UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JAMES A. GOEKE,
Appellant,

and

JOSEPH W. BOTTINI,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER(S)
SF-0752-12-0598-I-1
SF-0752-12-0600-I-1

DATE: April 5, 2013

Bonnie Brownell and Robert DePriest, Washington, D.C., for appellant James A. Goeke.

Kenneth L. Wainstein and Sara S. Zdeb, Washington, D.C., for appellant Joseph W. Bottini.

Robin M. Fields, Joanne Fine, Evan H. Perlman, and Charles M. Kersten, Washington, D.C., for the agency.

BEFORE
Benjamin Gutman
Administrative Judge

INITIAL DECISION

INTRODUCTION

The agency decided to suspendappellants Joseph Bottini and James Goeke, two federal prosecutors, for failing to meet their disclosure obligations in a criminal case.Initial Appeal File in Docket No. SF-0752-12-0600-I-1 (Bottini

IAF), Tab 6, Subtab 4a; Initial Appeal File in Docket No. SF-0752-12-0598-I-1 (Goeke IAF), Tab 5, Subtab 4a.The appellants filed timely appeals with the Board. Bottini IAF, Tab 1; Goeke IAF, Tab 1.

As explained below, I find that the agency violated its procedures governing discipline by appointing a member of management, rather than a rank-and-file attorney, to serve as the proposing official. I also find that because of this violation, the appellants likely received harsher discipline than they would have received if the agency had followed its procedures. The suspensions are therefore REVERSEDon grounds of harmful procedural error. In view of this ruling, I do not address whether the appellants committed the misconduct they were charged with or whether the penalties the agency tried to impose were reasonable.

ANALYSIS AND FINDINGS

Background

The appellants are Assistant United States Attorneys who participated in the 2008 prosecution of Senator Ted Stevens for failing to report gifts and liabilities on his financial disclosure statements. Hearing transcript of November 7, 2012 (11/7 Tr.) 9-14; Hearing transcript of November 8, 2012 (11/8 Tr.) 5, 10; Bottini IAF, Tab 6, Subtab 4g, at 20 n.5; Goeke IAF, Tab 5, Subtab 4g, at 20 n.5. After a jury convicted Senator Stevens, the government moved to vacate the conviction because its prosecution team had failed to disclose information that the defense was constitutionally entitled to—information that was exculpatory or could have been used to impeach the prosecution's witnesses. Bottini IAF, Tab 6, Subtab 4g, at 19-20, 35, 37, 50-51; Goeke IAF, Tab 5, Subtab 4g, at 19-20, 35, 37, 50-51; 11/29 Tr. 13, 120.The agency's Office of Professional Responsibility (OPR) conducted an investigation andconcluded that the appellants had recklessly but unintentionally committed professional misconduct in handling some of this

information. Bottini IAF, Tab 6, Subtab 4g, at 43-44; Goeke IAF, Tab 5, Subtab 4g, at 43-44.

OPR referred its findings to the agency's Professional Misconduct Review Unit (PMRU), which is responsible for disciplining attorneys and referring them to the state bar for matters related to OPR findings of professional misconduct. *Id.*, Subtab 4f, at 1; Subtab 4k, at 3-4. The chief of this unit, Kevin Ohlson, assigned the matter to one of the attorneys working for him, Terrence Berg, to determine whether OPR's findings were correct and, if Mr. Berg concluded that discipline was warranted, issue either a letter of reprimand or a proposal to suspend or remove the appellants. *Id.*, Subtab 4f, at 1; Subtab 4k, at 5;Bottini IAF, Tab 38, exhibits D-22, E-5, F-4. Mr. Berg spent several months studying OPR's report and the underlying evidence, and he became convinced that the appellants had not committed professional misconduct as the agency defined the offense. Bottini IAF, Tab 38, exhibits F-10 to F-13. Because the PMRU had jurisdiction only over professional misconduct—the individual United States Attorneys handled disciplinary matters involving the lesser offense of poor judgment—Mr. Berg concluded that he did not have the authority to propose any discipline for the appellants. *Id.* at F-8 to F-9; 11/7 Tr. 293-94; *see also* Bottini IAF, Tab 6, Subtab 4i, at 2; Goeke IAF, Tab 5, Subtab 4i, at 2. Mr. Berg ultimately drafted an eighty-two-page memorandum explaining in detail why the appellants' actions did not rise to the level of professional misconduct. Bottini IAF, Tab 6, Subtab 4c, at 77-158; Goeke IAF, Tab 5, Subtab 4c, at 35-116.

When it became clear that Mr. Berg disagreed with OPR's findings of professional misconduct, the agencyappointed Chief Ohlson (who agreed with OPR's findings) as the proposing official instead of Mr. Berg. *Id.*, Subtab 4f. Chief Ohlson then proposed a forty-five day suspension for Mr. Bottini and a fifteen-day suspension for Mr. Goeke for professional misconduct. Bottini IAF, Tab 6, Subtab 4e; Goeke IAF, Tab 5, Subtab 4e. After receiving oral and written responses from the appellants, Associate Deputy Attorney General(ADAG) Scott

Schools upheld the charges and imposed a forty-day suspension for Mr. Bottini and a fifteen-day suspension for Mr. Goeke. Bottini IAF, Tab 6, Subtab 4a; Goeke IAF, Tab 6, Subtab 4a. (ADAG Schools reduced Mr. Bottini's proposed suspension by five days because he disagreed with one of the aggravating factors cited by Chief Ohlson in his proposal. Bottini IAF, Tab 6, Subtab 4a, at 64.)

