UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 134

Docket No. SF-0731-10-0977-I-2

Shane Hudlin,

Appellant,

v.

Office of Personnel Management,

Agency.

December 26, 2012

Byron Dare, Esquire, San Francisco, California, for the appellant.

Cylia E. Lowe, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed the determination of the Office of Personnel Management (OPM) that the appellant was unsuitable for employment. For the reasons set forth below, we REVERSE the initial decision in part and order the agency to CANCEL the negative suitability determination.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition for

BACKGROUND

¶2 The appellant applied for the position of Special Agent with the Drug Enforcement Administration in August 2008. Initial Appeal File (IAF), Tab 4, Subtab 2e at 4. In support of his application, the appellant submitted an Optional Form (OF) 306, Declaration for Federal Employment. IAF, Tab 4, Subtab 2y. On his OF 306, the appellant gave a negative response to the following question:

> During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by [OPM] or any other Federal agency?

Id. at 1 (Question 12). Additionally, the appellant certified that the information on the form was true, correct, complete, and made in good faith to the best of his knowledge and belief. *Id.*

¶3 Thereafter, on April 21, 2009, the appellant completed the Standard Form 86 (SF-86), Electronic Questionnaires for Investigations Processing (e-QIP) for the purpose of assisting OPM in conducting a background investigation. IAF, Tab 4, Subtab 2w. Section 13A.4 on the appellant's SF-86 required him to provide the explanation or reason for leaving employment at Vitamin Adventure in June 2006, and the appellant responded, "Position offered for more compensation and full time work." *Id.* at 27-28. Section 13C.1 on the SF-86 asked if, in the last 7 years, the appellant: (1) was fired from a job; (2) quit a job after being told he would be fired; (3) left a job by mutual agreement following charges or allegations of misconduct; (4) left a job by mutual agreement following notice of unsatisfactory performance; (5) left a job for other reasons under unfavorable circumstances; or (6) was laid off from a job by an employer. *Id.* at 36. The appellant responded in the negative and certified that the information on the form

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review under the previous version of the Board's regulations, the outcome would be the same.

was true, complete, and correct to the best of his knowledge and belief, and that his statements were made in good faith. *Id.* at 36, 55.

¶4 As part of his background investigation, in May 2009, the appellant took and passed a polygraph examination in which he denied falsifying any information on his SF-86. IAF, Tab 8, Exhibit A-4; Hearing Compact Disc (CD) at 3:12:20 (testimony of Special Agent Mary Toomey, Polygraph Examiner, San Francisco Field Division). Thereafter, on June 2, 2009, the appellant spoke with the background investigator, Joe Alesi, confirming, under oath, that he had never been fired from a job and the accuracy of his SF-86. IAF, Tab 4, Subtab 2p at 1.

¶5 Shortly after his meeting with Mr. Alesi, the appellant contacted his former employers to let them know that a background investigator would be contacting them and to request his employee files. IAF, Tab 4, Subtab 2e at 4. In response, he received a packet from Vitamin Adventure and it is at this time that the appellant claims to have first learned that Vitamin Adventure considered him fired from the company. *Id.* Upon learning of the documented termination, the appellant contacted Mr. Alesi to explain the situation and change his federal employment forms. *Id.* at 5; Hearing CD at 4:21:50, 4:34:30 (testimony of the appellant). The appellant claims that Mr. Alesi told him not to worry about it and that he would contact him if there was anything he needed from the appellant. Hearing CD at 4:35:40 (testimony of the appellant). The appellant also claims that he never spoke to Mr. Alesi again. *Id.* The appellant subpoenaed Mr. Alesi to testify at the hearing but the process server was unable to serve him despite multiple attempts. Refiled Appeal File (RAF), Tab 6.

¶6 On March 30, 2010, as a result of the findings of its background investigation, OPM informed the appellant that two issues raised a serious question about his suitability for employment: (1) misconduct or negligence in employment; and (2) material, intentional false statement, or deception or fraud in examination or appointment. IAF, Tab 4, Subtab 2h. Specifically, OPM alleged that the appellant had been terminated from his employment at Vitamin

Adventure in June 2006 after he had given a substantial discount to two individuals who appeared to be his friends or acquaintances when he was not authorized to do so, and he made intentional false statements in connection with his application for employment regarding the termination. *Id.* at 3-5. The appellant timely responded to the charges, asserting that he did not engage in the alleged misconduct and that he had been unaware of the alleged termination. IAF, Tab 4, Subtab 2e. On August 11, 2010, OPM informed the appellant that it was sustaining the charges. IAF, Tab 4, Subtab 2b. OPM found one additional consideration to be pertinent, which was the nature and seriousness of the conduct. *Id.* at 2. As a result, OPM rated the appellant's application for the position of Special Agent ineligible, canceled any eligibilities he may have had for any covered position,[2] and debarred him from competition for, or appointment to, any covered position until September 30, 2012.[3] *Id.* at 1.

