UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 71

Docket No. AT-1221-09-0874-B-1

Harroll Ingram,

Appellant,

v.

Department of the Army,

Agency.

July 25, 2011

Harroll Ingram, Sanford, Florida, pro se.

Laura A. Cushler, Esquire, Orlando, Florida, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the remand initial decision that denied his request for corrective action. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115(d), REVERSE the remand initial decision, and ORDER the corrective action listed below.

BACKGROUND

¶2 In an initial decision dated December 3, 2009, the administrative judge dismissed the appellant's individual right of action (IRA) appeal for lack of jurisdiction on the ground that the appellant had failed to nonfrivolously allege

that he had made a protected disclosure. Initial Appeal File, Tab 12.[1] In an Opinion and Order dated May 7, 2010, the Board granted the appellant's petition for review, reversed the administrative judge's initial decision, held that the appellant had nonfrivolously alleged the Board's jurisdiction, and remanded the appeal for further adjudication. *See* Remand Appeal File, Tab 1; *Ingram v. Department of the Army*, 114 M.S.P.R. 43 (2010). The Board found that the appellant had nonfrivolously alleged that he had disclosed to his supervisors that a program manager was about to engage in conduct contrary to the agency's regulations in connection with a proposed medical simulation training event. *See* Remand Appeal File, Tab 1, ¶¶ 4, 20. The appellant waived a hearing on remand, and the parties filed very limited additional evidence. *See* Remand Appeal File, Tabs 5, 10, 11. In his remand initial decision, the administrative judge denied the appellant's request for corrective action on the ground that the appellant had failed to prove that he made a protected disclosure by a preponderance of the evidence.[2] Remand Appeal File, Tab 12. The appellant filed a timely petition for review. Petition for Review File, Tab 1. On review, the appellant argues that the administrative judge misconstrued the factual record and made findings unsupported by the evidence. Petition for Review File, Tab 1 at 2-4.

ANALYSIS

Legal Standards

¶3 The Whistleblower Protection Act (WPA) prohibits an agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation;

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[1] The record for the initial appeal file in MSPB Docket No. AT-1221-09-0874-W-1 will be cited as "Initial Appeal File, Tab _." The record in the remand appeal file in MSPB Docket No. AT-1221-09-0874-B-1 will be cited as "Remand Appeal File, Tab _."

[2] In essence, the administrative judge considered the same record the Board considered in the prior petition for review.

gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Chambers v. Department of the Interior*, 602 F.3d 1370, 1375-76 (Fed. Cir. 2010) (citing 5 U.S.C. § 2302(b)(8)). In an appeal before the Board, the employee must establish by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action. *See* 5 U.S.C. § 1221(e)(1); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 12 (2011). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidenced wrongdoing as defined by the WPA. *See Drake v. Agency for International Development*, 543 F.3d 1377, 1382 (Fed. Cir. 2008); *see also Chambers*, 602 F.3d at 1379 n.7; *Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 25 (2011).

¶4 A very broad range of personnel actions fall within the Board's jurisdiction under the WPA, including a significant change in the appellant's duties. *See Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 7, *overruled on other grounds, Mason v. Department of Homeland Security*, 116 M.S.P.R. 135 (2011); *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 n.4 (2010) (the term "significant change in duties . . . or working conditions" should be construed broadly); *see also* 5 U.S.C. § 2302(a)(2)(A). A "contributing factor" means the disclosure affected the agency's decision to threaten, propose, take, or not take the personnel action regarding the appellant. *See Covarrubias*, 113 M.S.P.R. 583, ¶ 15. An employee can show that his disclosure was a contributing factor to the personnel action via the knowledge/timing test --- by presenting evidence that the official taking the personnel action was aware of the disclosure, and the official took the action within a short enough period after the disclosure for a reasonable person to conclude that the disclosure was a contributing factor

to the personnel action. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 19 (2008).

¶5 If the employee meets that burden, the Board shall order corrective action unless the agency shows by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* 5 U.S.C. § 1221(e)(1)-(2); *Chambers*, 116 M.S.P.R. 17, ¶ 12. In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider whether the agency had legitimate reasons for the personnel action, the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 36 (2011); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 23 (2010).

Protected Disclosure

¶6 We conclude that the appellant proved that he made a protected disclosure by a preponderance of the evidence. Where the administrative judge's findings are not based upon witness demeanor, the Board may make its own factual judgments based upon the record. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002); *Miller v. Department of Homeland Security*, 111 M.S.P.R. 312, ¶ 15 (2009).

