

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

MICHAEL E. MCNEIL,
Appellant,

DOCKET NUMBER
SF-1221-12-0113-W-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: March 16, 2012

John D. Burgess, Salem, Oregon, for the appellant.

Alexandra M. James, Esquire, Portland, Oregon, for the agency.

BEFORE
Amy V. Dunning
Chief Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed an Individual Right of Action (IRA) appeal alleging he was terminated during the probationary period from the excepted service position of Teacher (Special Education), Chemawa Indian School, on November 8, 2010, in reprisal for whistleblowing activity. Initial Appeal File (IAF), Tab 1, Tab 6, Subtabs 12, 15. The Board has jurisdiction pursuant to 5 U.S.C. § 1221.¹ The

¹ The appellant was appointed to his teaching position under section 1131 of the Education Amendments of 1978, Pub. L. No. 95-561, which currently is codified as amended at 25 U.S.C. § 2012. IAF, Tab 4, Subtab 1. This statute exempts Indian education personnel from various provisions of Title 5 of the United States Code: "Chapter 51, subchapter III of chapter 53, and chapter 63 of Title 5, relating to classification, pay and leave, respectively, and the sections of such title relating to the appointment, promotion, hours of work, and removal of civil service employees, shall

appellant requested a hearing and one was held February 27-28, 2012 in Salem, Oregon. IAF, Tabs 1, 8. For the following reasons, the appellant's request for corrective action is GRANTED.

ANALYSIS AND FINDINGS

Background

The appellant began working as a Teacher (Special Education) at the Chemawa Indian School under a School Year Contract for the period September 23, 2009 to May 21, 2010. *Id.*, Tab 4, Subtab 1 at 3. On September 23, 2009 the appellant received an excepted service appointment not to exceed September 30, 2010. *Id.* at 1-2. The appellant received a second contract for the same position but from August 30, 2010 to May 20, 2011. *Id.* at 5. Craig Wellman, the School Supervisor, signed for the school on May 24, 2010. *Id.*

On August 30, 2010 the appellant was converted to an excepted service appointment not to exceed September 30, 2011. *Id.* at 4. The appellant's first appointment Standard Form (SF)-50 states in the remarks section the appointment is subject to a probationary period of 18 months beginning September 23, 2009. *Id.* at 1-2. The appellant does not dispute that he was serving an 18 month probationary period. Bureau of Indian Affairs (BIA) Manual 11.24B states that for Education Contract Personnel, a probationary employee may be terminated at any time during the term of a contract. *Id.*, Tab 18, Exhibit 1.

The appellant's supervisor, Amanda Ward, Education Specialist (School Reform), signed the letter, dated October 25, 2010, notifying the appellant of his termination. *Id.*, Tab 1. The letter was given to the appellant in a meeting with

not apply to educators or to education positions (as defined in subsection (p) of this section)." *Id.* at § 2012(a). For the reasons stated in my Order on Jurisdiction dated December 23, 2011, I found § 2012(a) does not take away the Board's jurisdiction over the appellant's IRA appeal. IAF, Tab 8. The agency did not raise the § 2012(a) issue or object to my determination on jurisdiction. Notably, the Office of Special Counsel reached the opposite result, finding it did not have jurisdiction over the appellant's complaint because he was hired in accordance with Pub. L. 95-561. *Id.*, Tab 6, Subtab 1 at 18-26.

Mr. Wellman and Ms. Ward. *Id.*, Tab 6, Subtab 11. Ms. Ward states in the letter that the appellant's "inappropriate behavior and unprofessional outbursts toward staff has continued to be counterproductive, diminishing your ability to effectively work at Chemawa Indian School" and that it had become necessary to terminate his employment for the benefit of the service. *Id.*, Tab 1.

The appellant filed a complaint with the Office of Special Counsel (OSC) on April 7, 2011, and it was assigned OSC File No. MA-11-2118. *Id.*, Tab 6, Subtab 1 at 3-25. The appellant alleged he was terminated because on September 30, 2010 he told Ms. Ward that Renee Wellman, the wife of Mr. Wellman, the School Supervisor, was appointed to the Special Education Coordinator's position and that appointment was illegal and prohibited because it was nepotism, and her appointment and employment at Chemawa Indian School as an Education Specialist violated the excepted qualification standards established by the Bureau of BIA. *Id.* at 10; Tab 1 at MSPB Form 185-5 Additional Disclosure at 1.

The appellant identified Mr. Wellman in his OSC complaint as the official responsible for the violations he was reporting. *Id.*, Tab 6, Subtab 1 at 7. The appellant stated in his appeal that he was required to follow the chain of command and report the matter to Ms. Ward. *Id.*, Tab 1 at MSPB Form 185-5 Additional Disclosure at 1. Indeed, the appellant submitted a memorandum dated April 13, 2011 (after the events at issue here but supportive of the appellant's belief he was required to follow the chain of command), signed by the acting principal at that time, Theodore Mack, that required staff to sign and date the memorandum saying they understand the requirement that they are required to follow the chain of command, that all issues shall be addressed at the lowest level, and that staff not following the chain of command may be subject to disciplinary action. *Id.*, Tab 6, Subtab 18.

There is some dispute as to whether the appellant regarded Ms. Ward as a wrong-doer at the time he made the disclosure but it is clear he regarded her as one at the time of the appeal ("Amanda Ward colluded with Craig Wellman to

fire me and continue covering up the fact that both of their relatives were working in positions that they were not qualified to hold”). *Id.*, Tab 1 at MSPB Form 185-5 Continuation Sheet; Hearing Compact Disk (HCD) (testimony of appellant).