¶7 The appellant filed a timely appeal of OPM's suitability action, claiming that he was unaware of the alleged misconduct with which he was charged and that he believed the statements he made in connection with his application for employment to be true at the time he signed them. IAF, Tab 1 at 3. After holding the requested hearing, the administrative judge issued an initial decision affirming the suitability determination. RAF, Tab 7, Initial Decision at 2. The administrative judge found that the agency failed to prove charge (1), misconduct or negligence in employment, and therefore did not sustain the charge. *Id.* at 10-

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

[3] Although the debarment was set to expire September 30, 2012, the regulations provide that OPM may impose an additional period of debarment based in whole or in part on the same conduct at issue here should the appellant again become an applicant subject to OPM's suitability jurisdiction. *See* 5 C.F.R. § 731.204(b).

13. However, she did sustain charge (2), material, intentional false statement, or deception or fraud in examination or appointment, finding that the agency proved the charge by preponderant evidence. *Id.* at 13-19. In so doing, the administrative judge found that, "although it [was] a close call, [she was] nevertheless persuaded that more likely than not, the appellant provided intentional false statements on his federal application forms and to OPM's investigator." *Id.* at 19. As a result, the administrative judge remanded the appeal to OPM to determine whether the suitability action was appropriate in accordance with 5 C.F.R. § 731.501(b), given that she sustained only one of the two underlying charges. *Id.* at 2, 19.

¶8 The appellant has filed a petition for review arguing, in pertinent part, that the administrative judge's finding that the appellant provided intentional false statements is contrary to findings contained in the initial decision and not logical considering the record evidence. Petition for Review (PFR) File, Tab 3 at 4. OPM has filed a response in opposition to the appellant's petition for review.[4] PFR File, Tab 9.

ANALYSIS

¶9 Pursuant to OPM regulations at 5 C.F.R. part 731, the Board has jurisdiction over certain matters involving suitability for federal employment. *Alvarez v. Department of Homeland Security*, 112 M.S.P.R. 434, ¶ 6 (2009). Under the regulations, a "suitability action" is defined as a cancellation of eligibility, a

[4] OPM filed a motion seeking an extension of time to file its response to the appellant's petition for review, which the Office of the Clerk of the Board granted. PFR File, Tabs 5, 6. The appellant filed an objection to OPM's motion, PFR File, Tab 7, a motion requesting the Board to rescind its order granting OPM's motion, PFR File, Tab 8, a supplemental motion requesting the Board to rescind its order granting OPM's motion, PFR File, Tab 10, and a motion for the Board to strike and dismiss OPM's response to the appellant's petition for review, PFR File, Tab 11. Because the appellant has failed to show that OPM missed its deadline to file its response to the petition for review as he claims, his motions are DENIED.

removal, a cancellation of reinstatement eligibility, and a debarment. *Id.*, ¶ 7; 5 C.F.R. § 731.203(a). In order to prevail, OPM must demonstrate by preponderant evidence that the appellant's conduct or character may have an impact on the integrity or efficiency of the service based on one of the specific factors listed in 5 C.F.R. § 731.202(b). *See* 5 C.F.R. §§ 731.101(a), 731.202(a), 731.501(b); *see also Ferguson v. Office of Personnel Management*, 100 M.S.P.R. 347, ¶ 9 (2005). Two factors that will support a finding of unsuitability are misconduct or negligence in employment, and making a material, intentional false statement, or deception or fraud in an examination or appointment. *Ferguson*, 100 M.S.P.R. 347, ¶¶ 10-13; 5 C.F.R. § 731.202(b)(1), (3). OPM will also consider, as appropriate, the factors set out in 5 C.F.R. § 731.202(c), including the nature and seriousness of the conduct. *See Ferguson*, 100 M.S.P.R. 347, ¶ 9; 5 C.F.R. § 731.202(c)(2).

