UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

[redacted],
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
SF-0752-13-1461-I-1

DATE: February 11, 2014

Joel J. Kirkpatrick, Esquire, Plymouth, Michigan, for the appellant.

Kerri E. Bandics, Esquire, San Francisco, California, for the agency.

BEFORE
Benjamin Gutman
Administrative Judge

INITIAL DECISION

INTRODUCTION

The agency removed the appellant from his position as a supervisory contract specialist based on charges of failing to follow proper contracting procedures and inappropriate conduct towards his subordinates. Initial Appeal File (IAF), Tab 5, Subtabs 4b, 4g. He timely appealed to the Board, which has jurisdiction under 5 U.S.C. § 7513(d). IAF, Tab 1. As explained below, I find that the agency removed the appellant in retaliation for his equal-employment-opportunity (EEO) activity. The agency's action is therefore REVERSED.

ANALYSIS AND FINDINGS

Background

The agency hired the appellant as a supervisory contract specialist in 2009 to manage an office that had a history of personality conflicts, poor morale, and

repeated complaints by employees against one another. IAF, Tab 5, Subtab 4u; *see also, e.g.*, Tab 35, exhibit P (report of a fact-finding investigation from 2009). At first, his efforts to impose order and improve morale appeared to be succeeding. Hearing CD 1 (HCD1) 2:40, 4:12-4:13. But eventually some of his subordinates began lodging complaints about him and his supervisory style. *See, e.g.*, IAF, Tab 35, exhibit Q. In 2011, after a lengthy investigation of some of these complaints, the agency determined that there was no call for disciplinary action against the appellant. *Id.*, exhibit O. The appellant's supervisors—the director and deputy director of acquisition management for the region—instead decided that the appellant's supervisory responsibilities would (in the director's words) be "micromanaged" for a time. *Id.*, exhibit OO. Over the next few months, they issued several nondisciplinary letters setting forth specific directions and expectations. *Id.*, Tab 5, Subtabs 4n, 4q, 4r.

The appellant felt that the letters of direction were unwarranted and demeaning, and his relationship with his supervisors quickly deteriorated. *See, e.g.*, *id.*, Subtab 4q, at 5. In February 2012, he filed a grievance about his supervisors' micromanagement. *Id.* In July, he filed an informal EEO complaint about the same issues, alleging that the treatment was because (among other things) of his national origin and sexual orientation, and he told the supervisors about the complaint a week later. *Id.*, Tab 29, at 135-36; Tab 37.

In August, less than ten days after learning about the EEO complaint, the appellant's supervisor assigned him five new contracts that had to be completed before the end of the fiscal year in September. *Id.*, Tab 35, exhibit Y, at 5-6. The appellant protested that he did not have enough time to handle that assignment together with his current duties, and he proposed alternatives such as offering overtime to his subordinates who had volunteered to complete the contracts. *Id.* at 3-5; exhibit CC; *see also id.*, Tab 29, at 55. When the supervisors nonetheless insisted that the appellant personally complete the assignment, he filed an informal grievance about it. *Id.*, Tab 35, exhibit Y, at 1; HCD1 3:03. He

ultimately had to work nights and weekends to carry out the assignment. Hearing CD 2 (HCD2) 6:24.

In September, the deputy director gave the appellant a letter of reprimand for allegedly making unprofessional comments, such as stating about his staff that "[a]ll these damn people are crazy" and telling her that if she did not approve a change in his work schedule, he was going to "come completely out of the closet." IAF, Tab 5, Subtab 4m. The appellant filed a formal grievance challenging this letter of reprimand. *Id.*, Tab 35, exhibit DD.

In October, the appellant filed a formal EEO complaint challenging the letter of reprimand and many of the previous issues with his supervisors. *Id.*, Tab 30, at 12-24. He also alleged that the deputy director had sexually harassed him a few months earlier by touching his breast and commenting that his long hair looked effeminate. *Id.* at 23.

