

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

JOSHUA J. GOOD,
Appellant,

DOCKET NUMBER
CH-0752-10-0393-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: October 22, 2010

Elaine L. Fitch, Esquire, Washington, D.C., for the appellant.

Suzette Atkinson, Esquire, Arlington, Virginia, for the agency.

BEFORE

Gregory A. Miksa
Administrative Judge

INITIAL DECISION

INTRODUCTION

By petition filed March 4, 2010, Joshua J. Good appealed from the agency's February 13, 2010, action that indefinitely suspended him from his position as a Federal Air Marshall with Transportation Security Administration (TSA), Federal Air Marshal Service at TSA's Cincinnati, Ohio Field Office based on the suspension of his security clearance. Record at tab 1. On August 27, 2010, the agency issued a "Notice of Review Determination," in which it announced that the appellant's security clearance was being reinstated and on August 31, 2010, the appellant was returned to paid status, but without back pay

for the period of his suspension from duty. *See* Record at tab 20, Exhibits 8 7 10 to Appellant's closing argument.

On September 15, 2010, the appellant withdrew his request for a hearing. *See* Record at tab 16, Appellant's September 15, 2010 submission. In a September 16, 2010, status conference, the parties agreed that the sole issue remaining for adjudication in this matter is the appellant's affirmative defense claim that the agency committed harmful procedural error with respect to the imposition of the suspension of his security clearance and employment and his resulting claim for back pay for the entire period, exceeding six calendar months, of his suspension without pay. The appellant claims the agency failed to provide him timely access, as required by its regulations, to the materials on which it relied to impose the suspension of his security clearance and his suspension from employment, in order to allow him to make a timely and informed response to the clearance suspension and his suspension from employment. *See* Record at tab 17, Order and Summary of Conference.

Because the appellant withdrew his request for a hearing, this decision is based on the parties' written submissions received by the Board before the record on the instant appeal closed. *Id.*, *see also* Record at tabs 18 through 22. For the reasons set forth below, the agency's suspension action is REVERSED.

JURISDICTION

Pursuant to 5 U.S.C. § 7701(a), the Board's jurisdiction is limited to those matters over which it has been granted jurisdiction by statute or regulation. *See Weaver v. Department of Agriculture*, 55 M.S.P.R. 569, 573 (1992). Because the appellant is a TSA employee, the Board's jurisdiction over his appeal is governed by the provisions of the Aviation and Transportation Security Act (ATSA). *See Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 9 (2005). Under the ATSA (at 49 U.S.C. § 114(n)), TSA employees are covered by the personnel management system that is applicable to employees of the Federal

Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent modified by the TSA Administrator. *Id.*, see also *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423 ¶ 9 (2004). The ATSA provides, in pertinent part, as follows:

(n) Personnel management system. The personnel management system established by the Administrator of the [FAA] under section 40122 shall apply to employees of the [TSA], or, *subject to the requirements of such section*, the Under Secretary [for TSA] may make such modifications to the personnel management system with respect to such employees as the Under Secretary considers appropriate, such as adopting aspects of other personnel systems of the Department of Transportation.

49 U.S.C. § 114(n). (Emphasis added). Thus, 49 U.S.C. § 114(n) allows the TSA to establish personnel management policies through modifications of the FAA's personnel management system, but subject to the same statutory limitations imposed on the FAA's ability to establish its own personnel system. See *Schott, et al. v. Department of Homeland Security*, 97 M.S.P.R. 35, ¶¶ 7-9 (2004). In *Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521 (2010), the Board found that chapter 75 of title 5 of the U.S. Code does not apply to TSA employee adverse action cases. Instead, pursuant to 49 U.S.C. § 114(n), TSA Management Directive (MD) 1100.75-3, "Addressing Unacceptable Performance and Conduct Problems," must be applied in adverse action employment cases. *Id.*; see also Record at tab 20, Exhibit 11 to Appellant's closing brief. Similarly, with regard to back pay issues, the provisions of TSA MD 1100.55-10, "Back Pay," apply if the appealable personnel action under review is mitigated or reversed. *Id.*; see also Exhibit 12 to Appellant's closing brief.