OPM failed to prove charge (1) by preponderant evidence.

¶10 In its response to the appellant's petition for review, OPM does not challenge the finding of the administrative judge that it failed to prove by preponderant evidence that the appellant engaged in negligence or misconduct in employment by giving unauthorized discounts at Vitamin Adventure. Accordingly, we affirm the administrative judge's finding with respect to charge (1).

OPM failed to prove charge (2) by preponderant evidence.

¶11 Under 5 C.F.R. § 731.202(b)(3), a "[m]aterial, intentional false statement, or deception or fraud in examination or appointment" may form a basis for finding an individual unsuitable. *Patton v. Department of the Treasury*, 94 M.S.P.R. 562, ¶ 13 (2003), *modified on other grounds by Scott v. Office of Personnel Management*, 116 M.S.P.R. 356, ¶ 13 n.6 (2011). To establish unsuitability based on falsification, the agency must prove, by preponderant evidence, that the information was incorrect and that the appellant knowingly provided incorrect information with the intention of defrauding the agency. *Id.*; *see Haebe v.*

Department of Justice, 288 F.3d 1288, 1305 (Fed. Cir. 2002). Because there is seldom direct evidence on the issue, circumstantial evidence must generally be relied upon to establish intent. *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986); *Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 11 (2012). Whether the element of intent has been proven must be resolved from the totality of the circumstances. *Reid*, 118 M.S.P.R. 396, ¶ 11. The Board may consider plausible explanations in determining whether the incorrect information was supplied intentionally. *See Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 6 (2010). A conclusion that an appellant has provided incorrect information does not control the question of intent for purposes of adjudicating a falsification charge. *Reid*, 118 M.S.P.R. 396, ¶ 11. However, intent may be inferred when an appellant makes a misrepresentation with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *Id.*

¶12 In assessing the charge, the administrative judge identified several factors that weighed in the appellant's favor regarding his credibility. Initial Decision at 14. Applying the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), she found that the appellant "testified credibly, without hesitation, and with great articulation in a direct and forthright manner." *Id.* She additionally found that his unequivocal testimony at the hearing was consistent with his request for reconsideration, the statement he made to Vitamin Adventure upon receipt of the termination forms, and the statements that he made to a current coworker, Keith Silva. *Id.* The administrative judge also noted that, in consideration of the appellant's character, Mr. Alesi interviewed numerous witnesses, the vast majority of whom described the appellant as being honest and using good judgment. *Id.* The administrative judge further found "the polygraph evidence probative of the appellant's truthfulness that he did not falsify his SF-86." *Id.* at 16. In addition, the administrative judge noted that she was mindful that when the appellant discovered he had been terminated from Vitamin

Adventure, it was undisputed that he immediately contacted Mr. Alesi to inform him of the new information and to change his federal employment forms. *Id.* She also noted that Mr. Silva testified that, based on his knowledge of the appellant, he believed the appellant had no reason to be less than truthful because he knew that he would be subject to a background investigation. *Id.*

¶13 Notwithstanding these factors in the appellant's favor, the administrative judge nevertheless determined that the appellant knew that he was being fired from Vitamin Adventure in June 2006 based on the testimony of his then-supervisor, Xochitl MacPhee.[5] *Id.* at 16. The appellant's version of events is as follows: In late May 2006, the appellant provided Ms. MacPhee with notice that he intended to leave his job at Vitamin Adventure because he had been selected for a position with the City of Santa Rosa. Hearing CD at 4:12:00 (testimony of the appellant). He told Ms. MacPhee that he did not know the exact date he would be starting because the offer was contingent upon the appellant providing certain paperwork and passing a physical examination. *Id.*; IAF, Tab 4, Subtab 2e at 2, 21. The offer letter provided that his wage at the City of Santa Rosa would be $16.55 an hour, whereas his wage at Vitamin Adventure was $10.00 an hour. IAF, Tab 4, Subtab 2e at 21; Hearing CD at 4:10:10 (testimony of the appellant). On June 25, 2006, the appellant allegedly engaged in the charged misconduct that the administrative judge found the agency failed to prove. IAF, Tab 4, Subtab 2e at 2. On the following day, June 26, 2006, the appellant received a telephone call from the City of Santa Rosa informing him that he had been medically cleared and that it was ready for him to start work. IAF, Tab 4, Subtab 2e at 3; Hearing CD at 4:05:30 (testimony of the appellant). The appellant had just completed his junior year of college and was available to begin full-time work for the summer.