Within a few days of the formal EEO complaint, the agency opened another investigation into alleged misconduct by the appellant to his subordinates. *Id.*, Tab 22, at 38. Soon after this investigation ended, the director and deputy director decided to review the contracts from the appellant's office from September 2012. *Id.*, Tab 29, at 128-29. The review revealed discrepancies in the files for the five contracts the appellant had been assigned to complete. *Id.* at 128-34.

The deputy director proposed removing the appellant for failure to follow contracting procedures and conduct unbecoming a federal supervisor. IAF, Tab 5, Subtab 4g. The first charge asserted that the appellant had entered the five contracts as obligated in the agency's computer system in September even though the paper contracts were not fully executed until December, and that the official contract files were missing some required documentation such as negotiation memoranda explaining how the parties agreed on the price. *Id.* at 1-2. The conduct-unbecoming charge was based on three incidents where the appellant was allegedly rude to his subordinates: (1) during a group meeting, he put his hand in front of a subordinate's face and told her to stop speaking; (2) on another

occasion, he came over to a subordinate's desk to speak to her and she started yelling "help" and "call 911"; and (3) he sent an email to a subordinate asking why she had accompanied a coworker to his office, which the deputy director asserted violated the directions in the letter of expectations he had been given. *Id.* at 3. Although the charges may not have seemed especially serious on their face, the deputy director wrote a lengthy analysis of the *Douglas* factors to justify the proposed removal. *Id.*, Subtab 4h. Among other things, the deputy director asserted that the appellant he had "clearly" violated the Antideficiency Act, a statute that authorizes criminal penalties against federal employees who obligate funds without a proper appropriation; that he displayed "bullying, intimidation, agitation and disruption" in the workplace; that his "inability to get along with fellow workers" was evidenced by the "increasing severity of complaints . . . advanced by others as well as by the employee[] himself"; and that "[t]he most consistent skill demonstrated by the employee is to identify problems." *Id.* at 1-5.

After giving the appellant an opportunity to respond, the deciding official sustained the charges and penalty, adopting word-for-word most of the deputy director's *Douglas* factors analysis. *Id.*, Subtab 4b.

The appellant filed an appeal with the Board. *Id.*, Tab 1. In addition to arguing that he was not guilty of the charges, he asserted that the agency had violated his right to due process, had discriminated against him on the basis of his sexual orientation (gay) and gender stereotyping, and had retaliated against him for protected EEO activity. *Id.*, Tab 36, at 3; Tab 43. I held a hearing on January 14 and 15, 2013, and the record on appeal closed at the end of the hearing. HCD2 9:17.

The appellant proved his affirmative defense of retaliation

As explained below, I find that the appellant proved his affirmative defense of EEO retaliation, which is a prohibited personnel practice. *See* 5 U.S.C. § 2302(b)(1), (9). Because this alone requires reversal of the agency's decision,

see 5 U.S.C. § 7701(c)(2)(B), I do not separately address the merits of the agency's charges or the reasonableness of the penalty.

The appellant had to prove by a preponderance of the evidence that he engaged in protected activity and that the agency's decision to remove him was in retaliation for that activity. *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 21 (2012); *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005). Retaliation is typically shown through a mosaic of circumstantial evidence, no one piece of which is especially probative by itself but that taken together suggest that the agency's asserted reasons for its action were a pretext for retaliation. *See FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 20 (2008).

Here, there was no dispute that the appellant engaged in protected activity by filing an informal and then a formal EEO complaint in 2012. IAF, Tab 29, at 135-51; Tab 30, at 4-24. The complaint named the director and the deputy director (who later proposed the appellant's removal) as the alleged discriminators. *Id.*, Tab 30, at 4. There also is no dispute that both supervisors were aware of the complaint; the appellant told them in August 2012 that he had filed it, and both were interviewed during the complaint process. *Id.*, Tab 29, at 137-38; Tab 37; *see also* HCD1 7:36 (deputy director's testimony that the appellant told her about an EEO complaint in May or June 2012).

