UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

[redacted],
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
NY-0752-19-0039-I-1

DATE: June 3, 2019

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

Joseph Rieu, Esquire, and Sarah Grafton, Esquire, Arlington, Virginia, for the agency.

BEFORE
Nicole DeCrescenzo
Administrative Judge

INITIAL DECISION

On November 19, 2018, the appellant initiated this appeal challenging his removal. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. 5 U.S.C. § 7511-13. I held the requested hearing on May 9, 2019. AF, Tab 43. The evidentiary record closed on that date. *Id*. For the reasons below, the agency decision is MITIGATED to a 7-day suspension.

Background

Before the removal at issue, the agency employed the appellant as a federal air marshal (FAM), SV-1801-I, with the Federal Air Marshal Service (FAMS) at its Newark, New Jersey Field Office. AF, Tab 8 at 4.[1]

As a FAM, the appellant was required to adhere to the terms of the Transportation Safety Administration (TSA) Employee Responsibilities and Code of Conduct as well as the FAM Employee Responsibilities and Conduct, which required that all FAMs comply with rules, regulations, procedures, directives and orders of FAMS, TSA, and DHS. AF, Tab 35 (stipulations) citing Tab 31 at 6.

On October 19, 2016, the appellant signed the OLE/FAMS Employee Responsibilities and Conduct Annual Certification, acknowledging that he had read, understood, and would adhere to the standards of the FAMS Employee Responsibilities and Conduct policy. AF, Tab 35 citing AF Tab 26.

On January 20, 2017, he signed the Newark Airport ID Card acknowledgment of responsibilities, affirming that he had read, understood and agreed to adhere to requirements for a Newark Airport Secure Identification Display Area (SIDA) badge. AF, Tab 35 citing Tab 25.

October 5, 2017

On the morning of October 5, 2017, the appellant traveled on a Southwest Airlines (SWA) flight from Newark, New Jersey, to Chicago, Illinois, accompanied by a friend. AF, Tab 35 citing Tabs 16 and 4.

Upon arriving at the airport, he checked in at the SWA ticket counter, where he received and completed the Law Enforcement Officer Flying Armed (WN-364) paperwork. AF, Tab 35; Tab 8 at 193. This paperwork, specific to

[1] Citations in this decision are to the electronic tab and page number, except where the agency filed its pleading on a disk. Where the pleading is a disk, as in AF, Tab 8, the citation is to the electronic tab and the adobe pagination on the disk.

SWA, gives the carrier's requirements for off-duty FAMs flying with a weapon. AF, Tab 8 at 193.

After visiting the ticket counter, he and his companion approached the security screening checkpoint, where he met with a uniformed TSA Transportation Security Officer (TSO). AF, Tabs 35-36. The TSO who met the appellant at the A1 Security Checkpoint contacted TSA Supervisory Transportation Officer (STSO) Kaznowski, to process the appellant and his companion through the checkpoint. AF, Tab 35.

At the gate, the SWA agent reviewed the appellant's credential and flying armed paperwork, and invited the appellant and his companion to preboard the aircraft. Hearing CD, Appellant's Testimony. They did, and after briefly greeting the pilot and the "A" flight attendant, they moved to the seating area and took two seats in an exit row (as SWA does not assign seating). *Id*. Shortly thereafter, the "C" flight attendant told them they were not permitted to sit in the exit rows, to which the appellant responded, "Are you serious?" or something to that effect. *Id*. The pilot's testimony was confident that the appellant's response intimidated and defied the flight attendant. Hearing CD; Sterritt Testimony. The appellant testified without contradiction in the record that he did not understand why he was being asked to move, and was incredulous. Hearing CD, Appellant's Testimony. He acknowledged in hindsight that he could have replied more effectively. *Id*. He testified the attendant did not tell him why he could not sit in the seat he had chosen, and further that he and his companion moved to comply with the request. *Id*.

Upon arrival at their destination, the SWA flight Captain Douglas Sterritt spoke with the appellant. *Id.* Sterritt and the appellant discussed Sterritt's understanding that the appellant defied a rule on the appellant's flying armed form, which precludes anyone who preboards from selecting a seat in an exit row. Hearing CD, Sterritt, Appellant's Testimony; AF, Tab 8 at 193. The appellant told the captain he did not know the rule, and further disagreed that he defied or

abused the flight attendant. Hearing CD, Sterritt, Appellant's Testimony; Tab 8 at 179. The disagreements were not resolved to Sterritt's satisfaction, and he was advised by his own command structure to file a report of the incident. Hearing CD, Sterritt Testimony; Tab 8 at 179; Tab 35.

Upon receipt of the Sterritt complaint, Special Agent In Charge Clyde Porter directed his subordinate, Assistant Federal Security Director Michael Iannelli, to collect video of the gate area to see if it supported the SWA complaint that the appellant abused his credentials to preboard with his companion. Hearing CD, Porter Testimony. Ianelli did not procure such video, but he did access and forward to Porter several short video clips of the appellant in the security checkpoint area, before clearing into the sterile area. *Id*.; AF, Tab 8 at 163-64. Porter did not direct Ianelli to interview the appellant or his companion. Hearing CD, Porter Testimony. He did not ask Ianelli to gather additional video clips or any additional evidence. *Id*. Porter testified that he did not assign Ianelli to apply evidence to answer specific identified inquiries, and he did not ask Ianelli to make any conclusions.[2] *Id*.