I found the appellant had shown he exhausted his administrative remedies with OSC and made non-frivolous allegations that (1) he engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). IAF, Tab 8. Therefore, I found jurisdiction over the appellant’s IRA appeal and held the requested hearing. *Id.*

Applicable law and findings

Personnel action and protected disclosure

It is undisputed, and I find, the agency took a personnel action when it terminated the appellant from the Federal service during his probationary period. 5 U.S.C. § 2302(a)(2)(A)(xi). I also find the appellant reasonably believed his disclosure evidenced a violation of law, rule or regulation, that is, that the selection of Ms. Wellman to the stipend position of Special Education Coordinator, and her employment as an Education Specialist, was due to nepotism and in violation of BIA excepted qualification standards. 5 U.S.C. § 2302(b)(8)(A).

It is undisputed Ms. Wellman did not have a valid teaching credential from Oregon when she and Mr. Wellman began their employment at Chemawa Indian School in January 2010, except for a brief period from February 16 to June 30, 2010, when she was given an emergency teaching license to teach reading. HCD (testimony of Ward); IAF, Tab 6, Subtab 21 (Teacher Standards and Practices Commission of Oregon (TSPC) license information). It is also undisputed the position of Education Specialist required a valid teaching license from Oregon. HCD (testimony of Ward); IAF, Tab 19, Exhibit H (BIA Manual 11.35).

The stipend position of Special Education Coordinator did not require a teaching license from Oregon or have BIA excepted qualification standards associated with it; nonetheless the appellant asserts Ms. Wellman was not qualified for the position and was selected because she is Mr. Wellman's spouse. *Id.* (testimony of Ward, appellant).

The BIA excepted qualification standard 11-01 states that all professional educators must meet the certification standards for their position in the state where the position is located. IAF, Tab 7, Exhibit B. BIA Manual 11.35 also required Ms. Wellman to have a valid teaching license from Oregon. *Id.*, Tab 19, Exhibit H. Further, a Federal statute, 5 U.S.C. § 2302(b)(7), provides that any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (defined to include husband and wife, section 3110(a)(3)) of such employee if such position is in the agency in which such employee is serving as a public official (an employee with authority to appoint, employ, promote, or advance individuals, or to recommend individuals for appointment, employment, promotion, or advancement in connection with employment in the agency). This is the statutory definition of nepotism although the appellant uses the term more loosely to refer to anyone seeking or receiving preferential treatment for relatives.

The agency argued the appellant's disclosure was not protected because the information he disclosed was public knowledge. IAF, Tab 7. Ms. Ward and another teacher, Dr. Debbie LaCroix, testified they knew of Ms. Wellman's inability to obtain an Oregon teaching license long before the appellant made his disclosure. HCD (testimony of Ward, LaCroix). Further, the appellant stated in his appeal that Ms. Wellman's inability to obtain an Oregon teaching license and her continued employment in violation of BIA excepted qualification standards was common knowledge among teaching and paraprofessional staff, often

discussed, and attributed to nepotism. *Id.*, Tab 1, MSPB Form 185-5 Additional Disclosure at 1. Lastly, the TSCP license information for Ms. Wellman (and other teachers) is available on TSCP's public web site. HCD (testimony of Ward, Thomas Krise).

While it may be public knowledge Ms. Wellman lacked a teaching license in Oregon, there is no evidence of record the public beyond the school or agency had reason to know her continued employment without a license violated internal agency rules or was due to nepotism. *Id.*, Tab 8. *See Askew v. Department of the Army*, 88 M.S.P.R. 674, ¶¶ 20-23 (2001) (although alleged disclosure may have concerned an issue that was well-known to management, the key is whether the information disclosed is publicly known). *See also Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, 268 (2011) (disclosure protected because public observation of the shooting would not necessarily have indicated a violation of law without consideration of the additional information the appellant provided, information that was not publically known).

The agency also argued that since the appellant complained of misconduct by Ms. Ward to Ms. Ward, he was not making a disclosure because Ms. Ward necessarily knew of the conduct already since she is the one that engaged in the misconduct. *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001). However, I note the appellant complained to Ms. Ward of nepotism in the treatment of Ms. Wellman, and he named Mr. Wellman as a wrong-doer in his OSC complaint.

Further, Ms. Ward testified unexpectedly at the hearing that she did not hire Renee Wellman. HCD (testimony of Ward). This was contrary to a sworn statement she submitted earlier in which she stated she hired Ms. Wellman as an Education Specialist (Reading) on January 4, 2010 and that she was aware at the time she hired her that she did not have the required certification. IAF, Tab 7, Exhibit C.

Ms. Ward testified she told the agency's representative "immediately" after signing the statement that she did not hire Ms. Wellman and that was a mistake. HCD (testimony of Ward). Ms. Ward signed the sworn statement on January 6, 2012 and the agency representative submitted it with a motion to dismiss dated January 9, 2011 (the year appears to be an error). IAF, Tab 7 at 1, Subtab C. The error was a material one because Ms. Ward suddenly could not testify to the circumstances of how Ms. Wellman was hired for a position for which she was allegedly not qualified, and she was the only witness who allegedly could. Especially aggravating is that the agency knew of the error but took no initiative to disclose it to the Board and the appellant.

