**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**DENVER FIELD OFFICE**

KRISTINA HORN,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
SF-0752-21-0310-I-3

DATE: January 31, 2022

Matthew Z. Crotty, Esquire, Spokane, Washington, for the appellant.

Nayoka L. Irving, Esquire, Washington, D.C., for the agency.

**BEFORE**
Samantha J. Black
Administrative Judge

## INITIAL DECISION

On April 19, 2021, the appellant timely appealed the agency's decision to remove her from the position of Rangeland Management Specialist, GS-0454-09, effective March 27, 2021, based on charges of dereliction of duty, lack of candor, and failure to respond to supervisory request for information. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7511, 7512(2), 7513(d), and 7701(a). I held the hearing the appellant requested on January 10, 2022 and January 20, 2022, and the record in the appeal closed at the conclusion of the hearing. Refiled Appeal File 2 (RAF-2), Hearing Recording (HR and HR-2), Tabs 5-6, 9-10. As explained below, I REVERSE the agency's decision to remove the appellant.

## ANALYSIS AND FINDINGS

Background

At all times relevant to this appeal, the agency employed the appellant as a Rangeland Management Specialist, GS-0454- 09, with the agency's Natural Resources Conservation Service (NRCS) in Washington. HR, appellant testimony. On November 2, 2020, John George, Area Conservationist, NRCS, proposed to remove the appellant from her position based on charges of dereliction of duty, lack of candor, and failure to respond to supervisory request for information. IAF, Tab 7, pp. 143-146. The specifications under the dereliction of duty charge all pertained to improper payments the appellant certified in her role as Rangeland Management Specialist, which were uncovered during a Functional Review conducted by the agency in summer 2020; in these instances, the appellant's actual certifications occurred between 2015 and 2019. HR, George testimony, Johnson testimony. The facts underlying the lack of candor and failure to respond to supervisory request for information charges occurred in March and July 2020 respectively. IAF, Tab 7, pp. 144-145.

The appellant responded to the notice of proposed removal both orally and in writing. IAF, Tab 7, pp. 41-53, 66-142. After reviewing some of the appellant's replies, Roylene Comes at Night, State Conservationist, informed the appellant she would be considering some additional information in rendering her decision on the notice of proposed removal, and provided the appellant an additional opportunity to respond to the proposed removal and additional evidence. HR, Comes at Night testimony; IAF, Tab 7, pp. 283-325. The appellant submitted two additional written replies to the notice of proposed removal thereafter. IAF, Tab 7, pp. 54-65.

On March 26, 2021, Comes at Night issued her decision on the notice of proposed removal, sustaining all three charges and the proposed penalty of removal. IAF, Tab 7, pp. 36-40. The agency removed the appellant effective March 27, 2021. IAF, Tab 7, pp. 33-34.

This appeal followed timely thereafter. IAF, Tab 1. The appellant requested a hearing, which I held on January 10, 2022 and January 20, 2022. RAF-2, Tabs 5-6, 9-10. The record closed at the conclusion of the hearing. *Id.*

Following the January 10, 2022 day of hearing, I notified the parties that the evidence reflected a possible due process violation in the removal process, and granted the parties an opportunity to submit any evidence or argument pertaining to that issue. RAF-2, Tab 4. The appellant timely responded to that order, and submitted a copy of a settlement agreement in another appeal, which the appellant argued reflected Comes at Night lacked candor. RAF-2, Tab 7. The agency objected to the evidence submitted as outside the scope of the limited reopening of the record. RAF-2, Tab 8. I agree with the agency's objection. I left the record in the appeal open solely on the issue of whether the agency afforded the appellant due process protections, not as to any other issue. RAF-2, Tab 4. I do not find the evidence the appellant submitted pertained to that issue. As a result, I do not admit the document, and have not considered it here.

The agency violated the appellant's constitutional due process rights.

I do not address the agency's burden to prove the charges, nexus, and penalty in the removal action because I find that the agency violated the appellant's right to due process. The appellant is therefore entitled to a new proceeding.

The Supreme Court has expressly recognized that tenured federal employees have a property interest in their continued employment, and the Fifth Amendment to the United States Constitution offers procedural protections to safeguard this property interest. Such procedural protections are referred to generally as due process requirements. *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1374-75 (1999). The essential requirements of due process are notice and an opportunity to respond. A tenured employee is specifically entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of

the story before any decision is made. *Id.,* at 1375-1376, quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-546 (1985).

Because of that right, the deciding official is not allowed to consider – either in connection with the charge itself or the penalty – new and material information that he obtained *ex parte*. *Ward v. U.S. Postal Service,* 634 F.3d 1274, 1280 (Fed. Cir. 2011); *Stone*, 179 F.3d at 1377. Information that the deciding official knew from personal experience is considered *ex parte* if the appellant was not informed that it would be taken into account. *Lopes v. Department of the Navy,* 116 M.S.P.R. 470 (2011). In determining whether a deciding official's consideration of information obtained *ex parte* violates due process, the question is whether the information is "so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Stone*, 179 F.3d at 1377. Relevant factors include: (1) whether the *ex parte* communication merely introduces cumulative information or new information; (2) whether the employee knew of the information and had a chance to respond to it; and (3) whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. *Id*. A due process violation requires automatic reversal regardless of whether the error likely affected the agency's decision. *Id*.

These due process requirements pertain not just to the merits of the charge, but also to the *Douglas* factors. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). In accordance with the *Ward/Stone* line of authority, when an agency intends to rely on an aggravating factor as the basis of an imposition of a penalty, that factor should be included in the advance notice, providing the employee a fair opportunity to respond to it before the deciding official. *Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 10 (2012). This is so regardless of whether the aggravating factor was known to the deciding official or obtained by *ex parte* communications, so long as it was considered in reaching

the decision but not previously disclosed to the appellant. *Lopes*, 116 M.S.P.R. 470, ¶¶ 10-13. If an employee has not been given "notice of any aggravating factors supporting an enhanced penalty," it potentially deprives the employee of notice of all the evidence being used against him and the opportunity to respond. *Jenkins*, 118 M.S.P.R. 161, ¶ 10 (quoting *Ward*, 634 F.3d at 1280).

Here, the issue is whether the agency afforded the appellant constitutional due process by considering her replies to the notice of proposed removal prior to deciding the proposed action. An agency's failure to provide a non-probationary Federal employee with prior notice and an opportunity to present a response to an appealable agency action, either in person or in writing, deprives him of his property right in his employment and constitutes an abridgement of his constitutional right to minimum due process of law. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991). The right to minimum due process is "absolute," and does not depend on the merits of the claim. *Id*. at 681. An employee has not received minimum due process if they did not have a meaningful opportunity to invoke the discretion of the decision maker before the personnel action is effected. *Hodges v. U.S. Postal Service*, 118 M.S.P.R. 591, 594 (2012); *Stern v. Department of Defense*, 2015 WL 4170840 (July 10, 2015) (such response by the employee must be timely submitted to the deciding official for consideration).

The appellant submitted multiple replies to the notice of proposed removal. IAF, Tab 7, pp. 41-142. She responded orally and in writing in November 2020. IAF, Tab 7, pp. 41-53, 66-142. Her therapist directly submitted evidence to Comes at Night that same month. HR, Comes at Night testimony. Then, after Comes at Night notified the appellant about additional evidence she would be

considering in deciding the notice of proposed removal, the appellant submitted two additional written replies.[1] IAF, Tab 7, pp. 54-65.

Preponderant evidence reflects Comes at Night considered the appellant's oral and written replies made to her. However, Comes at Night testified credibly that she did not consider the information provided directly to her by the appellant's therapist in November 2020. HR, Comes at Night testimony. In November 2020, Lynne Allen, the appellant's therapist, sent an email to Comes at Night that appended three documents. *Id.* The first document was a Summary of Services, dated November 16, 2020, pertaining to the appellant's Posttraumatic Stress Disorder (PTSD), which contained the following information:

> Ms. Horn's ongoing symptoms have impacted her job performance. She continues to experience trauma triggers daily. She has difficulty concentrating. When she experiences something in her work environment that is a trigger, she reports a significant increase in her

---

[1] During the hearing, the appellant also testified that, on the day she was allowed to access her work computer and email to gather information for her reply to the notice of proposed removal, she forwarded a number of emails to Comes at Night directly for her consideration. HR, appellant testimony. The record contains no evidence of the appellant having done so, except for this testimony by the appellant. After considering all of the evidence in the record, I do not find the appellant's testimony in this regard credible. The appellant did not present any documentary evidence that she forwarded these emails to Comes at Night, and the record contains no evidence these emails were requested during discovery and the agency somehow failed to produce them. Nor did the appellant ask either George (who was allegedly present in the room while the appellant was reviewing and forwarding these emails) or Comes at Night (who allegedly received these emails) about any portion of this process. Among the emails the appellant testified she sent to Comes at Night were emails documenting the on-site certification by another employee of certain practices identified in the dereliction of duty charge; such evidence would undoubtedly go to the core of whether the appellant was derelict in her duties. As a result, I find it highly likely that, if the appellant had uncovered such an email and forwarded it to Comes at Night before she decided to remove the appellant, the appellant would have sought to introduce that evidence in this appeal. Ultimately, I find the appellant's testimony regarding these emails she allegedly sent directly to Comes at Night during the reply period were unsupported by any other evidence in the record, even though it is likely such additional evidence would have been introduced if it existed. As a result, I do not find the appellant's testimony on this subject credible.