On December 7, 2017, the appellant's manager directed him to write an additional statement regarding his October 5, 2017 off-duty travel. AF, Tab 35 citing Tab 8 at 162; Hearing CD, Appellant's Testimony. He was instructed to address three concerns: his access to the sterile area, his companion's entry into the sterile area, and carry-on luggage. AF, Tab 8 at 162; Hearing CD, Appellant's Testimony. He did so on December 8, 2017. AF, Tab 8 at 162.

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[2] Nonethless, I find Ianelli's "report" forwarding the video clips comprises Ianelli's interpretation of the video clips, and Ianelli's interpretation of various rules. AF, Tab 8 at 163-64.

October 16, 2017

On October 16, 2017, the appellant was on official duty as a FAMS team leader of a team [redacted] flying on United Airlines (UA), in [redacted] AF, Tab 35 citing Tab 15. It is undisputed he was responsible for coordinating the operations of the flight team, including checking in with airline and confirming boarding and seating arrangements. *Id*. The appellant went to the ticket counter to check the team in for their flight. *Id*.

The agent the appellant spoke to at the ticket counter was unfamiliar with the carrier's procedure for responding to FAM requests to change seating arrangements. AF, Tab 8 at 176. The agent called a supervisor, who informed the appellant that the carrier would not honor his request to move a passenger [redacted] for tactical reasons, and also would not process any seat changes at the ticketing counter. *Id*. They further suggested the changes "MIGHT" be done at the gate. *Id*. (emphasis in original). The ticket agent described the appellant's response as "calmly aggressive," implied he took too much of the carrier's time, and further conveyed distaste for having to respond to such FAM requests, which are "frequent." *Id*. The appellant testified competently and without contradiction in the record that it is operationally preferable to change a passenger's seat before check-in, so that the passenger need not be disappointed by losing a seat they never knew they had. Hearing CD.

On May 30, 2018, agency Office of Professional Responsibility (OPR) Case Manager Charles Tomasello proposed to remove the appellant from service on six charges with 26 total specifications. AF, Tab 1 at 9; Tab 9 at 137-55. The proposal notice attached the materials relied upon by the OPR, identified the deciding official as SAC Clyde Porter, and invited the appellant to reply. *Id.* The appellant's then-attorney filed a written response on August 3, 2018. AF, Tab 8 at

27-126. The appellant made an oral response on August 6, 2018.[3] *See* AF, Tab 8 at 24; Hearing CD, Appellant's Testimony.

On October 22, 2018, Porter issued a letter of decision effecting the appellant's removal on about October 27, 2018. AF, Tab 8 at 6; Tab 1 at 28. The decision sustained five of the proposal's six charges, dismissing proposed charge 3. He also dismissed other individual specifications of the remaining charges, as discussed below. *Id.*

This appeal followed. Affirmative defenses were waived. AF, Tabs 12, 27. At the prehearing conference, I identified the following issues to be decided, to the exclusion of all others:

Can the agency prove by preponderant evidence that the appellant

1. Misused his ID as described in charge 1;

2. Failed to follow the flying armed policy as described in charge 2;

3. Committed the conduct described in charge 4, and it was improper, and it impacted the efficiency of the service;

4. Committed the conduct described in charge 5, and it was improper; and/or

5. The appellant failed to disclose the truth under circumstances in which it was called for, as described in charge 6.

6. That the penalty of removal was reasonable for the proven charges.

AF, Tab 27. Neither party timely objected to this statement of the issues. Accordingly, these are the issues to be decided below.

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[3] I find the appellant's testimony confirmed Porter's summary of his oral reply was substantively accurate. *See id.*

Applicable Law and Findings

The agency bears the burden of proving its charges by preponderant evidence. 5 U.S.C. § 7701(c); 5 C.F.R. § 1201.56(a)(1)(ii). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The agency also must demonstrate that disciplinary action will promote the efficiency of the service, *see Kruger v. Department of Justice*, 32 M.S.P.R. 71, 73-74 (1987), and that the penalty imposed was reasonable. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Here, the agency effected the appellant's removal based on five charges. AF, Tab 8 at 6; Tab 1 at 28. Each of these is discussed below.

Charge 1: Misuse of Secure Identification Display Area (SIDA) Badge

The agency sustained this charge on one specification:

> On October 5, 2017, you used your SIDA Badge to access the sterile area of Newark Liberty International Airport (EWR) while off-duty and not on official business.

AF, Tab 8 at 137. To sustain this charge, the agency relied in part on video clips. AF, Tab 36; Hearing CD, Porter Testimony. I find the video clips show the appellant flashing bifold credentials. This is significant because record evidence indicated that the SIDA badge and metal credential are credit-card sized and commonly stored in a bifold container. Hearing CD, Testimony of Porter, Kasnowski, Appellant.[4]

[4] The record reflects that by contrast, the Law Enforcement Officer Flying Armed (WN-364) paperwork he was required to show at airport security is an 8 ½ by 11 standard sheet of paper. *See* Tab 8 at 190; Hearing CD, Testimony of Porter, Kasnowski.