Ms. Ward offered that she understood the Wellmans were the only applicants for their positions, and that she recommended against hiring the Wellmans because of her experience with them when they last worked at the school. HCD (testimony of Ward). She testified she could not give specifics as to why she felt that way, only that they said whoever worked here was insane to work here and then walked out the door. *Id.* She thought nothing good could come from hiring them again. *Id.*

Ms. Ward testified she did select Ms. Wellman for the stipend position of Special Education Coordinator. *Id.* She explained that Mr. Wellman approached her and gave her information about Ms. Wellman's qualifications that she found helpful in selecting Ms. Wellman for the stipend position. *Id.* Ms. Ward added that without the information she would not have selected anyone (the other applicants were the appellant and Mr. Orr, who was performing the function for many years but not well) or she would have talked with Ms. Wellman. *Id.* Because it appears she did neither, I find the information from Mr. Wellman was determinative in causing Ms. Wellman to be selected. *Id.*

Assuming Mr. Wellman, the School Supervisor, is a public official in BIA as defined in section 2302(b)(7) and what he did may be construed as advocating for Ms. Wellman's appointment or advancement in BIA, Mr. Wellman is more

than an alleged wrong-doer – he actually violated section 2302(b)(7). I need not decide that he did for purposes of this appeal, but it is readily apparent that the appellant did not complain to Ms. Ward about Ms. Ward only. The evidence certainly supports the appellant's reasonable belief that Ms. Wellman's continued employment constituted nepotism.

Contributing factor

To prevail on a claim of reprisal for making disclosures protected under 5 U.S.C. § 2302(b)(8), an appellant must show by preponderant evidence that the disclosures were a contributing factor in the agency's personnel action. See 5 U.S.C. § 1221(e)(1). An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*

It is undisputed that Ms. Ward knew of the disclosure, and she signed the letter terminating the appellant from his position within a month of the disclosure. Ms. Ward denies informing Mr. Wellman of the appellant's disclosure from September 30, 2010;² however, the circumstantial evidence described below leads me to conclude that (1) Mr. Wellman knew of the substance of the disclosure because it was the same issue the appellant raised with Ms. Wellman on September 28 and 30, 2010, and (2) Ms. Wellman informed Mr. Wellman of those interactions shortly after they occurred.

Therefore, I find the disclosures were a contributing factor in the agency's termination of the appellant.

² HCD (testimony of Ward).

Clear and convincing

Because the appellant made a protected disclosure that was a contributing factor in his termination, the remaining issue is whether the agency met its burden of proving by clear and convincing evidence that it would have taken the same action in the absence of the protected disclosure. *See* 5 U.S.C. § 1221(e)(2). 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). It is a higher standard than a “preponderance of the evidence,” which is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id.*; *see* 5 C.F.R. § 1201.56(c)(2). As explained by one of the sponsors of the Whistleblower Protection Act, “clear and convincing evidence” is an intentionally high standard of proof:

“Clear and convincing evidence” is a high standard of proof for the Government to carry. It is intended as such for two reasons. First, this standard of proof comes into play only if the employee has proven by a preponderance of the evidence that whistleblowing was a contributing factor in the action against him or her—in other words, that the agency action was tainted. Second, this heightened burden of proof on the agency recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bears a heavy burden to justify its actions..

135 Cong. Rec. S2780 (Mar. 16, 1989) (statement by Sen. Levin); *see also* 135 Cong. Rec. H747 (Mar. 21, 1989) (similar statement by Rep. Sikorski); *Fulton v. Department of the Army*, 95 M.S.P.R. 79, ¶ 9 (2003).

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of

whistleblowing, the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the 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. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Having considered each of these factors, I am not persuaded the agency would have terminated the appellant in the absence of his disclosure. Under a different burden of proof the appellant's conduct might have justified a probationary termination. But the evidence very much suggests after-the-fact rationalizations for the agency's actions. As outlined below, management was already in the process of terminating the appellant well before Ms. Ward decided to do so, and for reasons that are not well explained.

Strength of the agency's evidence in support of its action.

Ms. Ward testified she became the appellant's supervisor in August 2010. HCD (testimony of Ward). She did not supervise him during his first year at the school. *Id.*

On October 8, 2010, Charlotte Mathews, who handled human resources matters for the school under the direction of the school's business manager, Rachenda Reynosa, wrote an email to Jodi Tomhave, the human resources point of contact at the agency's higher headquarters in Albuquerque, in which she requested a "Termination During Probationary Period letter for Mr. McNeil" and "Reasons are several documented issues where Mr. McNeil has verbally attacked co-workers." IAF, Tab 18, Exhibit 8. This started a string of emails, all sent on October 8, with Ms. Tomhave asking Ms. Mathews to fax the supporting documents; Ms. Mathews writing Ms. Reynosa, stating "So hopeful this won't take too long to get;" and Ms. Reynosa writing Mr. Wellman stating "Letter is requested, we just need the documentation on it" and "Please follow up with

Amanda next week by like Wednesday to make sure we have it all by the end of the week.” *Id.* Ms. Ward is not copied on any of the emails. *Id.*

Thus, it appears that the agency did not in fact have “several documented issues where Mr. McNeil has verbally attacked co-workers” at the time it requested a termination during probationary period, but went about obtaining the documentation after making that representation to Ms. Tomhave. Nor was Ms. Ward, who claimed the decision to remove the appellant was hers alone, apparently involved at this point in the termination. *Id.*; HCD (testimony of Ward). There was an email from September 30, 2010 from Ms. Wellman to the appellant in which she complains of his rude and unprofessional behavior in a meeting that day but how and when that email came to the attention of management is not apparent from the record. IAF, Tab 18, Exhibit 4. There was also an unsworn memorandum dated August 24, 2010 from Edith McCoy, another special education teacher, in which she wrote she felt threatened by the appellant after the appellant told her he would handle his own files. *Id.*, Tab 4, Subtab 2. She also added an incident from September 8, 2010 when the appellant told her the files she was maintaining were “all mess [*sic*] up.” *Id.* Further questioning of Ms. McCoy revealed the memorandum was not written on August 24, 2010 but later on September 9, 2010, after the appellant had criticized her files. HCD (testimony of McCoy). Ms. McCoy claimed she transposed the information from her calendar for August 24, 2010 to the memorandum and she gave the memorandum to someone on September 9, 2010 but she could not recall who or articulate why, other than she writes down everything and she attended training. *Id.* She could not explain why “Received Time Oct. 12. 3:41PM” was printed or stamped on the bottom of the memorandum. *Id.* Ms. McCoy testified the appellant did not swear or yell or loom over Ms. McCoy but did put some files down roughly and slam the door. *Id.*

Given the alleged timing of the memorandum’s creation and distribution (September 9, following the files are “all mess up” comment) and the appellant’s

behavior as described by Ms. McCoy, I find Ms. McCoy acted more out of fear that the appellant regarded her as incompetent than any kind of physical threat.

