

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 85

Docket No. DA-0752-07-0177-I-1

**Gilberto M. Rodriguez,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

April 10, 2008

Leslie Deak, Esquire, Austin, Texas, for the appellant.

Frances C. Silva, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the July 6, 2007 initial decision that sustained his removal for falsifying an official government document and making false statements. For the reasons set forth below, we GRANT the appellant's petition for review, REVERSE the initial decision, and DO NOT SUSTAIN the appellant's removal.

BACKGROUND

¶2 On September 19, 2006, the agency proposed the appellant's removal from his senior criminal investigator position in the Austin, Texas office of the agency's Immigration and Customs Enforcement (ICE) branch on charges of falsifying an official government document and making false statements. Initial

Appeal File (IAF), Tab 6, Subtab 4f. The agency's first charge alleged that on August 2, 2005, while processing Miguel Rangel-Martinez (Rangel), an undocumented alien in the agency's custody who had been deported on an earlier occasion, the appellant falsified agency form I-213 by indicating that Assistant United States Attorney (AUSA) Dan Mills had declined Rangel's prosecution.¹ *Id.* The second charge alleged that the appellant made two false statements that Mills had declined Rangel's prosecution, one on August 2, 2005, to his acting supervisor, Kevin Duberstein, and one on February 15, 2006, to Brian Collentine, an investigator for ICE's Office of Professional Responsibility. *Id.*

¶3 The appellant submitted a written reply to the deciding official, Alonzo Pena, in which the appellant contrasted his "clear denial of the charges in his affidavit" with Duberstein's February 2, 2006 affidavit recounting the events of August 2 and 3, 2005, and Collentine's April 20, 2006 sworn statement recounting his January 30, 2006 interview of Mills. IAF, Tab 6, Subtab 4d at 29. On January 4, 2007, Pena issued his decision sustaining the agency's charges against the appellant and removing him effective January 6, 2007. *Id.*, Subtab 4c. The appellant then filed a timely Board appeal in which he argued, in pertinent part, that he did not commit the charged misconduct and that the action was motivated by sex discrimination. IAF, Tab 1. The agency responded that the appellant's incorrect statement that Mills had declined Rangel's prosecution, coupled with his lack of a credible explanation for his error, constituted circumstantial evidence that the appellant knowingly supplied incorrect information with the intent of deceiving or misleading agency officials when he amended an official document, the I-213 form, to indicate that Mills affirmatively

¹ The agency alleged that, because its law enforcement database indicated that Rangel was previously deported following a felony conviction for drug possession, he was subject to prosecution under 8 U.S.C. § 1326 for his re-entry into the United States. IAF, Tab 6, Subtab 1 at 2-3. For this reason, the agency contended that it considered Rangel an "aggravated felon," which, according to agency policy, required the appellant to give the U.S. Attorney's office the option to either prosecute or decline to prosecute Rangel for his re-entry into the United States before the agency deported him. *Id.*

declined Rangel's prosecution, and when he made false statements to Duberstein and Collentine during the agency's investigation of the episode. *Id.*, Tab 6, Subtab 1 at 7-8.

¶4 At a June 12, 2007 hearing, the appellant testified that he called the AUSA duty phone number on August 2, 2005, in order to get a declination or approval for Rangel's prosecution, and left a voicemail message with his name and the main ICE number on the duty cell phone, along with a request for the AUSA on duty to call him back. Hearing Transcript (HT) at 238-39. The appellant explained that, at the time he placed the call, he did not know which of the seven or eight AUSA's in the office was on duty that day. HT at 239. The appellant further testified that he received a return call later that day and that he explained Rangel's criminal history to the AUSA who returned his call, who then declined Rangel's prosecution. HT at 240-41. The appellant then assembled a temporary alien file on Rangel and handed it to Duberstein, who questioned why Rangel was not being prosecuted. HT at 245. Duberstein testified that the declination of Rangel's prosecution surprised him, and he therefore called the U.S Attorney's office to speak to the AUSA on duty about it. Duberstein further testified that the receptionist indicated that Mills was the duty AUSA that day, but that Mills was unavailable because he was at the hospital with his wife, and that the office chief, Tony Brown, was covering for Mills; however, the receptionist noted that, if the call was not an emergency, Brown had asked that the caller wait until the next day to speak with Mills. HT at 57-58.