> anxiety. Personal safety continues to be a concern, which causes her to have ongoing sleep disturbance. When she has transferred offices for safety, it is reported that her ex-husband has learned of her new workplace creating added fear.

IAF, Tab 7, p. 41. Allen also appended two medical notes, dated July 22, 2019 and October 2, 2019, asking the agency to allow the appellant time off for psychotherapy appointments. IAF, Tab 7, pp. 43-44. Comes at Night received the email appending these documents on November 17, 2020, but did not review or consider them in deciding whether to remove the appellant. HR, Comes at Night testimony; Hearing Transcript (HT), 32:18-33:8. Comes at Night testified as follows on this issue: she received the email and forwarded it to the Human Resources professional assisting her with the action; her practice is not to review the attachments in matters such as this when she receives them; instead, she reviews the entire packet of information at once when it is sent to her by the Human Resources representative. Hearing Transcript, 33-34. Comes at Night testified that she "didn't get this packet" because the agency "was already in process under the other action." HT, 35. When I asked Comes at Night to explain what she meant by that, she testified as follows:

> THE WITNESS: So I -- so we were already in process with the quality assurance. Because of the volume and the magnitude of the seriousness of those offenses, we were already in the process towards making and pulling the information together for what direction we were going to go with that process, because of it being conduct. I was looking at a conduct issue; I wasn't looking at performance. I was looking at a conduct issue. So we try very hard to make sure we keep those two tracts separate.
>
> * * * * *
>
> JUDGE BLACK: Can you explain to me what you mean by we were already working a different process?
>
> THE WITNESS: So we were working, just like you said, the proposed for removal. We were already in the process of looking at that, and looking at the conduct of the seriousness of the violation of policy and procedures.

> JUDGE BLACK: Was it your understanding that Ms. Allen's email to you on November 17th, 2020 was not part of a response to a proposed removal?
>
> THE WITNESS: I looked -- I -- I guess I looked at it as two different topics, and I -- I stayed on the course of the conduct.
>
> JUDGE BLACK: What topic do you think this was?
>
> THE WITNESS: So I -- this was -- so basically we had received a reasonable accommodation request from her -- from Ms. Horn. And I looked at -- as this was a part of that, the reasonable accommodations. And so we had provided reasonable accommodations for two other issues, and then this was a third one that was in process, and then this issue with the quality assurance came forward for removal. So the direction that I was given was to stay on track of the -- basically of the conduct issue and basically was to stay focused and get this issue resolved. So she had submitted a third reasonable accommodation, and I looked at this as a part of that.

HT, 35-37. Comes at Night subsequently confirmed that she did not consider any of the documents Allen submitted to her in rendering her decision to remove the appellant. HT, 37-38.

I find preponderant evidence reflects Allen's November 17, 2020 submission to Comes at Night was a part of the appellant's reply to the notice of proposed removal. Allen submitted the document to Comes at Night just two weeks after the appellant's removal was proposed, and before the appellant made either a written or oral reply to the proposed removal. HR, Comes at Night testimony; *see* IAF, Tab 7, p. 6 (re dates of the written and oral reply). In this appeal, the agency submitted copies of the attachments to Allen's email, and bookmarked those documents as part of the appellant's written reply. IAF, Tab 7, pp. 41-44 (*see bookmark,* "Tab 4C.1: Horn Written Reply KH 11.16.2020 Counseling Documents").

The record contains no evidence reflecting that, at the time, the appellant was seeking any type of reasonable accommodation based on her PTSD. In fact, the record contains no evidence the appellant ever sought a reasonable

accommodation from the agency based on a diagnosis of PTSD. Even if the appellant had been seeking a reasonable accommodation for PTSD, it seems it would be inconsistent with the agency's practice throughout 2020 for the appellant to be providing documentation in support of her request for a reasonable accommodation directly to Comes at Night. RAF, Tab 11, pp. 65-66, 73-75, 77-90, 94-100, 180-185.

After the record as a whole, I find preponderant evidence demonstrates Allen's November 17, 2020 email to Comes at Night was a submission of additional information for Comes at Night to consider as part of the appellant's reply to the notice of proposed removal. I also find preponderant evidence reflects Comes at Night did not consider this evidence before reaching her decision on the proposed removal. HR, Comes at Night testimony.

I must now consider whether Comes at Night's failure to consider this portion of the appellant's written response is a violation of the appellant's due process rights. I find it is. The record reflects Comes at Night sincerely considered three of the appellant's written responses and her oral reply before reaching her decision. *See* HR, Comes at Night testimony. However, Comes at Night did not consider the appellant's evidence pertaining to her PTSD and any impact that may have had on the appellant's actions in the workplace. Regardless of whether this information would have impacted Comes at Night's ultimate decision with regard to the personnel action, a meaningful opportunity to respond to the proposed action includes the deciding official actually considering all of the evidence and information the appellant provided. Thus, I find the undisputed fact that the deciding official did not review a portion of the appellant's supporting evidence, though inadvertent,[2] deprived the appellant of a meaningful

[2] The record contains no evidence leading me to believe Comes at Night's failure to consider the information Allen provided was intentional or reflected any animus. Instead, I found compelling Comes at Night's testimony regarding her perception that she was merely focusing on the specific process in front of her (i.e., the adverse action

opportunity to be heard with respect to the issues raised in the notice of proposed removal charges.

After carefully reviewing all of the record evidence, I find the agency failed to provide the appellant with minimum due process rights for an opportunity to be heard when Comes at Night admittedly failed to review a portion of the evidence submitted to her as part of the appellant's response to the notice of proposed removal. In reaching this conclusion, I need not assess the *Stone* factors because the issue is not the consideration of *ex parte* matters, but instead a failure to consider the appellant's own submissions which deprives her of a meaningful right to respond.

After I notified the parties of the potential due process issue in this matter, and provided them an opportunity to address it, the appellant identified five alleged considerations of *ex parte* information by Comes at Night. RAF-2, Tab 7; HR-2, appellant closing statement. I have not addressed these claims here because, having found the agency failed to provide the appellant a meaningful opportunity to reply to the proposed removal, no additional relief could be afforded her by any additional finding with regard to her due process rights.

Thus, under the circumstances present here, I find the agency violated the appellant's due process rights in its decision to remove her.[3] This due process

---

process) and not considering external information from another process (i.e., the reasonable accommodation process). In fact, if Allen's submission had not been submitted as part of a response to the proposed removal, and Comes at Night had nonetheless considered it, Comes at Night's actions could have themselves been a violation of the appellant's due process rights.

[3] Due process is a threshold issue because the Board cannot make alternative findings that assume no due process violation. *Boss v. Department of Homeland Security*, 908 F.3d 1278, 1284 (Fed. Cir. 2018). However, the Federal Circuit has held that a due process analysis is "applied on a charge-by-charge basis," and sustained an arbitration decision despite a due process error in one of three charges. *Id.* at 1281-82. Here, I find the due process violation impacted all of the charges because the evidence submitted pertained to mitigating circumstances the appellant wanted considered as to the entire action.

violation requires reversal of the agency's removal action without reaching its merits. *Jenkins*, 118 M.S.P.R. 161, ¶¶ 11, 14. Where a due process violation exists, the Board will not reach the merits of an appeal, but will simply reverse the agency action. *Id.* This does not preclude the agency from reinitiating an action on the same charge if it affords the appellant a new proceeding which grants her due process. *Ward*, 634 F.3d at 1282.

Affirmative Defenses

The appellant raised a number of affirmative defenses in this appeal, including discrimination based on disability, reprisal based on prior equal employment opportunity (EEO) activity, harmful procedural error, violation of the law, and reprisal for use of Family and Medical Leave Act (FMLA) protected absence. Even though I have decided that the removal must be reversed based on a due process violation, I must also decide any affirmative defenses that, if proven, could entitle the appellant to additional relief. As to all other affirmative defenses, the due process finding moots the claim.

Here, if the appellant proves her claims of disability discrimination and/or EEO reprisal, she may be entitled to relief in addition to that afforded her by the reversal of the removal action based on a due process violation. *See Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 19 (2012); *see also Seibel v. Department of the Treasury*, 87 M.S.P.R. 260, ¶ 15 (2000); 5 C.F.R. §§ 1201.201(d), 1201.202(c). Accordingly, I decide these affirmative defenses below.

However, even if the appellant were successful in proving the remainder of her alleged affirmative defenses, she would not be entitled to any additional relief. *See Wilson v. Office of Personnel Management,* 2015 WL 502974,

¶ 6 (2015) (non-precedential); 29 U.S.C. § 2617(a)(1)(A)(i)(I); 29 C.F.R. § 825.400(c). I do not decide them in this matter.

The appellant did not prove the agency discriminated against her on the basis of a disability.