In any event, I am unable to conclude that management had a copy of either Ms. Wellman's email or Ms. McCoy's memorandum at the time Ms. Reynosa asked Ms. Tomhave for a termination letter for the appellant.³

Ms. Reynosa testified Mr. Wellman, who was Ms. Ward's supervisor, had the authority to stop Ms. Ward from terminating the appellant. *Id.* (testimony of Reynosa). Ms. Ward agreed, but was not sure whether Mr. Wellman's approval was required to proceed with the termination. *Id.* (testimony of Ward). She testified she received no direction or guidance from Mr. Wellman on the appellant's firing. *Id.* There is also no evidence that Ms. Ward told Mr. Wellman what the appellant disclosed on September 30, 2010. However, the gathering of documentation for the appellant's termination that began October 8, 2010 was not initiated by Ms. Ward but by Ms. Reynosa and Mr. Wellman and predated Ms. Ward's decision on October 15, 2010 to proceed with the termination, which she communicated to Ms. Mathews in an email. IAF, Tab 18, Exhibit 7.

Further, Ms. Reynosa sent Mr. Wellman an email on October 20, 2010 (Ms. Ward is not copied) relating that Jodi did not support a termination during probation for Mr. McNeil and wanted more documentation from Ms. Ward talking to him on his problem. IAF, Tab 18, Exhibit 19. Mr. Wellman wrote back the next day with "I say let's move ahead on this" after relating a story he heard from Ms. Wellman, based on double hearsay, in which it was reported (by whom is not clear) to Ms. Wellman and Ms. Ward that during a meeting between Cheryl Bower and the appellant, the appellant said he was going to run out of his meds in four days and then he would not be responsible for his actions and that he was going to request accommodations for his medical condition. *Id.* The appellant allegedly told Ms. Bower he was not afraid to get fired and that he was going to

³ However, as later explained, I find management knew at the time about the incident reported in Ms. Wellman's email.

start reporting Chemawa for everything that is being done wrong, which is everything. *Id.* Mr. Wellman further writes that he does not know if Ms. Ward reported this but Ms. Wellman said this was a critical situation. *Id.* Ms. Ward recalled Ms. Bower speaking to her about this but she did not consider it in deciding to terminate the appellant. *Id.* Neither Ms. Wellman nor Ms. Bower testified at the hearing (no explanation as to why), and the appellant testified he did not make the statements. *Id.* (testimony of appellant).

The next day, October 22, 2010, after Mr. Wellman wrote Ms. Reynosa that he wanted to “move ahead on this,” Ms. Ward sent an email to Ms. Tomhave describing the occasions when she spoke to the appellant about his staff interactions. IAF, Tab 6, Subtab 10. Ms. Ward testified she did not rely on Ms. McCoy’s memorandum in her decision to remove the appellant, describing it as “superficial.” HCD (testimony of Ward). She also testified she did not consider any of the incidents Ms. Reynosa testified she experienced with the appellant, which were never documented by Ms. Reynosa. *Id.* She stated she considered an incident with Ms. Mathews from October 2009 regarding health benefits but there is no memorandum of the incident in the record, Ms. Ward did not recall the incident with much clarity, and Ms. Mathews did not testify. *Id.* Ms. Ward admitted considering an incident from November 2009 involving Janet Elliott, a school counselor, and the appellant, but Ms. Elliott never reported the incident to Ms. Ward until March 2010 after a meeting with the appellant, Ms. Ward and Ms. Elliott. *Id.* (testimony of Ward, Elliott).

The November 2009 incident involved Ms. Elliott signing the appellant’s name to an email and the appellant objecting. *Id.* (testimony of Elliott). The appellant had not previewed the email but it was based on a synopsis of their discussion. *Id.* Ms. Elliott quoted the appellant as saying “I can see through you” and described him as loud and angry. *Id.* She testified she cried afterwards but did not report the interaction to human resources because she was new and she did not want to make waves. *Id.*

Ms. Ward testified she never documented any of the incidents she personally observed, and she would not have removed the appellant based on her own interactions with him – it was only when she could see he was affecting others that she decided to remove him. *Id.* (testimony of Ward). Drawing from her October 22, 2010 email to Ms. Tomhave and her testimony, those “others” appear to include (1) Charlotte Mathews from the health benefits incident in October 2009; (2) Dr. Debbie LaCroix, an English teacher, from an event on October 28, 2009; (3) Ms. Elliott from the November 2009 email incident and her witnessing an interaction between the appellant and Ms. Ward on March 3, 2010; (4) Kathy Murray, the school registrar, from incidents on August 2010 and October 2010; (5) Renee Wellman from incidents on September 28 and 30, 2010; and (6) a “Lunch with the Administrator” meeting from October 12, 2010. Notably, only Dr. LaCroix and Ms. Elliott testified at the hearing. We learned from one of the appellant’s witnesses, Sandra Line, that Ms. Murray passed away, but not when. There is no explanation as to the availability of Ms. Wellman or Ms. Mathews, and no sworn statements from them in the record.