As noted earlier, the appellant also filed a number of other grievances against his supervisors about the same general issues. At least some of these grievances raised allegations of bias and mentioned his EEO complaint, and I therefore find that they also constituted protected EEO activity. *Id.*, Tab 35, exhibit Y, at 2; exhibit DD, at 4; *Ray v. Henderson*, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000) (recognizing that even an informal complaint to a supervisor can be protected EEO activity). The appellant's supervisors received copies of some if not all of these grievances. *See, e.g.*, IAF, Tab 35, exhibit Y, at 1.

Thus, I find that at the time she proposed the appellant's removal in May 2013, the deputy director was aware that the appellant had engaged in protected EEO activity. *Id.*, Tab 5, Subtab 4g. The main dispute about this defense was

whether she proposed the appellant's removal because of, or merely in spite of, this protected activity. At the hearing she testified that the appellant's EEO complaint had no bearing on her proposal. HCD1 7:36. But for the reasons discussed below, I do not credit this testimony.

In finding that the deputy director proposed the appellant's removal in retaliation for his protected EEO activity, I rely primarily on two pieces of evidence. First, she made several statements, including some directly in connection with the proposed discipline, indicating that she was upset by the appellant's protected activity and thought it was inappropriate. Second, although the agency likely had grounds from taking some disciplinary action against the appellant, the case for removal was marginal at best. As explained below, I find that the deputy director grossly exaggerated the seriousness of the charged offenses in arguing for removal. When I weigh the severity of the appellant's alleged misconduct against the intensity of the agency's motive to retaliate, I conclude that he likely would not have been removed but for his protected EEO activity. *See Rhee*, 117 M.S.P.R. 640, ¶ 26.

Statements suggesting a retaliatory motive

The deputy director gave an affidavit as part of the investigation that led to the appellant's removal, and she listed it as among the information she relied on for the proposal. IAF, Tab 5, Subtab 4i; Tab 22, at 137. In this affidavit, the deputy director specifically referenced the appellant's EEO complaint in bemoaning that the appellant was "not focusing on his tasks" and instead "files another complaint" every time his supervisors tried to take action against him:

> He is not performing and is not focusing on his tasks. He complains about his plate being too full, and he has filed an EEO complaint. He acts like this is a game, so when we try to make a move against him or take action, he files another complaint.

Id., Tab 22, at 147. She also accused the appellant of "bullying and intimidation" when he threatened to complain directly to the Secretary of Agriculture about her treatment of him. *Id.* Overall, this affidavit suggests that the deputy director resented the appellant's protected activity and that his EEO complaint and related

activity were part of the motivation for taking action against him. *See FitzGerald*, 107 M.S.P.R. 666, ¶ 27 (relying on evidence that agency managers resented the employee's EEO activity as proof of retaliation).

At the hearing, the deciding official tried to downplay the significance of the part of the affidavit quoted above, asserting that she was referring not to the appellant's EEO complaint but only to his other grievances. HCD1 7:45-7:47. I do not credit this testimony. The affidavit expressly mentioned the EEO complaint, and I cannot see any reasonable way to understand it as *not* referring to that complaint. In any event, even if the reference to the EEO complaint was a mistake, the other grievances (or threats to file grievances) were likely protected activity as well, *see* 5 U.S.C. § 2302(b)(8), (9), and as discussed above at least some of them constituted EEO activity. Because all of the protected activity revolved around the same set of common issues, I find that it is not possible to separate out the EEO activity from any other grievances, and I therefore analyze them together. In any event, I find it implausible that the deputy director was upset about the appellant's other protected activity but had no reaction to his EEO activity on the very same subjects.

