

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

2013 MSPB 75

Docket Nos. CB-7521-13-0070-T-1
CB-7521-13-0072-T-1
CB-7521-13-0074-T-1
CB-7521-13-0075-T-1
CB-7521-13-0076-T-1
CB-7521-13-0079-T-1
CB-7521-13-0080-T-1
CB-7521-13-0081-T-1
CB-7521-13-0087-T-1
CB-7521-13-0089-T-1
CB-7521-13-0091-T-1
CB-7521-13-0093-T-1
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CB-7521-13-0097-T-1
CB-7521-13-0098-T-1
CB-7521-13-0100-T-1
CB-7521-13-0102-T-1
CB-7521-13-0106-T-1
CB-7521-13-0108-T-1
CB-7521-13-0109-T-1
CB-7521-13-0110-T-1

**Department of Labor,
Petitioner,**

v.

**Charles R. Avery, et al.,
Respondents.**

September 18, 2013

James V. Blair, Esquire, and Katherine Brewer, Esquire, Washington, D.C.,
for the petitioner.

Administrative Law Judge Larry W. Price, Covington, Louisiana, pro se.

Administrative Law Judge Stuart A. Levin, Jacksonville Beach, Florida,
pro se.

Paul A. Mapes, Esquire, Walnut Creek, California, for the remaining
respondents.

BEFORE

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

OPINION AND ORDER

¶1 The petitioner petitions for review, and the respondents cross petition for review of the initial decision by the administrative law judge authorizing the petitioner to furlough the respondents for 4 days under [5 U.S.C. § 7521](#). For the reasons discussed below, we GRANT the petitioner's petition for review, DENY the respondents' cross petition for review, VACATE the initial decision, and FIND good cause to furlough the respondents for 5.5 days.

BACKGROUND

¶2 The respondents are 19 administrative law judges (ALJs) employed in the Office of the ALJ (OALJ), Office of Adjudication, Office of the Secretary of Labor (OSec). By complaint filed on March 18, 2013, the petitioner sought authorization under [5 U.S.C. § 7521](#) to furlough the respondents for 5.5 days¹ because of a funding shortfall engendered by President Obama's March 1, 2013 Sequestration Order. Complaint File (CF), Tab 1 at 11.

¹ The petitioner initially requested authorization for furloughs of 22 days. Complaint File, Tab 1 at 5. At the time of the initial decision and the petition for review, changed circumstances prompted the petitioner to reduce its request to 5.5 days.

¶3 After a hearing, the administrative law judge found that the petitioner showed good cause to furlough the respondents for 4 days (2 days for part-time ALJs). Initial Decision (ID) at 24-39. The administrative law judge found that, to establish good cause to furlough the respondents under [5 U.S.C. § 7521](#), the petitioner had to prove by preponderant evidence that: (1) The proposed furlough related to a management plight caused by financial restrictions; (2) the proposed furlough was implemented in accordance with law and consistent with Office of Personnel Management (OPM) furlough guidance; (3) ALJs were treated like other employees in the agency; and (4) the proposed action was not predicated on grounds which improperly interfere with the ALJs' performance of judicial functions. ID at 24. The administrative law judge found that the petitioner met its burden except that it failed to show that ALJs were treated like other employees in the agency. ID at 37-38. He found that the petitioner engaged in disparate treatment by proposing to suspend the respondents for a greater length of time than it was furloughing other employees whose positions were funded from the same budget account, account number 012-25-0165. *Id.* at 28-31. He found that employees in OSec were furloughed for an average of 4 days and that the petitioner failed to show good cause to furlough the respondents for more than the average. *Id.* at 37-39.

¶4 The petitioner petitions for review of the initial decision and argues, inter alia, that the decision to reduce the proposed furlough to 4 days misapprehends the special status afforded to ALJs and results in an "unprecedented degree of interference with an agency's ability to structure a furlough." *See* Petition for Review at 12-18. The respondents cross petition for review and argue, inter alia, that the administrative law judge's methodology for calculating that the furlough should be 4 days was flawed. *See* Cross Petition for Review (XPFR) at 8-14. The respondents further assert that the administrative law judge erred by failing to find that ALJs are a protected class, by failing to consider that the petitioner's fiscal decisions had a disparate impact on the respondents, and by failing to

consider respondents’ argument that the petitioner’s decision interferes with their qualified judicial independence. *Id.* at 18-19, 24-30. The respondents also challenge the administrative law judge’s discovery rulings. *Id.* at 19-24.