Concerning the appellant's harmful procedural error affirmative defense, I note that the Department of Transportation and Related Agencies Appropriations Act of 1996 (1996 Act), Pub. L. No. 104-50, § 347, 1995 U.S.C.C.A.N. 4 (109 Stat.) 436, 460, effective April 1, 1996, gave the FAA the authority to set up its own personnel system, and in so doing eliminated the right of FAA employees to

appeal certain actions to the Board. See *Szajkovics v. Department of Transportation*, 90 M.S.P.R. 643, ¶ 4 n.1 (2001). Four years later, Congress reinstated Board appeal rights for FAA employees as part of the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century (the Ford Act), Pub. L. No. 106-181, 2000 U.S.C.C.A.N. (114 Stat.) 61. The Ford Act specifically provides that an FAA employee “may submit an appeal to the Merit Systems Protection Board . . . from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.” *Id.*, § 307, codified at 49 U.S.C. § 40122(g)(3). As of March 31, 1996, an FAA employee could appeal to the Board from an indefinite suspension. Accordingly, the appellant herein has the right to appeal his February 13, 2010, suspension to the Board. Moreover, neither the FAA, nor TSA, can modify the mandatory provisions of the Ford Act, which expressly preserve the applicability of certain portions of title 5. In this regard section (g) of the Ford Act, entitled “Personnel Management System, provides:

(g) Personnel Management System –

(1) In General -- In consultation with the employees of the Administration and such non-governmental experts in personnel management systems as he may employ, and notwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement, not later than January 1, 1996, a personnel management system for the Administration that addresses the unique demands on the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

(2) Applicability of Title 5 -- The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of – (A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5; (B) sections 3308-3320, relating to veterans' preference; (C) chapter 71, relating to labor-management relations; (D) section 7204, relating to antidiscrimination; (E) chapter 73, relating to suitability, security, and conduct; (F) chapter 81, relating to

compensation for work injury; (G) chapters 83-85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage; and (H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

49 U.S.C. § 40122. (Emphasis added). Pursuant to 5 U.S.C. § 7701(c)(2), the FAA's or TSA's decision to effect an adverse action such as a suspension without pay, may not be sustained if the employee:

(A) shows harmful error in the application of the agency's procedures in arriving at such decision: . . .

5 U.S.C.A. § 7701(c)(2)(A) (West 2007).

Notwithstanding these statutory provisions, the agency herein claims the Board is without jurisdiction to review the appellant's harmful procedural error affirmative defense. *See* Record at tab 18. The agency avers that in 1992 the U.S. Court of Appeals for the Federal Circuit, this Board's reviewing court, ruled that termination of an employee's access to classified information due to the suspension or revocation of his security clearance does not implicate any constitutional due process concerns because no employee has a "property right" to a security clearance or access to classified information. *See Jones v. Department of the Navy*, 978 F.2d 1223, 1224-25 (Fed. Cir. 1992), *affirming Jones v. Department of the Navy*, 48 M.S.P.R. 680, 690 (1990), *modified on remand*, 51 M.S.P.R. 607 (1991). The agency notes that consistent with *Jones*, the Board held in *Satterfield v. Department of the Navy*, 58 M.S.P.R. 152, 156 (1993), that an employee suspended without pay pending an agency's adjudication of the reinstatement of the employee's security clearance was not denied constitutional due process, even if he were not afforded an opportunity to respond to the agency's decision to suspend his access to classified information. The Board noted in *Satterfield* that pursuant to *Department of the Navy v. Egan*, 484 U.S. 518, 530-31, 108 S.Ct. 818, 825-26, 98 L.Ed.2d 918 (1988), it had previously ruled in *Jones* that it lacks authority to review the "merits" of an agency's suspension of an employee's security clearance that forms the basis for

an indefinite suspension. *See Satterfield*, at 155; *Jones*, 48 M.S.P.R. at 690. The agency argues in the instant appeal that the appellant's suspension from duty without pay was based solely on the suspension of his security clearance without reference to the underlying reasons his security clearance was suspended, and that the denial of his access to materials underlying the decision to suspend his clearance cannot form the basis for his harmful procedural error claim. *See Record* at tab 21, p. 3 of Agency's Response to Appellant's Brief in Support of Affirmative Defense.