¶5 With the knowledge that Mills was unavailable that day, Duberstein claimed that he then asked the appellant "who the [AUSA] was that [the appellant] spoke with, and [the appellant] indicated that it was Dan Mills." HT at 58. Duberstein then asked the appellant "to modify the narratives on Rangel's I-213 to reflect the name of the [AUSA] he spoke with." *Id.* The appellant testified that, because he was not in the habit of noting which AUSA had declined a particular prosecution on the I-213 form, he did not pay particular attention to which AUSA had returned his call and declined Rangel's prosecution. HT at

246-48. In order to fulfill Duberstein's demand that he write the AUSA's name on the I-213, the appellant testified that he looked at the AUSA duty roster posted on the wall in the ICE agents' office, noted that Mills was the duty AUSA that day, and put Mills name on the form. The appellant further testified that, if Duberstein had told him that Mills was out of the office at the time that the appellant identified Mills to Duberstein as the declining AUSA and wrote Mills name on the I-213 form, the appellant would have contacted the U.S. Attorney's office to find out which AUSA had returned his call and declined Rangel's prosecution. HT at 249-50.

¶6 Mills testified that, because his wife had surgery on August 2, 2005, he was out of the office on sick leave and did not receive any duty phone calls or voicemails that day. HT at 13-14. Mills added that Brown was going to take duty phone calls for him on August 2, 2005, if there were any, but Mills did not know if Brown had done so, or if Brown had assigned someone else to cover the duty calls. HT at 14, 20. On direct examination, Mills asserted that he did not speak with the appellant on August 2, 2005, but that he may have retrieved a voicemail message from the appellant when Mills came back to work on August 3, 2005, and further testified, "I believe I called [the appellant] back and – probably in reference to the – the message [the appellant] may have left." HT at 15. Mills asserted without hesitation, however, that he did not decline prosecution of an alien on August 2, 2005, as he was not in the office that day, nor did he do so in his August 3, 2005 conversation with the appellant, because the appellant did not ask Mills to do so, but instead had reported to Mills that the situation about which he had called on August 2nd was resolved by deportation. HT at 15-16. Ultimately, the appellant testified that, although he had gradually come to believe that he had mistakenly identified Mills as the AUSA who declined Rangel's prosecution, the appellant thought the I-213 form was accurate when he filled it out at Duberstein's request on August 2, 2005. HT at 248-50.

¶7 The administrative judge (AJ) found that the record established by preponderant evidence that Mills did not decline Rangel's prosecution and further

determined that the appellant's assertion that he mistakenly identified Mills as the declining AUSA was not plausible. IAF, Tab 29, Initial Decision (ID) at 11. The AJ also found that the record established that the appellant's false statements to Duberstein and Collentine evidenced "at best, a reckless disregard for the truth." ID at 11-13. Accordingly, the AJ sustained all of the agency's charges and affirmed the appellant's removal, finding that the penalty was both reasonable and promoted the efficiency of the service. ID at 16. Finally, the AJ found that the appellant failed to sustain his burden of proof on his affirmative defenses of sex discrimination and harmful error. ID at 14-15.

¶8 The appellant filed a timely petition for review (PFR), arguing, in pertinent part, that the agency failed to establish by a preponderance of the evidence that the appellant named Mills as the AUSA who declined Rangel's prosecution with the intent to deceive, defraud, or mislead the agency. Petition for Review File (PFRF), Tab 5 at 3. The agency responded that the appellant's PFR fails to meet the Board's criteria for review and represents mere disagreement with the AJ's findings of fact. PFRF, Tab 7 at 1-2.

ANALYSIS

¶9 To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). Whether the element of intent has been proven must be resolved from the totality of the circumstances. *See Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). Because there is seldom direct evidence on the issue, circumstantial evidence must generally be relied upon to establish the element of intent. *Naekel*, 782 F.2d at 978. A conclusion that an appellant has provided incorrect information cannot control the question of intent, however, for purposes of adjudicating a falsification charge. *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 16 (2001).

¶10 The appellant does not dispute the fact that the agency established that Mills did not decline Rangel's prosecution and, thus, established that the

appellant incorrectly identified Mills as the declining AUSA on Rangel's I-213 form, as well as during the appellant's discussions with Mills and Collentine. Throughout the proceedings before both the agency and the Board, however, the appellant has maintained that he received a return call from the U.S. Attorney's office and that the person with whom he spoke, even if it wasn't Mills, informed the appellant that the office declined to prosecute Rangel. If an AUSA other than Mills returned the appellant's call and declined to prosecute Rangel, the agency has offered no evidence that would justify a finding that the appellant misidentified Mills as the AUSA with the intent to defraud or deceive the agency; if the appellant received such a call, the appellant's misidentification of the caller would appear to be nothing more than an honest mistake.