ANALYSIS

¶5 Under [5 U.S.C. § 7521](#), the Board has jurisdiction to adjudicate actions against ALJs. An agency may take an action against an ALJ only for “good cause” as determined after a hearing by the Board. [5 U.S.C. § 7521](#)(a). The petitioner must prove good cause by a preponderance of the evidence. *Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶ 12 (2010), *aff’d sub nom. Long v. Social Security Administration*, [635 F.3d 526](#) (Fed. Cir. 2011). Congress has not defined the term “good cause” for purposes of section 7521, and the Board has adopted a flexible approach in which good cause is defined according to the individual circumstances of each case. *See Long*, [113 M.S.P.R. 190](#), ¶ 13 (“There is no statutory definition of good cause, leaving the interpretation of the term to the adjudicatory process and the facts of each case.”). However, the baseline for evaluating good cause in any action against an ALJ is whether the action improperly interferes with the ALJ’s ability to function as an independent and impartial decision maker. *See Brennan v. Department of Health & Human Services*, [787 F.2d 1559](#), 1563 (Fed. Cir. 1986); *Social Security Administration v. Mills*, [73 M.S.P.R. 463](#), 468 (1996), *aff’d*, 124 F.3d 228 (Fed. Cir. 1997) (Table).

¶6 The initial decision’s test fails to recognize that not all furloughs are a result of a shortage of funds. *Cf.* [5 U.S.C. § 7511](#)(a)(5)² (“furlough” means “the placing of an employee in a temporary status without duties and pay because of

² Even though “good cause” is not the equivalent of the efficiency of the service standard applicable under [5 U.S.C. § 7513](#) in chapter 75 actions against non-ALJ civil servants, the Board finds cases under chapter 75 to be appropriate guidance in adjudicating actions against ALJs. *See Long*, [113 M.S.P.R. 190](#), ¶ 13.

lack of work or funds or other nondisciplinary reasons”); [5 C.F.R. § 752.402](#) (same). If, hypothetically, the petitioner experienced a drastic reduction in the respondents’ workload but not in the workload in other parts of the agency, the petitioner would be unable under the initial decision’s formulation to establish good cause to furlough its ALJs. This is because the petitioner would be unable to prove that its action was a “management plight related to financial restrictions,” and it would be unable to prove that it treated its ALJs the same as it treated employees in other parts of the agency who were not affected by a reduction in the ALJs’ workload.³ We reject the initial decision’s four-prong test and reaffirm that the definition of “good cause” is flexible and depends on the individual circumstances of each case. *See Brennan*, 787 F.2d at 1561-62; *Long*, [113 M.S.P.R. 190](#), ¶ 13; *Mills*, 73 M.S.P.R. at 467-68.

¶7 We further find that the administrative law judge erred by requiring the petitioner to prove, as part of its case-in-chief, that it did not engage in disparate treatment toward the ALJs. This is problematic for two reasons. First, it requires the petitioner to prove a negative, which the Board has acknowledged is usually impracticable. *See Chavez v. Office of Personnel Management*, [6 M.S.P.R. 404](#), 416 (1981). Second, it ignores the possibility of circumstances in which there is good cause for treating ALJs differently from other classes of employees.