The agency's argument, however, ignores significant recent decisions of the U.S. Court of Appeals for the Federal Circuit addressing the issue of an employee's procedural entitlements in a security clearance suspension case. Thus, in *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), the court held that the Drug Enforcement Administration did not provide an employee with the information he needed to make a meaningful response to the charges against him when he was indefinitely suspended based on the suspension of his security clearance. *Id.* at 1353. In this regard the court stated:

. . . [I]n a case involving the suspension resulting from the suspension of a security clearance, both the Board's and this court's review is limited. Neither the Board nor this court may review the underlying merits of an agency's decision to suspend a security clearance. *Egan*, 484 U.S. at 529-32, 108 S.Ct. 818; *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed.Cir. 2000); *King v. Alston*, 75 F.3d 657, 661-62 (Fed.Cir. 1996). All the Board and this court may do is "determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 (of the U.S. Code) were followed." *Hesse*, 217 F.3d at 1376. Under section 7513, the employee must receive "written notice . . . stating the specific reasons" for the suspension of his or her security clearance "when that is the reason" for suspending the employee "pending a decision on the employee's security clearance." *Alston*, 75 F.3d at 661. The requirements of section 7513 are met if, as we stated in *Alston*, the notice "provides the employee with an adequate opportunity to make a meaningful reply to the agency" before being suspended. *Id.* In other words, the employee must be given enough

information to enable him or her to make a meaningful response to the agency's proposed suspension of the security clearance. "Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency" before being suspended. *Id.* at 662.

Id. at 1352. The court held that the limited information provided to Mr. Cheney put him in the position of having to guess at the reason for his security clearance suspension. *Id.*

Recognizing that section 7513 of title 5 does not apply to the TSA under the ATSA, I note that the court in *Romero v. Department of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008), held:

Section 7513 (of title 5, U.S. Code) is not the only source of procedural protections for employees subject to adverse actions based on security clearance decisions: agencies must also follow the procedures established by their own regulations. *See Drumheller v. Department of the Army*, 49 F.3d 1566, 1569-73 (Fed. Cir. 1995) (reviewing Department of the Army regulations related to the revocation of security clearances). In the event that an agency does not follow its own regulations, 5 U.S.C. § 7701(c)(2)(A) provides that an adverse action may not be sustained by the Board if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision."

Id. (Emphasis added).

The Board has held that although Chapter 75 is not applicable to the TSA, it will review TSA adverse action cases utilizing Chapter 75 as guidance. Thus, in *Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 4, note *, the Board found no evidence that the Administrator of TSA intended for agency managers to have less discretion in managing cases of unacceptable performance under MD 1100.75-3, than they would have if charges of unacceptable performance of TSA employees were covered under chapter 43 of title 5. Similarly, in *Pratt v. Department of Transportation*, 103 M.S.P.R. 111 (2006), the Board held that even though FAA employees are not covered under 5 U.S.C. § 6323 for purposes of entitlement to military leave, the Board has jurisdiction

under the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C.A. § 4324(b)(1) (West 2002)), to review the merits of a military leave claim by an FAA employee where the employee was covered by an FAA regulation that conferred military leave benefits similar to § 6323.

In the instant case, the appellant relies on the agency's procedures in effecting the suspension of his security clearance and, subsequently, his indefinite suspension from employment in advancing his claim that TSA committed harmful procedural error in effecting his February 13, 2010, suspension from employment. I find under applicable court precedent in *Cheney* and *Romero*, and under applicable Board precedent in *Winlock* and *Pratt*, that the Board has jurisdiction under the ATSA and 5 U.S.C. § 7701(c)(2)(A) to review the appellant's affirmative defense of harmful procedural error.

ANALYSIS AND FINDINGS

The appellant was informed in the Board's September 16, 2010, conference that he carries the burden of proof, by preponderant evidence, to establish the merits of his affirmative defense that the agency committed harmful procedural error in effecting his indefinite suspension. *See* Record at tab 17; *See* 5 C.F.R. § 1201.56(a)(2)(iii) (2010). Under the Board's regulations, preponderant evidence is defined as:

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) (2010). Also under those regulations, "harmful error" is defined as:

Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his rights.

5 C.F.R. § 1201.56(c)(2)(3) (2010).

The facts concerning the appellant's affirmative defense are essentially undisputed. The parties agree that the appellant's security clearance was suspended from February 13, 2010 through August 27, 2010, and that maintenance of the clearance is a requirement of his Federal Air Marshal position. By Notice of Determination to Revoke Access to Classified Information (NOD) dated December 23, 2009, Larry A. Smith, Deputy Associate Director of TSA's Personnel Security Division, notified the appellant that the Personnel Security Division "has made the decision to revoke your access to classified information." Record at tab 20, Appellant Exhibit 2. The NOD further stated:

Effective immediately, the Top Secret security clearance granted to you on July 15, 2003 is hereby suspended. This action is taken in accordance with the provisions of Executive Order 12968 and with the Adjudicative Guidelines developed there under.