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[5] At the time that Ms. MacPhee supervised the appellant, her name was Xochitl Nava. IAF, Tab 4, Subtab 2e at 2.

IAF, Tab 4, Subtab 2e at 3; Hearing CD at 4:12:50 (testimony of the appellant). The next day, June 27, 2006, the appellant informed Ms. MacPhee during a telephone conversation that he had accepted the position with the City of Santa Rosa and that he needed to resign from his position at that time. IAF, Tab 4, Subtab 2e at 3; Hearing CD at 4:13:50, 4:14:40 (testimony of the appellant). Ms. MacPhee told him to bring his keys and work shirts into the store and that she had some papers for him to sign. IAF, Tab 4, Subtab 2e at 3. The appellant arrived at the store, dropped off his shirts and keys, quickly signed the documents at the highlighted yellow areas indicating where he needed to sign without reading the content, and took his last paycheck. *Id.*; Hearing CD at 4:15:25 (testimony of the appellant). He did not take a copy of the forms he signed. IAF, Tab 4, Subtab 2e at 3. By the end of the week, the appellant began full-time work at the City of Santa Rosa. *Id.* Once the appellant went back to school for the start of his senior year, and because he was still serving an internship at the U.S. Postal Inspection Service, the City of Santa Rosa allowed him to work on a part-time basis. Hearing CD at 3:41:00 (testimony of the appellant); IAF, Tab 4, Subtab 2p at 19.

¶14 Ms. MacPhee testified that on June 25, 2006, she received a telephone call from her supervisor advising her that the appellant had been sent home that day for giving unauthorized discounts to his friends. *Id.* at 5:58:45 (testimony of Ms. MacPhee). Her supervisor informed her that termination forms would be coming to the store in 2 days and that the appellant needed to sign them. *Id.* at 5:59:45. Ms. MacPhee understood the appellant's termination was involuntary. *Id.* at 6:00:10. When the forms arrived, she called the appellant to let him know the packet was there and he needed to pick up his last paycheck. *Id.* Although Ms. MacPhee did not remember the appellant's exact words during that conversation, she testified that the appellant stated that he did not know why it had gone down the way it did and that he did not want to leave on bad terms. *Id.* at 6:01:00. The appellant came into the store later that day. *Id.* at 6:08:10. He wanted to discuss what had happened on Sunday but Ms. MacPhee did not. *Id.* at

6:09:00. When he was reviewing the documents, the appellant asked Ms. MacPhee what "involuntary" meant. *Id.* at 6:09:20. Ms. MacPhee testified that the appellant did not give her advanced notice that he would stop working at Vitamin Adventure once the job at the City of Santa Rosa came through, although she acknowledged that she knew about the job. *Id.* at 6:18:40. Ms. MacPhee does not remember if the appellant took copies of the termination forms when he left. *Id.* at 6:25:38.

¶15 "The general rule is that the Board is free to substitute its judgment for that of one of its administrative judges," with the exception of overturning a demeanor-based credibility determination. *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008). The Board must give deference to an administrative judge's credibility determination when it is based, explicitly or implicitly, on the demeanor of a witness. *Leatherbury*, 524 F.3d at 1304; *Haebe*, 288 F.3d at 1301. The Board may substitute its own determinations of fact for those of an administrative judge, even where his credibility findings are based in part on demeanor evidence, if the Board can articulate a sound reason, based on the record, for a contrary evaluation of the evidence. *Haebe*, 288 F.3d at 1300.

¶16 In this case, the administrative judge made demeanor-based credibility determinations in assessing the credibility of the appellant, finding that he testified credibly, with one significant exception. Initial Decision at 14, 16-17. The administrative judge sustained the second charge based, in part, on her finding that the appellant knew he was being fired from Vitamin Adventure. Initial Decision at 16. In making this determination, she did not credit the appellant's assertion that he did not read the termination forms due to "the appellant's overall thoroughness and the consistent descriptions of the appellant during the background investigation as being a conscientious and 'by the book' person." *Id.* at 17. She also relied on Ms. MacPhee's testimony that the appellant must have known he was being terminated under the circumstances. *Id.* at 14, 17-18. She noted that Ms. MacPhee testified that the appellant saw that the

termination was labeled involuntary in the termination forms and asked her what that meant. *Id.* at 17. We find that the administrative judge's determinations are not supported by the record.