¶8 In requiring the petitioner to prove the absence of disparate treatment, the administrative law judge relied on two Board cases, *Department of Education v. Cook*, [46 M.S.P.R. 162](#) (1990), and *Federal Drug Administration v. Davidson*, [46 M.S.P.R. 223](#) (1990). Neither case supports the administrative law judge’s conclusion because neither *Cook* nor *Davidson* held that an agency must prove

³ To meet the administrative law judge’s disparate treatment standard under these circumstances, the petitioner would have to furlough employees elsewhere in order to justify furloughing ALJs. If, however, the petitioner did this, it is difficult to imagine how it could show that furloughing one set of employees solely for the purpose of reaching the ALJs promoted the efficiency of the service under [5 U.S.C. § 7513](#).

that it treated ALJs the same as other agency employees. Rather, *Davidson* noted, as one consideration among several, that there was no evidence that ALJs were being treated differently. *Davidson*, 46 M.S.P.R. at 226. *Cook* mentioned disparate treatment in a background statement reciting the parties' arguments, not in any Board finding. *Cook*, 46 M.S.P.R. at 163.

¶9 Further, because it relies on the purported "special status" of ALJs,⁴ the initial decision could be deemed to imply that ALJs are entitled to greater protection than non-ALJ employees in a furlough situation. An agency may furlough ALJs under § 7521 for precisely the same reasons that it may furlough any other category of employee under § 7513. Actions against ALJs involve a different standard for action, and they involve additional *procedural* protections in that the petitioner has to obtain authorization from the Board before acting. Also, whatever the reason for the action, it cannot be for a reason that interferes with the ALJs' qualified judicial independence. However, ALJs are not a "protected class," and they have no entitlement to receive favorable *substantive* treatment in a furlough.

¶10 Requiring the petitioner to treat ALJs the same as other employees necessarily limits the petitioner's discretion to decide how to allocate its funding because it will, in many circumstances, require the Board to consider whether an agency's choices about how to absorb budget shortfalls are appropriate. We have held in the context of a reduction in force that an agency has broad management discretion to take action to avoid a budget deficit. *See Schroeder v. Department*

⁴ *See* ID at 32 (" . . . I must determine whether this plan nevertheless appropriately considered the special status of [ALJs] . . ."); *see also* ID at 34 ("The evidence in the record tends to show that the [petitioner] did not recognize its limitations related to the compensation and tenure of its ALJs."); ID at 36 ("If an agency employs [ALJs] . . . then under existing law the [petitioner] must consider that ALJs have special protections and accept that the existence of a financial plight does not give it unbridled discretion to furlough them.").

of Transportation, [60 M.S.P.R. 566](#), 570 (1994). We find that the same is true in the context of a furlough. The Board will not scrutinize an agency's decision to determine whether the agency has structured a furlough in a manner that second-guesses the agency's assessment of its mission requirements and priorities. The Board lacks the expertise to review every agency spending decision to determine whether it was wise or whether a particular choice should have been foregone in order to save funds necessary to avoid furloughs. See *Chandler v. Department of the Treasury*, [2013 MSPB 74](#).

¶11 None of this is to say that evidence of how the petitioner treated other similarly-situated employees is irrelevant. Disparate treatment is certainly a valid consideration and must be part of the good-cause calculus. Cf. *Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶ 6 (2010) (in a chapter 75 case brought under [5 U.S.C. § 7513](#), when an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by preponderant evidence before the penalty can be upheld). Evidence of disparate treatment without justification would weigh against a finding of good cause but it does not alone establish the absence of good cause.

¶12 We further find that the administrative law judge's decision to reduce the length of the proposed furlough in order to bring it in line with the hypothetical average employee in OSec improperly intruded on the petitioner's broad discretion to structure its furlough. In deciding that the ALJs should receive the same number of furlough days as other employees, the administrative law judge substituted his judgment for that of the petitioner as to where the petitioner could cut spending while performing its mission as it deemed appropriate. Moreover, the initial decision authorizes the petitioner to furlough the respondents for the *average* number of days of furlough per OSec employee. This does not achieve the stated objective of ensuring that employees are treated the same because it

remains true that some OSec employees will serve more furlough days than others, and some will serve no furlough days at all.

¶13 We find that the petitioner has shown by preponderant evidence that it had sound business reasons behind its decision to furlough OALJ employees, including the respondents. There is no evidence that the decision was made for an improper reason or to interfere with the ALJs' qualified judicial independence. We further find that the arguments that the respondents proffer on review are unpersuasive. In particular, we find that the respondents have not established that the administrative law judge's discovery ruling constituted an abuse of discretion.⁵ Accordingly, we find good cause shown under [5 U.S.C. § 7521](#), and authorize the petitioner to furlough the respondents for 5.5 days.