The only witness in this case with first hand knowledge of (1) is the appellant, who does not recall an incident with Ms. Mathews in October 2009 involving benefits. *Id.* (testimony of appellant). For (2), the testimony of Dr. LaCroix and the appellant is consistent in all material aspects, that is, Dr. LaCroix knocked on the door of the appellant’s classroom and told him he could not have kids on the floor and the lights off, and the appellant responded “Mind your own business.” *Id.* (testimony of appellant, LaCroix). Ms. Ward testified she heard a “commotion” but the appellant and Dr. LaCroix do not recall seeing Ms. Ward and Ms. Ward later admitted she relied on information from Dr. LaCroix as to what she wrote about the incident in her October 22, 2010 email, even though she wrote it without attribution. *Id.* (testimony of Ward). The appellant testified he told Ms. Ward about the incident and she did not reprimand or counsel him. *Id.* (testimony of appellant). Ms. Ward said she spoke to him

about treating others in a polite and civil manner. *Id.* (testimony of Ward). Dr. LaCroix testified she told Ms. Ward about the incident and Ms. Ward said it was no big deal, but Ms. Ward does not recall saying that. *Id.* (testimony of LaCroix, Ward). Indeed, it would seem if Ms. Ward was concerned she would have gone to see what the “commotion” was about but she stayed where she was. *Id.* (testimony of Ward).

The November 2009 incident with Ms. Elliott from (3) was first raised by Ms. Elliott at the hearing after the appellant testified in his case in chief, so it is not clear what the appellant recalls of the matter. The decision to terminate does not describe the incidents relied upon, and none of the agency’s pleadings (response to Acknowledgement Order, motion to dismiss, or prehearing submissions) include this matter when listing the incidents (nor are the pleadings consistent with each other⁴). The agency’s representative claims she first learned of the incident from Ms. Ward in preparing for the hearing. She then called Ms. Ward last to testify about all of the incidents she considered, including this one, in deciding to remove the appellant.

I was troubled by this approach because (1) much of the testimony from Ms. Reynosa and Ms. McCoy was unnecessary, since Ms. Ward testified she did not consider their experiences with the appellant, and (2) Ms. Ward apparently knew of the November 2009 incident at the time she made her decision to remove the appellant but the agency chose to reveal it much later as a component of Ms. Ward’s decision to terminate the appellant, thereby indicating she may not have considered it but found it convenient to claim so now. It behooves an agency,

⁴ For example, the incident on March 3, 2010 with the appellant and Ms. Ward is described in the agency’s response to the Acknowledgment Order as occurring *in front of Ms. Elliott*, whereas the agency’s later-submitted prehearing submissions describe the incident as occurring *in front of other teachers*. IAF, Tab 4, Narrative; Tab 18, Statement of Facts and Issues. At the time of the prehearing submissions the agency already possessed Ms. Ward’s October 22, 2010 email describing the meeting as happening in her office, with Jan Elliott, a school counselor, present, and no teachers mentioned. *Id.*, Tab 6, Subtab 10.

when faced with the “clear and convincing evidence” standard, to fully explain all of its potentially questionable actions to meet that burden. *Cosgrove v. Department of the Navy*, 59 M.S.P.R. 618, 625–26 (1993); see also *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶¶ 23–24 (2010).

This is not to say I question Ms. Elliott’s testimony, as I found her testimony straightforward and plausible. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). However, rather than aid the agency’s clear and convincing case, it detracts because of the manner in which it was revealed by the agency in the course of these proceedings.

Ms. Ward and the appellant disagreed on the date of this event (March 3, 2010 v. April 2010) and the subject of the meeting, but agreed it occurred in Ms. Ward’s office with Ms. Elliott was present. HCD (testimony of appellant, Ward). The appellant states he complained there were Individualized Education Plans (IEPs) with his name on them but he did not write them and he threatened to quit. *Id.* (testimony of appellant). He denied cursing or yelling but agreed the meeting was unpleasant and Ms. Elliott uncomfortable. *Id.* After the meeting Ms. Ward told him not to threaten to quit. *Id.* Ms. Ward alleges the meeting was about the proper grade level for reading materials for a reading class and the appellant accused her of not servicing students with special education needs. IAF, Tab 6, Subtab 10; HCD (testimony of Ward). She told him he could not speak to her in that way and he had to leave if he could not calm down. *Id.* The appellant calmed down and explained he gets passionate about the students. *Id.*

For (4), the two incidents with Kathy Murray, Ms. Murray wrote an unsworn two page memorandum, addressed to Ms. Ward and Mr. Wellman, stating she was “submitting the documentation per your request.” *Id.*, Tab 4, Subtab 3. There is testimony from Mr. Wellman’s secretary, Sandra Line, in which she recalls Ms. Murray telling her Mr. Wellman asked her to write a letter of complaint against the appellant because of a recent confrontation between the appellant and Ms. Wellman. HCD (testimony of Line). Ms. Murray’s letter is

dated October 12, 2010 and typed or stamped at the bottom is "Received Time Oct. 12. 3:41PM." IAF, Tab 4, Subtab 3. Ms. Ward testified she asked Ms. Murray for documentation of her incidents and Ms. Murray said she was already working on it. HCD (testimony of Ward).

The incident in August 2010 concerned when the school reviews applications (after receiving transcripts and special education records) and the appellant accused her of not doing enough to get the special education records. *Id.* The incident in October 2010 (Ms. Murray dates it as September 29, 2010) concerned the appellant writing a letter asking that special education records be sent to him and not the registrar. IAF, Tab 4, Subtab 3. Ms. Ward writes that she spoke to the appellant after each incident and there appears to be no repeat; she recalls giving him a directive on checking out records from the registrar and requesting records and he "agreed to the directive without much comment." *Id.*, Tab 6, Subtab 10.

