UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

ROBERT LEE GREENE,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
AT-0752-10-1029-I-1

DATE: January 4, 2011

Elaine L. Fitch, Esquire, Washington, D.C., for the appellant.

Diane M. McDevitt, Esquire, Arlington, Virginia, for the agency.

BEFORE
Brian Bohlen
Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On September 7, 2010, Robert Greene timely appealed the agency's decision indefinitely suspending him from his position as a Supervisory Transportation Security Specialist, SV-1801-K, with the Transportation Security Administration (TSA), in TSA's Office of Global Strategies, Miami, Florida, effective August 30, 2010. *See* Initial Appeal File (IAF), Tab 13, subtab 4A and 4B. The Board has jurisdiction over this appeal pursuant to 49 U.S.C. §40122(g)(3), 49 U.S.C. §114(n), and TSA Management Directive 1100.75-3.

On November 29, 2010, the agency moved to dismiss the appeal as moot because it had cancelled the indefinite suspension and was issuing the appellant

back pay for the period. *See* IAF, Tab 14. The appellant opposed the motion by providing notice that he sought compensatory and consequential damages related to reprisal for protected EEO activity, and whistleblowing.[1] IAF, Tabs 15 and 18. On December 3, 2010, I issued an Order denying the agency's motion to dismiss the appeal as moot, and stating that the appeal and affirmative defenses would be adjudicated on the merits. IAF, Tab 20.[2]

This decision is based on the written submissions of the parties because the appellant withdrew his request for a hearing during the prehearing conference. *See* IAF, Tab 20, p. 1. For the reasons stated below, the agency action is REVERSED, and the appellant's affirmative defenses of Equal Employment Opportunity (EEO) reprisal and whistleblower retaliation are DENIED.

ANALYSIS AND FINDINGS

Procedural History and Material Facts

On January 19, 2010, the agency received a hotline complaint about the appellant's management practices. *See* IAF, Tab 23, pp. 19-31. As a result of this complaint, the agency initiated a management inquiry on February 12, 2010. *Id.*, Declaration of Roger Friedt.

On February 16, 2010, the appellant's supervisor, Robert Rottman, placed the Appellant on administrative leave due to the pending management inquiry which had grown to encompass allegations of travel voucher fraud, misuse of government resources, and unauthorized possession of a concealed firearm at

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[1] These affirmative defenses were timely raised under 5 C.F.R. § 1201.204(a).

[2] The agency's close of record submissions indicate that the indefinite suspension has now been cancelled, and the appellant has received the requisite back pay. Nonetheless, my prior ruling denying the agency's motion to dismiss stands because the claims for damages are still pending. *See Antonio v. Department of the Air Force*, 107, M.S.P.R. 106, ¶13 (2008).

work. IAF, Tab 21, p. 22, and Tab 22, p. 27. On March 11, 2010, the agency determined that the alleged misconduct at stake warranted review by the TSA Office of Inspector General (OIG). IAF, Tab 22, p. 27. On March 25, 2010, the OIG advised that it had opened an investigation into the allegations. *Id.* That same day, the appellant filed an informal EEO complaint alleging that his placement on administrative leave was discriminatory based on his race, gender, and age. IAF, Tab 22, p. 56.

During the agency's investigation of the appellant's EEO informal complaint, an EEO counselor interviewed the appellant's supervisor, Robert Rottman, and the Deputy Administrator over the Office of Global Strategies, John Halinski, about his concerns. Both explained that the appellant was placed on administrative leave because of an ongoing investigation into alleged travel fraud, mismanagement of agency funds, and carrying a concealed weapon without approval. Both denied that the appellant's race, gender, and age had no bearing on the decision. *Id.*, p. 27.

On June 8, 2010, the agency issued a Notice of Proposed Suspension for an Indefinite Period ("Notice") to the appellant. IAF, Tab 9, p. 20. The Notice explained that the appellant was under investigation by the OIG since April 25, 2010. On August 17, 2010, the Agency issued a Notice of Decision upholding the proposed indefinite suspension based on the pending OIG investigation, effective August 30, 2010. *Id.*, p. 23. This Decision recounted the evidence uncovered thus far in the continuing OIG investigation, and stated its basis for taking the action as follows:

> The evidence demonstrates that the OIG accepted for investigation allegations that you engaged in fraud and other similarly serious misconduct. . .[T]his action being taken is based on more than mere suspicion. I have a reasonable belief that you have engaged in serious misconduct, and I have significant concerns that allowing you to remain at the workplace would jeopardize the mission of the agency. Based on the evidence, it is reasonable to believe that you violated or facilitated the violation of conflict of interest rules and

> committed other egregious misconduct. As the supervisor of this regional office, you are held to a higher standard. Your oversight of this office was so deficient that it appears multiple instances of serious misconduct occurred, including the submission of false receipts. It would not be appropriate to return you to the workplace before OIG completes its investigation. . . .Therefore, I have decided to indefinitely suspend you to promote the efficiency of the service. This suspension will remain in effect until resolution of the OIG investigation shows there is sufficient evidence to either return you to duty or support an administrative action against you.