¶7 At the outset, the appellant had obtained an opinion from the legal department stating that allowing the event to proceed (with videotaping and photography) would violate agency ethical regulations and possibly compromise the trade secrets of agency contractors. Initial Appeal File, Tab 11, Subtab 1 at 3; Remand Appeal File, Tab 10, Subtab 1 at 3. The appellant also relied upon a memorandum from the Deputy Secretary of the Army emphasizing the importance of avoiding these same ethical issues and the penalties for failing to do so. *See*

Initial Appeal File, Tab 11, Subtab 1 at 4; Remand Appeal File, Tab 10, Subtab 1 at 4, 6-8. Moreover, the appellant's second-level supervisor also concluded that the event should not take place given the potential legal issues. Initial Appeal File, Tab 7, Enclosure 4 at 25-26; Remand Appeal File, Tab 10, Subtab 1 at 4. This evidence more than suffices to provide a layman (like the appellant) with a reasonable belief that the project manager's proposed course of conduct could violate agency regulations. *See Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, ¶ 17 (2011) (an employee need not prove an actual violation to establish that he had a reasonable belief that his disclosure met the statutory criteria); *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 27 (2010) (the appellant's reliance on the Contracting Officer's recommendation regarding the proper handling of an invoice suggested that he had a reasonable basis for believing his supervisor's conduct was contrary to law); *Schnell*, 114 M.S.P.R. 83, ¶ 20 (the reasonableness of the appellant's belief that the agency was violating the law was supported by a report concluding that the agency needed to improve its monitoring of contractor performance).

¶8 We must also disagree with the administrative judge's conclusions that the project manager accepted the appellant's recommendations to modify the event, that the appellant could not reasonably believe the event was illegal because he advocated for it, and that the discussions after the initial disclosures were simply internal disagreements. *See* Remand Appeal File, Tab 12 at 7-9. Whether the project manager "accepted" the appellant's recommendations of June 5, 2008, is irrelevant; they were made before he obtained the legal opinion which formed the basis for his later disclosures. *See* Remand Appeal File, Tab 10, Subtab 1 at 1-3. There is also no evidence that the project manager ever unconditionally agreed to proceed with the event without videotaping or photography by the contractor, and the agency appears to concede as much. *See* Remand Appeal File, Tab 10, Subtab 1 at 3; Initial Appeal File, Tab 7, Enclosure 3 at 22-23; Petition for Review File, Tab 3 at 6. The appellant also never advocated for the event after he obtained the

legal opinion, instead asserting that he was participating under duress and finally refusing to participate at all, even if his refusal resulted in disciplinary action. Remand Appeal File, Tab 10, Subtab 1 at 5, 8; Initial Appeal File, Tab 7, Enclosure 4 at 25. Lastly, the appellant's disclosure, and the ensuing disputes, cannot be fairly characterized as a mere internal disagreement. There was much more here – the appellant had a legal opinion that the project manager's conduct would violate agency regulations and he obtained the assistance of supervisors to attempt to stop the event. *See generally Ingram*, 114 M.S.P.R. 43, ¶ 19. Therefore, we conclude that the appellant proved that he made a protected disclosure by a preponderance of the evidence.[3]

Remaining Issues

¶9 Neither the administrative judge in his remand decision nor the parties on review addressed the issues of whether the appellant's protected disclosure was a contributing factor to any personnel action or whether the agency established, by clear and convincing evidence, that it would have taken the same action in the absence of the appellant's protected disclosure. *See* Initial Appeal File, Tab 12; Remand Appeal File, Tab 12; Petition for Review File, Tabs 1, 3. Nonetheless, to preserve the Board's resources and avoid the delay inherent in a second remand, we resolve these issues here. This course is appropriate because the administrative judge repeatedly provided both parties with notice of the relevant standards and burdens of proof. *See, e.g.*, Initial Appeal File, Tab 5 at 2-5, Tab 10 at 2-3; Remand Appeal File, Tab 9. In addition, the record, though limited,[4] is

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[3] On remand, the agency did not appear to argue below or on review that the appellant's purported disclosures were part of his normal duties. Petition for Review File, Tab 3; Remand Appeal File, Tab 11. We note his duties do not appear to include disclosures of the type at issue here. *See* Initial Appeal File, Tab 3, Subtabs 4g, 4h; *see also Lane*, 115 M.S.P.R. 342, ¶ 22 (there was no basis in the record for concluding that the appellant's duties included reporting ethical violations).