¶17 Ms. MacPhee claims that she does not remember how she responded to the appellant's alleged question regarding what involuntary meant, but she was certain that she did not say it meant he was "fired or anything like that." Hearing CD at 6:09:45 (testimony of Ms. MacPhee). Indeed, there is no evidence in the record that anyone at Vitamin Adventure ever verbally informed the appellant that he had been terminated. Therefore, Ms. MacPhee does not directly refute the appellant's assertion that he did not know he was fired and, in fact, she substantiates his consistent assertion that he was never told he was fired.

¶18 Moreover, there is no evidence in the record that would confirm that the appellant understood he was being terminated, as his alleged questioning of the termination papers was vague at best. We note that the termination papers do not mention the word involuntary; rather, they include a place where the employer could check either yes or no as to whether the termination was voluntary, and it was checked no. IAF, Tab 4, Subtab 2l at 17-19. If the appellant truly did not know what not voluntary meant, it is unlikely that he knew the word "involuntary," and Ms. MacPhee admits that she did not inform him that it meant he was fired. In any event, it is undisputed that the signatory lines in the termination forms were highlighted for signature and pre-dated. IAF, Tab 4, Subtab 2e at 3 (appellant's response to OPM's charges); Hearing CD at 6:11:50, 6:12:40 (testimony of Ms. MacPhee). In addition, the first sentence of the portion of the document where the appellant signed provided that he either was being terminated or he was terminating voluntarily. IAF, Tab 4, Subtab 2l at 17. Although the following sentence provided that he acknowledged he was agreeing with the reasons for termination, which were described above as giving unauthorized discounts to friends, we find that, despite the appellant's usual thoroughness, it is more likely than not that the appellant did not read the forms

in their entirety prior to signing them, as he asserts, and that he therefore believed that he was signing resignation forms. In the absence of any evidence that the appellant was either verbally informed of or acknowledged his termination, and taking into consideration the polygraph evidence, we find his signature on the termination forms insufficient to prove by preponderant evidence that he knew he was being fired.

¶19 The administrative judge also found in sustaining the charge that the appellant did not resign as he claimed and that he intended to keep his job at Vitamin Adventure, crediting Ms. MacPhee's testimony, for two reasons: (1) she found that it was undisputed that one of the appellant's primary interests was body building or physical fitness, so she found it plausible that the appellant would want to maintain minimal employment to receive a substantial employee discount on fitness products; and (2) she found that, despite the appellant's testimony to the contrary, the appellant was not offered full-time work by the City of Santa Rosa. *Id.* at 18. She based the latter finding on the appellant's statement on his SF-86 that he worked two part-time jobs beginning in June 2006, and on the absence of a statement in the conditional offer of employment from the City of Santa Rosa indicating whether the work was full-time or part-time. *Id.* at 18 n.8. She also noted that the appellant did not submit a final offer of employment. *Id.* at 19. However, for the reasons set forth below, we find that the record does not support a finding that the appellant intended to keep his job at Vitamin Adventure.

¶20 First, Ms. MacPhee testified that her understanding, based on conversations she had had with the appellant, was that the appellant wanted to keep his job at Vitamin Adventure after beginning work at the City of Santa Rosa because he was only working 1 day a week and continuing to work at Vitamin Adventure would enable him to keep his employee discount at the store. Hearing CD (testimony of Ms. MacPhee at 6:04:55). While the record reflects that the appellant was physically fit, *see e.g.*, IAF, Tab 4, Subtab 4p at 4, 5, 7, 15, the

only evidence in the record that the appellant ever used his employee discount at Vitamin Adventure was his testimony that he purchased their products "very sparingly." Hearing CD at 5:36:30 (testimony of the appellant). Despite what Ms. MacPhee gathered from their conversations, we find that it is not a logical conclusion that the appellant would want to keep his job at Vitamin Adventure to maintain an employee discount on products that he purchased only very sparingly. Second, it is undisputed that the appellant worked for the City of Santa Rosa part-time once he began his senior year of college and until August of that year when he received his current employment, IAF, Tab 4, Subtab 2w at 23-24; Hearing CD at 3:41:25 (testimony of the appellant). The administrative judge also cited the appellant's failure to submit a final offer of employment from the City of Santa Rosa as evidence that the position was not full-time, but there is no evidence in the record to suggest that a written final offer of employment exists, and there is nothing in the record to dispute the appellant's assertions, which are consistent throughout the record, that he was employed full-time by the City of Santa Rosa during the summer before his senior year of college. IAF, Tab 4, Subtab 2e at 7; Hearing CD at 3:41:25 (testimony of the appellant). Accordingly, considering the evidence as a whole, including the fact that the appellant began full-time work within days of his last day of employment at Vitamin Adventure, we find that the agency did not prove that the appellant intended to maintain employment at Vitamin Adventure upon learning of his start date at the City of Santa Rosa.