The decision in this matter is based on information contained in the Transportation Security Administration (TSA) Office of Inspection (OI) Report of Investigation (ROI) #I090195, dated August 24, 2009. The ROI alleges that you made false statements to OI agents and submitted fraudulent travel vouchers. Between July 25, 2006 and August 15, 2006, you traveled on two international missions to London, England. You submitted two separate travel vouchers wherein you claimed a full day of per diem for London, England for July 27, 2006 and August 10, 2006 when you were actually in New York, NY and Boston, MA, respectively. You overrode the TeServ System to claim the London, England full day per diem for both dates in question.

Id. The notice further stated that the appellant's August 8, 2006, travel voucher contained his claim for per diem based on a full day in London, England on July 27, 2006, when in fact he arrived from London in New York on that date at 2:33 p.m. and spent the evening in New York because his connecting flight to Cincinnati was cancelled. The correspondence noted that the appellant's "fraudulent" claim for London per diem instead of New York per diem for that date resulted in a "\$109.00" overpayment. Similarly, the notice stated that on a second voucher submitted by the appellant on August 18, 2006, the appellant claimed per diem for London on August 10, 2006, when he had, in fact spent the

night in Boston after arriving on a flight from London at 9:09 p.m. The notice advised the appellant that his “fraudulent” claim for London per diem resulted in another “\$109.00” overpayment. *Id.* The NOD further alluded to the fact that the appellant had discussed how to claim per diem for these trips with his fellow Federal Air Marshals and his supervisor before he submitted the subject vouchers for approval, but did not describe what advice he allegedly received during those discussions. The NOD also stated the appellant told OI investigators that his supervisors had approved the subject vouchers, without stating whether this fact was alleged to be true or false. *Id.*

The NOD further generally asserted the appellant “[was] dishonest and displayed lack of candor during the official investigation.” *Id.* The notice described three OI interviews of the appellant, the first on April 22, 2008, the next on May 12, 2009, and the last on May 13, 2009, in which the appellant initially expressed his belief that he thought he missed his connecting flight to Cincinnati because his flight from London to New York had been delayed, not cancelled. The NOD states the appellant later admitted that he may have confused the circumstance of his trip from London to New York in July 2006 with his trip from London to Boston on August 10, 2006. The NOD contained no explanation showing the relevance of the reasons surrounding the appellant’s undisputed inability to obtain connecting flights to Cincinnati on the dates in question to the issue of the appellant’s alleged “fraudulent” submission of the subject vouchers. The notice generally stated that the appellant “provided misleading information to your ATSAC [Assistant Special Agent in Charge] concerning relevant facts of your trips,” without specifying what misleading information he was alleged to have intentionally imparted to the ATSAC. *Id.* (Emphasis added). It further generally stated, “when questioned by agency investigators, you repeatedly provide [sic] false and misleading information,” again without specifying what relevant or material information the appellant intentionally provided that was false or misleading. The NOD continued:

Your conduct as alleged is a violation of Transportation Security Administration Management Directive 1000.6, Temporary Duty Travel Policy and 1100.73.5, Employees Responsibilities and Conduct. All TSA employees are required to exhibit behavior that meets Federal Government and TSA standards for trustworthiness, judgment, and reliability. Your conduct, as it relates to your honesty and truthfulness demonstrates that you do not meet these standards. Therefore, a determination has been made that you are not eligible for continued access to classified information.

Id. (Emphasis added).

Notwithstanding the introduction to the NOD announcing the immediate suspension of the appellant's security clearance, the notice advised the appellant:

This is not a final decision. You have the right to respond to this determination. You may reply to the Chief Security Officer (CSO) in writing; or you may request to appear personally before the CSO, Transportation Security Administration. In either case your response must be received by the CSO within 30 calendar days of receipt of this letter to be considered timely. . . . If you wish to request an extension of time in which to reply, you must submit your written request for an extension addressed to the CSO before the expiration of the 30 calendar days available for reply. . . .