The appellant asserted the agency's decision to remove her was discrimination based on her disability. IAF, Tab 1; RAF, Tab 11. As a federal employee, the appellant's disability discrimination claim arises under the Rehabilitation Act of 1973. However, the Equal Employment Opportunity Commission (EEOC) regulations implementing the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act (ADAAA), have been incorporated by reference into the Rehabilitation Act, and the Board applies them to determine whether there has been a Rehabilitation Act violation.

The appellant may prove she has a disability by showing that she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(g)(1), (2), (3). The definition of disability is construed in favor of broad coverage. 42 U.S.C. § 12102(4)(A). A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2(h). The test for whether a disability substantially limits the ability of an individual to perform a major life activity is applied as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). Major life activities include but are not limited to activities such as caring for oneself, performing manual tasks, lifting, bending, and working, including the operation of a major bodily function. 29 C.F.R. § 1630.2(i).

Here, the appellant alleged three separate disabilities: PTSD, asthma, and hearing impairment.[4] HR-2, appellant closing statement. With respect to the PTSD, the appellant introduced evidence regarding her diagnosis, typical symptoms, and its impact on her ability to concentrate among other life activities. HR, appellant testimony, Allen testimony. I find the appellant established by a preponderance of the evidence that her PTSD is a mental impairment that substantially limits one or more major activities. Thus, I find she is disabled under the law in this regard.

As to the appellant's diagnosis of asthma, the appellant introduced evidence that she has severe environmental allergy.[5] HR, appellant testimony. The record contains a letter, dated July 29, 2020, confirming the appellant's diagnosis severe environmental allergies as well as asthma. RAF, Tab 11, p. 158. Between the appellant's testimony regarding the ways in which her severe environmental allergies impact her ability to breathe, and the supplied medical documentation, I find the appellant proved she was disabled under the law based on the medical condition of asthma and severe environmental allergies.

Finally, the appellant alleged she was disabled under the law due to a severe hearing impairment. HR, appellant testimony. The parties stipulated that the appellant was disabled as a result of a hearing impairment. RAF, Tab 18,

---

[4] As Allen's summary of treatment explains, the appellant's separate medical conditions overlap in some instances in a manner that further impedes her abilities. IAF, Tab 7, pp. 41-42.

[5] The appellant also testified that she is highly allergic to bees and spiders and, as a result, she cannot conduct field work alone anywhere that is more than 20 minutes from a hospital. HR, appellant testimony. The appellant did not allege these allergies constituted a disability in this appeal. As a result, I do not assess whether she has demonstrated she is disabled under the law as a result of her allergic responses. Even if I were to find she had demonstrated she was disabled in this regard, the record contains no evidence any portion of the misconduct set forth in the notice of proposed removal was attributable to this condition, that she ever requested a reasonable accommodation for this condition, or that any bias pertaining to this condition motivated any agency action against her.

p. 5. While the parties may stipulate to factual matters, they may not stipulate to legal conclusions. *King v. Department of Veterans Affairs*, 105 M.S.P.R. 21, ¶ 16 n.2 (2007). However, considering the significant evidence in the record that the appellant has a significant hearing impairment, and the lack of any agency challenge to this evidence, I find the appellant established by preponderant evidence that she is disabled under applicable law based on a hearing impairment.

I next consider whether the appellant has established that the agency's decision to remove her was disability discrimination, either as a failure to reasonably accommodate her or as disparate treatment. I find she has not.

I first consider the appellant's claim the agency discriminated against her based on her disabilities by failing to provide reasonable accommodations. An agency must reasonably accommodate the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship on its business operations. 29 C.F.R. § 1630.9(a). Reasonable accommodation includes modifications to the manner in which a position is customarily performed in order to enable a qualified individual with a disability to perform the essential job functions. EEOC Notice No. 915.002, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (Oct. 17, 2002) (EEOC Guidance).

As part of a claim of failure to provide reasonable accommodation, the appellant must demonstrate that the appealed action was based on her disability. *See Gardner v. Department of Veterans Affairs,* 123 M.S.P.R. 647, 660 (2016). In essence, the appellant must establish a causal connection between her disability and the misconduct at issue; in the instance of a claim of reasonable accommodation, that connection must be between the provision of a reasonable accommodation and the misconduct at issue. *See McCray v. Department of Defense,* 68 M.S.P.R. 186, 192-193 (1995). Such a causal connection is necessary to a claim of reasonable accommodation because the Board does not

have jurisdiction to hear a claim an agency failed to provide a reasonable accommodation when that claim is not connected to an otherwise appealable action (e.g., a removal). *See Cruz v. Department of the Navy*, 934 F.2d 1240, 1245-46 (Fed. Cir. 1991).

Prior to 2020, the appellant had requested and received accommodations from the agency for her hearing impairment. HR, appellant testimony. However, the appellant's claim in this appeal pertains to her requests for reasonable accommodation in 2020. HR-2, appellant closing statement.

In January 2020, the appellant requested a reasonable accommodation at her new office in Davenport, Washington; specifically, she requested a quiet soundproof office space. HR, appellant testimony; RAF, Tab 11, pp. 65-75. In early March 2020, George responded to the appellant's request on behalf of the agency, explaining that the agency had already moved her into her own work space with a door and was supplying her with an ADA compliant phone. RAF, Tab 11, pp. 77-90. The appellant disputed that the agency had actually provided her with a reasonable accommodation. RAF, Tab 11, p. 94-100. The appellant testified that the office which she was assigned to use in the Davenport office did not meet her needs. HR, appellant testimony. She was not allowed to lock the door of the office because other individuals sometimes needed to access the room to obtain the keys to government owned vehicles. *Id.* As a result, the door opened unexpectedly, allowing in excess background noise, which impeded the appellant's ability to focus and concentrate, and to communicate effectively with the individuals she spoke with on the phone. *Id.*

On August 19, 2020, the appellant also requested a reasonable accommodation based on her asthma and environmental allergens. RAF, Tab 11, p. 185. In support of her request, the appellant provided the July 29, 2020 note discussed above, and she requested that her work duties be changed to "inside work only at office or home." *Id.* The appellant explained that "75% of [her] work is field work." *Id.* The agency requested additional information from the

appellant in support of her reasonable accommodation request, and it appears the appellant did not provide the additional information. RAF, Tab 11, p. 192; Tab 17, pp. 13-14. According to the appellant, the agency had not yet granted her request for reasonable accommodation by September 16, 2020 when the appellant began approved FMLA leave for a different condition. HR, appellant testimony.

I assume without deciding that the appellant's requested accommodations were indeed reasonable accommodations.[6] However, I find the appellant failed to prove a causal connection between the agency's failure to provide the requested accommodations and the misconduct at issue in this appeal.

I turn first to the appellant's claim the agency failed to accommodate her hearing disability in 2020. The appellant has not established a causal connection between the agency's failure to provide her a soundproof work space and the removal action. All of the specifications under the dereliction of duty charge involved certifications of practices occurring before the appellant moved to the Davenport office and requested an accommodation there (i.e., the appellant certified the practices from September 2015 through September 2019). IAF, Tab 7, pp. 143-144. As a result, I find the appellant's failure to properly certify these practices could not be attributable to the agency's failure to provide her – in 2020 – with a soundproof office. Both the charged lack of candor and the failure to respond to the supervisory request for information occurred in 2020, when the appellant was working in the Davenport office without a soundproof work space. IAF, Tab 7, pp. 144-145. However, the appellant's explanation for her conduct in both instances did not involve being impeded by her workspace. *See* HR,

---

[6] The appellant's August 19, 2020 request for a reasonable accommodation appears to be a request to not perform what she characterized as 75% of her duties. If any of the 75% the appellant referenced is an essential function of her position, the requested change to her duties was not a request for a reasonable accommodation. *Clemens v. Department of the Army,* 104 M.S.P.R. 362, ¶ 24 (2006); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act.

appellant testimony. Instead, the appellant argued the claimed lack of candor was actually her forwarding an email from years before and the photos that she used on an earlier attachment being mistaken for something else by the recipient. HR-2, appellant closing statement. The appellant also provided multiple reasons for her failure to respond to George's July 23, 2020 email, including she was too busy with other work George had told her to focus on, she was out of the office at court when the email was sent, and she chose to stop responding to George because she "felt he was jumping to conclusions and putting words in [her] mouth." HR, appellant testimony; IAF, Tab 7, pp. 47-48. After reviewing all of these reasons, I find the appellant has not established any agency failure to provide her with a soundproof work area caused any of the alleged misconduct.

Turning now to the agency's alleged failure to accommodate the appellant's asthma and environmental allergies in 2020. The appellant submitted the request for reasonable accommodation for this matter on August 19, 2020. RAF, Tab 11, p. 185. None of the misconduct at issue in the removal occurred after the appellant's request, and thus that misconduct could not have been caused by any failure to grant the request.

