ID at 11. However, as noted above, the record does not support this finding; rather, the record shows that the appellant only offered to make restitution to the agency in the amount of $5,000. Nevertheless, we find that this error does not affect the administrative judge's determination that the agency's original penalty of removal was too severe. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

[12] We note in this regard that: (1) the agency Chief Information Officer testified that the appellant's government-owned air card was among the first international air cards that the agency had ever used; (2) the agency did not know how much more it would cost to use an international air card than a domestic card based upon roaming charges; (3) the appellant believed that, like domestic air cards, a flat-rate monthly fee would be charged for use of international air cards; and (4) the actual amount of the appellant's expenditure of government funds in accessing sexually explicit material is unknown. *See* HT at 215-217, 239; IAF, Tab 8, Vol. I at 33.

standard of conduct. Counterbalancing these factors, however, are the appellant's 18 years of discipline-free service with the agency, the fact that his misconduct occurred off-duty while he was on an extended overseas business trip, and his demonstrated remorse and potential for rehabilitation. After carefully weighing the various factors, we find that a 60-day suspension is the maximum reasonable penalty.

ORDER

We ORDER the agency to cancel the removal action and to retroactively restore the appellant effective September 3, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). In place of the removal action, the agency must retroactively issue a 60-day suspension. The agency must complete this action no later than 20 days after the date of this decision.

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

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

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

believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

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.

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

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

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

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.

DFAS CHECKLIST

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

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.