The appellants filed these appeals with the Board, which I consolidated. Bottini IAF, Tabs 1, 17; Goeke IAF, Tabs 1, 16. I held a hearing in person in Washington, D.C. on November 8, 9, and 29, 2012. With the parties' consent, I also admitted transcripts of the depositions of several witnesses to substitute for or supplement their live testimony.Bottini IAF, Tab 56, at 1-2; Goeke IAF, Tab 53, at 1-2. I denied Mr. Goeke's motion to admit an additional exhibit after the hearing. Bottini IAF, Tab 66; Goeke IAF, Tab 63. The record closed on January 4, 2013, when the parties' closing briefs were due. Bottini IAF, Tab 64, at 1-2; Goeke IAF, Tab 60, at 1-2.

Jurisdiction

Although the parties agreed that the Board has jurisdiction over these appeals (Bottini IAF, Tabs 12, 13; Goeke IAF, Tabs 11, 12), I have an independent duty to examine the Board's jurisdiction. *SeeParrish v. Merit Systems Protection Board*, 485 F.3d 1359, 1362 (Fed. Cir. 2007).As explained below, I find that the Board has jurisdiction even though neither appellant has yet served a suspension long enough to fall within the Board's jurisdiction.

The Board has jurisdiction over suspensions of more than fourteen days. 5 U.S.C. § 7513(d). Here, although the agency stated that it was imposing forty- and fifteen-day suspensions on the appellants, the decision letters did not set dates when the suspensions would be served. Bottini IAF, Tab 6, Subtab 4a; Goeke IAF, Tab 5, Subtab 4a.As far as the record reflects, Mr. Bottini still has not served any part of his forty-day suspension, and Mr. Goeke has served only

one day and does not have a schedule set for the other fourteen days. Bottini IAF, Tab 44, at 3; 11/8 Tr. 96-97, 195.

But the fact that the suspensions have not been served does not mean that the Board lacks jurisdiction over these appeals. The Board's jurisdiction under § 7513(d) attaches when the agency has made a final decision to take an action appealable to the Board, even if it has not yet executed the decision. *Murray v. Department of Defense*, 92 M.S.P.R. 361, ¶ 12 (2002). In *Murray*, the Board found that it had jurisdiction over an appeal by an employee whose suspension the agency had stayed pending his appeal to the Board. *Id.* ¶¶ 5, 13. The Board concluded that despite the stay, the agency's decision to suspend the employee for thirty days had "all the attributes of a final agency action": the employee received notice of the agency's proposed action, had a meaningful opportunity to argue his case to the deciding official, and received a written decision conveying the agency's final decision. *Id*. ¶ 12. Because the only remaining step was to execute the suspension, the decision was "a terminal, complete resolution of the matter . . . in no way tentative, provisional, or contingent, subject to recall, revision, or reconsideration." *Id.* The Board found persuasive then-Judge Ruth Bader Ginsburg's reasoning in *National Treasury Employees Union v. Federal Labor Relations Authority*, 712 F.2d 669 (D.C. Cir. 1983). 92 M.S.P.R. 361, ¶ 8. That opinion explained that although there was "imprecise language in some MSPB opinions," the Board's regulations were "most reasonably read" to require only that the agency haveissued its "final word on the contested action," not also that it havecarried out the action. 712 F.2d at 670, 674, 676.

Here, the agency's actions bear all the attributes of finality that the Board found relevant in *Murray*. The appellants received written notice of the agency's proposed action, responded, and received formal decision letters explaining their right to appeal to the Board. Bottini IAF, Tab6, Subtab 4a, at 64; Subtabs 4b, 4c, 4e; Goeke IAF, Tab 5, Subtab 4a, at 27; Subtabs 4b, 4c, 4e. ADAG Schools also confirmed at the hearing that the agency's decisions were final. 11/29 Tr. 193.

I recognize that there are significant differences between the facts of these cases and those of *Murray*. In *Murray*, the decision letter set a date for the suspension, but the agency then formally stayed execution of the suspension under the provisions of a collective bargaining agreement. 92 M.S.P.R. 361, ¶ 5. Here, the agency never set any effective dates and did not formally stay the suspensions; rather, it simply has not gotten around to executing them fully. Bottini IAF, Tab 44, at 3; Goeke IAF, Tab 40, at 3. Given the length of time that this has passed since the suspensions were announced, this raises a question about whether the agency really intends to carry out the suspensions or whether it instead intends to treat them as paper suspensions that result in no, or at least less than fifteen days', loss of pay. *SeeLabinski v. U.S. Postal Service*, 88 M.S.P.R. 125, ¶ 5 (2001) (a paper suspension with no actual loss of pay is not appealable to the Board).