I also considered whether George requiring the appellant to submit medical documentation on July 22, 2020 before allowing her to cease field work was a failure to accommodate the appellant that impacted the appellant's misconduct and thus the removal. On July 21, 2020, the appellant's supervisor approved the appellant not performing field work that week "as recommended by your doctor." RAF, Tab 11, p. 148. She notified the appellant that, after that week, she needed to get a medical note with recommendations on the appellant's limitations. *Id.* The next day, George corrected the appellant's supervisor, and explained that, before any change would occur to the appellant's duties, the appellant needed to provide medical documentation substantiating a need for her duties to change. RAF, Tab 11, pp. 150-151. George's July 22, 2020 email occurred one day prior to her email request for information that formed the basis of the charge of failure

to respond to supervisory request for information. *Id*. Even if I were to find the agency should have allowed the appellant to cease performing all field work on July 21, 2020, without any medical documentation, the appellant has not established any causal connection between such failure and the appellant's failure to respond to George's July 23, 2020 email. None of the appellant's explanations for her failure to respond involved her doing field work, attending to medical appointments for her asthma or environmental allergies, or experiencing some symptom of those conditions occasioned by doing field work. HR, appellant testimony. After considering all of the evidence in the record, I find the appellant did not establish any causal connection between the agency's failure to remove her field work duties and the removal action.

In her closing statement, the appellant also referenced a claim the agency failed to accommodate her PTSD. HR-2, appellant closing statement. However, the appellant evinced no evidence she ever requested an accommodation for her PTSD.[7] In September 2020, the appellant requested FMLA protected leave based on her PTSD, which the agency provided. HR, appellant testimony; RAF, Tab 11, pp. 194-197.

During the hearing, the appellant evinced evidence that her PTSD diagnosis could impact the way that she responded to direct communications from her supervisor. HR, Allen testimony. The appellant argued that her failure to

[7] The record contains two notes from Allen in 2019 referencing the appellant's need for absences to attend counseling. IAF, Tab 7, pp. 43-44. Allen's subsequent note indicates the appellant was having some difficulty obtaining that time off. *See* IAF, Tab 7, p. 42. Allen's 2019 notes did not mention the appellant had PTSD or provide any other diagnosis. IAF, Tab 7, pp. 43-44. And, other than Allen's statement in November 2020 that the appellant was having difficulty obtaining time off for this purpose, the record contains no evidence the agency did not approve the appellant's leave to attend her appointments. To the extent the appellant is claiming this was a reasonable accommodation request, I find the appellant has not established a causal connection between any agency failure to approve requested leave to attend counseling and the removal action.

respond to George's July 23, 2020 email, asking the appellant to explain two specific instances where George perceived the appellant lacked candor, may be explained by PTSD. HR-2, appellant closing statement. This is the sort of question that Comes at Night could and should have addressed in deciding the removal after receiving the appellant's medical records. However, even if I were to find the appellant's failure to respond to George's email was a result of PTSD, the appellant had not requested the agency accommodate the PTSD. The appellant could have, for example, requested a change in supervisory approach by George to accommodate her PTSD, but she had not done so. As a result, the appellant has not met her burden of showing a causal connection between her removal and a request that the agency ignored.

After considering all the evidence in the record, I find the appellant did not prove by preponderant evidence that any agency failure to provide a reasonable accommodation had a causal connection to the removal. Thus, I find the appellant did not prove her affirmative defense of disability discrimination based on failure to provide reasonable accommodation.

I similarly find the appellant has not established the agency discriminated against her on the basis of her alleged disability under a disparate treatment theory. An appellant may establish a prima facie case of disability discrimination under this theory by showing that she: (1) is a member of a protected class; (2) suffered an adverse employment action; and (3) that the unfavorable action gives rise to an inference of discrimination. Here, the agency has already articulated the reasons for its action. Thus, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving discrimination. *See Gregory v. Department of the Army*, 114 M.S.P.R. 607, ¶ 40 (2010) (citing *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008)). The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its

actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Id.,* ¶ 41. While such evidence may include proof that the employer treated similarly situated employees differently, an appellant may also prevail by introducing evidence: (1) that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of disabled employees; and (5) of incriminating statements by the employer. *See id.* (citing *Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008)).

The Board has held a mixed motive analysis is appropriate in disability discrimination claims arising under the ADAAA, and the appellant need not prove that, but for the discrimination, the action would not have been taken. *See Southerland v. Department of Defense*, 119 M.S.P.R. 566, ¶ 21 (2013). Under a mixed-motive analysis, an employee is entitled to some relief if she proves that her disability was "a motivating factor" in the decision, "even though other factors also motivated the practice." *Id.*, ¶ 23 (citing 42 U.S.C. §§ 2000e–2(m), 2000e–5(g)(1)); *see also Forte v. Department of the Navy*, 123 M.S.P.R. 124, ¶ 27 (2016). An agency may limit the extent of the remedy if it demonstrates by clear and convincing evidence that it "would have taken the same action in the absence of the impermissible motivating factor." *Southerland*, 119 M.S.P.R. 566, ¶¶ 23–25 (citing 42 U.S.C. § 2000e–5(g)(2)(B)). If the agency meets this burden, an employee would not be entitled to reinstatement, hiring, promotion, back pay, or damages, but he may be awarded declaratory relief, injunctive relief, and attorney's fees and costs "demonstrated to be directly attributable only to the pursuit of a claim under [42 U.S.C. § 2000e–2(m)]." *Id.*

Based on my review of the entire record, I find the appellant did not establish her disability was a motivating factor in her removal. In presenting her claim, the appellant relied mainly on an argument that, because a portion of the appellant's alleged misconduct is directly attributable to her disability (i.e., PTSD), the removal action as a whole was taken based on her disability. HR-2, appellant closing statement. I do not find the appellant's claim supported by the evidence or the law.

The appellant argued her failure to respond to a supervisory request for information was the result of PTSD. HR-2, appellant closing statement. The third charge in the notice of proposed removal was for failure to respond to supervisory request for information with a single specification as follows:

> On Thursday, July 23, 2020 at 1:29 p.m. I, John George, Area Conservationist, sent you an e-mail requesting information from you regarding Buck and Pole Fence certifications you certified for the Spokane Tribe that did not meet specifications. I sent the email to you marked high priority, delivery & read receipt. You were instructed to respond to me with the requested information by noon on Friday, July 24, 2020. Although you were in the office on both Thursday, July 23, 2020 and Friday, July 24, 2020, you failed to respond to this request for information.

IAF, Tab 7, pp. 144-145.

On July 23, 2020, George sent the appellant an email entitled "Follow up on Spokane Tribe Fence Improper Payments," wherein he explained as follows:

> I am contacting you regarding issues identified while reviewing project work in the East Area that you were assigned to. The topic I would like to cover in this email is the Spokane Valley office attempting to certify a buck and pole fence for the Spokane Tribe. The attempted certification has brought to light significant deficiencies in your work in the East Area as a Range Management Specialist and I am requesting clarification on the following issues.

IAF, Tab 7, p. 263. In bold, George identified those matters he was asking the appellant to explain, including:

> Please explain why you didn't send pictures of the fence you certified as you were instructed, but instead sent pictures of another

> fence giving the misleading impression the pictures were of the fence you certified?
>
> * * * * *
>
> Please explain why you told Jacob Turner you had received a variance for this fence when you hadn't?
>
> Please explain why you certified fences for payment that you knew did not meet NRCS specification?

IAF, Tab 7, pp. 263-264. He concluded the email with the following: "I am requesting that you respond to these questions by Noon tomorrow, Friday July 24th." IAF, Tab 7, p. 264. The appellant did not respond. HR, appellant testimony.

In her replies to the proposed removal, the appellant explained her failure to respond at follows:

> I apologize… that month I was swamped on CSP, Court Proceedings , dealing with the decision daily to walk away as a parent to my 15 year son and keep a restraining order on a minor that threatens me . Dealing with a lung function at 74 % and my oxygen level would not improve. I completely space the request as I was focused on CSP work that my supervisor explicitly directed me to work only on CSP/CRP and she never said to take time out to respond to Mr Geoarges request. I ran out of time that week which was supposed to be personal pretrial leave, and wasn't able to get back to the request when I came back from court. My directive from my direct line supervisors was to work only on CSP and CRP.
>
> * * * * *
>
> I stopped responding back to Mr George on the Spokane tribes , as I felt he was jumping to conclusions and putting words in my mouth.

IAF, Tab 7, pp. 47-48. At the hearing, the appellant testified that she first saw George's email on July 23, 2020 when she was sitting at the courthouse with her attorney having a discussion about her protection order. HR, appellant testimony. While she was there, her supervisor texted her to inform her there was a work email she needed to respond to. *Id.* When the appellant looked for the email her supervisor was referencing, she also saw George's email. *Id.* She testified she didn't intend to ignore George's email, but that week and month were so busy.