The appellant did not dispute that he showed his SIDA badge before entering the sterile area (the area beyond the security checkpoints) on his personal travel to Chicago. Hearing CD, Appellant's Testimony; AF, Tab 8 at 27. Rather, he argued, consistently with the record, that the agency's video was produced in short clips from different angles, all of which together did not reveal the appellant's entire security transaction.[5] AF, Tab 36; Hearing CD, Testimony of Appellant, Porter, Kasnowski. At hearing, the appellant testified convincingly and without contradiction in the record that he did show his SIDA badge, because he does not fly on personal business often, and it is what he normally shows, and he did not know he was not supposed to use it on personal travel.[6] *Id*. He further explained he offered to sign a log book for off-duty flights, and as far as he recalled, he did show Kasnowski his WN-364. *Id*. Kasnowski testified that he did not remember what credential the appellant showed him, or the interaction at all, outside of what he saw on the video clips the agency showed him in January 2018.[7] Hearing CD.

I find the appellant's hearing testimony was consistent with his two brief written statements, his oral reply, and the written reply furnished by his former

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[5] As noted above, Porter testified that he initially did not request that these security area video clips be collected, and that he could have asked for more video once he had reviewed the clips in evidence. Hearing CD, Testimony of Porter. He explained his decision not to saying that he did not believe he needed more video. *Id*.

[6] I find his testimony was not inconsistent with the appellant's signature on the January 20, 2017 Newark Airport ID Card acknowledgment of responsibilities he signed to be eligible for a SIDA Badge eight months earlier. AF, Tab 35 citing Tab 25. The appellant admitted the boilerplate on that form should have informed him not to use the SIDA off-mission. Hearing CD. I find his admission demonstrated acceptance of responsibility for his error.

[7] He further testified that he had not been asked about the exchange until January 2018, that he did not remember it independent of the video he was shown at that time, and was pleased to be told by Ianelli that he was "not in trouble." *Id*. The record does not reflect Kasnowski received corrective action as a result of the incident. *See* Hearing CD, Porter Testimony.

attorneys. AF, Tab 8 at 173, 179, 24, and 27. In addition, I find his explanation inherently believable: it is far more likely that the appellant, having never read or forgotten the boilerplate on his SIDA application, mistakenly used that identification when he entered the security checkpoints on October 5, 2017, because that was the ID he was accustomed to using at the airport. *See* Hearing CD, Appellant's Testimony. Conversely, as the appellant argued, he had no reason to withhold the WN-364 flying armed form from the TSOs, because as it is stipulated, he completed it upon check-in and retained copies that he later provided to other officials. *See* AF, Tab 8 at 27; Tab 35. Based on the above and after a review of all record evidence, I find preponderant evidence supports the appellant's defense for his misuse of the SIDA, and I find it was truthful.

Nonetheless, there is no dispute that he miused the SIDA. He has repeatedly admitted as much. Hearing CD, Appellant's Testimony; AF, Tab 8 at 173. *Baracker v. Department of Interior*, 70 M.S.P.R. 594, 602 (1996) citing *Rogers v. Department of Justice*, 60 M.S.P.R. 377, 389 (1994)(there is no intent element to misuse). Accordingly, I find whether the appellant also showed the TSOs the WN-364 as he believed he did is immaterial to proof of the miconduct, as is whether he was aware of the restrictions on use of the SIDA. Deciding official Porter, in the decision letter, concluded, "you misused your SIDA badge when you used it for non-official business…" AF, Tab 1 at 33-34. I agree that this is the gravamen of the charge, and that the record supports it. Charge 1 is therefore sustained.

Charge 2: Failure to Follow Flying Armed Policy

Porter sustained specifications 2-6 of this charge, finding the appellant did not provide the TSA various documents, which were required to be reviewed at the security checkpoint, by rule or regulation. He testified at hearing that the "flying armed policy," which was not referenced in the specification, is located at

AF, Tab 8 at 189.[8] Hearing CD. I find the cited policy does not "require" or otherwise make an off-duty FAM responsible for the security clearance failures specified. *See* AF, Tab 8 at 189-90. I find these are, rather, instructions for the TSOs entrusted with the checkpoint. Accordingly, I find that less than preponderant record evidence supports a finding that the appellant "failed to follow" a "flying armed policy" by failing to provide TSOs with items listed in the sustained specifications:

> 2. [his] metal badge or credentials;
> 3. a second US or State Government-issued identification;
> 4. a Unique Federal Agency Number (UFAN);
> 5. a Notice of LEO Flying Armed document; and
> 6. [his] travel document.

AF, Tab 8 at 137. Stated another way, I find it was TSA's responsibility to ask for these items, and the appellant did not commit misconduct by following the TSOs' instructions.

Further, Porter testified he sustained these specifications based on the video clips he reviewed. Hearing CD; *see* AF, Tab 36. He testified that because he only observed the appellant showing one small document in a wallet, he concluded the appellant showed the TSO on the video only one credential. Hearing CD. He further testified that he did not rely on Kasnowski's written statement or any other evidence to decide the charge. *Id*. Moreover, he testified that while he considered the appellant's two written statements, oral reply, and written reply, he did not believe the appellant's account of his security checkpoint conduct, because it was inconsistent with the video evidence. *Id*.

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[8] I find the cited TSA policy is not titled, "Flying Armed Policy," but the appellant did not contest this point. *See id.*

However, on cross-examination, Porter acknowledged that he only reviewed the eight short video clips originally collected by a subordinate, and did not ask for more video angles, or longer segments of video from the existing angles. *Id*. I find this approach was contrary to logic. I find preponderant evidence supports my inference that there existed additional video cameras in the relevant area that might have given clearer or additional views of the specified conduct. *See* Hearing CD, Porter Testimony. I further find that since at least one of the clips collected cuts off abruptly while the appellant is still interacting with the TSOs, Porter's conclusion that the appellant definitively did *not* do the specified things, relying solely on the video evidence, was misplaced.