ORDER

¶14 The Board authorizes the petitioner to furlough the respondents for 5.5 days for good cause shown, pursuant to [5 U.S.C. § 7521](#). This is the final decision of the Merit Systems Protection Board in this matter. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE RESPONDENTS REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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

⁵ The respondents' Request to Exceed Word Limitations is GRANTED. See [5 C.F.R. § 1201.114\(h\)](#).

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.

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

in

Department of Labor v. Charles R. Avery, et al.

MSPB Docket No. CB-7521-13-0070-T-1

¶1 Although I agree with my colleagues that the petitioner met its burden to show that its decision to furlough the respondents was in response to a severe management plight caused by the sequestration order, I write separately to express my view that the Board should nevertheless deny the petitioner's petition for review and affirm the initial decision as issued by the administrative law judge.

¶2 After conducting a hearing, the administrative law judge determined that the agency's decision to furlough the respondents, 19 administrative law judges (ALJs) employed by the Department of Labor, was in response to "a severe management plight" stemming from a 5 percent reduction in Appropriations Account No. 012-25-0165, which covers the salaries and benefits of employees in the agency's Office of the Secretary, including the respondents. Complaint File (CF), Tab 162 at 39. However, rather than authorizing the full 5.5 days of furlough sought by the agency in its amended request, the administrative law judge found that good cause existed only to furlough respondents serving in a full-time capacity for 4 days and those serving in a part-time capacity for 2 days. The basis for his decision is that the length of the ALJ furloughs requested by the agency was significantly longer in duration than the furloughs that have been or will be imposed upon most other employees covered by account 012-25-0165. *Id.* at 39-40.

¶3 The majority vacates the initial decision and finds good cause to furlough the respondents for 5.5 days on the basis that the administrative law judge erred by requiring the petitioner to prove, as part of its case-in-chief, that it did not

engage in disparate treatment toward the respondents. Majority Opinion (Maj. Op.), ¶ 7. Citing precedent from reduction-in-force (RIF) caselaw, my colleagues elaborate that the initial decision improperly requires the petitioner to treat the respondents the same as other employees, which necessarily limits the petitioner's discretion in allocating funding and improperly requires the Board to consider whether an agency's choices in responding to a budget shortage are appropriate. *Id.*, ¶ 10, citing *Schroeder v. Department of Transportation*, [60 M.S.P.R. 566](#), 570 (1994) ("Once the agency has shown that it invoked RIF regulations for a permissible reason, the Board lacks authority to review the management considerations underlying the exercise of the agency's discretion."). The majority further notes that, while evidence of disparate treatment without justification may weigh against a finding of good cause in a furlough, it does not alone establish the absence of good cause. *Id.*, ¶ 11. However, without rejecting any of the administrative law judge's factual findings or articulating any additional factual justification for the harsher treatment to be afforded to the respondents, the majority still finds good cause for the petitioner to furlough the respondents for 5.5 days.

¶4 The record does not support the majority's decision. Indeed, in Finding of Fact No. 33, the administrative law judge found that approximately 1,400 agency employees are paid from the appropriations fund pertinent to the respondents and that approximately 900 employees paid from this fund received some furlough days. CF, Tab 162 at 8. The initial decision specifically states that the affected offices and furloughs to be imposed are as follows:

- Program Direction and Support [Office of the Secretary and Deputy Secretary – 4 days. Office of the Assistant Secretary for Policy, Schedule C and Non-Career SES – 4 days, all others – 0 days. Office of Public Affairs, Schedule C and Non-Career SES – 4 days, all others – 0 days];
- Legal Services [Office of the Solicitor, Schedule C and Non-Career SES – 4 days, all others – 1.5 days];

- Bureau of International Labor Affairs [Schedule C and Non Career SES – 4 days. All others – 0 days];
- Office of the Assistant Secretary for Administration and Management [Schedule C and Non-Career SES – 4 days. Business Operation Center – 2 days. All others – 0 days];
- Adjudications [Office of Administrative Law Judges – 7 days. Benefits Review Board – 6.5 to 7.5 days. Administrative Review Board – 6 days. Employee Compensation Appeals Board – 1 to 8 days];
- Women’s Bureau [Schedule C and Non-Career SES – 4 days. All others – 0 days];
- Civil Rights [0 days];
- Chief Financial Officer others [0 days].