The deputy director's written analysis of the *Douglas* factors here also suggests that the appellant's protected EEO activity was part of the reason for proposing his removal. It expressly asserted that the appellant's "complaints" created problems in the workplace:

> Employee's inability to get along with fellow workers, interface respectfully with subordinates, supervisors and others is evidenced by *increasing severity of complaints* and the need for mediation, teambuilding and redress of matters advanced by others as well as *by the employee, himself*.

IAF, Tab 5, Subtab 4h, at 3 (emphasis added). It also asserted that "[t]he most consistent skill demonstrated by the employee is to identify problems," *id.* at 5, which I take to be another reference to his complaints. Although these statements may not have mentioned the EEO activity expressly, I again find it implausible to think that the deputy director was referring to the non-EEO activity alone. For

these reasons, I find that the deputy director's *Douglas* factors analysis suggests a direct nexus between the appellant's protected activity and the proposal to remove him.

I also find some support for my conclusion in the letter of reprimand that the deputy director gave the appellant in September 2012, shortly after she learned about the EEO complaint. IAF, Tab 5, Subtab 4m. The reprimand was for "making unprofessional comments," and it cited five specific comments he had allegedly made to her. *Id.* One of the comments was made during a discussion about his work schedule, when he allegedly told the proposing official, "now I don't want to you take this personally, but if I don't get what I am requesting which is very important to me, I will come completely out of the closet. . . . I mean all the way out of the closet." *Id.* (ellipsis in original). It is not clear to me why the deputy director regarded this comment as unprofessional. I find it hard to imagine what the appellant could have meant other than that he planned to file some sort of complaint if his request was denied. I recognize that coming out of the closet can refer to a gay person's decision to reveal his sexual orientation publicly. But that interpretation would make no sense here, because it was already well known at work that the appellant was gay. HCD1 4:00-4:01, 7:48; HCD2 0:42-0:44. And if it had not been, I cannot see why disclosing his sexual orientation would have merited a reprimand. It appears instead that the appellant must have been threatening to reveal some other kind of secret, such as by blowing the whistle on discrimination or similar misconduct. The fact that the proposing official reprimanded him for this statement further suggests that she was upset by his protected activity and motivated to discipline him for it. *Cf. Rhee*, 117 M.S.P.R. ¶ 25 (although the Board will not readjudicate past discipline in determining the reasonableness of the penalty, it can give it more scrutiny in the context of a retaliation defense).

Collectively, I find that these statements are strong evidence that the appellant's EEO activity was at least a motivating factor in his removal. That alone is not enough to establish his defense of retaliation. *See id.* ¶ 35. But when

it is combined with the evidence discussed below, I find that the appellant met his ultimate burden of proving that he was removed because of his EEO activity.

Strength of agency's case

As noted earlier, the agency asserted two unrelated charges against the appellant: first, that he had violated contracting procedures in connection with the five contracts he was assigned in August 2012, and second, that he engaged in conduct unbecoming a federal supervisor on three specific occasions. IAF, Tab 5, Subtab 4g.

I find that the agency had strong evidence in support of the first charge. For each of the five contracts at issue, the agency accused the appellant of entering the contract as obligated in the agency's computer system several months before the contract was fully executed and failing to include certain documentation in the official contract file. *Id.* at 1-3. There was no dispute that a contract generally can be recorded as an obligation only if (among other things) there is documentary evidence of a binding written agreement; that the appellant recorded the contracts as obligated in September; and that he did not sign traditional pen-and-paper contracts until December. 31 U.S.C. § 1501(a)(1); IAF, Tab 5, Subtab 4z, at 118; Subtab 4aa, at 2; Subtab 4bb, at 3; Subtab 4cc, at 2; Subtab 4dd, at 2, 6; Subtab 4ee, at 2, 10, 18, 27; HCD2 7:30. Although the appellant asserted at the hearing that he had binding written agreements before then based on some back-and-forth emails with the contractors, he pointed to no emails or other documentary evidence unambiguously establishing that there had been a written offer and acceptance of all the material terms before he entered the contracts as obligated. HCD2 6:29-6:32, 6:45-6:48, 6:51-6:56. There also was no dispute that the documentation listed in the charge was missing from the agency's official contract files. IAF, Tab 6, Subtabs 4z to 4dd. Although he produced documentation during this appeal, *see id.*, Tab 35, exhibits A to E, at a minimum the agency had strong evidence supporting its allegation at the time of the charge. *Cf. FitzGerald*, 107 M.S.P.R. 666, ¶ 21 (for retaliation claims, the