Moreover, the record reflects that the appellant raised this concern in his written reply, and so it should have been considered. *See* AF, Tab 8 at 27. A review of Porter's testimony, the decision letter, and the record as a whole does not demonstrate that Porter considered this argument either in support of the appellant's account, or as a mitigating factor. *See* Hearing CD, Porter Testimony; AF, Tab 8 at 28.

The appellant addressed charge 2 by explaining that he does not fly off-duty often, he did not knowingly violate any rule, and he followed the instructions of the supervisory TSO on duty. Hearing CD, Appellant's Testimony. For the above reasons, I find the agency did not proffer preponderant evidence that the appellant violated a flying armed policy. Accordingly, charge 2 is not sustained.

I have also considered the agency's proffer of other TSA policies, also not titled "flying armed policy," which it argues are also implicated here. Below, I consider whether the evidence of record meets the agency's burden to prove charge 2.

The agency failed to establish the appellant was required to produce his metal badge or credentials, and failed to do so.

In his decision letter and hearing testimony, Porter explained that the appellant was required to follow flying law enforcement officer (FLEO) policies,[9] to include one "procedure" that provides that a FAM can be cleared into the airport sterile area "by following the requirements of a FLEO to include inspection and verification of their metal badge, credentials, and a second US or State Government-issued photo ID." *See* AF, Tab 8 at 194-97. However, from review of the document, I find the procedure is written for the benefit of the TSO doing the screening, and is not obviously intended for the FAMs who might be subject to the screening. For example, there are two bold instructions at the header of the document that state, in relevant part

A. "TSA must verify the identity of individuals eligible for specialized screening…."
B. "Individuals eligible for specialized screening are generally permitted to enter the sterile area through the Law Enforcement Officer (LEO)/exit lane without [x-ray and other screening]."

Id. at 194. Further, this procedure appears to require the LEO passenger to sign a log book, while Porter confirmed at hearing the applicable rules did not actually require that of the appellant. Hearing CD. Indeed, I find the majority of the

[9] He also cited section IV.C.2.b.(2) of the policy located at AF, Tab 8 at 227, but I find the cited provision requires off-duty FAMs to "travel as armed FLEOs," but does not support the agency's burden to prove the specified requirements in this charge. In addition, he cited a fourth TSA document, the cited section of which applies to "FAMs that do not possess a SIDA badge, whereas here, clearly, the appellant did possess a SIDA badge. For these reasons, I find the agency failed to identify any policy that placed these specifications within the primary responsibility of a FAM, as opposed to a TSO.

procedure supplied by the agency gives a TSO instructions about the inapplicable log book. Moreover, supervisory TSO Kasnowski testified that the metal badge was also not required under these circumstances. Hearing CD. Lastly, I find the record contains no evidence allowing a factfinder to discern what the additional "credential" referenced in the rule and specification are, in light of the second specification, below. For these reasons and after full consideration of the record, I find there is less than preponderant evidence that the appellant was "required" to produce his "metal badge or credentials," and failed to do so. This specification is not sustained.

> *The agency failed to establish the appellant was required to produce a second US or State Government-issued identification, and failed to do so.*

For this specification, Porter cited the same TSO screening procedure discussed above, and for the same reasons, I find the agency supplied less than preponderant evidence that the cited procedure prescribed this obligation to the appellant. Further, as discussed above, I agree with the appellant that he was not remiss in following the instructions, or lack thereof, he received from TSO. I infer the appellant arrived at the TSO checkpoint in possession of a state driver's license, because he drove to the airport. *See* Hearing CD, Appellant's Testimony. I find the appellant knew it was his responsibility to ask to see a supervisory TSO to be cleared at the checkpoint, and he did so. Hearing CD; Appellant, Kasnowski Testimony. It is undisputed that Kasnowski did not require the appellant to show a second ID before processing him through the checkpoint. Hearing CD; Appellant, Kasnowski Testimony. For these reasons and after full consideration of the record, I find there is less than preponderant evidence that the appellant was "required" to produce a second government ID and failed to do so. This specification is not sustained.

The agency failed to establish the appellant was required to produce a Unique Federal Agency Number (UFAN), and failed to do so.

For this specification, Porter cited the same TSO screening procedure discussed above, and for the same reasons, I find the agency supplied less than preponderant evidence that the procedure prescribed this particular obligation to the appellant. Here again, it is undisputed that Kasnowski did not require the appellant to use a UFAN. Hearing CD; Appellant, Kasnowski Testimony. I find For these reasons and after full consideration of the record, I find there is less than preponderant evidence that the appellant was "required" to provide a UFAM and failed to do so. This specification is not sustained.

The agency failed to establish the appellant was required to produce his flying armed document and failed to do so.

For this specification, Porter cited the same TSO screening procedure discussed above, and for the same reasons, I find the agency supplied less than preponderant evidence that the procedure prescribed this particular obligation to the appellant. Hearing CD; Appellant's, Kasnowski Testimony. It is undisputed the appellant had a boarding pass in his possession, because he used it to board the flight at issue. AF, Tab 35. It is undisputed that Kasnowski did not require the appellant for his flying armed document, because Kasnowski was of the indefensible belief that the appellant was flying on duty with "his girlfriend."[10] *See* AF, Tab 8 at 161; Hearing CD; Appellant, Kasnowski Testimony. For these reasons and after full consideration of the record, I find there is less than preponderant evidence that the appellant was "required" to provide Notice of

[10] It was further undisputed that a FAM cannot fly missions with a civilian travel companion. Hearing CD, Porter Testimony.