¶11 Although the appellant's failure to confirm which AUSA declined to prosecute Rangel after Duberstein instructed the appellant to identify the declining AUSA on Rangel's I-213 form might support a charge for which intent is not an element, such as improper conduct or failure to follow Duberstein's instructions, *see, e.g., Fernandez v. Department of Agriculture*, 95 M.S.P.R. 63, ¶ 7 (2003) (a general charge such as "improper conduct" does not contain a specific intent element); *Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, ¶ 5 (1999) (a charge of failure to obey orders does not require proof of intent), the Board is required to review the agency's decision in an adverse action solely on the grounds invoked by the agency: the Board may not substitute what it considers to be a more adequate or proper basis, *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989). Thus, even if the agency established that the appellant acted negligently in failing to confirm which AUSA declined to prosecute Rangel, such evidence would be insufficient to sustain the agency's charges of falsifying an official government document and making false statements. *See George v. Department of the Army*, 104 M.S.P.R. 596, ¶ 8 (2007) (where an agency used the word "false," rather than the words "incorrect" or "negligent," in the label it affixed to its charge, the agency was required to prove that the documents involved were "false," not merely incorrect), *aff'd*, No. 2007-

3166 (Fed. Cir. 2008) (Table); *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 37 (2006) (where an agency charges an appellant in a manner that requires the agency to prove that the appellant's actions were willful and intentional, proof that the appellant's actions were negligent or unintentional will not suffice); *Gager v. Department of Commerce*, 99 M.S.P.R. 216, ¶ 8 (2005) (“[A]n appellant's negligent misstatement – even her recklessly negligent misstatement – without other evidence does not establish that she has given an intentionally false statement.”). Thus, in light of the fact that the agency failed to establish any basis to find that the appellant's misidentification of Mills as the declining AUSA was false if the appellant actually received a return call from another AUSA who declined Rangel's prosecution, we find that the agency was required to prove by preponderant evidence that the appellant did not receive such a return call in order to sustain its charges against the appellant.

¶12 The agency failed to meet its burden. Other than verifying that Mills did not decline Rangel's prosecution, the record is devoid of evidence that would suggest that the agency made any effort to determine whether another AUSA may have spoken with the appellant and declined to prosecute Rangel. The appellant asserted without rebuttal that he called the number assigned to the duty AUSA and left a message regarding Rangel on August 2, 2005. Mills testified that he believed the chief of his office, Tony Brown, was going to take duty calls, or assign another AUSA to take the duty calls, while Mills was out of the office on that date, and Mills conceded that it was possible that Brown or another AUSA received the call from the appellant and called the appellant back. HT at 14, 20. Nevertheless, the record does not indicate that the agency contacted Brown or any of the other AUSA's assigned to the Austin U.S. Attorney's office to determine whether any of the AUSA's who were in the office on August 2, 2005, might have returned the appellant's call.

¶13 Despite the fact that the agency did not present any direct evidence to show that another AUSA did not return the appellant's call on August 2, 2005, the agency offered some evidence that could be viewed as supporting the proposition

that the appellant did not receive such a call. At the hearing, during Mills' direct examination, the agency representative asked Mills what the U.S. Attorney's policy was in August 2005 "regarding aliens who are convicted felons and were issued a prior order of removal and found in the United States illegally." Mills responded, "Well, because they qualified for prosecution as aggravated – an aggravated felony offense, we prosecuted all of those." Mills also testified that he understood that Rangel had a prior drug conviction, noting, "[W]e would have prosecuted him, because they got the enhanced penalty. Those are generally the only ones that we prosecuted." HT at 20. When the appellant's representative questioned Mills regarding the possibility that another AUSA in the office may have declined Rangel's prosecution, Mills responded, "[I]f the AUSA in our office was made aware that an alien had a prior felony conviction, especially for drugs, before they were [] deported, no one in our office would have declined that prosecution. Because that was against office policy, it would have been contrary to office policy." HT at 21. Thus, assuming that Mills' testimony regarding this point is credible and that the evidence is sufficient to establish that Rangel had a prior felony conviction, Mills testimony could be viewed as sufficient to establish that it was more likely than not that the appellant falsely indicated that someone in the AUSA's office declined prosecution of Rangel because such a declination would have been contrary to the policy in effect at the U.S. Attorney's office at that time.