*Id.* The appellant testified she didn't even read the entirety of George's email "for a while." *Id.*

The appellant's therapist, Allen, noted that, as a result of PTSD, the appellant "has difficulty concentrating. When she experiences something in her work environment that is a trigger, she reports a significant increase in her anxiety." IAF, Tab 7, p. 41. Allen testified that the appellant could be triggered by threats from a boss, email threats from a boss, and being asked to respond to respond to emails in a condensed time frame. HR, Allen testimony. She also testified that her condition can affect her ability to think and interact in the workplace. *Id.*

I found Allen's testimony to be quite credible. However, I do not find that, under the circumstances, it establishes that the appellant's failure to respond to George's July 23, 2020 request for information was due to the appellant's PTSD. The appellant provided a number of different reasons for not responding to George's request for information on this specific date: she was too busy, she was not told to focus on his email, and she wasn't communicating well with George so she wasn't responding to him on these issues. HR, appellant testimony. The appellant did not say she was having difficulty concentrating due to her PTSD, she viewed George's email as a threat, or she thought George's timeline for response was too short causing anxiety. The appellant testified she didn't even read George's email in its entirety until days after she first saw it. HR, appellant testimony. The record contains no evidence the appellant ever responded to George's email.

After considering all of the evidence in the record, I find that, while it is entirely possible the appellant failed to respond to George's email as a result of her PTSD, she has not proven it is more likely true than not true it was the result of PTSD. I do not doubt the appellant's condition impacted the way she interacted with her co-workers and supervisors, including George. However, the appellant provided a number of reasons for the specific actions at issue, and those

reasons do not reflect her PTSD was a motivating factor in these actions. The appellant was busy – both with significant personal and professional matters – during the week in question. HR, appellant testimony. Thus, while the appellant was on duty on July 23, 2020 and July 24, 2020, she elected not to review George's email in its entirety.[8] George's email was marked High Importance, which should have flagged for the appellant the significance of her reviewing and responding to it. IAF, Tab 7, pp. 263-264. Ultimately, she did not do so, either by the deadline or in general. I find the appellant has not established by preponderant evidence that her disability caused the misconduct identified in the removal action.[9]

Even if I were to find the appellant had demonstrated her failure to respond to a supervisory request for information was caused by a disability, I do not find that, under the circumstances, this would render the removal the result of disability discrimination on its own. In support of this proposition, the appellant cited to *Humphrey v. Memorial Hospitals Association,* 239 F.3d 1128 (9th Cir. 2001). HR-2, appellant closing statement. Specifically, the appellant cited *Humphrey* for the proposition that: "For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Humphrey,* 239 F.3d 1139-1140, citing to *Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997). The Board has not adopted this holding in either *Humphrey* or *Hartog* and, while the Equal Employment Opportunity Commission (EEOC) has cited to *Humphrey* in cases involving Federal employees, it has done so only for unrelated matters.

---

[8] The deadline for response was the last sentence in George's email. IAF, Tab 7, pp. 263-264.

[9] The appellant did not argue – and I do not find – that any of the other charge misconduct in the proposed removal was caused by any of her disabilities.

Instead, the Board has repeatedly held the Rehabilitation Act of 1973 does not immunize disabled employees from being disciplined for misconduct in the workplace, provided the agency would impose the same discipline on an employee without a disability. *Laniewicz v. Department of Veterans Affairs*, 83 M.S.P.R. 477, ¶ 5 (1999); *Fitzgerald v. Department of Defense*, 85 M.S.P.R. 463, ¶ 12 (2000). This doctrine is consistent with the EEOC's Applying Performance and Conduct Standards to Employees with Disabilities, issued on September 3, 2008, which explains that, "if an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees" and, if an employee's "disability causes violation of a conduct rule," the employer may discipline the individual "if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard." EEOC's Applying Performance and Conduct Standards to Employees with Disabilities, issued on September 3, 2008, https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities. The EEOC's guidance makes clear that the ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability. *Id.* The guidance identifies, among other conduct standards that will always meet the job-related and consistent with business necessity standard, the following: "employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers." *Id.*

Here, the only misconduct which the appellant attributes to her disability is a failure to respond to a supervisory request for information. George testified credibly that he views responding to emails as important. HR, George testimony. After viewing George's testimony, I was left with the firm impression that, in supervising employees, he values prompt and clear communication. His own communications are consistent with that approach. *See* IAF, Tab 7, pp. 246-251;

RAF, Tab 11, p. 153; Tab 17, pp. 12-23. The record contains no evidence the agency actually disciplined any other employee for the failure to respond to a supervisory request for information, but the record also contains no evidence any other employee actually failed to respond to a supervisory request for information. The appellant argued the agency did not discipline her former supervisor, K.W., who consistently didn't respond to emails, both from the appellant and from other people. HR, appellant testimony. However, a general failure to promptly respond to emails is not the same as the failure to respond to a supervisory request for information.[10]

Ultimately, I find the evidence reflects that, like insubordination toward a supervisor, failing to respond to a supervisory request for information is job-related and consistent with business necessity. I also that, while the record contains no evidence George or Comes at Night had actually disciplined another employee for this misconduct, they would do so.[11] Accordingly, I find the appellant has not established that, either as a matter of fact or as a matter of law, a portion of the appellant's alleged misconduct is directly attributable to her disability, and the removal action as a whole was thus taken based on her disability.

I nonetheless considered whether the agency's decision to identify as misconduct the appellant's failure to respond to a supervisory request for information (and then remove her, in part, based on that misconduct) was discrimination based on her disability. I find no evidence to support it was. As explained above, it is entirely possible the appellant's actions with respect to George's email were impacted by PTSD. However, the record contains no

---

[10] K.W. retired sometime in 2020. HR, George testimony, appellant testimony.

[11] Comes at Night had removed another employee for a single instance of dereliction of duty similar to that which the agency demonstrated the appellant engaged in here. HR, Comes at Night testimony.

evidence that George would have had any reason to know that. There is no evidence that George was aware that the appellant had PTSD as of July 23, 2020, nor is there any evidence he was aware that, as a result of any disability, he needed to approach requests for information from the appellant in a different manner than he otherwise would. The appellant had not notified the agency of her disability or requested any accommodation based thereon.

As explained above, with her reply to the proposed removal, the appellant had documents pertaining to her PTSD diagnosis submitted to Comes at Night directly. Thus, Comes at Night had available to her information showing the appellant's disability and that it could cause difficulty concentrating. However, Comes at Night did not consider this information in rendering her decision, so there is no evidence she was aware any portion of the misconduct at issue in the removal could have been caused by PTSD.

Further, Allen's summary did not directly connect the appellant's diagnosis with any of the misconduct identified in the notice of proposed removal. IAF, Tab 7, pp. 41-42. She broadly described the impacts the condition can have on the appellant, and explained her "ongoing symptoms have impacted her job performance." *Id.* Given the lack of connection between this information and any of the specific misconduct identified in the notice of proposed removal, considering Allen's summary to be evidence the appellant's disability caused any of her misconduct would have required applying significant assumptions about the appellant and her conduct. Under the circumstances, doing so would have been inconsistent with the appellant's own explanation of her actions in her multiple replies, in which she did not attribute her actions to her disability.

In her closing argument, the appellant pointed to the timing of the agency's actions as suspicious, and noted several matters she perceived to be pretext. HR-2, appellant closing statement. The appellant argued the agency was motivated by the difficulties, time, and expense that arise when an employee requests reasonable accommodations. *Id.* I understand the appellant to have been

making these arguments in the context of her claim the agency reprised against her for engaging in EEO activity (where the alleged EEO activity was her requests for reasonable accommodation). Thus, I consider these arguments at length in my assessment of the appellant's EEO reprisal claim below.

However, to the extent the appellant was also arguing the timing and alleged pretextual actions reflected discriminatory intent based on the appellant's disability, I find little evidence to support this conclusion. The appellant's hearing disability was known to, and accommodated by the agency since well before 2020, when the appellant argues the agency's impermissible actions were elevating. HR, appellant testimony. The agency learned of the appellant's asthma and environmental allergies, as well as her PTSD, in summer and fall 2020, when the agency had already learned the appellant had engaged in serious misconduct. By the time the agency learned of these conditions, the agency had already conducted a functional review that uncovered that, in 137 certifications reviewed, the appellant's certifications were insufficient in 130. *See* IAF, Tab 7, pp. 154-175, 264.

The appellant also argued that, at the conclusion of the functional review, the agency had decided the appellant needed to be retrained; yet, thereafter, the agency elected to remove her instead. HR-2, appellant closing statement. The appellant argued this change of course – from planning retraining to removal – reflected discriminatory intent. I considered this argument, but found it unavailing.

The Functional Review had uncovered that the appellant was essentially failing to perform certain elements of her job to an appropriate standard. Specifically, the appellant was certifying practices – which led to payments of taxpayer money – without ensuring the practices had been undertaken in accordance with applicable regulations or, on some occasions, without ensuring the practices had been undertaken at all. IAF, Tab 7, pp. 154-243; RAF, Tab 11, pp. 160-169; HR, Johnson testimony. The Functional Review team determined

that, before the appellant could have the authority to make further certifications, she needed to have sufficient training to ensure she would properly undertake those actions. *Id.* None of the members of this team supervised the appellant, and none had the power to discipline the appellant. *Id.*

However, when Comes at Night learned of the appellant's failures, she suggested possible removal based on those offenses. HR, Comes at Night testimony. Comes at Night had previously been involved with the removal of another employee who had improperly certified a single practice. *Id.* As a result, she believed removal for such improper certification was appropriate. *Id.*

By this time, George had already been addressing what he viewed as performance and conduct issues with the appellant. In January 2020, George had instructed the appellant not to disparage her co-workers. HR, George testimony; RAF, Tab 5, pp. 12-13. On March 31, 2020, George reprimanded the appellant when she failed to follow that instruction. IAF, Tab 7, pp. 281-282.