LEO Flying Armed document, and failed to do so. This specification is not sustained.

> *The agency failed to establish the appellant was required to produce his travel document, and failed to do so.*

For this specification, Porter cited the same TSO screening procedure discussed above, and for the same reasons, I find the agency supplied less than preponderant evidence that the procedure prescribed this particular obligation to the appellant. Hearing CD, Appellant's, Kasnowski Testimony. It is undisputed the appellant had a copy of his boarding pass, because he used it to board the SWA flight, discussed below. AF, Tab 35. It is undisputed that Kasnowski did not require the appellant for his flying armed document, because Kasnowski was of the indefensible belief that the appellant was flying on duty with "his girlfriend."[11] *See* AF, Tab 8 at 161; Hearing CD; Appellant, Kasnowski Testimony. For these reasons and after full consideration of the record, I find there is less than preponderant evidence that the appellant was "required" to provide Notice of LEO Flying Armed document, and failed to do so. This specification is not sustained.

In summary, the record reflects that these security breaches were the responsibility of TSA, and the TSOs here did not fulfil them. I agree with the appellant that he was entitled to trust and defer to the authority of the TSOs, and I agree that the agency failed to establish he was required to argue with them about rules that are within TSA's purview. For all of the above reasons, charge 2 is not sustained.

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[11] It is further undisputed that a FAM cannot fly missions with a civilian travel companion. Hearing CD, Porter Testimony.

Charge 4: Off-Duty Misconduct

Porter sustained five of six specification of this charge, which was extrapolated from the complaint of Southwest Captain Douglas Sterritt. AF, Tab 8 179-80. Below, I discuss the evidence as it related to the sustained specifications.

> Specification 1: On October 5, 2017, you flew on personal travel as a FLEO flying armed, and you used your FLEO status to pre-board your Southwest Airlines (SWA) flight with your female travel companion. Your travel companion should not have preboarded with you.

AF, Tab 8 at 137. Captain Sterritt's carrier complaint (aka Flight Operations IR Summary Report), which formed the basis for this charge, stated in relevant part, "FAM [redacted] …pre-boarded the aircraft in [non-mission] status with his girlfriend." *Id*. It is undisputed the captain did not see the appellant preboard the flight. It is undisputed on the record that the FAM flying armed must present documentation at the gate. Hearing CD, Appellant, Kasnowski Testimony. The appellant testified without contradiction in the record that he presented the necessary documents to the gate agent, who later invited the appellant and his companion to preboard. Hearing CD. I find based on this evidence, and after consideration of the record, less than preponderant evidence that the appellant misused his credential to cause his companion to preboard. Because the record reflects the gate agent extended the appellant a professional courtesy, this specification is not sustained.

> Specification 2: On October 5, 2017, [a] Flight Attendant (FA) told you that you could not sit in the emergency exit row on the flight. You told the FA that you were a FAM and you are entitled to sit in the emergency exit row, or words to that effect.

AF, Tab 8 at 137. Sterritt's complaint stated, in relevant part

> [redacted] went back to the Emergency Exit Rows and took two seats. The C Flight Attendant… told [redacted] [that] since he pre-boarded… and was on non-mission status, he could not sit in the Emergency Exit Rows. [redacted] was very argumentative, and told the C Flt Attendant he was a Federal Air Marshal and was entitled to sit in the Emergency Exit Rows.

AF, Tab 8 at 179-80. It is undisputed that Sterritt did not witness this exchange. Hearing CD, Sterritt Testimony. The appellant conceded in his hearing testimony that he had not known the rule that on Southwest, a preboarded LEO cannot sit in an exit row. Hearing CD. He allowed that when he said, "Are you serious?" or words to that effect, he may have been viewed as abrasive. Hearing CD. But he testified without contradiction in the record that the flight attendant did not answer him, and he said nothing further. I find based on this evidence and after consideration of the full record that less than preponderant record evidence supports a finding that the appellant became "very argumentative, and told the C Flt Attendant he was a Federal Air Marshal and was entitled to sit in the Emergency Exit Rows." This specification is not sustained.

> Specification 4: On October 5, 2017, while on a SWA flight, you argued with a passenger about sitting in the emergency exit row. You eventually moved to the other side of the aircraft and sat in the emergency exit row there.

AF, Tab 8 at 137. Sterritt's complaint stated in relevant part, "our first passenger saw Mr. [redacted] pre-board, and asked him why he was sitting in the Emergency Exit Row… Mr. [redacted] argued with the passenger, but did allow the passenger to sit, there…" AF, Tab 8 at 179-80. It is undisputed that Sterritt did not witness

the incident. At hearing, Sterritt was not able to expand on the facts in the complaint, and did not testify as to what the appellant allegedly said to the passenger. Hearing CD. The appellant testified credibly that he did not argue with a passenger. Hearing CD. For these reasons and after consideration of the record, I find less than preponderant record evidence supports this specification, and it is not sustained.

> Specifications 5 and 6: On October 5, 2017, [d]uring a conversation with the pilot after the flight landed, you became very argumentative with the pilot. [Y] ou told the pilot you are a FAM and you are above the rules, or words to that effect.