Id., p. 25.

The Indefinite Suspension Violated the Efficiency of the Service Standard

The proposal and decision letter for the indefinite suspension state that the agency indefinitely suspended the appellant because the agency was investigating possible serious misconduct by the appellant. IAF, Tab 9, pp. 19-27. The appellant was not charged with actually committing any misconduct. The validity of this suspension turns entirely on the legal question of whether the efficiency of the service standard permits such actions.[3]

Because the appellant is a TSA employee, his employment is governed by the provisions of the Aviation and Transportation Security Act (ATSA). 49 U.S.C. § 114; *Connolly v. Dep't Homeland Security*, 99 M.S.P.R. 422, ¶ 9 (2005). Under ATSA, TSA employees are covered by the personnel management system applicable to the employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122 except to the extent that the TSA Administrator modifies that system for TSA employees. 49 U.S.C. § 114(n); 49 U.S.C. § 40122.

The Administrator of TSA modified the FAA's system by issuing Management Directive (MD) 1100.75-3, "Addressing Conduct and Performance

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[3] The agency produced voluminous records which might support a conclusion that the appellant actually committed the underlying misconduct. However, this question is not before the Board, and the Board is not free to substitute what it considers to be a more appropriate basis for the agency's action. *See James v. Dale*, 355 F.3d 1375, 1378 (Fed. Cir. 2005); *O'Keefe v. U.S. Postal Service*, 318 F.3d 1310, 1315 (Fed. Cir. 2002); *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

Problems," on January 2, 2009. *See* IAF, Tab 9, pp. 52-56. This Management Directive provides that an employee may be suspended only "for such cause as will promote the efficiency of the service." This standard is explained at MD 1100.75-3(6)(E) to require:

> ". . .the action must be taken to further a legitimate government interest. Taking disciplinary action would promote the efficiency of the service where, for example, an employee fails to perform his or her duties acceptably, interferes with other employees' performance of their duties, or exhibits conduct that adversely affects the agency's ability to accomplish its mission.

TSA did not invent the "efficiency of the service" standard. 5 U.S.C. §7513(a) has long mandated that disciplinary actions involving employees governed by Title 5 satisfy this same standard. 5 U.S.C. § 1204(a)(1) charges the Board with adjudicating the validity of Title 5 disciplinary actions and, to that end, with interpreting the meaning of the statutory "efficiency of the service" standard. Under 49 U.S.C. §40122(g)(3), and 49 U.S.C. §114(n), the Board also adjudicates TSA adverse actions under this standard.

For employees employed under Title 5, 5 U.S.C. §§ 7511-14 governs major adverse actions such as a removal, a reduction in grade or pay, or a suspension lasting for more than 14 days. 5 U.S.C. § 7513(a) allows an agency to take such an action against an employee "only for such cause as will promote the efficiency of the service." "Cause" under section 7513(a) generally connotes some specific act or omission on the part of the employee that warrants disciplinary action, and an agency charge that does not set forth actionable misconduct cannot be sustained. *See Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶10 (2010). The Board's reviewing Court has also explained that an adverse action promotes the efficiency of the service "when the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions." *See James v. Dale*, 355 F.3d 1375, 1379 (2005).

TSA's explanation at MD 1100.75-3(6)(E) of what it intended by the "efficiency of the service standard" is harmonious with the

Board's long-standing interpretation of this standard for Title 5 employees. TSA requires that agency actions be rooted in a legitimate government interest and it provides examples demonstrating that the standard is met by conduct which adversely impacts the agency's ability to perform its mission. *See* MD 1100.75-3(6)(E). This explanation provides no suggestion whatsoever that TSA intended for its actions to be measured against a different or lower standard than agencies governed by the Title 5 efficiency of the service standard, nor would one intuitively expect such a deviation when TSA expressly adopted this long-standing and well-known standard. I therefore conclude that TSA intended within its Management Directive to adopt the same efficiency of the service standard applicable to Title 5 actions.