evidence should be evaluated as it appeared at the time of the personnel action, not the evidence that was developed later).

I find, however, that this charge was of only moderate seriousness. Although the deputy director's *Douglas* factors analysis asserted otherwise (IAF, Tab 5, Subtab 4h, at 1-2), the agency ultimately offered no evidence that the appellant's premature entry of the contracts as obligated violated the Antideficiency Act. *See, e.g.*, *id.*, Tab 35, exhibit H, at 6-7; HCD1 6:34. It appeared to be undisputed that the irregularities identified in the charge did not require cancelation of any of the contracts, and that they were all ultimately fully performed by the contractors. HCD1 6:11-6:12; HCD2 6:48-6:50. There was no allegation that the appellant's actions cost the agency any money or that he profited personally from any of the irregularities. *See* IAF, Tab 35, exhibit GG, at 2; HCD1 5:03-5:04. There also was no evidence of any other problems with the appellant's substantive contracting work—no evidence that this was anything other than an isolated mistake made during a hectic end-of-the-fiscal-year rush. And the appellant made no effort to hide what he had done; in an email in the first week of October he disclosed to the director that he was still awaiting the "actual signatures" for the contracts at issue. IAF, Tab 35, exhibit R, at 1. The director testified that he somehow overlooked this email at the time, HCD1 4:45-4:46, but even if he did so it suggest that the appellant was not trying to deceive anyone when he entered the erroneous obligation data into the computer system.

The second charge, conduct unbecoming a federal supervisor, accused the appellant of (1) telling a subordinate to stop speaking during a meeting and putting his hand directly in front of her fact; (2) coming up to the same subordinate at her desk to speak to her about something, which caused the subordinate to start screaming for someone to "call 911"; and (3) sending an email to another subordinate titled "Managerial Inquiry" asking why she had attended a meeting in his office that she seemed to have nothing to do with. IAF, Tab 5, Subtab 4g, at 3. There was little dispute about most of the basic facts

surrounding these incidents, and I will assume without deciding that the agency had strong evidence supporting the accusations in its charge.

But I find that this charge, too, involved at most moderately serious conduct. With respect to the first two specifications, there can be no real dispute that the appellant, as a supervisor, had the right to tell a subordinate to stop talking during a meeting he was running or to walk up to her desk to speak to her. The only accusations I see in the charge that even arguably constituted misconduct were that the appellant may have put his hand too close to the subordinate's face or stood too close when talking to her. There is nothing in the charge suggesting that the appellant actually touched the subordinate. Even assuming that the appellant was too close on both occasions, that does not strike me as especially serious misconduct. And if the subordinate began screaming without good cause, the misconduct was by her rather than the appellant. With respect to the third specification, although the appellant's email may have been a bit heavy-handed, I fail to see how it merited discipline. The agency suggested that it violated an instruction he had been given not to inquire further about "previous fact-finding related situations," *id.*, but as far as I can tell the email had nothing to do with any *previous* fact-findings.

Thus, even if the agency had proved that the appellant committed all of the conduct in its charges, I find it unlikely that the charges themselves would have merited a penalty as serious as removal. Perhaps recognizing this, the deputy director wrote a lengthy *Douglas* factors analysis justifying her proposal to remove the appellant. *Id.*, Subtab 4h. But some of the assertions in this analysis were flat-out wrong, such as the accusation of an Antideficiency Act violation discussed above. As noted earlier, the analysis also suggested that the appellant's history of making complaints should be treated as an aggravating factor, which suggests retaliation on its face. And many of the other assertions in the analysis seem to be at a minimum grossly exaggerated.