[4] While the appellant has not preserved any discovery issues for our review, we note that the agency appears to have been less than responsive to the appellant's discovery

complete -- the appellant waived a hearing and the parties made their final evidentiary filings in response to the administrative judge's close of record order. *See* Remand Appeal File, Tabs 5, 9, 10, 11.[5]

A. Contributing Factor to a Personnel Action

¶10 At the outset, the appellant readily satisfies the knowledge-timing test. There is no dispute that the appellant's supervisors (as well as the project manager) were well-aware of his disclosures. *See, e.g.*, Remand Appeal File, Tab 11, Enclosure 1. It is also undisputed that the appellant made his disclosures during the summer of 2008, and the purported personnel actions took place in the following months, culminating with his performance review in January 2009. *See generally Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 16 (2011) (the knowledge-timing test is satisfied where the disclosure and personnel action are only 1 to 2 years apart); *Gonzalez*, 109 M.S.P.R. 250, ¶¶ 19-20 (the knowledge/timing test is satisfied where the appellant's disclosure and his removal were slightly over a year apart).

¶11 The agency does not challenge the issues of knowledge or timing, but instead argues that the appellant did not suffer a negative personnel action – his duties were not reduced, he was not denied a transfer, he retained the same job with the same title, his lateral moves were based upon the agency's needs, and he did not receive a punitively low performance appraisal. *See* Remand Appeal File, Tab 11 at 5-6. In his close of the record conference call, the administrative judge defined the relevant personnel actions as follows: (1) The project manager reduced (or took away entirely) all the appellant's responsibilities; (2) the

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requests (and the administrative judge was less than thorough in addressing this problem). *See generally* Initial Appeal File, Tab 10 at 3; Tab 11 at 2-5, Subtabs 2, 3; Tab 12; Remand Appeal File, Tabs 6, 9, 10 at 2-5, 12.

[5] Indeed, the agency asked for, and received, an extension of the close of the record conference. *See* Remand Appeal File, Tabs 7, 8.

appellant was denied a transfer off the project manager's team (MSTC team); (3) the appellant was involuntarily transferred to the EST 2000 team; and (4) the appellant received a punitively low performance appraisal. Remand Appeal File, Tab 9 at 1-2.

¶12 As to item 1, the appellant represents that the project manager took away all his duties and ceased communicating with him, and he supports his statement with contemporaneous e-mails to his supervisor complaining about the problem. *See* Remand Appeal File, Tab 10 at 3, Subtab 1 at 9. The agency has not directly responded to the appellant's presentation on this issue. The agency appears to indirectly challenge this assertion by stating that the project manager was not in the appellant's direct chain of command. Remand Appeal File, Tab 11, Enclosures 1, 2. However, this appears to be an artificial and irrelevant distinction – the appellant served the MSTC team (which assigned his work), his supervisor directed him to follow the project manager's orders, and he informed his supervisor that the project manager had stopped assigning him work. *See* Remand Appeal File, Tab 10 at 3, Subtab 1 at 4, 9. A significant change in duties or working conditions can constitute a personnel action. *See* 5 U.S.C. § 2302(a)(2)(A)(xi). Therefore, the appellant established this personnel action by a preponderance of the evidence.

¶13 The appellant's presentation regarding the purported denial of his requested transfer off the MSTC team, however, is not persuasive. While a transfer (or the denial thereof) can constitute a personnel action, *see* 5 U.S.C. § 2302(a)(2)(iv), there is no evidence suggesting any involuntary action here. Notably, the appellant expressly agreed to remain on the team for a transition period, and, after meeting the project manager's successor, he affirmatively asked to remain

on the team. *See* Remand Appeal File, Tab 10 at 3, Subtab 1 at 10; Initial Appeal File, Tab 11 at 3; Subtab 1 at 7-8.[6]

¶14 The appellant also claims that the agency punitively transferred him from the MSTC team (after he had asked to remain to assist the new project manager) to the EST 2000 team, which gave him far less promotion potential. The record also contains evidence of the appellant and his supervisor's contemporaneous discussion of the matter. *See* Initial Appeal File, Tab 3, Subtab 4k at 1-3; Remand Appeal File, Tab 10, Subtab 1 at 10-11. The supervisor's affidavits submitted by the agency do not address the appellant's claim that his promotion potential was diminished by the transfer, and the two supervisors contradict each other somewhat regarding the appellant's willingness to transfer — his first-level supervisor stated that the appellant "agreed" to the transfer and his second-level supervisor stated that the appellant could give input and could express a preference. Remand Appeal File, Tab 11, Enclosures 1, 2. While the question is a close one, the appellant has established that his transfer off the MSTC team was a personnel action by a preponderance of the evidence.