The Board recently considered in *Gonzalez v. Dep't of Homeland Security* whether the efficiency of the service standard under 6 U.S.C. §7513(a) permits an agency to indefinitely suspend an employee based solely on a pending investigation into alleged misconduct. In that case, the Board forcefully rejected the validity of such actions as a matter of law, holding that "the mere existence of the agency's open investigation into allegations regarding the appellant's conduct is not "cause" for taking an action under subchapter II of chapter 75." *Gonzalez v. Dep't of Homeland Security*, 114 M.S.P.R. 318, ¶28 (2010). In reaching this conclusion, the Board explained in *Gonzalez*:

> ". . .the practical effect of such a procedure is that the agency has subjected the appellant to a severe adverse action — a lengthy suspension without pay — while the agency conducts its investigation into whether any grounds exist for taking an adverse action against the appellant for misconduct. In addition, the agency has, in effect, unilaterally and indefinitely delayed the point at which it could be required to meet its statutory obligation to prove by preponderant evidence that the appellant actually engaged in conduct warranting an adverse action."

Gonzalez, 114 M.S.P.R. 318, ¶8.

The agency argues that the Board's holdings in *Gonzalez* has no bearing on TSA because it applied only to employees governed by the Title 5 personnel system. While *Gonzalez* indeed involved the Title 5 efficiency of the service standard, I find that this is not a meaningful distinction here since the TSA has adopted an indistinguishable standard. While the TSA had the authority to create its own standard for judging its adverse actions, it did not do so. Thus, the Board's interpretation of the efficiency of the service standard as stated in *Gonzalez* applies with equal force to the TSA.

TSA also argues that indefinite suspensions based on agency investigations are specifically authorized by its personnel handbook, and it claims that the handbook is entitled to substantial deference from the Board. Put another way, TSA seeks to redefine the efficiency of the service standard for TSA employees through its handbook to allow an adverse action which the Board would otherwise instantly reverse as a matter of law. This argument is considered and rejected below.

The handbook at issue is the TSA MD 1100.75-3 Handbook, *Addressing Unacceptable Performance and Conduct*, effective January 2, 2009. This handbook indicates on the front cover that it was produced by the Office of Human Capital, however, it is unsigned. The handbook at Section J(1) states that an indefinite suspension is appropriate when evidence (i.e., more than a mere suspicion or allegation) exists to demonstrate misconduct. IAF, Tab 7, p. 30.[4] At Section J(1)(C)(3), the handbook purports to authorize the use of indefinite suspensions when:

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[4] While this section requires something less than a preponderance of the evidence to support an indefinite suspension, Section (J)(2)(b) of the handbook requires a legal sufficiency review, and legal sufficiency is defined at Section (A)(10)(a) to require that the action be supported by preponderant evidence. This inconsistency in the level of evidence required to take an indefinite suspension is not reconciled within the handbook.

> an investigation is being conducted on an employee regarding conduct that TSA believes may have been committed by the employee, which is so serious that if it proves to be true, the employee's continued presence at the worksite would represent a threat to life, property, safety or the effective operation of the workplace. This could include investigation into or allegations of theft, fraud or falsification, for example, where these is substantial evidence, and removal is the likely outcome; or (d) An employee's security clearance has been suspended, denied, or revoked, and a security clearance is a condition of employment or is otherwise required for the employee's position. Note: Once an indefinite suspension is imposed, management must determine if subsequent action, i.e., removal, is justified. If justified, management should initiate appropriate action to propose the removal. If it is determined that further action is not warranted, the indefinite suspension will be terminated and the employee returned to duty.

When Congress explicitly leaves a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Congress at 49 U.S.C. § §114(n) gave the TSA authority to promulgate its own civilian personnel system, and the agency exercised this authority through promulgating Management Directive 1100.75-3. The content of this Management Directive is therefore entitled to significant deference under *Chevron*. However, the Management Directive aligns seamlessly with the Board's interpretation of the efficiency of the service standard, and therefore is not in dispute here. The sole question is the level of respect or deference the Board owes to a handbook it promulgated under the derivative authority of its Management Directive when that handbook clashes with the Board's holdings.