For example, the analysis relied heavily on the accusation that the appellant engaged in "bullying" and "defiance":

> Employee [redacted] demonstrates misconduct in the form of bullying, intimidation, agitation and disruption in the workplace when interfacing with others. His communications, written or verbal, are frequently disrespectful, defiant, insulting regardless of the recipient—be it his own supervisor, subordinate staff members, internal/external customers, clients and contacts or other representative staff. . . . There is mounting evidence of written and verbal admonishments, warnings and cautions consisting of specific direction, recommendations citing expectations, direction unit instruction to demonstrate professional conduct, behavior and overall performance—all of which are frequently dismissed, challenged and ignored by the employee. The employee reacts to each and every instance related to misconduct and unacceptable behavior with rejection, defiance, threats, intimidation and workplace bullying.

Id. at 1; *see also id.* at 6 (reiterating that the appellant was "defiant" to his supervisor's directions).

The agency offered little evidence to substantiate most of the extreme accusations leveled here. There was no dispute that the appellant had a strained relationship with his supervisors and many of his subordinates. But I saw no persuasive evidence that, for example, he engaged in anything that reasonably could be characterized as "bullying" towards his supervisors. As far as I can tell, the only things the appellant did that might be thought of as bullying his supervisors were making (or threatening to make) complaints about them, including his protected EEO activity. And if that is what the deputy director was alluding to, then this part of the *Douglas* factors analysis is further evidence of retaliation—not of a legitimate nonretaliatory reason for proposing the appellant's removal.

Overall, I find it a close question whether the agency had a reasonable basis for proposing the appellant's removal here. Several factors weighed in the agency's favor: the appellant was a supervisor and therefore could be held to a higher standard of conduct, he had a relatively short tenure with the agency, he had previously received a letter of reprimand, and regardless of whether he was at fault he had managed to alienate many of his subordinates and his supervisors.

But as explained above, the charges themselves were of only moderate seriousness. I find that the case of removal was at best marginal.

Weighed against the relative weakness of the case for removing the appellant was the strong motive the deputy director had to retaliate against him. As noted earlier, the appellant had accused the deputy director of serious misconduct, including sexual harassment, and there is strong evidence that the deputy director was upset by these accusations. I find that this balancing weighs in favor of a finding of retaliation.

I also find that the agency singled out the appellant for investigation and discipline even though others may have engaged in similar misconduct, at least with respect to the first (and more serious) charge. The director testified that during the investigation of the contracting irregularities, he and the deputy director reviewed every contract file that they could find for his office during the relevant period, and that only the appellant's had discrepancies. HCD1 3:26-3:27. Yet the appellant identified two contracts signed by one of his subordinates in the same period that on their face suggested that they had been signed after they were obligated. IAF, Tab 35, exhibits JJ, LL. The director testified that he had not seen the contracts during the review but that if he had, he would have been "very concerned" because they appeared to be "inappropriate." HCD1 3:29-3:32. It is possible that other documents could have cleared up any discrepancy, HCD1 3:32, 7:23, although the agency offered no evidence that any such documents existed. It also offered no evidence that it followed up after learning about these potential discrepancies during discovery to determine if there was a problem or if it should take disciplinary action against the subordinate. At a minimum, all of this suggests that the agency was not working very hard to identify discrepancies involving any other contracting officers. This, too, supports a finding of retaliation. *Cf. Spadaro v. Department of the Interior*, 18 M.S.P.R. 462, 466 (1983) (evidence that the agency disciplined other employees for similar misconduct can dispel an inference of retaliation).