Nonetheless, the agency has given no indication that it will not eventually carry out the suspensions, at least if they are not reversed. Because the agency has asserted unequivocally that it has made a final decision to suspend the appellants, I find that the reasoning of *Murray* applies. I therefore find that the Board has jurisdiction under 5 U.S.C. § 7513(d).

The agency committed harmful procedural error

The Board must reverse an agency's decision if it committed harmful error in applying its procedures to reach the decision. 5 U.S.C. § 7701(c)(2)(A). The appellants had the burden of proving by a preponderance of the evidence that the agency committed an error and that without this error it likely would have reached a different decision. 5 C.F.R. 1201.56(a)(2)(iii), (b)(1), (c)(3). As explained below, I find that the agency committed harmful procedural error here by designating the PMRU chief, rather than a subordinate PMRU attorney, as the proposing official.

Agency policy required that the proposing official be a PMRU attorney

The agency has promulgated adetailed policy governing the discipline of attorneys for intentional or reckless professional misconduct. Bottini IAF, Tab 6, Subtabs 4i, 4k; Goeke IAF, Tab 5, Subtabs 4i, 4k. This policy is implemented by the PMRU, which is headed by a chief who is a career Senior Executive Service attorney and staffed by two line-level attorneys (such as Assistant United States Attorneys) who serve one- or two-year details with the PMRU. Bottini IAF, Tab 6, Subtab 4k, at 3-4; Goeke IAF, Tab 5, Subtab 4k, at 3-4; 11/29 Tr. 32, 49.

Under the agency's policy,if the PMRU chief preliminarily determines that a finding of misconduct is warranted, he "will refer the matter to a PMRU attorney." Bottini IAF, Tab 6, Subtab 4i, at 2; Goeke IAF, Tab 5, Subtab 4i, at 2. The PMRU attorney, after collecting and reviewing information on aggravating and mitigating factors, either (1) determines that no discipline is warranted, in which case the subject attorney and the PMRU chief are notified of the determination; (2) issues a letter of reprimand, in which case the subject attorney may file a grievance withthe PMRU chief; or (3) proposes suspending or removing the attorney for misconduct. *Id.* If the PMRU attorney proposes discipline, the PMRU chief serves as the deciding official. *Id.* at 4.

There is no express provision in this policy for anyone other than a PMRU attorney to serve as the proposing official in the first instance. This is not an accident. As ADAG Schools—who was involved in developing the policy—explained, it was important to have prosecutors with actual experience consider and weigh in on the professional-misconduct issues, and the attorneys detailed to the PMRU provided that. 11/29 Tr. 28, 33, 43. Although there was a potential disadvantage to asking "peers to review the conduct of their colleagues who were similarly situated," on balance the agency believed this arrangement to be beneficial. *Id.* at 33. The agency was concerned about the rank-and-file attorneys' perception of the fairness of the disciplinary process, and it believed that these attorneys would take some comfort knowing that a PMRU attorney—

someone who himself or herself had come out of the ranks—would be "taking the first crack at the OPR findings and determination of punishment." *Id.* at 282-83.

As the policy required, Chief Ohlson originally referred the appellants' cases to a PMRU attorney, Mr. Berg. Bottini IAF, Tab 6, Subtab 4f, at 1;Goeke IAF, Tab 5, Subtab 4f, at 1. But when it became clear that Mr. Berg did not agree with OPR's findings that the appellants had engaged in professional misconduct, the agency appointedChief Ohlson as the proposing official instead. *Id.* at 2.

The Board addressed a similar situation earlier this week in *Canary v. U.S. Postal Service*, 2013 MSPB 25 (April 2, 2013). In that case, the agency's policy provided that "[u]nless the circumstances of a particular case make it impractical, the employee's immediate supervisor issues a written notice of proposed adverse action." *Id.* ¶ 11. The agency appointed a different member of management as the proposing official because it was concerned that the immediate supervisor would not impose harsh enough discipline. *Id.*; *see also id.*, ¶ 3 (noting the supervisor's view that no discipline was warranted). The Board found that the agency had not shown that it was impractical for the supervisor to serve as the proposing official, and (after concluding that this error was harmful) it reversed the agency's disciplinary decision. *Id.* ¶¶ 11-12.

Here too, I find that the agency's appointment of Chief Ohlson as the proposing official violated its procedures for handling charges of professional misconduct. On their face, these procedures did not allow the PMRU chief, rather than one of his subordinates, to be the proposing official. Rather, they required that a subordinate PMRU attorney be the proposing official and that the PMRU chief be the deciding official. I find no reasonable way to read the procedures as treating Chief Ohlson as a "PMRU attorney" for these purposes. Although it is true that he is both part of the PMRU and an attorney, the procedures clearly distinguish between the PMRU chief, who is part of the Senior Executive Service, and the PMRU attorneys, who are detailed from the agency's rank-and-file prosecutors. Bottini IAF, Tab 6, Subtab 4k, at 3-4; Goeke IAF, Tab

5, Subtab 4k, at 3-4. I therefore find that the procedures did not allow Chief Ohlson to serve as the proposing official.