At around the same time, in March 2020, George was following up on the appellant's work with the Spokane tribe, pertaining to approving a fence that was outside state specifications. IAF, Tab 7, pp. 246-251. George referred to the appellant's actions as "an obvious performance issue that will need to be addressed so that such actions do not take place into the future." *Id.* When George attempted to obtain information from the appellant about her own actions over the next few months, she provided conflicting and confusing responses, when she responded at all. IAF, Tab 7, pp. 246-251, 263-264. Thus, by the summer of 2020, the evidence of the appellant's misconduct was mounting, and it included more than merely the appellant needing additional training in how to perform the job she had been performing for several years.

After considering this evidence, I do not find the difference between the Functional Review's recommendation (i.e., that the appellant receive training and a review process be instituted to eventually return her job approval authority (JAA)) and the agency's ultimate action (i.e., removing the appellant for

dereliction of duties, lack of candor, and failure to respond to a supervisory request for information) reflects discriminatory intent.

I also find the agency's actions toward the appellant were consistent with its actions toward the other individual whose work the Functional Review Team found deficient. As explained in greater detail below, the Functional Review Team recommended removing the appellant's JAA based on the deficiencies in her reviewed work. RAF, Tab 11, pp. 160-169. The Functional Review Team also recommended the suspension of engineering JAA for D.R., and recommended the creation of a review process for reinstatement of that authority. IAF, Tab 7, p. 162. At the time, D.R. was a re-employed annuitant, and the agency let him go after the Functional Review. HR, Johnson testimony.

I also considered the strength of the agency's evidence to support its decision to remove the appellant. The agency premised its removal action on three separate charges of misconduct: dereliction of duty, lack of candor, and failure to respond to supervisory request for information. IAF, Tab 7, pp. 143-146. The appellant disputed the evidence the agency relied on with respect to each such charge. *See* HR-2, appellant closing statement. I am mindful that the Board cannot make findings that assume no violation of due process, and thus do not make findings on the agency's charges for purposes of discipline; however, I must still evaluate the charges in the context of evaluating whether they are pretext for discrimination. In that limited context, after considering all of the record evidence, I conclude that the agency had sufficient basis to charge the misconduct and that it did not do so for discriminatory reasons.

During the relevant time period, the agency employed the appellant as a Rangeland Management Specialist. HR, appellant testimony. In this role, the appellant worked with landowners to develop range and pasture management plans that include planned conservation systems for the land, and then administered cost sharing programs whereby the agency paid landowners for the

implementation of certain conservation practices. HR, appellant testimony; RAF, Tab 11, pp. 15-16. As part of these duties, the appellant completed NRCS-CPA-1245 forms for Practice Approval and Payment Application, and frequently signed a certification on those documents that states as follows: "Practice(s) performed to the extent shown above, meets program requirements and practice standards and specifications."[12] IAF, Tab 7, pp. 189-240.

A 2020 Functional Review Team reviewed the state's Northeast Team, which included work previously performed by the appellant. HR, Johnson testimony; RAF, Tab 11, pp. 160-169. The Functional Review Team set criteria and parameters for which matters they would review, and then selected a random sample of matters falling within those parameters. HR, Johnson testimony; RAF, Tab 11, pp. 113-132. The team reviewed the agency files associated with the certified conservation practices and, at least as to some of the certified conservation practices, conducted an on-site review of the practice. HR, Johnson testimony; RAF, Tab 11, pp. 160-169.

On August 4, 2020, the Functional Review Team provided its final report to Comes at Night. RAF, Tab 11, pp. 160-169; HR, Comes at Night testimony. The team identified a number of concerns with the appellant's performance, including:

- Unacceptable contract case file management;
- Under the appellant's Engineering JAA, all 44 of the appellant's actions under her Practice Design JAA were deficient, and 15 of the 44 practices the appellant certified under the Practice Certification JAA were deficient;

[12] The appellant noted that her position description does not contain the word certify. However, the overwhelming evidence reflects the appellant did certify matters in the course of her duties for years, and understood this to be a part of her duties.

- Under the appellant's Ecological JAA, 24 of 66 actions under the Practice I&E JAA were deficient, 17 of 66 actions under the Practice Design JAA were deficient, and 18 of 39 practice certifications were deficient.

RAF, Tab 11, pp. 160-169. Among the functional review team's recommendations were:

> Contract case files prepared by Kristi Horn should be reviewed and organized in accordance with policy file content requirements. All other superfluous information should be removed from the case folder.
>
> Engineering JAA should be suspended for Kristi Horn. A review process should be developed.
>
> Ecological Sciences JAA should be suspended for Kristi Horn. A review process should be developed by the ARC for re-instatement of JAA
>
> Suspend Kristi Horn's conservation planner designation due to demonstrated incompetence or the knowledge, skills, and abilities required for conservation planner designation. A review process should be developed by the ARC for re-instatement of planner certification designation.
>
> Pro Tracts permissions for Kristina Horn should be suspended until further review for all programs.

RAF, Tab 11, pp. 167-168.

In the first charge in the notice of proposed removal for dereliction of duty, the agency set forth eight specifications, which each identified a practice the appellant certified in the course of her duties, but that the Functional Review Team found resulted in an improper payment. IAF, Tab 7, pp. 143-144. Two of the specifications identified practices the appellant certified where an on-site review did not find the practice installed at all. *Id.*

To prove a charge of dereliction of duty, which is similar to negligent performance of duties, the agency must show the employee had a duty, the employee had knowledge of the duty, and the employee engaged in conduct that violated that duty, which evidenced a lack of due care. *Thomas v. Department of*

*Transportation*, 110 M.S.P.R. 176, ¶ 9 (2008). For purposes of the discrimination pretext analysis, I conclude that the agency had sufficient grounds to charge the appellant with dereliction of duty: the appellant had a duty to properly certify the practices which she certified, she was aware of that duty, and she violated that duty with respect to her conduct in each specification.

The appellant argued that the agency never informed her she had to physically view a practice before certifying it. HR, appellant testimony; HR-2, appellant closing statement. She pointed to testimony that a practice could be certified based on information provided by another person. HR, Johnson testimony. I do not find this evidence negates that the appellant was derelict in her duties as to each of the specifications. The appellant certified each of the practices at issue. IAF, Tab 7, pp. 189-233. When she did so, she was signing off that "Practice(s) performed to the extent shown above, meets program requirements and practice standards and specifications." *Id.* She could have made that certification based on her own personal observation of the practice or based on information provided by another, but she was the individual responsible for the certification. Here, where the practices she certified were not as she certified them to be, she was responsible for that failure.

The agency's second charge was for lack of candor based on a single specification alleging the appellant lacked candor in a March 17, 2020 email to Lance Burton when she represented two photos she had sent to him were from "4 Peaks" when they were not. IAF, Tab 7, p. 144. To prove a charge of lack of candor, the agency must prove the appellant employee gave incorrect or incomplete statements, and did so knowingly. *Fargnoli v. Department of Commerce*, 123 M.S.P.R. 330 (2016).

On March 17, 2020, Burton asked the appellant "Are these the pictures you used to certify the ethel fence?" IAF, Tab 7, p. 253. The appellant responded "No…. those are 4 Peaks-Ethel has more forestry around it." IAF, Tab 7, p. 252. The record is clear that the identified photos are neither from 4 Peaks or Ethel.

HR, Burton testimony, appellant testimony; RAF, Tab 11, p. 111. I find this sufficient cause for the agency to charge the appellant with lack of candor.

The appellant argued the appellant did not knowingly provide incorrect or incomplete information. HR, appellant testimony. Instead, she simply misremembered what two photos appended to a years old email reflected and was not precise enough in her response. HR-2, appellant closing statement. I do not find this argument persuasive. At the time the appellant was responding to this email, both Burton and George were attempting to obtain additional information from the appellant about the practices she had previously certified for the Spokane tribe. HR, Burton testimony. The appellant was essentially being asked to account for her prior certifications, and understood her second level supervisor was involved in reviewing her prior work. Under these circumstances, the appellant knew she was providing an incorrect response to Burton when she sent it, in an attempt to cover up for her failure to either obtain or maintain proper photos of the practice she certified. Thus, I find the agency proved the charge of lack of candor.

I have discussed the third charge of failure to respond to a supervisory request for information at length above. I find the agency had sufficient grounds for this charge.

Ultimately, I find the agency presented strong evidence to support the removal action and had sufficient cause to charge the appellant with the identified misconduct. This supports the conclusion there is no pretext for discrimination.

The record contains little evidence any other individuals engaged in a similar pattern of misconduct to the appellant. However, what evidence there is of possible comparators supports the agency removes individuals for similar offenses. Comes at Night testified to another employee removed for certifying a single practice that was not found. HR, Comes at Night testimony. In addition, the agency terminated D.R. following the Functional Review report, although he was a reemployed annuitant and not a Federal employee.