¶14 Nevertheless, even if Mills' testimony is sufficient to establish that no AUSA in the Austin office would have declined prosecution of an alien with a prior felony conviction, the evidence does not establish that Rangel had a prior felony conviction on August 2, 2005. Rangel's criminal history indicates that Rangel was arrested several times, including an arrest on December 20, 2002, for possession of a controlled substance, which the criminal history identifies as a felony of unclassified degree. IAF, Tab 6, Subtab 4G at 222. However, while the criminal history indicates the disposition of various charges against Rangel, including his conviction for burglary of a vehicle, a Class A misdemeanor, *id.* at

216, the criminal history does not indicate that Rangel was ever convicted of a felony. In fact, the only other entry in the criminal history with regard to the charge of possession of a controlled substance is a notation indicating that the prosecutor, identified as “District Attorney’s Office Austin,” changed the charge to “POSS CS PG 2 < 1G,”² but this document does not indicate that Rangel was convicted of this offense; the document includes only the notation, “No Court Data Available.”³ Thus, despite the fact that Rangel’s criminal history indicates that he was arrested and charged with felony possession of a controlled

² The criminal history indicates that the “Citation” for the offense was “HSC 481.116(b),” which presumably refers to subsection 481.116(b) of the State of Texas Health & Safety Code (HSC). Subsection 481.116(a) of the HSC criminalizes possession of a controlled substance in “Penalty Group 2,” and subsection (b) provides, “An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.” Vernon’s Texas Statutes and Codes Annotated, HSC § 481.116(b) (2003). Thus, the criminal history appears to indicate that the District Attorney for Austin, Texas, charged Rangel with felony possession of a penalty group 2 controlled substance in a quantity less than one gram.

³ We note that Rangel’s criminal history appears to indicate that he was incarcerated in the Huntsville, Texas state prison from April 30, 2003, through June 16, 2003, based on the offense for which he was arrested on December 20, 2002. IAF, Tab 6, Subtab 4G at 225-26. His immigration history indicates that he was deported to Mexico on June 17, 2003, the day following his release from state prison. *Id.* at 229. However, the fact that Rangel was incarcerated, apparently based on the offense the District Attorney charged as a state jail felony, does not necessarily mean that Rangel was convicted of a felony. Rather, particularly in light of the fact that Rangel’s criminal history indicates that no court data is available regarding the offense and in light of the fact that the period of Rangel’s confinement lasted less than two months, less than the 180-day statutory minimum required based on a conviction for a state jail felony, it is entirely possible that Rangel may have been incarcerated after pleading guilty to a misdemeanor charge. *Compare* Vernon’s Texas Statutes and Codes Annotated, Penal Code § 12.21 (2003) (“An individual adjudged guilty of a Class A misdemeanor shall be punished by: (1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.”) *with* Penal Code § 12.35(a), (b) (2003) (“(a) Except as provided by subsection (c) [(concerning an individual adjudged guilty of a state jail felony involving the use of a deadly weapon or an individual previously convicted of certain other felonies)], an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days. (b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed \$10,000.”).

substance, Rangel's criminal history does not indicate that he was actually convicted of a felony offense. Accordingly, even if Mills' testimony was sufficient to establish that the U.S. Attorney's office had a policy not to decline prosecution of an alien with a prior felony conviction who reentered the United States after being deported, the agency failed to establish that Rangel fell within the class of aliens to which this policy would have applied. We therefore find Mills' testimony insufficient to establish that the appellant did not receive a return call from someone in the U.S. Attorney's office who indicated that the office declined to prosecute Rangel. Because the agency failed to establish that the appellant did not receive a call from the U.S. Attorney's office declining Rangel's prosecution, we find that the agency failed to establish that the appellant incorrectly identified Mills as the AUSA who declined Rangel's prosecution with the intent to deceive or defraud the agency. Accordingly, we find that the agency did not prove its charges and we DO NOT SUSTAIN the appellant's removal. *See* 5 U.S.C. § 7701(c)(1)(B) (the agency's decision regarding an adverse action will be sustained only if the agency's decision is supported by a preponderance of the evidence).

¶15 With respect to the AJ's findings regarding the appellant's affirmative defense of sex discrimination, however, the appellant's PFR fails to present new and material evidence and fails to establish that the AJ's conclusion that the appellant failed to establish this defense was based on an erroneous interpretation of statute or regulation. Thus, the appellant's PFR fails to establish any reason to overturn the initial decision on that issue, and we affirm the AJ's finding that the appellant did not prove this affirmative defense. *See* 5 C.F.R. § 1201.115(d). Further, in light of our determination that the agency failed to establish its charges against the appellant, it is unnecessary to address the appellant's allegations of harmful error.

ORDER

¶16 We ORDER the agency to CANCEL the removal action and to restore the appellant effective January 6, 2007. *See Kerr v. National Endowment for the*

Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶17 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶18 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶19 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶20 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. The agency is ORDERED 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.

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

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.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



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.