This was not a situation where it was impossible or impracticable for the agency to comply with its procedures as written, and where it therefore might be thought necessary to read an exception into the procedures. It was not a situation, for example, where all of the PMRU attorneys were recused because of conflicts of interest, or where budgetary constraints prevented the agency from filling the PMRU attorney positions at all. In developing the procedures, the agency may not have carefully thought through what would happen if a PMRU attorney and the PMRU chief disagreed about the threshold question whether there was any professional misconduct at all. *Cf.* 11/29 Tr. 44-45 (ADAG Schools's testimony that he had "not really processed" what would happen at that point). But when it was confronted with Mr. Berg's conclusions here that the PMRU lacked jurisdiction over the appellants' cases, it had several options that likely would have complied with the procedures. It could have treated his conclusion as a determination that no disciplinary action was warranted for the charge of professional misconduct, which was a matter within his authority to decide. Bottini IAF, Tab 6, Subtab 4i, at 3; Goeke IAF, Tab 5, Subtab 4i, at 3. If it believed that he had not made that determination clearly enough, it could have (as it acknowledged on appeal) overruled his jurisdictional determination and directed him to fulfill his assigned role by determining that no discipline was warranted, issuingletters of reprimands, or proposing harsher discipline. Bottini IAF, Tab 6, Subtab 1, at 21-22. Or it could have reassigned the cases to another rank-and-file attorney detailed to the PMRU, at least so long as it did not violate the case law discussed below about replacing a proposing official after a decision has been made. *See*11/29 Tr. 45-46. As in *Canary*, the agency therefore violated its procedures governing the identity of the proposing official.

The delegation of authority to the PMRU chief did not override the procedures

The agency's argument to the contrary is based primarily on a document signed by the Deputy Attorney General shortly after the PMRU was created thatdelegatedto Chief Ohlson "the authority to issue or propose disciplinary action" in matters falling within the PMRU's jurisdiction. Bottini IAF, Tab 6, Subtab 4h; Tab 69, at 91; Goeke IAF, Tab 5, Subtab 4h; Tab 66, at 91. The agency apparently views this document as authorizing Chief Ohlson to serve as a proposing official in any PMRU matter regardless of what its procedures said. But as explained below, the delegation of authority did not allow the agency simply to ignore its own procedures requiring a PMRU attorney to be the proposing official in the first instance.

Whether an official has the legal authority to take a particular kind of action is not the same question as whether his action complies with the applicable procedures. For example, in *Service v. Dulles*, 354 U.S. 363, 385-86 (1957), the Supreme Court reversed the Secretary of State's decision to fire an employee because the Secretary had not complied with the procedures he had set up for handling loyalty matters. There was no question that the Secretary had the legal authority to fire his employees—on the contrary, a statute specifically gave him the "absolute discretion" to do so whenever he deemed it "necessary or advisable in the interests of the United States." *Id.* at 370 (quoting Act of Oct. 22, 1953, Pub. L. No. 82-108, § 103, 65 Stat. 576, 581). But the procedures for loyalty matters allowed the Secretary to act only if the Deputy Under Secretary had made a decision adverse to the employee. *Id.* at 384-85. The Deputy Under Secretary had not done so there, so the Secretary's action had to be reversed. *Id.* at 386.

Or closer to the facts of these appeals, the Deputy Attorney General himself has the legalauthority to decide disciplinary matters involving Assistant United States Attorneys. *See*28 C.F.R. § 0.15(b)(1)(v). But as ADAG Schools testified, the Deputy Attorney General could not have imposed discipline on the appellants if Chief Ohlson had decided that they had not committed professional

misconduct. 11/29 Tr. 361-62. That is because under the PMRU procedures, the PMRU chief's determination on this point "will be the Department's final finding on the matter." Bottini IAF, Tab 6, Subtab 4k, at 4; Goeke IAF, Tab 5, Subtab 4k, at 4. Thus, the Deputy Attorney General's legal authority to take disciplinary action does not mean that he can take action in violation of the PMRU procedures.

Here, the delegation of authority to Chief Ohlson at most meant that he had the legal authority to propose disciplinary actions in the abstract. It did not mean that he could ignore the PMRU procedures that otherwise applied.

The agency also noted a second document signed by the Deputy Attorney General that approved the appointment of Chief Ohlson as the proposing official in the appellants' cases. Bottini IAF, Tab 6, Subtab 4f, at 2; Tab 69, at 91; Goeke IAF, Tab 5, Subtab 4f, at 2; Tab 66, at 91. But as ADAG Schools recognized, this second document is irrelevant to my analysis. 11/29 Tr. 58. Chief Ohlson either already had the authority to serve as a proposing official, or he did not. *Id.* If he did not, then an appointment by the Deputy Attorney General would not have changed that. *Id.*[*]

Thus, the delegation of authority to Chief Ohlson does not in itself resolve the question whether it was proper for him to be the proposing official. That question must be resolved by looking to the procedures governing the PMRU.