AF, Tab 8 at 137. Sterritt's complaint stated in relevant part

> Landing in Chicago, I asked for [redacted] to stop by on his way off the plane. [redacted] came into the cockpit, and I explained to him, very nicely, that a FAM on non-mission status, is considered in the same category as all other armed LEO's and must follow normal armed LEO protocols, which, if you pre board you cannot sit in the Emergency Exit Rows. I also showed [redacted] his signed WN-364 form, stating that "if you pre board, you may not sit in an emergency exit row." He was very argumentative with me, was not receptive to the rules, and threatened to never fly SWA. [redacted], used his FAM badge to pre-board with his [redacted] and as a bullying device to shutdown [sic] my Flt Attendant, and disregard our rules. This would never have left the cockpit if [redacted] would have been receptive to my nice, explanation of our rules. Instead he wanted to explain to me, as a FAM, he is above all this, and continued arguing with me. The Chief Pilot at the NOC was notified and advised me to document the incident. [redacted] lack of integrity by using

> his badge to detour procedures, and shield him from rules, shut down my crew and could have created an unsafe situation.

AF, Tab 8 at 179-80. Sterritt testified in support of specifications 5 and 6 at hearing. He explained that he has respect for law enforcement, and was reticent to file a complaint, but was very disturbed that the appellant's conduct aboard his plane bullied and "shut down" one of his flight attendants, abusing his credential and causing a safety risk. Hearing CD. I find from the content and demeanor of the captain's testimony that he genuinely maintained outrage and incredulity for his experience with the appellant more than a year before his testimony. However, I also find his written statement and hearing testimony reflected that by the time he spoke to the appellant in the cockpit, Sterritt had made a number of conclusions about the appellant's conduct that might only have been assuaged with utter humility and a thorough apology. This is evidenced by Sterritt's otherwise unsupported conclusions that the appellant "used his FAM badge to pre-board," that he was "with his girlfriend," that the badge was again used on the aircraft to "bully" the flight attendant, and that the appellant knew and intended to "disregard" SWA's preboarding rules. AF, Tab 8 at 179-80. Because of these assumptions, I find it likely and understandable that by the time Sterritt confronted the appellant, the appellant's assertion that he did not know the preboarding/exit row rule was irritating. For these reasons, I find Sterritt's account of events, while honest, was less than objective. Based on a review of all record evidence, I find the captain called the appellant to the cockpit already convinced the appellant had belligerently refused the instruction of "his" flight attendant, calmly but severely told the appellant that he had behaved disruptively, and was affronted when the appellant did not immediately acknowledge his mistakes. In light of this, I find less than preponderant evidence that the appellant stated he was above the rules, or words to that effect. I find the captain misunderstood the appellant's responses as argument.

By contrast, I find the appellant's account was internally consistent, consistent with Sterritt's account, and consistent with his prior statements and the record as a whole, and credit it over Sterritt's. The appellant testified he did not read the boilerplate at issue in the signed WN-364 form, stating that "if you preboard, you may not sit in an emergency exit row," and therefore was confused when Sterritt suggested he had violated a rule. *Id*. His assertion was reasonable: it was boilerplate, he does not fly off-mission often, he only received the form at the ticket counter that day, and each airline has a different form containing different rules. Hearing CD. He admitted his exclamation of confusion was susceptible to misinterpretation by the flight attendant. *Id*. Moreover, it is unclear why he would make such a stand: He stood to gain possibly a few inches of leg room, whereas the risks- of everything from missing the Chicago marathon to losing his job-- were great. I find the appellant's testimony and demeanor at hearing did not support a finding that the appellant easily emotes over perceived slights.

For all of these reasons, I believed the appellant to the minor extent that his testimony materially differed from Sterritt's. I find less than preponderant evidence supported these final two specifications. They are not sustained. For all of the reasons discussed above, I find the agency did not meet its burden to sustain charge 4.

Charge 5: Inappropriate Conduct

Porter sustained specifications 1 and 3 of this charge stemming from a carrier complaint from United Airlines concerning an incident on October 16, 2017, which stated

> [The appellant] (seat [redacted] came to the check in counter with all the passport to be checked in, straight away this person demanded that we move the customers next to the FAMS (in economy), so that they could have a free seat next to them.
> The agent didn't know what the procedure was with this so asked the Supervisor, she advise [sic] that it wasn't standard procedure to do this and if it was possible this MIGHT be done at the gate. FAM wasn't happy with this and wanted to speak to a supervisor.
> Supervisor came to explain to the FAM that we would not move the customers. The FAM wanted them to be moved to economy plus, he became calmly aggressive to the agent explaining that this would affect how they work and there are two sides to this coin as in you're not helping us and there might be a time you will need us and we won't be able to help you.
> The FAM continued kept on going about us not moving the customers and wouldn't accept the reason why - he also was quoted in saying " Every time we are going to ask, are going to chip away until it breaks" - we will agree to disagree.
> This conversation went on for r [sic] about 10 minutes and in fact it's becoming quite regular.

AF, Tab 8 at 156. The sustained charges here are as follows

> Specification 1: On October 16, 2017, as a team leader, while checking in with a ticket counter agent, you insisted that the airline move a passenger so that the [redacted]

> Specification 3: On October 16, 2017, as a team leader, you spoke to the airline ticket counter supervisor, insisting that the airline change the FAMs' or the passenger's seats… You stated that there are two sides to this coin. [You] stated that "You're not helping us and there might be a time you will need us and we won't be able to help you," or words to that effect.