Ultimately, after considering all of the evidence in the record, I find the appellant did not prove by preponderant evidence that any one of her disabilities – or any combination thereof – was a motivating factor in the agency's decision to remove her. Thus, I find the appellant did not prove the agency discriminated against her based on a disability.

The appellant did not prove reprisal based on prior EEO activity.

The appellant alleged the agency's decision to remove her was reprisal for prior EEO activity. IAF, Tabs 1, 11; RAF, Tab 11. Under 5 U.S.C. § 2302(b)(1)(A), it is a prohibited personnel practice for an agency to take a personnel action against an employee in retaliation for prior EEO activity as prohibited under 42 U.S.C. § 2000e-16.

To establish a claim of retaliation under that section, an appellant must prove that retaliation was a substantial or motivating factor in the contested personnel action. *See Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 41 (2015). The appellant may meet her burden in a number of ways, including by direct evidence, comparator evidence, evidence of pretext, and a "convincing mosaic" of circumstantial evidence. *Savage*, 122 M.S.P.R. at ¶ 43 (citing *Troupe v. May Department Stores Company*, 20 F.3d 734 (7th Cir. 1994)). An appellant may use any one or a combination of these types of evidence to make his case, and such evidence will be considered as a whole in assessing the ultimate question (*i.e.,* whether the appellant has shown that the prohibited consideration was a motivating factor in the contested personnel action). *Id.*; *Gardners*, 123 M.S.P.R. 647, ¶ 30 (citing *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016)).

If the appellant can show retaliation for prior EEO activity was a substantial or motivating factor in the personnel action, then the burden shifts to the agency to show it would have taken the action notwithstanding the retaliatory motive. *Savage*, 122 M.S.P.R. 612, ¶¶ 49, 50 (citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)). A violation of

42 U.S.C. § 2000e-16 will entitle the appellant to reversal of the personnel action only if the prohibited personnel practice was its "but for" cause, meaning that the agency would not have taken the same action in the absence of the discriminatory or retaliatory motive. *Savage*, 122 M.S.P.R. 612, ¶¶ 48, 49. The burden of proof shifts to the agency to show, also by preponderant evidence, that it would have taken the action even if it lacked such a motive. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 273 (1981). "If we find that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action." *Savage*, *id*. at ¶ 51.

The appellant alleged the agency's decision to remove her was reprisal for her requests for reasonable accommodation in 2020. IAF, Tabs 1, 11; RAF, Tabs 11, 18. The appellant submitted a formal request for reasonable accommodation with the agency on January 6, 2020, and another on August 19, 2020. RAF, Tab 11, pp. 73-75, 185. I find the appellant established by preponderant evidence she engaged in protected activity with these requests for reasonable accommodation. *See EEOC Enforcement Guidance on Retaliation and Related Issued*, August 25, 2016.

In support of her reprisal claim, the appellant argued the timing of George's actions throughout 2020 reflect that he was reprising against the appellant for her requests for a reasonable accommodation. HR-2, appellant closing statement. The appellant also noted actions by George and others that were inherently suspicious in a manner that requires considering them pretext. I consider these arguments below.

The appellant argued that, every time the appellant took a step forward with her efforts to obtain a reasonable accommodation, George took steps toward disciplining and then removing her. HR-2, appellant closing statement. The appellant requested a reasonable accommodation on January 6, 2020. RAF, Tab 11, pp. 73-75. George sent an email chastising the appellant on January 8, 2020 for seeking his assistance on a matter she felt her supervisor was not handling

appropriately. HR, George testimony. Then, in March 2020, after the appellant disputed that the agency had provided her with an effective accommodation, George issued the appellant a letter of reprimand, her first disciplinary action ever with the agency. HR, appellant testimony; IAF, Tab 7, pp. 281-282. On July 21, 2020, the appellant's supervisor granted the appellant the accommodation of not performing field work that week, but George immediately removed that accommodation requiring the appellant to complete field work. IAF, Tab 11, pp. 150-151. Then, a day later, George sent her an email, requiring a 24-hour turnaround response, and took no action to ensure the appellant received the email and knew she had to respond. IAF, Tab 7, pp. 263-264; HR, George testimony. Finally, on the day the appellant returned from FMLA protected leave, George issued her a notice of proposed removal. HR, appellant testimony; IAF, Tab 7, pp. 143-146. The appellant argued the timing of George's actions lead to the conclusion that the appellant's requests for a reasonable accommodation motivated his decision to remove her.

The timeline the appellant sets forth is certainly suspicious. However, when additional matters are placed on the timeline, I am left with the firm impression that George was motivated by the appellant's misconduct when he proposed to remove her, and not by her requests for reasonable accommodation.

As a starting point, the agency had provided the appellant with reasonable accommodations for years before her January 2020 request. HR, appellant testimony; RAF, Tab 11, pp. 65-66. When the appellant worked in the Colville office, she had a soundproof office where she could lock the door and work. HR, appellant testimony. In fall 2019, the appellant requested and was granted a transfer to the Davenport office, where she was not assigned to a similarly soundproof office. *Id*.

On January 8, 2020, the appellant emailed George a request from a producer with the following note:

> I am handing it off to you, and I do not feel professional or polite enough to send it on to [K.W.]. Besides she has always ignored any emails I send on to her, so from past experience, I refuse to go down that rabbit hole again. Rabbit holes will get flooded out and I am not in the position to be brave enough to deal with drowning.
>
> Plus, don't want to see these guys get dropped.

RAF, Tab 5, pp. 12-13; HR, George testimony. George responded that same day, noting he found her communication "utterly unprofessional" and instructing the appellant not to "lay waste to a coworker in the manner" she had in the email in any future communications. *Id.* When George sent this email, the appellant had already requested a reasonable accommodation, but he did not know that; George did not learn of that request until January 9, 2020, after he emailed the appellant about what he perceived to be unprofessional conduct. RAF, Tab 11, p. 80.

Thereafter, in late January 2020, George worked with the agency's reasonable accommodation team to respond to the appellant's request for accommodation. At that time, he explained that, since her request, the agency had taken steps that he believed accommodated her (e.g., provided her a different office), and sent a response to the accommodation request to the reasonable accommodation team. RAF, Tab 11, pp. 86-87; Tab 17, pp. 16-23. That response was not passed along to the appellant at that time (for reasons that are not entirely clear), but, when the reasonable accommodation team followed up with George in early March 2020, George returned the signed document and it was provided to the appellant. *Id.* On March 10, 2020, the appellant's concerns with George's decision were relayed to George. RAF, Tab 17, pp. 15-16.

One week later, on March 17, 2020, Burton followed up with the appellant about the buck and pole fence she had certified for the Spokane tribe. HR, Burton testimony; IAF, Tab 7, pp. 252-253. Burton was attempting to certify a practice for the Spokane tribe, but had determined it was not in compliance with agency specifications. HR, Burton testimony. The tribe told Burton it was the same as the fence the appellant had previously certified for them, and the

appellant had told them she obtained a variance on their behalf. *Id.* Burton was trying to track down the documentation the appellant had previously used to certify the practice and any variance she obtained, so he could move forward with the currently pending practice certification. *Id.* In her email on March 17, 2020, the appellant lacked candor and represented that the photos she had forwarded to Burton were used to certify a specific practice, but the photos were not of that practice. *Id.*

George was involved in attempting to address this disconnect between the appellant's prior certification of a Spokane tribe fence and the then-pending certification of another Spokane tribe fence. HR, Burton testimony. On March 18, 2020, George emailed the appellant seeking clarification regarding any variance she had sought. IAF, Tab 7, pp. 246-251. The appellant promptly responded, explaining she did not seek a variance because she did not realize any was necessary. *Id.* On March 22, 2020, George responded to the appellant, explaining his attempts to locate documents the appellant had referred to and identifying his concerns with the appellant's actions. *Id.* He concluded his email as follows:

> I will be following up with leadership this week as to how to move forward with this issue. This is an obvious performance issue that will need to be addressed so that such actions do not take place into the future.
>
> Starting today, I am directly instructing you that you will follow standards and specifications for all contractual work you are planning and certifying in the East Area. Once I have addressed the issue of certifying practices outside of the specification I will follow up with you accordingly.

IAF, Tab 7, p. 247. As of May 2020, George was still trying to obtain additional information from the appellant as to her role in the certification of the Spokane tribe practices. RAF, Tab 11, p. 111.

On March 31, 2020, George issued the appellant a letter of reprimand for failure to follow his instructions. IAF, Tab 7, pp. 281-282. Specifically, on

January 8, 2020, George had instructed the appellant not to disparage other employees; then, in March 2020, the appellant made significant disparaging remarks about co-workers on an agency instant message with another co-worker. *Id.* The individual the appellant massaged brought the information to George's attention, and he issued the reprimand to the appellant for her behavior. HR, George testimony.

In May 2020, the Functional Review Team set the parameters of its review and began reviewing the actions identified within the scope. RAF, Tab 11, pp. 113-132; HR, Johnson testimony. That review was ongoing until the team issued its report on August 4, 2020.