I also find that the delegation was not an amendment of the PMRU procedures. The agency may well have been able to amend these procedures unilaterally. *See* 5 U.S.C. § 553(a)(2) (matters relating to agency personnel are

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[*] The transcript is slightly inaccurate here, mostly with respect to punctuation, in a way that may leave a misleading impression of ADAG Schools's testimony. After reviewing the hearing tapes, I believe that what he actually stated was, "If the process was incorrect, the Deputy Attorney General's authorizing him to do it I'm not sure made any difference." 11/29 Hearing CD, Track 1, at 1:05:02-:08; *cf.Brough v. Department of Commerce*, 2013 MSPB 2, ¶ 8 (relying on an audio recording of the hearing to parse the meaning of the testimony).

exempt from the rulemaking provisions of the Administrative Procedure Act); Bottini IAF, Tab 6, Subtab 4k, at 7; Goeke IAF, Tab 5, Subtab 4k, at 7 (implying that the appellants are not part of a collective bargaining unit that would have to be consulted before the PMRU procedures could apply to its members). But the delegation did not expressly purport to change anything about the PMRU procedures, or even to supplement them. Bottini IAF, Tab 6, Subtab 4h; Goeke IAF, Tab 5, Subtab 4h. This contrasts with an earlier document that expressly "supplement[ed] and clarifie[d]" the memorandum establishing the PMRU. *Id.*, Sutab 4i, at 1. By its terms the delegation affected only Chief Ohlson's authority, not that of any future PMRU chief, which is not what one would expect if the agency in fact intended to make a general change to the procedures. *Id.*, Subtab 4h. This also contrasts with the earlier document supplementing the procedures, which referred more generally to the PMRU chief even though Mr. Ohlson was already filling that role. *Id.*, Subtab 4i, at 1. And the delegation did not say anything about the conditions (if any) under which Chief Ohlson would be the proposing official and who would serve as the deciding official in those circumstances. *Id.*, Subtab 4h. One would have expected to see this kind of detail if the procedures were in fact being changed.

The Board has the authority to enforce not only formally promulgated regulations and negotiated provisions of collective bargaining agreements, but also formal agency policies governing discipline that the agency intended to be binding. *SeeFarrell v. Department of the Interior*, 314 F.3d 584, 590-91 (Fed. Cir. 2002); *see also Gilliam v. Department of Commerce*, 6 M.S.P.R. 57, 59-60 (1981) (reversing an agency action based on an agency circular that the Board concluded was binding). For example, the policy at issue in *Canary*,whichpresumptively required the immediate supervisor to be the proposing official, was not part of a regulation or collective bargaining agreement. 2013 MSPB 25, ¶ 11; *see also* U.S. Postal Service, *Employee and Labor Relations Manual* § 651.1 (noting that the policy at issue applies only to

employees who are not subject to the provisions of a collective bargaining agreement), *available at*http://about.usps.com/manuals/elm/html/elmc6_024.htm. The agency did not dispute in these appeals that the procedures it developed for the PMRU were intended to be binding and could be enforced by the Board. On the contrary, as noted above, ADAG Schools made it clear that the agency could not simply have ignored the procedures. I therefore find that the Board has the power to enforce the PMRU procedures here notwithstanding the Deputy Attorney General's delegation of authority to Chief Ohlson.

The delegation does not support a different interpretation of the agency's policy

The delegation of authority to Chief Ohlson to "issue or propose disciplinary action" does suggest that the Deputy Attorney General assumed there would be circumstances in which Chief Ohlson could serve as a proposing official. Bottini IAF, Tab 6, Subtab 4h; Goeke IAF, Tab 5, Subtab 4h. But for two reasons, I find this assumption unhelpful to the agency here.

First, an agency's interpretation of its own policy is entitled to deference only when the language of the policy is ambiguous. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). For the reasons explained above, I find no ambiguity in the PMRU procedures themselves with respect to whether a PMRU attorney will be the proposing official. *Cf.Hopper v. Office of Personnel Management*, 118 M.S.P.R. 608, ¶ 9 (2012) (refusing to defer where the agency's interpretation of a statute was contrary to its plain language). For this reason alone, I would find the delegation unhelpful even if it did reflect an interpretation of the procedures that allowed Chief Ohlson to serve as a proposing official.

Second, at most the delegation might be thought to support an interpretation of the procedures as allowing the PMRU chief to serve a proposing official *after* a PMRU attorney had issued a proposal that the chief found too lenient. But that is not what happened here.

ADAG Schools explained that the developers of the PMRU procedures had believed that a deciding official always had the inherent authority, if he thought

that the proposing official's proposal was too lenient, to re-propose harsher discipline. 11/29 Tr. 44-45, 51, 361. This was not spelled out in the PMRU procedures, and the agency later conceded that it would be improper under *Bross v. Department of Commerce*, 389 F.3d 1212 (Fed. Cir. 2004) and *Boddie v. Department of the Navy*, 827 F.2d 1578 (Fed. Cir. 1987). As the agency argued in its closing brief, a proposing official's issuance of a "finalized decision" serves as a "bright line demarcation" of the point at which an agency may no longer change proposing officials. Bottini IAF, Tab 69, at 88-89; Goeke IAF, Tab 66, at 88-89.