Pursuant to Executive Order 12968, you are advised that you have the following rights in regard to the Notice of Determination. You have the right to be represented by an attorney . . . Additionally, you shall be provided upon request and to the extent the documents would be provided if requested under the Freedom of Information Act . . . or Privacy Act . . . as applicable, any documents, records, and reports upon which a denial revocation is based. The materials relied upon must be requested no later than 15 calendar days following receipt of this Notice of Determination.

Id. (Emphasis added). Based on the undisputed content of this NOD, I find that under the subject Executive Order and the agency's own regulations governing the review of security clearance suspension actions, the appellant was procedurally entitled to the "documents, records, and reports" upon which the suspension of his security clearance was based in order to make an effective response to the Chief Security Officer.

It is further undisputed that on January 5, 2010, the appellant, through counsel, timely requested to make a response to the December 23, 2009 notice and further requested copies of the documents, records, and reports (including the OI Report of Investigation) relied upon to suspend his security clearance. *See* Record at tab 20, Appellant Exhibit #4. It is further undisputed the agency delayed until March 17, 2010 to provide the requested documents, thereby depriving the appellant of information contained therein to make an informed response to the CSO on the decision to suspend his security clearance. *Id.* at Exhibits 5 & 10. No explanation has been advanced by the agency for this delay.

As a result of the delay, however, the appellant also did not have access to the materials underlying the agency's decision to suspend his security decision in time to respond to Assistant Special Agent in Charge (ATSAC) Kurt Hansen's January 4, 2010, "Notice of Proposed Suspension for an Indefinite Period." *See* Record at tab 20, Appellant's Exhibit #3. This notice contained the following single charge and underlying specification:

Charge 1: Suspension of Top Secret Security Clearance

Specification: By written notification, dated December 23, 2009, and effective immediately, you were informed by the Deputy Associate Director of Personnel Security Division (PerSec) that your Top Secret security clearance had been suspended pending further agency review. PerSec suspended your security clearance on information regarding your personal conduct during August 2006 and April through May 2009. Your lack of candor with respect to an Office of Inspection [OI] investigation relative to your submission of improper travel vouchers raises concern regarding your reliability, trustworthiness, and ability to protect classified information.

Record at tab 20, Appellant Exhibit #3.¹ (Emphasis added). The notice further advised the appellant that he and his representative had the right "to review the

¹ The time period "April through May 2009" contained in the next to last sentence of the specification does not include the date of the appellant's interview with the OI in April 2008.

material relied upon to support the reason for the proposed action, and to prepare and present your oral and/or written reply.” *Id.* p. 2. Although the proposal notice advised the appellant that the material relied upon to support the proposal was attached to the notice, which apparently included the December 23, 2009, NOD, it is undisputed that the attachments did not include a copy of the OI Report of Investigation containing records of the appellant’s 2008 and 2009 OI interviews; copies of the August 8, and August 18, 2006 travel vouchers; records showing the content of interviews with other witnesses concerning the appellant’s discussions about preparing the vouchers before he submitted them; or copies of the TSA Management Directives the appellant allegedly violated in submitting the vouchers. It is further undisputed the agency proceeded to issue a Notice of Decision on Proposed Indefinite Suspension on February 8, 2010, over five weeks before the agency furnished the OI Report of Investigation and attached supporting documentation for the appellant’s review on March 17, 2010.

Although 5 U.S.C. § 7513(d) does not apply to TSA, I find that TSA’s MD 1100.75-3, “Addressing Unacceptable Performance and Conduct,” at section I(2)(x) & (xi), specifically requires that such material will be provided to the appellant and his representative upon issuance of the notice of his proposed indefinite suspension. *See* Record at tab 20, Appellant’s Exhibit 13, p. 16. The quoted general specification underlying the agency’s charge in its proposal notice, which generally summarized the contents of the December 23, 2009, NOD, establishes that the basis for suspending the appellant’s security clearance was the agency’s assertion of the appellant’s alleged “lack of candor” regarding his “personal conduct” in August 2006, and in OI interviews. Based on the specific contents of the NOD and Proposal Notice, I find the agency’s assertion the appellant was “*never* charged with lack of candor,” and thus was not entitled to the ROI and supporting documentation pertaining to that allegation, substantially misrepresents the undisputed evidence of record showing the reason

the appellant's security clearance was suspended. *See* Record at tab 21, Agency's reply brief at p. 3. (Emphasis in original).