The incidents involving Ms. Wellman from September 28 and 30, 2010, concern the appellant's objections with her qualifications. *Id.*, Tab 6, Subtab 10. The only witness in this case with first hand knowledge of the event on September 28 is the appellant and he testified Ms. Wellman came into his classroom (no students were present) and announced she was the Special Education Coordinator and he needed to make some changes in how he was doing things. HCD (testimony of appellant). This was the first the appellant had heard of her selection. *Id.* The appellant was stunned because he was told the position would not be filled. *Id.* He asked Ms. Wellman what are her qualifications and Ms. Wellman answered she had special education experience and he repeated his question and she repeated her answer. *Id.* The appellant noted she was not happy with his questioning of her experience. *Id.* She then gave two directives with which he disagreed and he claims they were changed. *Id.* In the first, she told the appellant to stop requesting records from the students' previous schools and the appellant said that was required by law. *Id.* The second directive

concerned forms to be provided to the general education teachers as a way of meeting the special education students' needs for accommodation or special needs. *Id.* The appellant said the teachers needed more detail than what the form provides and they need access to the IEPs. *Id.*

According to Ms. Ward, Ms. Wellman allegedly described the appellant to Ms. Ward as argumentative, uncooperative, rude and unprofessional, without any details, other than saying the appellant referred to communicating only with her and it would be her "butt on the line." IAF, Tab 6, Subtab 10. In an undated, unsworn statement, bearing the "Received Time Oct.12. 3:41PM," Ms. Wellman claims the appellant said "this school's special education department was totally fucked up and something needed to be done," while meeting with her on September 30 (the appellant describes this meeting as occurring on September 28). *Id.*, Tab 4, Subtab 4; HCD (testimony of appellant). This statement does not appear in Ms. Ward's summary of the encounter as told to her by Ms. Wellman. *Id.*, Tab 6, Subtab 10. Ms. Ward never asked the appellant about his version of the event because Ms. Wellman asked her not to, allegedly because she thought she had resolved it; however, Ms. Ward then used the event to terminate the appellant. HCD (testimony of Ward).

The only witnesses in this case with first hand knowledge of the September 30 meeting are the appellant and Ms. Ward. *Id.* There are no statements from Ryan Cox, a school counselor, or Doug Blackman, a physical education teacher, who were allegedly present at this meeting called by the appellant to discuss one of his students. *Id.*; HCD (testimony of appellant). Ms. Ward describes the appellant as telling Ms. Wellman he did not need her help with the IEP and after the meeting he told Ms. Ward he thought he was better suited for the Special Education Coordinator position and he did not feel he could take her (Wellman's) direction or coordination of the department. IAF, Tab 6, Subtab 10. The appellant recalls he interrupted Ms. Wellman, who was telling him to rewrite an

IEP and behavior intervention plan, and told her he knew how to do it. HCD (testimony of appellant).

This is the meeting at which the appellant claims he made his disclosure to Ms. Ward. *Id.* The appellant recalls Ms. Ward saying if he keeps challenging Ms. Wellman's credentials he would get the same punishment as Dr. LaCroix. *Id.* Ms. Ward denied making this statement, but testified she said he could face discipline for his conduct and unprofessionalism. *Id.* (testimony of Ward). She did not recall the appellant referring to BIA excepted qualification standards because if he had she would have told him the stipend position had none. *Id.* However, there are BIA standards for the Education Specialist position and the appellant alleges his disclosure concerned the BIA standards for the Education Specialist position, as well as Ms. Wellman's lack of qualifications for the stipend position.

The record shows the appellant possessed a masters degree in special education and served in several positions where he worked with children with disabilities or in the area of special education, prior to his employment as an Education Specialist (Special Education) at Chemawa. IAF, Tab 6, Subtab 7. He submitted his qualifications with his application dated May 12, 2010 for the stipend position. *Id.* The notice of availability for the posted stipend position was April 16 to May 21, 2010. *Id.*, Tab 6, Exhibit G. Ms. Ward testified Ms. Wellman had special education experience at previous schools, was part of a special education team at Chemawa for many students during a past tour there, and had written IEPs. HCD (testimony of Ward). Ms. Wellman provided a document with her qualifications in her application dated September 2, 2010 for the stipend position. *Id.*; IAF, Tab 7, Exhibit G. The application was submitted long after the period of availability for the position. *Id.* Ms. Ward agreed the appellant was more qualified but he had difficulties taking direction well. HCD (testimony of Ward). However, at the time she made the selection, September 10, 2010 - 8 days after Ms. Wellman submitted her application - there was only one

instance where the appellant arguably did not take direction well, which was the meeting in March 2010 where Ms. Ward had given the appellant reading materials to use and the appellant objected to the materials as too high of a grade level (I note Ms. Ward was not the appellant's supervisor then). IAF, Tab 7, Exhibit G.

Thomas Krise, a tenured special education teacher at Chemawa, testified Ms. Wellman was "absolutely not" competent to serve as the Special Education Coordinator, and that was separate from the issue of licensure. HCD (testimony of Krise). He recalled Ms. Wellman sitting at his computer changing one of his IEPs that had already been signed by the parents and students and it is a document that cannot be changed without going through a process. *Id.* She acted like this was the first she had heard of that. *Id.* He also recalled Ms. Wellman wrote an IEP with all kinds of errors and he had to correct it and finish it for her. *Id.* He expected the coordinator to have a certain level of mastery and show him a thing or two but it was the other way around with Ms. Wellman. *Id.* He did not complain because she was Mr. Wellman's spouse and he was "afraid of getting a target painted on my back." *Id.* There was much testimony about personal and school liability for not dealing properly with IEPs and other legal requirements for special education students. *Id.* (testimony of Krise, appellant).

Ms. McCoy, who was also a special education teacher, testified she thought Ms. Wellman was competent as the coordinator, but agreed she would say that about anyone who was going to do the file work that had fallen to Ms. McCoy. *Id.* (testimony of McCoy).