Under the developers' original(and mistaken) understanding of the law, however, it is apparentwhy the Deputy Attorney General would have delegated to Chief Ohlson the legal authority to serve as a proposing official. In a hypothetical chain of events, a PMRU attorney like Mr. Berg might have issued a proposal for discipline, as provided under the PMRU procedures. If Chief Ohlson thought that the proposal was too lenient, he would have re-proposed the discipline and given the employee another chance to respond. Presumably a higher-level agency official would then have served as the deciding official.

I need not decide whether this chain of events would have complied with the PMRU procedures, which say nothing about a deciding official's authority to reject a proposal as too lenient, much less whether it would have complied with the Federal Circuit's case law on replacing a proposing official. The agency argued vehemently that this is *not* what happened here. Bottini IAF, Tab 69, at 81-87; Goeke IAF, Tab 66, at 81-87. It argued instead that Mr. Berg's memorandum explaining why he believed that the appellants had not committed professional misconduct did not constitute a disciplinary proposal and in any event was not finalized. *Id.* It did so to avoid running afoul of *Boddie* and *Bross*, which together suggest that it is improper for an agency to replace a proposing official after he has made a final decision about the proposal. *See id.* at 77-81, 87-91. The agency is bound by its argument that Mr. Berg never issued a

disciplinary proposal against the appellants. *See Bencomo v. Department of Homeland Security*, 115 M.S.P.R. 621, ¶ 6 (2011) (describing judicial estoppel), *aff'd*, 468 F. App'x 986 (Fed. Cir. 2012) (per curiam), *overruled on other grounds by Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 n.4 (2012).

There is a significant difference between the hypothetical chain of events described above and what actually happened here. In the hypothetical, the employee would have first received a formal disciplinary proposal from the PMRU attorney explaining the level of discipline he or she believed was warranted. Even if the PMRU chief later rejected this proposal as too lenient, the employee would have received much of the intended benefit of the process: Someone who himself or herself had come from the rank and file would have had the chance to take the "first crack" at analyzing OPR's findings and determining the appropriate punishment. 11/29 Tr. 282-83. Here, however, the appellants did not receive this. They received only an incomplete draft memorandum that, by its terms, addressed only the issue of the PMRU's jurisdiction and offered no views on the appropriate level of discipline (if any) for the appellant's actions. Bottini IAF, Tab 6, Subtab 4c, at 77, 80; Goeke IAF, Tab 5, Subtab 4c, at 35, 38. Mr. Berg neither determined that the appellants had committed no discipline-worthy conduct nor took a "first crack" at determining the appropriate punishment for their conduct.

In any event, this discussion shows why the delegation of authority does not support an interpretation of the PMRU procedures as allowing the PMRU chief to act as a proposing official any time he wanted. At most the delegation suggests that the Deputy Attorney General recognized the possibility of disagreement between a PMRU attorney and the PMRU chief, and that he believed that the chiefcould reissue a harsher proposal *after a PMRU attorney had already issued a proposal*. But that is not what happened here, so even if I thought the PMRU procedures were ambiguous in this respect (and I do not), I

would not adopt an interpretation loose enough to authorize what the agency did here.

For these reasons, I find that notwithstanding the delegation, the agency violated its procedures when it made Chief Ohlson rather than a PMRU attorney the proposing official.

The error was harmful

I also find that this errorwas harmful, because if the agency had followed its procedures the appellants likely would have been punished less serverly, if at all. The agency does not appear to dispute the harmfulness element. *Compare* Bottini IAF, Tab 69, at 96-97; Goeke IAF, Tab 66, at 96-97 (arguing lack of harmfulness with respect to another alleged procedural error), *with id.* at 91-93 (not arguing lack of harmfulness with respect to this error). Nonetheless, in the interest of completeness, I address the element here.

Because Mr. Berg was the PMRU attorney assigned to this matter, the main question is what he would have done if he had not been replaced. *SeeCanary*, 2013 MSPB 25, ¶ 12. At the time he stopped working on the matter, he had concluded that the appellants were guilty only of poor judgment, not professional misconduct. Bottini IAF, Tab 6, Subtab 4c, at 77, 80; Tab 38, exhibits F-12 to F-13, F-25 to F-26, F-32; Goeke IAF, Tab 5, Subtab 4c, at 35, 38. He remained open to being persuaded that his conclusions were wrong, as any prosecutor or judge ought to be. 11/7 Tr. 275-76; Bottini IAF, Tab 38, exhibits F-25 to F-26. But given the enormous amount of thinking and research that he had already put into the matter, I find that it was not likely—as opposed to merely possible—that he would have changed his views upon further consideration.

Mr. Berg had not made a final decision about the level of discipline, if any, that was warranted for the appellant's conduct. Bottini IAF, Tab 38, exhibits F-18, F-31 to F-32; 11/7 Tr. 297. He withheld judgment on this issue because he believed that the PMRU lacked jurisdiction over the matter and that it should be

returned to the appellants' United States Attorneys for consideration of discipline. Bottini IAF, Tab 38, exhibit F-32. Had the PMRU done so, I find that the United States Attorney who supervised Mr. Bottini would have imposed no discipline on him, as she testified unequivocally at the hearing. 11/7 Tr. 220. The United States Attorney who supervised Mr. Goeke was not asked the same question, but he wrote a letter stating that he disagreed with the proposed fifteen-day suspension, so I find that he likely would have imposed no or less severe discipline. Goeke IAF, Tab 5, Subtab 4d.