In considering the deference owed to the agency's handbook, I first note that the handbook, unlike the Management Directive, is not based on an express grant of statutory authority. It also does not appear to have resulted from a formal

rulemaking procedure or adjudicatory process. As such, it does not merit *Chevron*-type deference. *See Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1340-41 (Fed. Cir. 2003); *cf. Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002); *Nichol v. Office of Personnel Management*, 105 M.S.P.R. 201, FN 1 (2007)(agency handbooks are entitled to some weight, as they are formal documents, prepared for publication and published with the apparent expectation that they would be relied upon by agencies, employees, and others).[5]

The weight to be accorded to the agency's handbook ultimately depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *See also Perkins v. U.S. Postal Service*, 100 M.S.P.R. 48, ¶¶14-15 (2005). Taking into consideration the persuasive force of the handbook's guidance on indefinite suspensions, I conclude it is entitled to very little respect. The handbook is unsigned and there is no indication what deliberative process was employed in its creation. The handbook cites no authority except MD 1100.75-3 for its pronouncements, and it did not explain how or why it concluded that an indefinite suspension may be imposed based on a pending investigation into serious misconduct. As noted in FN 4 above, the

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[5] In considering the weight owed to this handbook, I considered the impact of the Federal Circuit's discussion in *James v. Dale*, 355 F.3d 1375 (2005). In that case, an Immigration and Naturalization Service handbook prohibited border patrol agents from "associating with known or suspected law violators" off duty. The Court sustained this charge, finding that the conduct was proven and that the off duty misconduct contained a sufficient nexus to the efficiency of the service. One could argue that this case demonstrates a level of deference to an agency's pronouncements within a handbook about the kind of conduct that satisfies the efficiency of the service standard. However, I disagree with this point of view because the Court did not blindly defer to the handbook's prohibitions, and instead conducted its own inquiry into whether the conduct at issue satisfied the nexus requirement to the agency's legitimate interests under the efficiency of the service standard.

handbook is also internally inconsistent about the quality of evidence required for the agency to conduct an indefinite suspension.

Contrasted with the TSA's internally inconsistent guidance on indefinite suspensions within its handbook, the Board has both the expertise and clear statutory authority to interpret the boundaries of the efficiency of the service standard in this context. Moreover, when the Board held in *Gonzalez* that indefinite suspensions based on mere agency investigations are invalid, this decision was formed and tested in the fire of adversarial litigation, and the reasons underpinning the decision were clearly stated with supporting citations. The agency's guidance within its handbook bears no such marks of reliability, vigorous debate, or deep thought. I therefore find that the handbook lacks the legal authority and the persuasive power necessary to earn the Board's deference, and it is invalid to the extent that it is inconsistent with the Board's holding in *Gonzalez*. The indefinite suspension is therefore REVERSED as a matter of law.

The Appellant Failed to Prove Retaliation Based Upon His Prior EEO Activity.

On March 25, 2010, the appellant filed an informal Equal Employment Opportunity (EEO) complaint alleging that his placement on administrative leave based on management's inquiry into possible misconduct on February 16 was discriminatory based on his race, gender, and age. IAF, Tab 22, p. 56. The appellant claims that the agency's decision on August 17 to indefinitely suspend him based on the continuing investigation was in retaliation for this EEO activity.

For an appellant to prevail on a contention of illegal retaliation for EEO activity, he has the burden of showing that: (1) he engaged in a protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 17 (2008). Because the appellant withdrew his request for a hearing and the record is complete, the Board will proceed to the ultimate question, which is whether, upon

weighing the evidence presented by both parties, the appellant has met his overall burden of proving retaliation." *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 42 (2006).

The Board has held that, to show retaliation through circumstantial evidence, an appellant must demonstrate a "convincing mosaic" of retaliation against him. *FitzGerald*, 107 M.S.P.R. 666, ¶ 20 (citing *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). Such a mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Id.*

The appellant has failed to any demonstrate retaliatory treatment, much less a "convincing mosaic" of retaliation. The record establishes that the hotline complaint and management inquiry into possible misconduct predated the appellant's EEO activity. Additionally, the agency's decision to place the appellant on paid administrative leave and the decision to involve the OIG occurred before the appellant approached an EEO counselor. The OIG announced to the agency that it was pursuing further investigation of the alleged misconduct on March 25, the same day the appellant went to the EEO office complaining about his continuing placement on administrative leave. IAF, Tab 21, pp. 24-28.