Id. at 8-9. This finding plainly shows that, other than some other employees in the agency’s Adjudication function, the petitioner has imposed or will impose furloughs of between 0 to 4 days on every other agency employee paid from account 012-25-0165.

¶5 After summarizing the parties’ arguments, the administrative law judge determined, based upon the Board’s holding in *Department of Education v. Cook*, [46 M.S.P.R. 162](#) (1990); and *Federal Drug Administration¹ v. Davidson*, [46 M.S.P.R. 223](#) (1990), that to show good cause, the petitioner must prove by preponderant evidence that

(1) the proposed furlough related to a management plight caused by financial restrictions, (2) a furlough was implemented in accordance with law and consistent with [Office of Personnel Management (OPM)] furlough guidance, (3) ALJs were treated like other employees in the agency, and (4) the proposed action was not predicated on grounds which improperly interfere with the administrative judges’ performance of judicial functions.

CF, Tab 162 at 23-24. I disagree with the majority’s assessment that the above “4-prong test” is erroneous because it fails to recognize that not all furloughs are

¹ The agency requesting to furlough its administrative judges in *Davidson* was actually the federal Food and Drug Administration, not the Federal Drug Administration as reflected in the caption of that case as it appears in the reporter.

a result of a shortage of funds and that lack of work is another justification of furloughs.² Maj. Op., ¶ 6. When viewed in context, it is apparent that the administrative law judge did not set out this standard as a rigid identification of the elements of a furlough that must be proved in every possible ALJ furlough case. Rather, the statement accurately identifies the factual and legal issues raised in this unique case. Indeed, while the majority “rejects” the application of the initial decision’s “4-prong test,” the opinion does not identify any additional issues raised in this case. In essence, the majority opinion merely disagrees with the administrative law judge’s factual finding with regard to the third factor.

¶6 As I explained more fully in my separate opinion in *Chandler v. Department of the Treasury*, [2013 MSPB 74](#), I disagree with the majority’s use of our highly deferential standard for reviewing RIF cases to adjudicate chapter 75 furloughs of 30 days or less. The Board’s jurisdiction over RIF appeals derives entirely from the OPM’s regulations which largely define the scope of the Board’s review of such actions. See *Bodus v. Department of the Air Force*, [82 M.S.P.R. 508](#), ¶ 7 (1999) (the Board’s jurisdiction over RIF actions is not statutory but derives from regulation). Thus, an agency in a RIF case need only show by preponderant evidence that there is a legitimate management reason for the action, i.e., a reason for the RIF that is listed under OPM’s regulations. See *McMillan v. Department of the Army*, [84 M.S.P.R. 476](#), ¶ 5 (1999). As long as a RIF is legitimately conducted for one of the reasons identified in the regulation, it will not be disturbed absent a clear abuse of discretion or a substantial departure from applicable procedures. *Cross v. Department of Transportation*, [127 F.3d](#)

² It should be noted that the administrative law judge did observe in the initial decision that lack of work is another basis for imposing furloughs. CF, Tab 162 at 26. More importantly, the majority’s criticism of the “4-prong test” is irrelevant because there is no indication that the petitioner has proposed the furloughs for any reason other than a shortage of funds. Thus, the majority’s objection to the initial decision is purely hypothetical.

[1443](#), 1447 (Fed. Cir. 1997). The majority provided little basis in *Chandler*, other than the fact that furloughs and RIF actions are both non-disciplinary and generally triggered by a shortage of funds, for importing a deferential RIF concept from the Federal Personnel Manual into the standard for proving an action under chapter 75. Moreover, I find that such a highly deferential review is even less applicable in cases such as this involving adverse actions imposed upon ALJs because, under [5 U.S.C. § 7521](#) governing such actions, the Board, and not an agency official, decides whether to impose the proposed action.