Dr. LaCroix received a letter of reprimand from Ms. Ward on April 5, 2010 for being inappropriate and discourteous in interrupting Ms. Wellman while she led a staff meeting and telling her she did not need her help and she was not one of them or part of the faculty. IAF, Tab 18, Exhibit 2. Ms. Wellman was serving as an instructional coach at the time since she only had the emergency teaching license from Oregon. HCD (testimony of Ward). Dr. LaCroix, who is licensed in

Oregon with over 30 years of experience teaching, agreed her remarks were rude but she testified she apologized for how she said them and not what she said. IAF, Tab 18, Exhibit 2; HCD (testimony of LaCroix). Another teacher, Sachin Shah, testified he felt he could benefit from coaching but felt resentful about Ms. Wellman, an uncertified teacher, serving as coach and commenting on his lesson plans and teaching, but he kept quiet because he did not want to face the wrath of Mr. Wellman. HCD (testimony of Shah).

Mr. Shah also recalled Ms. Ward telling him in December 2011 that most of the decisions from last year were of Mr. Wellman's doing and she had no power and was harassed constantly by Mr. Wellman. *Id.* Her relationship with Mr. Wellman was one of extreme abuse and it was one of her worst years. *Id.* Mr. Shah testified she told him she was looking forward to the hearing to get rid of the tension. *Id.*

Notably, Ms. Wellman never obtained a teaching license in Oregon after her emergency license expired in June 2010. HCD (testimony of Ward). Ms. Ward issued a memorandum separating Ms. Wellman from the position of Education Specialist (Reading) and from Federal service during the probationary period for her inability to obtain/maintain a valid teaching license. IAF, Tab 7, Exhibit E. The separation was effective September 9, 2010 but Ms. Wellman was never separated from Federal service. *Id.*; HCD (testimony of Ward). Rather, she continued in the position of Education Specialist until October 5, 2010, when she was converted to an excepted appointment not to exceed September 30, 2011 to the position of Education Technician, which did not require a teaching license. IAF, Tab 7, Exhibit F. The conversion was later changed to a new appointment, but without lost time. *Id.*

Further, on September 10, 2010, the day after Ms. Wellman was supposedly removed from Federal service, Ms. Ward selected Ms. Wellman for the Special Education Coordinator stipend position. *Id.*, Exhibit G. The stipend paid Ms. Wellman, who suffered a loss in pay from moving to the Education

Technician position, the sum of \$4000 for the period September 16, 2010 to May 20, 2011. *Id.* Ms. Ward testified she placed Ms. Wellman in the Education Technician position to give her more time to obtain her license. HCD (testimony of Ward). She mentioned Mr. Orr, another teacher, and an assistant principal as examples of individuals for whom this was done, but Mr. Orr was not probationary (there was no testimony on the assistant principal's status) and Ms. Ward admitted she did not think about Ms. Wellman's probationary status, because this is "just what BIA does." *Id.* Ms. Wellman was fired in August 2011 not because she still did not have a valid teaching license (she failed the test in November 2010), but because she was again offered (and signed) a contract for the new school year and failed to show. *Id.* Mr. Wellman also failed to show and was fired. *Id.*

For (6), Ms. Ward accuses the appellant of interrupting a co-worker who was expressing her frustration at a "Lunch with the Administrator" meeting, with the statement "I don't think I will be able to finish out this year." IAF, Tab 6, Subtab 10. The appellant described it as a lunch in Ms. Ward's office where staff could drop in. HCD (testimony of appellant). He recalls the co-worker crying and saying she was not sure she could finish and the appellant saying the same thing as a "me too" statement in support of the co-worker. *Id.* He added that the co-worker was not upset at him. *Id.*

If it was permissible for the co-worker to make such a statement in the meeting, and there is no evidence she was counseled or reprimanded for making the statement, it seems to follow that the appellant could too. That the appellant interrupted her when he did and with what he said does not appear to warrant treating the matter as one of inappropriate behavior or unprofessional conduct, as opposed to another staff member expressing his frustration to their supervisor.

The last incident in Ms. Ward's October 22, 2010 email concerns an assignment that Ms. Ward regarded as a priority but the appellant had not completed. IAF, Tab 6, Subtab 10. It involved writing a Functional Behavior

Assessment and Behavior Plan for a student. *Id.* On October 14, 2010, Ms. Ward claimed she met with the appellant and he raised his voice and said she should just suspend the student since that is what we always do anyway, that at least 7 staff members were not coming back next year, and he probably won't stay the whole year. *Id.* The appellant testified he had no time to do the paperwork and she cleared his schedule and he completed the assignment. HCD (testimony of appellant). He agreed he made the statement about suspending the student but denied threatening to leave. *Id.*

Ms. Ward ends her October 22, 2010 email with the assertion that the appellant was "verbally confronting more and more staff daily," yet I find it notable that two of the three special education teachers who shared an office with the appellant did not recall him using vulgar language or yelling or acting unprofessionally. *Id.* (testimony of Shah, Krise). The third teacher, Ms. McCoy, recalled the appellant putting files down roughly, telling her the files were messed up, and slamming the door, but this occurred over two occasions in late August/early September. *Id.* (testimony of McCoy). By contrast, there was testimony from several witnesses that Mr. Wellman frequently yelled, interrupted, and/or used profanity with staff and students. *Id.* (testimony of Ward, Line, appellant, LaCroix). Ms. Ward testified Mr. Wellman followed her around, watched her, and harassed her. *Id.* (testimony of Ward).

Existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision.