The agency proposed to indefinitely suspend the appellant on June 8, and decided to impose that penalty on August 17, 2010. IAF, Tab 9, pp. 20, 27. The fact that the agency decided to indefinitely suspend the appellant after the appellant approached an EEO counselor does not support a finding that the agency's action was retaliatory in this case. This decision occurred several months after the appellant initiated the EEO complaint process, and the appellant present no support for his assertion that the proposing official or deciding official

were motivated to retaliate against him. Moreover, the record demonstrates that the agency's proposal and decision were simply the last steps in a chain of investigatory events predating the appellant's EEO activity. Additionally, at the time the proposal and decision were issued, the Board had not yet held that it was unlawful for agencies to impose an indefinite suspension based on an internal agency investigation into misconduct, and the agency's handbook specifically authorized such suspensions. Thus, it is understandable that the agency imposed such a suspension based on the circumstances known to them at the time. I therefore find that the appellant has failed to satisfy his burden of showing that the indefinite suspension was issued based upon EEO retaliation.

The Appellant Failed to Prove that the Agency Took the Adverse Action Based upon Protected Whistleblowing.

The appellant alleges that on April 28, 2009, he made protected disclosures to the agency's Office of the Inspector General, and that the indefinite suspension at issue was taken in retaliation for these disclosures. *See* IAF, Tab 16, pp. 4, and 15-19.

To establish the affirmative defense of reprisal for whistleblowing activities under the Whistleblower Protection Act (WPA), an employee must prove by preponderant evidence that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in a "personnel action" taken against him. If the employee meets this burden, the agency must show by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* 5 C.F.R. §§ 1209.1, 1209.7; *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table).

A disclosure within the meaning of 5 U.S.C. § 2302(b)(8), is one where the appellant disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. *Martin v. Department of the Air Force*, 73 M.S.P.R. 574, 577-78 (1997).

Assuming without deciding that the appellant made protected disclosures to the OIG on April 28, 2009, his whistleblower claim nonetheless fails because he provided no argument or evidence demonstrating that anyone involved with the indefinite suspension was aware of such disclosures. The proposing official and deciding official both provided sworn affidavits stating that they were unaware that the appellant filed any complaints with the OIG at the time the proposal and decision were issued. *See* IAF, Tab 22, pp. 21 and 29. Based on such undisputed evidence in the record, the appellant has failed to demonstrate that his allegedly protected disclosures were a contributing factor in the action taken against him.

Even assuming *arguendo* that the appellant made protected disclosures and that they were a contributing factor to the indefinite suspension, I find that the agency has demonstrated by clear and convincing evidence that it would have taken the same action even in the absence of such disclosures. Once an appellant shows that his whistleblowing activity was a contributing factor in an agency personnel action the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *See, e.g., Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 15 (2008). In determining whether an agency has shown 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, e.g., Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Gonzales v. Department of the Navy*, 101 M.S.P.R. 248, ¶¶ 11-12 (2006). 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).

In this case, the appellant has not explained why he believed the individuals involved in the indefinite suspension were motivated to retaliate against him based on his April 2009 disclosures to the OIG.[6] His comments to the OIG primarily concerned the agency supposedly disregarding security lapses in its oversight of airports in Brazil and Venezuela. *See* IAF, Tab 16, pp. 15-19. It is not at all clear why the proposing or deciding official would allegedly be upset about such comments, which do not appear to target them personally. Even if these comments were somewhat upsetting to the agency, there is nothing in the record suggesting that such comments could fuel the rage necessary for the agency to fabricate allegations of misconduct, stage an elaborate and time consuming investigation, and then indefinitely suspend the appellant based on the continuing investigation.

On the other hand, any agency presented with allegations of travel fraud, misappropriated agency resources, and a supervisor carrying a concealed weapon to work, would have significant and legitimate motivations to thoroughly investigate the allegations. While the appellant sees retaliatory animus in the agency's decision to vigorously investigate this alleged misconduct, and to suspend him until the investigation finished, I see an agency cautiously investigating serious allegations while earnestly trying to uphold its integrity and the safety of its personnel. While the indefinite suspension was defective on legal grounds, I discern no retaliatory animus from the agency's investigation or the resulting indefinite suspension.

DECISION

The agency's action is REVERSED. The appellant's affirmative defenses are DENIED.

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[6] The appellant did not provide any argument or evidence in support of this claim within his close of record submission to the Board. *See* IAF Tab 21.

ORDER

I **ORDER** the agency to cancel the suspension and retroactively restore appellant effective **August 30, 2010**.[7] This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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

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[7] It appears from the agency's submission at IAF, Tab 22, pp. 33-36, that the agency has already cancelled the suspension and paid the backpay it thinks is owed. Any disagreement about the amount of back pay owed and other potential compliance issues must be resolved in accordance with this decision after it becomes final.

are attached. I **ORDER** the agency 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.

FOR THE BOARD:

Brian Bohlen
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **February 8, 2011**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board

1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office,

describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

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.