I find that merely providing the appellant with documentation that his access to classified information was being suspended, without granting him access to the material relied upon to support the reason for the suspension of his clearance, did not provide the appellant with sufficient information to make an informed reply to the agency's Chief Security Officer, or to the agency's designated reply official on his proposed suspension from employment. *See Cheney v. Department of Justice*, 479 F.3d 1343 at 1352. In this regard, the appellant's undisputed October 5, 2010, affidavit establishes that without access to the agency's Report of Investigation and supporting documentation, he did not have the ability to review his August 2006 vouchers containing detailed information pertaining to his allegedly "fraudulent" London per diem claims, or other documentation used to support the agency's otherwise vague "lack-of-candor" claims. *See* Record at tab 20, Appellant's Exhibit #14. Nor did he have access to TSA MD 1000.6, "Temporary Duty Travel Policy," and MD 1100.73.5, "Employees Responsibilities and Conduct," because he was immediately placed on administrative leave upon his receipt of the December 23, 2009, NOD and did not have access to the agency's office where copies of these Directives and policies are maintained. *Id.* He emphatically attests that he did not have copies of the challenged August 2006 vouchers, and he could not remember the details concerning the contents or circumstances surrounding the submission of the August 2006 travel vouchers in his OI interviews in 2008 and 2009 without reviewing copies of the vouchers.

Corroborating his affidavit, the agency agrees the appellant had flown approximately 500 flights following submission of the subject August 2006 vouchers before his first interview with OI investigators on April 22, 2008. *See* Record at tab 20, Appellant Exhibit 10, Notice of Review of Determination, p. 2. The agency further does not dispute the appellant's attestation that two of the

travel policies he was accused of violating were not in effect at the time he submitted the August 2006 vouchers, and that a third had been in effect a few weeks before the vouchers were submitted and he did not otherwise know of the policy. The agency also does not dispute the appellant's attestation that he did not know until he reviewed the Report of Investigation that OI investigators misquoted statements of an agency supervisor during the course of their interviews with him and that they relied on erroneous information concerning the times and destination of the flights associated with the appellant's August 2006 vouchers. The agency also apparently agrees that the appellant incorrectly claimed London per diem on the August 2006 vouchers based, in part, on the fact the appellant had not previously missed connecting flights from a temporary duty destination causing him to incur an additional overnight stay en route to his duty station in Cincinnati. Record at tab 20, Appellant Exhibit 10, p. 2. Finally the agency does not dispute that the appellant reimbursed the agency for the overpayment associated with the two August 2006 vouchers when alerted to his incorrect per diem claims following the results of a November 2007 audit, well before OI investigators initially interviewed him in April 2008. The agency agrees that the erroneous total overpayment resulting from the vouchers was \$129.00, not \$218.00, as asserted in the NOD. *See* Record at tab 20, Appellant Exhibit #10, p. 2.

Based on the foregoing, I find a preponderance of the undisputed evidence shows the agency's action in withholding, until March 17, 2010, the material it relied upon to suspend the appellant's security clearance, and to indefinitely suspend him from employment, violated TSA's MD 1100.75-3, section I(2)(x) & (xi) of its internal regulations. I further find this violation prejudiced the appellant's right to make an informed response to the suspension of his security clearance and proposed suspension from employment before his indefinite suspension was imposed on February 13, 2010. Finally, I find the agency undisputed restoration of the appellant's security clearance and the termination of

his indefinite suspension from employment based on information the appellant was able to submit after he was furnished the withheld material on March 17, 2010, shows the agency likely would have reached a different decision on the imposition of his indefinite suspension in the absence of its regulatory violation. I therefore find the appellant has supported and sustained his affirmative defense that his indefinite suspension was tainted by reason of the agency's harmful procedural error, and the suspension must be REVESED in its entirety.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the suspension, in its entirety, and retroactively restore appellant effective **February 13, 2010**. 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, or its own regulations at TSA MD 1100.55-10, as appropriate, **no later than 60 calendar days after the date this initial decision becomes final**. See Record at tab 20, Appellant Exhibit #12. 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

Although appellant is the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A), for the following reasons. Because the appellant's indefinite suspension has been cancelled by the agency, and his security clearance has been restored, I do not find interim relief appropriate in the circumstances of this case

FOR THE BOARD:

_____/S/_____
 Gregory A. Miksa
 Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **November 26, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own

motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the

Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

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

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

NOTICE TO AGENCY/INTERVENOR

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



DFAS CHECKLIST

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

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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



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.