I saw no reason to think that the deciding official had any retaliatory motive. But I find that his independent review could not cleanse the disciplinary action of the retaliatory taint. He admitted that he, as a deputy regional forester, had little experience with technical contracting matters and deferred to the director and deputy director's expertise in this area. HCD2 0:57, 2:29-2:32. He also adopted much of the deputy director's *Douglas* factors analysis word for word, including the parts that I found above were incorrect or exaggerated. *Compare* IAF, Tab 5, Subtab 4b, at 4-9, *with id.*, Subtab 4h.

For all of these reasons, I find that the appellant proved his affirmative defense of EEO retaliation, and the agency's decision to remove him must be reversed.

The appellant did not establish gender discrimination

Although my ruling on retaliation alone requires reversal of the agency's decision to remove the appellant, in an abundance of caution I also address his affirmative defense of gender discrimination. It is not clear to me that it could lead to any additional relief, but because it is based on an alleged violation of the Civil Rights Act of 1964 the Board may nonetheless have a statutory obligation to resolve it. *See* 5 U.S.C. § 7702(a).

The appellant alleged that the agency removed him because it regarded him as an effeminate male who did not conform to traditional gender stereotypes. IAF, Tab 40. He had the burden of proving that his gender was a motivating factor in his removal, *see* 5 C.F.R. § 1201.56(a)(2)(iii), and I find that he did not do so. The only evidence he offered suggesting that his failure to conform to gender stereotypes, rather than his EEO activity, might have been a factor was his testimony that the deputy director once made a comment about his hair. HCD2 7:04-7:05. His testimony did not describe the comment in detail, but his EEO complaint alleged that the deputy director had said that his hair was "getting really long" and that it looked effeminate. IAF, Tab 30, at 23. The appellant testified that he did not know whether she was kidding when she made this statement. HCD2 7:10. I do not doubt that the statement, if it was in fact made,

was inappropriate. But even assuming that the deputy director made it, I see no reason to infer that her decision to propose the appellant's removal more than nine months later had anything to do with her perception of him as effeminate. I therefore find that the appellant did not prove this affirmative defense.

I do not address the appellant's other defenses

The appellant also raised affirmative defenses of lack of due process and discrimination based on sexual orientation, which is conduct that does not adversely affect an employee's performance. IAF, Tab 36, at 3. I need not reach these defenses because they are not based on claims of discrimination within the meaning of 5 U.S.C. § 7702(a)(1)(B) and would not entitle the appellant any additional relief beyond what I am already ordering. *See Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 14 (2012); *Van Prichard v. Department of Defense*, 117 M.S.P.R. 88, ¶ 25 (2011), *aff'd*, 484 F. App'x 489 (Fed. Cir. 2012). I therefore do not address them further.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **June 28, 2013**. 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 Supervisory Contract Specialist, GS-1102-13. 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: _____

Benjamin Gutman
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement and ask the administrative judge to vacate the initial decision. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **March 18, 2014**, 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 the Equal Employment Opportunity Commission (EEOC) or with a

federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal district court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

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).

Criteria for Granting a Petition or Cross Petition for Review

The criteria for review are set out at 5 C.F.R. § 1201.115, as follows:

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;

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

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 AND COMPENSATORY DAMAGES

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) or

compensatory damages by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this decision only after it becomes final, as set forth above.

Discrimination Claims: Administrative Review

You may request review of this decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the

United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request 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 your request 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, NE
Suite 5SW12G
Washington, D.C. 20507

You, or your representative if you are represented, should send your request to EEOC no later than 30 calendar days after the date this decision becomes final. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You, or your representative if you are represented, must file your civil action with the district court no later than 30 calendar days after the date this decision becomes final. If you choose to file, be very careful to file on time. 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. § 2000e5(f) and 29 U.S.C. § 794a.

NOTICE TO THE PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will then be referred to the Special Counsel "to investigate and take

appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8).

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.