¶7 Furthermore, even if analogizing this action to RIF appeals is appropriate, I would nevertheless disagree with the majority’s decision to impose the 5.5 days of furlough. As I stated in *Chandler*, there is a significant body of RIF precedent, which demonstrates that the Board review of RIF actions is not an empty process that effectively amounts to rubber stamping agency decisions. On the contrary, both with regard to the question of establishing the bona fides of the RIF action and with the manner in which a RIF action is conducted, the Board has clearly demonstrated that its adjudicatory process remains intact, which means holding agencies to their burdens of proof and persuasion and providing appellants with an opportunity to rebut the agency’s evidence. See *Chandler*, [2013 MSPB 74](#), ¶¶ 9-14.

¶8 In my view, the administrative law judge properly reviewed the proposed furloughs of the respondents under the standard set in *Clark v. Office of Personnel Management*, [24 M.S.P.R. 224](#) (1984). CF, Tab 162 at 36. The Board held in *Clark* that the efficiency of the service standard in a furlough case is met by showing that the furlough is a reasonable³ management solution to the

³ At one point in its opinion in *Chandler*, the majority states that “the wisdom of agency’s spending decisions is not at issue.” *Chandler*, [2013 MSPB 74](#), Maj. Op., ¶ 16. I agree. The well-established standard for Board review is simply whether those decisions were “reasonable.” That said, I fundamentally disagree with the majority’s view that the Board is somehow unable or not in a position to assess the reasonableness

financial restrictions at issue and that the agency applied its determination as to which employees to furlough in a fair and even manner. *See Clark*, 24 M.S.P.R. at 225. While I recognize that the efficiency of the service standard is not applicable in a proposed adverse action against an ALJ, the circumstances of this case are still sufficiently analogous for the *Clark* standard to be employed here. Therefore, the administrative law judge properly required the petitioner to prove that its imposition of furloughs on employees is being conducted in a fair and even manner.

¶9 Finally, I dissent from the majority's decision to impose furloughs of 5.5 days on the respondents. In my view, the administrative law judge did not abuse his discretion in finding that the respondents are comparable to other senior employees in the Office of the Secretary for purposes of determining whether the furlough of the ALJs was imposed in a fair and even manner. CF, Tab 162 at 38. Furthermore, I agree with the administrative law judge that the petitioner failed to provide a clear justification to impose furloughs of greater duration upon the respondents than the comparators. *Id.* In particular, the agency's justification for its dissimilar treatment of the respondents, i.e., that it deemed each separate office within the Office of the Secretary to be a separate "agency" for the budgetary and furlough purposes, is wholly unpersuasive. In the absence of any

of the agency's decisions in this context. In exercising our statutory authority to review adverse actions under [5 U.S.C. §§ 7513](#) and 7701, we routinely review the reasonableness of agency decision-making and I would note, in this regard, that a reasonableness standard is not a particularly high bar such that our review of the agency's spending decisions would threaten to put us in a position of "second guessing" or micromanaging an agency's operational decisions. Nor do I discern anything about the nature of an agency's budget allocation process that would render it inaccessible to third-party review.

other justification,⁴ I find that the petitioner has failed to prove that the imposition of the furloughs was being conducted in a fair and even manner. Accordingly, I would affirm the initial decision's authorization to impose furloughs of 4 days for full-time employees and 2 days for part-time employees.

Anne M. Wagner
Vice Chairman

⁴ I disagree with the majority that the administrative law judge adopted the requirement that the petitioner treat ALJs the same as other employees as an absolute rule. Maj. Op., ¶¶ 9-10. Instead, I find that the administrative law judge applied the fair and even test appropriately and required the petitioner to demonstrate its justification for treating the ALJs differently. For example, the initial decision states that "if employees within a particular funding source are furloughed for different periods of time, the protected employee should not be furloughed more than the average period of furlough without clear justification." CF, Tab 162 at 38. The administrative law judge specifically stated that he did not concur with the respondents' argument that the "ALJs cannot be furloughed unless every employee in the Department of Labor is furloughed for at least the same number of days." *Id.* at 36.