I also find that if Mr. Berg had been forced to decide the disciplinary issue, he more likely that not would have selected a less severe option than the suspensions that were ultimately imposed here. In his memorandum explaining why the PMRU lacked jurisdiction, he wrote that "[e]ven if I had concluded that reckless misconduct had occurred, all of the same concerns that caused me to reduce the finding to poor judgment, along with the uniformly positive—if not outright lustrous—personnel records of AUSAs Bottini and Goeke, would have counseled in favor of a low level of discipline." Bottini IAF, Tab 6, Subtab 4c, at 156; Goeke IAF, Tab 5, Subtab 4c, at 115. He also stated that "it is clear to me that no amount of 'discipline,' such as a letter of reprimand, or a suspension, would be likely to accomplish any further deterrence of future misconduct than their involvement in this prosecution and this misconduct investigation has already done." Bottini IAF, Tab 6, Subtab 4c, at 156-57; Goeke IAF, Tab 5, Subtab 4c, at 115-16. Although Mr. Berg might not have completely ruled out the possibility of proposing a suspension (*see* 11/7 Tr. 297), I find that at a minimum it is unlikely he would have proposed suspensions anywhere near as long as the ones ultimately imposed.

I find this particularly unlikely because, as ADAG Schools noted in his decision letters, both the suspensions ultimately imposed here were "longer than actual punishments received by Department attorneys found to have engaged in misconduct in the past." Bottini IAF, Tab 6, Subtab 4a, at 60; Goeke IAF, Tab 5,

Subtab 4a, at 23. ADAG Schools testified that comparable cases typically resulted in a letter of reprimand or at most a week's suspension. 11/29 Tr. 235, 384-85. He described one case where the attorney's violations were "comparable" to those alleged here and led to reversal of a conviction, but the attorney received only a letter of reprimand. *Id.* at 384-86. In another one that was comparable to Mr. Goeke's alleged violation, the attorney received a suspension of about three days. *Id.* at 385.

ADAG Schoolsindicated that he decided to impose harsher discipline here in part because he had long believed that the agency was being too lenient in disciplining attorneys for professional misconduct. Bottini IAF, Tab 38, exhibits D-60, D-62. Based on the evidence presented in these appeals, I do not necessarily disagree with this assessment. But the Board's case law on disparate penalties constrains an agency's authority to impose more severepunishment for similar misconduct when it has not given its employees notice of a change in policy. *See Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 27 (2012). ADAG Schoolsacknowledged that there had been no announcement here that the agency was going to begin imposing harsher punishmentfor professional misconduct. Bottini IAF, Tab 38, exhibit D-62. Mr. Berg was sensitive to the concernof disparate penalties (Bottini IAF, Tab 6, Subtab 4c, at 79; Goeke IAF, Tab 5, Subtab 4c, at 37), and I find that it likely would have led to him proposing discipline more commensurate with what others had received.

The agency conceded that if Mr. Berg had done so, it could not thereafter have imposed more severe punishment. *See, e.g.*, 11/29 Tr. 48 (ADAG School's testimony that if the PMRU attorney had issued a letter of reprimand, "I don't know that the chief could've done anything"), 361 ("once the proposal is issued, that's at the top end of the proposal"); Bottini IAF, Tab 69, at 88-89; Goeke IAF, Tab 66, at 88-89. I therefore find that if Mr. Berg had been the proposing official instead of Chief Ohlson, the appellants likely would not have been punished as harshly as they were.

There was another PMRU attorney, Lara Peirce, and I will assume for argument's sake that the agency could have reassigned the matter to Ms. Peirce despite cases like *Boddie* and *Bross*. Ms. Peirce worked closely with Mr. Berg on his memorandum and agreed with his analysis. Bottini IAF, Tab 38, exhibits E-9, F-10 to F-11, G-8 to G-9. For essentially the same reasons, therefore, I find it likely that Ms. Peirce would not have proposed discipline as severe as what was ultimately imposed here. To be sure, Ms. Peirce had not actually reached a decision of her own about whether the appellants committed professional misconduct, much less what level of discipline was warranted. *Id.* at G-8. But I find it only possible, not likely, that she would have disagreed with Mr. Berg upon further reflection.

The agency's error therefore was harmful here for the same reason the error was harmful in *Canary*, where the immediate supervisor testified that she would not have imposed any discipline if she had been the proposing official. 2013 MSPB 25, ¶ 12. If anything, the violation here was more serious than the one at issue in *Canary*. In *Canary*, the agency decided to appoint a different proposing official before the immediate supervisor had made up her mind about what action to take. *Id.*, dissenting op., ¶ 6. Here, the agency did not appoint Chief Ohlson until December 2011, but by mid-November at the latest Mr. Berg had already concluded that the appellants had not engaged in professional misconduct. Bottini IAF, Tab 6, Subtab 4f, at 2; Tab 38, exhibit F-25; Goeke IAF, Tab 5, Subtab 4f, at 2. I need not decide whether this violated *Boddie* and *Bross*, because I would find that the agency committed an error regardless of whether Mr. Berg had already made a decision. But I note that the agency's reason for appointing Chief Ohlson—disagreement with Mr. Berg's substantive conclusions about the seriousness of the appellants' conduct—runs afoul of at least the spirit, if not the letter, of the Federal Circuit's case law.