AF, Tab 8 at 137. The agency did not produce the author of the United complaint at hearing, and there is no record evidence the agency followed up with the carrier about the complaint. Hearing CD. Thus, the two hearing witnesses to this incident were the appellant and another member of the FAM team from that day. The appellant testified competently and without contradiction in the record that there are assigned seats that are tactically preferred on mission, and there are also tactical reasons FAM team leaders attempt to change seats at check-in, rather than at the gate, as the author of the complaint would prefer. *Id*. Consistent with the carrier complaint's characterization of his demeanor as "calm," the appellant stated he did not raise his voice during the exchange. Hearing CD. His testimony was supported by the other FAM team member, who testified credibly that he was a short distance away during the conversation, and did not hear any disturbance. *Id*. Both accounts were consistent with the appellant's written statement contemporaneous with the event. AF, Tab 8 at 173. Specifically, he wrote he "approached the counter all with necessary paperwork and checked us in for the flight… I discussed with the [check-in] agent if it was possible to move seating… if [redacted] could be moved to [redacted] for tactical reasons…" *Id*. In addition, the appellant recalled the United "supervisor directly complained that FAMs regularly ask for changes too much and was visibly perturbed." *Id*. I find this is consistent with the tone of the carrier complaint, and its note that the request for tactical seat changes was "in fact… becoming quite regular." AF, Tab 8 at 173.

Based on the above and after consideration of the record, I find less than preponderant evidence that the appellant "insisted" that the airline move a passenger so that the FAMs had [redacted] or stated, "You're not helping us and there might be a time you will need us and we won't be able to help you," or words to that effect. This charge is not sustained.

Charge 6: Lack of Candor

The agency can prove its lack of candor charge by showing that the appellant failed to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete. *Ludlum v. Department of Justice*, 278 F.3d 1280 (Fed. Cir. 2002). The charge can be established by showing that the appellant did not respond fully and truthfully to the questions he was asked. *Id*. The elements the agency must prove are (1) that the employee gave incorrect or incomplete information; and (2) that he did so knowingly. *Fargnoli v. Department of Commerce*, 123 M.S.P.R. 330, ¶ 17 (2016); *O'Lague v. Department of Veterans Affairs*, 123 M.S.P.R. 340, ¶ 13 (2016). Unlike falsification, lack of candor does not require "intent to deceive." *Ludlum*, at 1284–85. Nonetheless, lack of candor "necessarily involves an element of deception." *Id*. at 1284; *see Parkinson v. Department of Justice*, 815 F.3d 757, 766 (Fed. Cir. 2016); *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 11 (2012), *overruled in part on other grounds by Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015).

Here, Porter sustained the first two of eight specifications of lack of candor, sustained the charge, and concluded the appellant was *Giglio* impaired by

the misconduct.[12] AF, Tab 8 at 29. Below, I consider whether the agency proved the sustained specifications.

> Specification 1: On October 5, 2017, you used your SIDA Badge to access the sterile area of EWR while off-duty and not on official business. In a memorandum, dated December 8, 2017, you wrote that you presented your LEO flying armed paperwork to the TSA TDC Officer. In fact, the CCTV shows that you only presented your SIDA badge. Your statement lacked candor.

AF, Tab 8 at 137. I find the agency failed to establish this specification by preponderant evidence, for the reasons discussed at some length under charge 2 above. It is illogical to conclude an action did not occur because it cannot be seen on the video clips in evidence; the video footage was brief, intermittent, and cherry-picked. I find the video footage is only useful to show what did occur, and cannot be relied upon to exclude all other facts. Moreover, as Porter acknowledged at hearing, the appellant's written statement is prefaced with an explanation that the events he was asked to recall were unimportant to him, and not especially clear to his memory. Hearing CD. The appellant had the paperwork; he recalled he showed it. Porter testified he did not believe the defense. *Id*. As discussed above, I found the explanation inherently probable.

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[12] Under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), investigative agencies must turn over to prosecutors potential impeachment evidence with respect to the agents involved in the case. *See Prather v. Department of Justice*, 117 M.S.P.R. 137, ¶ 31 n.3 (2011). The prosecutor then exercises his discretion as to whether the impeachment evidence must be turned over to the defense. *See Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 76, ¶ 29 n. 3 (2008), *aff'd*, 314 Fed. Appx. 318 (Fed. Cir. 2009), *overruled on other grounds by Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453 (2011). A "*Giglio* impaired" agent is one against whom there is potential impeachment evidence that would render the agent's testimony of marginal value in a case. *Id.*

Lastly and importantly, the appellant testified without contradiction in the record that he was not asked any question that could be expected to elicit an answer different than the statement he gave. Hearing CD; AF, Tab 8 at 162-63. His statement reflects he "was asked to address my access to the sterile area, my companion's entry into the sterile area, and my companion's carry-on luggage." *Id*. I find his statement credibly addressed those items. I find less than preponderant evidence that the cited statement lacked candor.

> Specification 2: On December 8, 2017, you provided a signed memorandum referring to your October 5, 2017, flight. In that memorandum, you wrote that you did not bring your traveling companion through the exit lane. In fact, the CCTV shows you and your traveling companion entering the security checkpoint through the exit lane. Your statement, therefore, lacked candor.