¶21 We note that the administrative judge found that Ms. MacPhee had no motive to be less than truthful, and credited her testimony that the appellant told her that he did not want leave on bad terms, did not understand "why it happened the way it did," and did not tell her that he was resigning. Initial Decision at 18-19. In determining that Ms. MacPhee had no reason to be less than truthful, the administrative judge acknowledged that the appellant had introduced evidence that Ms. MacPhee had changed her story over time and feared being sued over her involvement, but the administrative judge nevertheless determined that

Ms. MacPhee was credible because "she admitted that she did not specifically tell the appellant he was fired." Initial Decision at 17 n.7.

¶22 The appellant provided a detailed account of his interactions with Ms. MacPhee and her husband since receiving the charges from OPM. IAF, Tab 4, Subtab 2e at 7-9. Specifically, the appellant claimed that Ms. MacPhee originally informed him that she would sign a statement indicating, among other things, that the appellant had informed her that he had resigned from Vitamin Adventure. *Id.* at 8. However, upon reading the draft statement, Ms. MacPhee's husband informed the appellant that he would not allow Ms. MacPhee to sign the statement because he feared they could be sued for wrongful termination. *Id.* at 9. Thereafter, Mr. Silva left a voicemail message for Ms. MacPhee's husband in an effort to secure a statement on the appellant's behalf, and to assure the family that the appellant would not take legal action against them. *Id.* at 38. Ms. MacPhee responded, stating that she and her husband were still friends with the people at Vitamin Adventure and that she did not want her family or Vitamin Adventure to be sued for wrongful termination. *Id.* This assertion is supported by a statement in the record from Mr. Silva, *id.* at 36-40, email correspondence between the appellant and Ms. MacPhee, *id.* at 41, and a "Hold Harmless Agreement," signed by the appellant on April 16, 2010, promising not to pursue legal action against Ms. MacPhee, her husband, or Vitamin Adventure, *id.* at 42.

¶23 It is unclear why the administrative judge decided that the appellant's evidence did not affect Ms. MacPhee's credibility based solely upon Ms. MacPhee's admission that she did not specifically tell the appellant he was terminated. This is especially concerning given the administrative judge's reliance on other portions of Ms. MacPhee's testimony, including her denial that the appellant told her he was resigning, in making her findings against the appellant. Nevertheless, as discussed above, the record itself supports a finding in favor of the appellant without regard to Ms. MacPhee's credibility. Even if we believe her testimony, Ms. MacPhee's assumption that the appellant must have

known he was terminated under the circumstances does not assure his knowledge that he was terminated. There is no evidence that anyone at Vitamin Adventure informed the appellant that he was terminated or that he actually understood he was being terminated, and he passed a polygraph examination in which he claimed that he had not falsified any information on his SF-86. IAF, Tab 8, Exhibit A-4. Thus, even if Ms. MacPhee honestly believed that the appellant must have known of his termination, her belief does not outweigh the appellant's testimony and record evidence demonstrating that he had no knowledge of the termination. Moreover, it is undisputed that, as soon as the appellant learned that Vitamin Adventure characterized his termination as involuntary, he contacted the OPM investigator to advise him that he needed to revise his responses. IAF, Tab 4, Subtab 2e at 5. Based upon the totality of the circumstances, we find that the agency failed to prove that the appellant knowingly provided incorrect information with the intention of defrauding the agency. *See Patton*, 94 M.S.P.R. 562, ¶ 13. Accordingly, the negative suitability determination cannot be sustained. *See* 5 C.F.R. §§ 731.201, 731.501(b)(1).

ORDER

¶24 We ORDER the agency to cancel the suitability determination and return the appellant to all appropriate open eligibility lists for employment. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶25 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).

¶26 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).

¶27 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.