The agency's policy concerns do not counsel in favor of a different result

The agency argued that it would be bad policy to have a system where a rank-and-file detailee like a PMRU attorney can make decisions about discipline that higher-level management cannot review. Bottini IAF, Tab 69, at 93; Goeke IAF, Tab 66, at 93; 11/29 Tr. 49-50. I agree that this is a legitimate concern. But the agency easily could have written its PMRU procedures to avoid this problem. It could have, for example, made the PMRU chief the proposing official in some or all cases and stated that the PMRU attorneys would serve merely as his law clerks, writing memoranda for his consideration or drafting documents for his approval.

Of course, if the agency had done so it would have lost some of the benefits of having a rank-and-file attorney rather than a member of management serve as the proposing official—for example, making the subjects feel that the process was fair because they were being judged by peers, or having attorneys with recent prosecutorial experience play a formal decision-making role. 11/29 Tr. 33, 282-83. The procedures that the agency adopted struck a balance among these countervailing interests, and it is not for me to say whether the balance is good policy or not. What the agency could *not* do, however, was hold itself out as having a process in which a rank-and-file attorney takes the "first crack" at making the disciplinary decision, *id.* at 283, but then substitute a management official for that role instead.

And the balance the agency struck in its PMRU procedures was rational even if it gave PMRU attorneys, rather than agency management,theauthority to set the maximum penalty for professional misconduct. Mr. Berg, for example, had previously served as a First Assistant United States Attorney for more than three years, as the acting United States Attorney for a year and a half, and as the acting First Assistant in another district for more than half a year. Bottini IAF, Tab 38, exhibit F-3. At the time of the hearing, the President had nominated him to serve as a federal district judge, and he has since been confirmed to that

position. *Id.*; 158 Cong. Rec. S7664 (daily ed. Dec. 6, 2012). Mr. Berg may have been a rank-and-file attorney rather than management, but it was hardly absurd for the agency to create a system in which he would serve as a proposing official.Mr. Berg's conclusions in this case may or may not have been correct; I am not deciding that question. I note only that the agency could have had enough confidence in his judgment and integrity to leave the initial disciplinary decision to him even though his decision would set the maximum punishment the agency could impose.

For these reasons, the suspensions are REVERSED on grounds of harmful procedural error.

Other issues

When the Board reverses an agency decision on procedural grounds, it does not address the merits of the adverse action. *See, e.g., Giannantonio v. U.S. Postal Service*, 111 M.S.P.R. 99, ¶¶ 2, 5 (2009); *Tyler v. U.S. Postal Service*, 62 M.S.P.R. 509, 514 n.2 (1994). There isconsiderable question whether the suspensions would have survived the disparate-penalties analysis of cases like *Boucher*, 118 M.S.P.R. 640, but I cannot decide that issue in the alternative. *See Giannantonio*, 111 M.S.P.R. 99, ¶ 5.

The Board continues to adjudicate affirmative defenses that involve prohibited personnel practices, suchas discrimination or retaliation claims. *See, e.g., Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶¶ 13-14 (2012); *Cowart v. U.S. Postal Service*, 117 M.S.P.R. 572, ¶¶ 8-9 (2012). But neither appellant has raised any such claims here. Bottini IAF, Tab 44, at 3; Goeke IAF, Tab 40, at 3. Although Mr. Goeke originally raised some claims of prohibited personnel practices, *id.*, he abandoned those issues as separate defenses in his closing brief. Goeke IAF, Tab 65, at 17 n.55. The appellants have raised a number of other procedural issues, but I need not reach them because the issue I have decided suffices to support reversal. *See, e.g., Wagner v.*

Environmental Protection Agency, 51 M.S.P.R. 337, 352 (1991),*aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) (per curiam).

I recognize that the parties and the Board have devoted a great deal of resources to developing the record on the merits. If my decision on the procedural issue is reversed or the matter otherwise returns to me to consider the merits, I will have the benefit of thisexisting record, including the outstanding legal briefs that the parties have submitted, and should be able to resolve any remaining issues expeditiously. At present, however, I find it prudent to comment only on the dispositive issue of harmful procedural error.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the suspensions. 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 the appellants by check or through electronic funds transfer for the appropriate amount of back pay due (if any) 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 appellants 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 the appellants 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. The appellants may then file petitions for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform the appellants 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, the appellants must ask the agency about its efforts to comply before filing petitions 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 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.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to theappellants in accordance with 5 U.S.C. § 7701(b)(2)(A). I find that this relief should consist of not executing any portion of the suspensions that the appellants have not yet served. The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order,

the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: _____
Benjamin Gutman
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **May 10, 2013**, 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 for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for 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.