In his December 8, 2017 statement, the appellant stated he "absolutely did not bring my travel companion through the exit lane and to the security desk with me." AF, Tab 8 at 162. I find the video evidence in the record fully supports his statement. AF, Tab 36. I further find the ostensibly contravening evidence, "the CCTV shows you and your traveling companion entering the security checkpoint through the exit lane," does not contradict the appellant's statement at all. I find the agency statement discussed entrance into the large security checkpoint, and the appellant discussed the entrance into the sterile area, leaving the security checkpoint. In this terminal, the exit lane for the sterile area is also the entrance for LEOs. Hearing CD, Kasnowski, Appellant Testimony. The video collected shows the appellant and his companion standing with the first TSO, greeting Kasnowski, and walking, escorted by Kasnowski, a bit further down the row, at which point the lane splits, and the companion was inserted into the screening line, while the appellant continued alone through the exit lane to the final podium

(desk). Hearing CD, Kasnowski, Appellant Testimony. For these reasons, and after consideration of the record, I find less than preponderant evidence that the appellant brought his companion through the exit lane. Accordingly, I find less than preponderant evidence that he lacked candor when he wrote that he did not. This specification is not sustained.

For all of the reasons above and after careful consideration of the record, I find less than preponderant evidence that the appellant's statements lacked candor. I find there is no evidence of *Giglio* impairment. I observe that the appellant admitted the only misconduct of which he is guilty, the first time he was asked, and consistently thereafter. This charge is not sustained.

For all of the reasons above, I find the agency established by preponderant evidence that appellant misused his SIDA badge (charge 1), but did not prove the remaining four sustained charges. I further find misuse of the SIDA badge while off-duty was inherently linked to his position. Below, I consider whether removal is a reasonable penalty for the sustained charge.

Penalty Considerations and Findings

When, as here, all charges have not been sustained, the Board considers the *Douglas Factors* to determine whether the sustained charges merited the penalty imposed. *Suggs v. Department of Veterans Affairs*, 113 M.S.P.R. 671, ¶¶6-7 (2010) citing *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The Board gives deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that management judgment has been properly exercised. *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 425 (1996). Thus, the Board will modify a penalty only when it finds the agency failed to weigh specific *Douglas* factors or that the penalty the agency selected clearly exceeded the bounds of reasonableness.

Parker v. U.S. Postal Service, 111 M.S.P.R. 510, ¶ 9 (2009). Here, I was impressed at hearing with deciding official Porter's testimony, which demonstrated nuanced understanding of the *Douglas Factors* and other applicable legal standards in this matter. However, as suggested above, I find the agency's pre-decision factual conclusions, upon which he based his decision, were flawed. More specifically, I find here that an incomplete and ineffectual agency fact-finding precipitated Porter's erroneous conclusions that the appellant harangued employees of two different airlines within a short period of time and for his own physical comfort, further that he knowingly violated multiple security procedures to impress his girlfriend, and was repeatedly dishonest in official statements. *See* AF, Tab 8 at 17-18. I agree with the agency that a FAM who meets that description has earned a removal. However, because I found the evidentiary record does not support those conclusions, it is necessary to revisit Porter's penalty conclusion on the single sustained charge.

Porter testified with the benefit of his particularized management expertise that he adjudged misuse of a SIDA badge alone to be serious misconduct, in part because it bears upon flight security. Hearing CD. I find this determination to be of significant weight. I further find Porter's analysis on the factors of leadership responsibility and supervisor trust and confidence remain sound. *See id.*

However, I find it clear from Porter's testimony that he believed the appellant knowingly misused the SIDA. *Id.*; *see also* AF, Tab 8 at 17. Above, I found that was not supported by the record. Further, I find the appellant's ignorance was a potentially mitigating factor, because it does not suggest the appellant will flagrantly violate rules in the future. Porter did not consider this factor. Moreover, I find the sustained charge did not affect stakeholder confidence, a significant concern for Porter. *See id.*; Hearing CD, Porter Testimony. Similarly, Porter found the appellant's alleged lack of candor "significantly aggravating," whereas here I did not sustain the charged lack of candor. *Id.* at 19. Finally, here I agree with Porter that the appellant's sixteen (16)

years of service, including over fifteen (15) years of service with the FAMS, no disciplinary history and above-satisfactory performance are also potentially mitigating. *Id.*

Finally, I consider the consistency of the penalty with similar comparators. *See id*. Porter testified that he reviewed Agency Exhibit 1, a document compiled by the agency's Office of Professional Responsibilities for the purpose of penalty comparison of this appellant with similarly situated FAMs. Hearing CD; *See* AF, Tab 42. The document is separated by charge, with the three SIDA offenses at the top. AF, Tab 42; Hearing CD, Porter Testimony. The highest penalty listed for misuse of a SIDA is 7 days. AF, Tab 42. The agency's table of penalties indicates the appropriate penalty for a first offense of failure to follow a policy or directive is a letter of reprimand to a 14-day suspension, with an annotation that "inadvertent violations may warrant" mitigation to a letter of counselling. AF, Tab 8 at 305.

Based on the above evidence and after reconsideration of all *Douglas Factors,* I find less than preponderant evidence supports a finding that the penalty of removal is reasonable. I find the appellant has potential for rehabilitation. Relying on above evidence and after consideration of the record, I MITIGATE the appellant's removal to a 7-day suspension.

DECISION

The agency's action is MITIGATED to a 7-day suspension.

ORDER

I **ORDER** the agency to cancel the removal and substitute in its place a **seven** day suspension without pay. 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 federal air marshal, SV-1801-I. 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:

Nicole DeCrescenzo
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 **July 8, 2019**, 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 you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, 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

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.