¶15 As to the purportedly low performance rating, the appellant asserts that his ratings for the 4 prior years were significantly higher, and he received the highest possible rating each year. Remand Appeal File, Tab 10, Subtab 1 at 11.[7] In response, the agency provides his first-level supervisor's affidavit that the appellant's review was a "good" review. Remand Appeal File, Tab 11, Enclosure 1 at 1. In addition, his second-level supervisor notes that the appellant was only ranked once under the NSPS, and that his prior rankings cannot be compared with

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[6] The appellant also fails to support his request for consequential damages. *See generally* Remand Appeal File, Tab 10.

[7] While not argued on review, there is an open question whether a National Security Personnel System (NSPS) performance appraisal is a personnel action under 5 U.S.C. § 2302(a). While it is not a "performance evaluation under chapter 43," it is a decision concerning "pay, benefits, or awards." *See* 5 U.S.C. §§ 2302(a)(2)(A)(viii) & (ix).

the NSPS system in a reliable or accurate manner, but they were at or below "the mean" under the prior system. *Id.*, Enclosure 2 at 2. The agency also notes that 43% of agency employees received the same score as the appellant under the NSPS appraisal system. Remand Appeal File, Tab 11 at 6.

¶16 The appellant and the agency differ regarding the appellant's ratings for the previous 4 years – with the appellant claiming the highest rating and the agency suggesting his prior ratings were average or worse. Neither side has provided the appellant's actual appraisals for the prior years. The appellant, however, does present contemporaneous correspondence in which he refers to his prior outstanding ratings, specifically by year, without contradiction by his supervisors in the correspondence. *See* Remand Appeal File, Tab 10, Subtab 1 at 11; Initial Appeal File, Tab 3, Subtab 4k at 1-3. In addition, we note that the appellant's supervisors somewhat contradict each other – one opining that the appellant received a good review and the other suggesting the appellant's reviews were always average at best. Thus, on this limited record, the appellant has established that he received the highest possible rating the 4 prior years by a preponderance of the evidence. While the agency is likely correct that the prior appraisal system cannot be readily compared with the NSPS, their own data nonetheless appears to support the appellant's claim. Notably, 56% of the agency received a higher score than the appellant under the NSPS appraisal system. *See* Initial Appeal File, Tab 3, Subtab 4j at 4. Even given the alleged differences in the performance scales between systems, however, the appellant went from the highest possible rating to a below average rating in one year with no explanation. The appellant has shown by a preponderance of the evidence that he did receive a punitively low rating. Therefore, in summary, the appellant has shown by a preponderance of the evidence that his disclosure was a contributing factor to three negative personnel actions by a preponderance of the evidence.

B. Clear and Convincing Evidence

¶17 At no point during the initial or remand proceedings, or on review, has the agency attempted to prove that it would have taken the same personnel actions regarding the appellant in the absence of his disclosures by clear and convincing evidence. Indeed, the agency has never mentioned this issue. This is inexplicable, given the administrative burden of proof. *See, e.g.*, Initial Appeal File, Tab 5 at 5, Tab 10 at 3; Remand Appeal File, Tab 9 at 2.

¶18 Clear and convincing evidence is "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d); *see also Schnell*, 114 M.S.P.R. 83, ¶ 23. It goes without saying that the agency's failure to present any evidence on this point fails to satisfy the clear and convincing standard. *See generally Parikh,* 116 M.S.P.R. 197, ¶ 40. Furthermore, the agency's limited evidence -- that was directed solely to whether the appellant suffered a personnel action -- consisted of general statements that did not satisfactorily provide a nonretaliatory explanation for the personnel actions (and failed to even address one of them). *See, e.g.*, Remand Appeal File, Tab 11, Enclosures 1, 2. General statements unsupported by other evidence (for example, the agency provides none of the appellant's transfer paperwork) do not satisfy the clear and convincing standard. *See Schnell*, 114 M.S.P.R. 83, ¶ 24. Therefore, the appellant is entitled to corrective action.

ORDER

¶19 We ORDER the agency to transfer the appellant to his prior position on the MSTC team. We also ORDER the agency to revise the appellant's 2008 NSPS performance appraisal to a level equivalent to his four prior appraisals (highest rating). 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 and/or Postal Service Regulations, 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.

¶20 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 to describe 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).

¶21 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 in 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).

¶22 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.

¶23 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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 on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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.