The evidence above suggests the Wellmans operated as a team in their employment with the school. That is, they were hired at the same time for vacancies in which they were, surprisingly, the only applicants, and fired at or near the same time for the same reason (abandonment of position). *Id.* (testimony of Ward). Mr. Wellman served as the School Supervisor at Chemawa while Ms. Wellman was placed in positions or given work at Chemawa for which she was unqualified (Education Specialist), or ill-suited (an unlicensed teacher coaching

licensed teachers, and a Special Education Coordinator with no special education degree and tangential experience in that area). Mr. Wellman intervened to cause the selection of Ms. Wellman as the Special Education Coordinator. He also participated in the termination of the appellant by having staff collect documentation to support the termination, and according to Ms. Line, he did so because of a recent confrontation between Ms. Wellman and the appellant. When higher headquarters balked at the evidence he advised Ms. Reynosa to press ahead, based on a double hearsay story Ms. Wellman told him.

I find Ms. Ward understood Mr. Wellman wanted Ms. Wellman to remain employed at the school. Further, Ms. Ward knew Mr. Wellman could stop the appellant's termination, and that his support may have been required to proceed. I find it highly unlikely, given Mr. Wellman's harassment of Ms. Ward and his micromanagement of her actions overall, that she did not at least sense or understand that Mr. Wellman wanted the appellant terminated. That Mr. Wellman and Ms. Ward are in the midst of gathering documentation on the appellant's termination, merely a week or two following the appellant questioning Ms. Wellman about her qualifications and reporting those concerns to Ms. Ward, is, I find, suggestive of a retaliatory motive. Indeed, Ms. Reynosa sent Mr. Wellman an email on October 8, 2010 informing him the "Letter is requested" and to please follow up with Amanda. IAF, Tab 18, Exhibit 8. This is the first we see Mr. Wellman's name in the emails, but it suggests he had some involvement in the matter beforehand in order to know what the "letter" is. Further, at the time of the October 8 emails, the incidents from October 12 and October 14 had not even occurred. In other words, at the time of the push for documentation, the last incident involved Ms. Wellman and the appellant, and the appellant's disclosure. This corroborates the testimony from Mr. Wellman's secretary, Ms. Line, in which she recalls Ms. Murray telling her Mr. Wellman asked her to write a letter of complaint against the appellant because of a recent confrontation between the appellant and Ms. Wellman. HCD (testimony of Line).

Evidence the agency took similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

The agency submitted copies of termination actions involving other probationary employees, presumably non-whistleblowers. IAF, Tab 18, Exhibit 3. None of the employees were teachers. *Id.* The appellant and Mr. Shah recalled a staff meeting in April 2010 where Mr. Blackman yelled at Ted Sawyer, another teacher, and dropped a "f-bomb" and threw papers. HCD (testimony of appellant, Shah). The appellant testified Mr. Blackman was not disciplined for the event. *Id.* (testimony of appellant). The appellant and Dr. LaCroix also recalled an angry exchange in the teachers' lounge in 2010 involving Mr. Cox and a social studies teacher, Mr. Kaiser. *Id.* (testimony of appellant, LaCroix). Ms. Ward testified she spoke with them but there was no discipline. *Id.* (testimony of Ward).

The agency, in the context of the appellant's removal, may regard these individuals as not similarly situated because they are not probationers, yet Ms. Ward treated Ms. Wellman the same as a tenured employee (like Mr. Orr) when it came to her near removal in September 2010. Moreover, while tenured employees may not be removed for what the appellant is alleged to have done, the agency offers no explanation for their largely silent reaction to these outbursts.

Having reviewed the strength of the agency's evidence in support of the termination; the existence and strength of any motive to retaliate on the part of Mr. Wellman and Ms. Ward; and the agency's evidence it took similar actions against employees who are not whistleblowers but who are otherwise similarly situated, I am not left with a firm belief as to the allegations sought to be established. I found the agency's evidence exaggerated, inconsistent, and based largely on hearsay from several witnesses whose lack of sworn statements (Murray, the Wellmans, Mathews, Bower) or non-availability for hearing (Mathews, the Wellmans, Bower) was never explained. The unsworn statements in the record were not routinely made and were provided to management in

response to requests for documents to support the appellant's termination. Accordingly, I find the hearsay evidence from these witnesses has little probative value in meeting the agency's burden. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981).

I find the appellant was assertive and not particularly sensitive in some of his interactions with staff members. However, I am not persuaded the agency has shown by clear and convincing evidence that it would have terminated him for those interactions absent his comments about Ms. Wellman. As Dr. LaCroix, with nearly 30 years experience at the school, testified, "tiffs" were not infrequent, and Mr. Krise, with 23 years experience at the school, testified he heard people be very passionate and raise their voices. HCD (testimony of LaCroix, Krise). It was also established that Mr. Wellman was perhaps the most rude and abusive, yet his employment at the school only ended because of his own failure to show for the new school year.

DECISION

The appellant's request for corrective action is GRANTED⁵.

ORDER

I **ORDER** the agency to cancel the removal effective November 8, 2010 and to retroactively restore the appellant for the balance of his School Year Contract, which was for the period August 30, 2010 to May 20, 2011. 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 appellant for the remainder of his School Year Contract by check or through electronic funds transfer for the appropriate

⁵ The appellant requested an award of consequential damages in connection with his whistleblower claim. IAF, Tab 1 at MSPB Form 185-5, Page 3. A request for consequential damages must be filed with the Board no later than 60 calendar days after the date on which the Board's decision becomes final. 5 C.F.R. § 1201.204(e)(1).

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 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:

Amy V. Dunning
Chief Administrative Judge
Phone: (415) 904-6772
Fax: (415) 904-0580

NOTICE TO APPELLANT

This initial decision will become final on April 20, 2012, 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

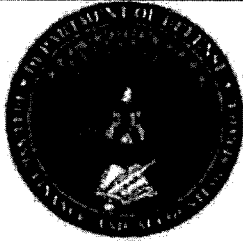
evidence showing good cause for the delay and a request for an extension of time for filing.

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.

NOTICE TO THE PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8).



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.



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.