On July 21, 2020, the appellant's supervisor approved for the appellant to not work field work that week based on her doctor's recommendations, but informed the appellant that, after this week, the appellant would need to get a medical note related to her limitations. RAF, Tab 11, p. 148. The next day, George told the appellant she would be required to perform field work until she provided medical documentation. RAF, Tab 11, p. 150. Later that afternoon, the appellant also responded to a written counseling George had sent her regarding a CSP application that exceeded a payment limitation, disputing his instructions. RAF, Tab 11, p. 153. He responded to her dispute, recommending she follow the guidance she had been provided. *Id.*

On July 23, 2020, George emailed the appellant, with a high importance flag, a request for the appellant to explain why she did not send the photos she used to certify the Spokane tribe fence, why she told the Spokane tribe she received a variance, and why she certified Spokane tribe fences that did not meet specifications. IAF, Tab 7, pp. 263-264. The appellant did not respond.

On August 4, 2020, the Functional Review Team issued its report, showing significant deficiencies in the appellant's work over a period of several years. RAF, Tab 11, pp. 160-169. The team recommended all of the appellant's files be reviewed and organized, the appellant's JAA be suspended and a review process

be created for re-instatement, and the appellant's conservation planner designation be suspended and a review process be created for re-instatement. *Id.* Upon receiving the report, Comes at Night suggested considering removing the appellant based on her improper certification of practices. HR, Comes at Night testimony. In a prior position, Comes at Night had been involved in removing another employee for improperly certifying a single practice, and the Functional Review Team had identified the appellant's improper certification of multiple practices. *Id.*

On August 17, 2020, George forwarded the appellant's medical documentation pertaining to her asthma and allergies to the reasonable accommodation program manager for further action. RAF, Tab 11, pp. 180-181. The appellant submitted a formal request for reasonable accommodation the next day. RAF, Tab 11, pp. 182-185. The reasonable accommodation program manager subsequently asked the appellant for additional information, and the appellant passed that request along to her medical provider on September 14, 2020. RAF, Tab 11, p. 192. It appears the appellant never submitted the additional requested information. RAF, Tab 17, pp. 13-14.

From September 16, 2020 to October 30, 2020, the appellant was on FMLA-protected leave. HR, appellant testimony. When she returned from leave, George issued the appellant a notice of proposed removal. The appellant remained on administrative leave until her removal.

In reviewing the more comprehensive timeline of the appellant's 2020 employment, I find that, while George sometimes took actions to investigate the appellant's misconduct after the appellant had taken steps in her requests for reasonable accommodations, George's actions were consistent with attempting to investigate and resolve meaningful problems. In January 2020, when faced with what he perceived as the appellant showing disrespect to her supervisor in an email, George immediately addressed the email and instructed the appellant to cease such behavior; when he learned the appellant engaged in the behavior

again, he reprimanded her for it. In early 2020, when George learned the appellant had certified an improper practice for the Spokane tribe, and represented to the tribe that she had obtained a variance on their behalf, George began to investigate the situation to assist in bringing to a resolution a pending practice certification for the tribe; when the appellant provided conflicting and confusing responses regarding her own actions on certifying the Spokane tribe's past practice, George continued to follow up, asking precise questions of the appellant to try to get to an answer. Then, when the Functional Review Team found the appellant's past work to be deficient across nearly every metric employed, George proposed the appellant's removal for her dereliction of duty and all of the other misconduct she had engaged in during his attempts to understand her actions with respect to the Spokane tribe. I do not find this sequence of events reflects retaliatory intent.

The appellant also identified multiple matters she viewed as pretext for discrimination. For example, she pointed out that George's July 23, 2020 email was sent solely to the appellant, and her supervisor was not copied; she argued that, if George was really seeking the information – and not merely trying to set the appellant up to fail – he would have copied the appellant's supervisor or sought to contact the appellant in other ways to get the information he sought. HR-2, appellant closing statement. I do not find this argument persuasive.

In 2020, the appellant had a series of acting supervisors. HR, George testimony. To ensure consistency in addressing performance and conduct problems, George was advised he should handle these matters himself, even though he was her second line supervisor. *Id.* As a result, George directly emailed the appellant and asked her to explain her actions. The appellant's supervisor at the time was not involved in George's inquiry into the appellant's alleged misconduct. HR, George testimony. And I see no reason why she would have or should have been included on the email at issue.

George could have sought the information he requested in the July 23, 2020 email from the appellant in other ways or he could have called to remind her to respond to his email. However, again, I see no reason his failure to do so was indicative of retaliatory intent. George requested the appellant respond to the specific questions in his email by July 24, 2020. IAF, Tab 7, pp. 263-264. There was nothing ambiguous about this request. Nor is there any reason to believe the appellant believed she was not required to meet the requests of her supervisors. Under these circumstances, George's email to the appellant is more consistent with providing the appellant a meaningful opportunity to respond to allegations of misconduct than with setting her up to fail based on discriminatory intent.

The appellant also pointed to George's August 17, 2020 email to the reasonable accommodation program manager, where he put the word accommodate in quotations, reflecting a negative perception of her request. HR, George testimony. In passing along the medical documentation the appellant supplied, George noted: "Ms. Horns medical provider supplied this documentation as of the 29th to the District Conservationist and document askes for us to "accommodate" Ms. Horn's situation." RAF, Tab 11, p. 181. Reviewing this email in context, I find George's use of quotation marks did not reflect doubts about the appellant's request, but instead was a sincere quote from the medical documentation. The July 29, 2020 medical note provided as follows:

> Kristina is a patient of our clinic. She has been diagnosed with severe environmental allergies as well as asthma. As her job duties do require her to be outdoors with significant environmental allergen exposures we would request that you provide acceptable accommodations for her at this time to decrease her environmental allergen exposure. As her asthma and allergy symptoms get better controlled with the medical therapy prescribed from our office she will be able to then return to her normal work functions in due time.
>
> Please accommodate her at the very best that you can.

RAF, Tab 11, p. 184. In essence, the medical note explained the appellant's condition, and then asked the agency to "accommodate" her, without explaining

what possible accommodation may be needed or effective. With this context, I do not find George's use of quotation marks in his email reflected a negative attitude toward accommodations or the appellant's specific request for accommodations.

The appellant also pointed to George denying her an accommodation on July 22, 2020 as evidence of his retaliatory intent. As a general matter, I do not find a decision to deny a reasonable accommodation automatically demonstrates retaliatory intent for having requested a reasonable accommodation. Here, the appellant requested to not perform a large part of her duties for a week based on medical recommendation, but without providing any medical documentation. I do not find George's decision to require the appellant to provide such documentation before the agency decided whether to relieve her of duties improper or reflective of retaliatory intent for her requesting an accommodation.

After considering the appellant's arguments, I find little evidence the agency was motivated by retaliatory motive for the appellant's reasonable accommodation requests when it removed her. To the contrary, the evidence reflects the agency was motivated by the appellant's misconduct in reaching its decision to remove her. As explained above, I find the evidence the agency relied on to remove the appellant was quite strong. Notably, the Functional Review Team – who reviewed the appellant's past work and it to be deficient – were not involved in any way with the appellant's requests for reasonable accommodation, and there is no evidence they were aware the appellant had sought such an accommodation. Thus, their assessment the appellant had demonstrated incompetence and lacked the knowledge, skills, and abilities to perform at least portions of her job appears removed from any claimed retaliatory motive. The dereliction of duty charge is premised on the evidence this team gathered, and the conclusions they reached with regard to the appellant's past certification actions.

Based on my review of the entire record, I find that the appellant has failed to prove by a preponderance of the evidence that her removal was motivated by a retaliatory animus for her prior EEO activity. In conclusion, I find the agency did

not afford the appellant the requisite due process in the removal action, and I reverse the removal on that basis. I considered all of the appellant's asserted affirmative defenses that could entitle her to additional relief, but found the appellant failed to prove any of these affirmative defenses. As explained above, this reversal does not preclude the agency from reinitiating an action on the same charge if it affords the appellant a new proceeding which grants her due process.

## DECISION

The agency's action is REVERSED.

## ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **March 27, 2021**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

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

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

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully

complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision 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 the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). 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.

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of Rangeland Management Specialist, GS-0454-09. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

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: /S/

Samantha J. Black
Administrative Judge

**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 PARTIES CONCERNING SETTLEMENT**

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

**NOTICE TO APPELLANT**

This initial decision will become final on **March 7, 2022**, unless a petition for review is filed by that date. 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 one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. 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.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition 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).

## NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

### Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross 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. A petition for review

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).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

**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.

## 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 OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

**(1) Judicial review in general**. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination**. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012**. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S.

Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

| | **DEFENSE FINANCE AND ACCOUNTING SERVICE**<br>**Civilian Pay Operations** |
|---|---|

# DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx.**

**NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.**

☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

<u>Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:</u>

☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.

☐ 3) Signed and completed "Employee Statement Relative to Back Pay".

☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

**Lump Sum Leave Payment Debts:** When a separation is later reversed, there is no authority under 5 U.S.C. § 5551 for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).

**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-50s (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.