DECISION CASE CITES LISTING

Joshua J. Good v. Department of Homeland Security

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- Cheney v. Department of Justice, 479 F.3d 1343 (Fed. Cir. 2007).....6
**Cheney v. Department of Justice, 479 F.3d 1343 (Fed. Cir. Mar. 2, 2007)
(No. 06-3124)**
- Connolly v. Department of Homeland Security, 99 M.S.P.R. 422 9 (2005)2
**Connolly v. Department of Homeland Security, 99 M.S.P.R. 422 (Aug. 19,
2005) (No. NY-0752-04-0234-I-1)**
- Drumheller v. Department of the Army, 49 F.3d 1566, 1569-73 (Fed. Cir. 1995).7
**Drumheller v. Department of the Army, 49 F.3d 1566 (Fed.Cir., Mar. 08,
1995) (No. 93-3482)**
- Hesse v. Department of State, 217 F.3d 1372, 1376 (Fed.Cir. 2000)6
**Hesse v. Department of State, 217 F.3d 1372 (Fed. Cir. July 6, 2000)
(No. 99-3387) , cert. denied, 531 U.S. 1154 (Feb. 20, 2001) (No. 00-6555)**
- Jones v. Department of the Navy, 48 M.S.P.R. 680, 690 (1990).....5, 5
**Jones v. Department of the Navy, 48 M.S.P.R. 680, aff'd as modified on
recons., 51 M.S.P.R. 607 (1991), aff'd, 978 F.2d 1223 (Fed. Cir. 1992)**
- King v. Alston, 75 F.3d 657, 661-62 (Fed.Cir. 1996).....6
King v. Alston, 75 F.3d 657 (Fed.Cir. 1996) (No. 95-3356)
- Lara v. Department of Homeland Security, 97 M.S.P.R. 423 ¶ 9 (2004).....3
**Lara v. Department of Homeland Security, 97 M.S.P.R. 423 (Sept. 29, 2004)
(No. SF-3443-04-0054-I-1)**
- Navy v. Egan, 484 U.S. 518, 530-31, 108 S.Ct. 818, 825-26, 98 L.Ed.2d 918
(1988).....5
**Navy v. Egan, 484 U.S. 518, 530-31, 108 S.Ct. 818, 825-26, 98 L.Ed.2d 918
(1988)**
- Pratt v. Department of Transportation, 103 M.S.P.R. 111 (2006)7
**Pratt v. Department of Transportation, 103 M.S.P.R. 111, 2006 MSPB 244
(Aug. 11, 2006) (No. DA-3443-05-0283-I-1)**
- Romero v. Department of Defense, 527 F.3d 1324, 1328 (Fed. Cir. 2008)7

**Romero v. Department of Defense, 527 F.3d 1324 (Fed. Cir. June 2, 2008)
(No. 2007-3322)**

Satterfield v. Department of the Navy, 58 M.S.P.R. 152, 156 (1993)5
**Satterfield v. Department of the Navy, 58 M.S.P.R. 152 (June 22, 1993)
(No. PH07529110425)**

Szajkovics v. Department of Transportation, 90 M.S.P.R. 643, ¶ 4 n.1 (2001)4
**Szajkovics v. Department of Transportation, 90 M.S.P.R. 643 (Dec. 21, 2001)
(No. CH-0752-01-0046-I-1)**

Weaver v. Department of Agriculture, 55 M.S.P.R. 569, 573 (1992).....2
**Weaver v. Department of Agriculture, 55 M.S.P.R. 569, 576 (1992)
(No. DE0752910408I1) (the proposition (stated in Weaver) that the Board
will automatically dismiss an agency's PFR as moot where it has exceeded the
requirements of the interim relief order, even if the agency did not intend
such a result, was overruled by Moscato v. Department of Education, 72
M.S.P.R. 266, 270-71 (1996); Moscato did not expressly overrule Weaver,
however)**

Winlock v. Department of Homeland Security, 110 M.S.P.R. 521 (2010).....3
**Winlock v. Department of Homeland Security, 110 M.S.P.R. 521, 2009 MSPB
23 (March 06, 2009) (DA 0752-08-0261-I-1)**

**THIS CITE CHECK CONDUCTED BY _____ ON October
21, 2010.**