UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

KIMBERLY A. GRAVES,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
CH-0707-16-0180-J-1

DATE: January 29, 2016

James P. Garay Heelan, Washington, D.C., for the appellant.

Julia H. Perkins, Esquire, Washington, D.C., for the appellant.

Demetrious A. Harris, Esquire, Dayton, Ohio, for the agency.

Kristi Glavich, Detroit, Michigan, for the agency.

Thomas Herpin, Esquire, Houston, Texas, for the agency.

BEFORE
Michele Szary Schroeder
Chief Administrative Judge

DECISION

The hearing in this case took place at Chicago, Illinois from January 25 - 27, 2016. A decision was announced at the hearing and it is fully documented in the attached partial hearing transcript. The partial transcript contains the complete decision and related reasoning and legal references. The date on which the bench decision was announced at the hearing was its effective date.

DECISION

The agency's action is REVERSED.

FOR THE BOARD: _____
Michele Szary Schroeder
Chief Administrative Judge

NOTICE TO APPELLANT

Pursuant to 38 U.S.C. § 713(e)(2), this decision is final and not subject to any further appeal.

ATTORNEY FEES

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 decision. 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. Pursuant to 5 C.F.R. § 1210.20(d)(1), the procedures in 5 C.F.R. Part 1201, Subpart F, not those in Part 1210, apply to any such petition.

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.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CENTRAL REGIONAL OFFICE

KIMBERLY A. GRAVES,	)	
Appellant,	)	Docket No.
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DEPARTMENT OF VETERANS AFFAIRS,	)	
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Merit Systems Protection Board

Kluczynski Federal Building

230 South Dearborn Street

Room 3124

Chicago, Illinois 60604

Wednesday,

January 27, 2016

The above-entitled matter came on for closing statements and a bench decision, pursuant to notice, at 9:00 a.m.

BEFORE: MICHELE SZARY SCHROEDER

Chief Administrative Judge

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P R O C E E D I N G S

CHIEF ADMIN. JUDGE MICHELE SZARY SCHROEDER: Good morning, my name is Michele Schroeder. I'm the Administrative Judge assigned to the matter of Kimberly Graves v. Department of Veterans Affairs. It is approximately 11:15 Central Time. As I indicated to the parties at the close of the testimony yesterday, I am issuing a bench decision in this matter. A few notes as to the decision I will be issuing.

Unless otherwise indicated all of my references to testimony refer to the testimony given in this proceeding on January 25th and 26th. I will only provide case citations during my bench decision. Any citations to the record will be entered in the transcript once it is prepared. Similarly to the extent that I use acronyms in my oral decision, the actual words will be entered in the transcript as well as, there was an agreed-upon list filed by the parties. So the acronyms and the actual words will be either from the record or from that filing. Furthermore, the Appellant, you will be referred to as either the Appellant or Ms. Graves throughout the decision. And the Agency will either be the Agency or the VA.

On January 19th, 2016, Kimberly Graves filed a timely appeal challenging the Deputy Secretary's decision to transfer her from a Senior Executive Service (SES) position to a General Schedule position. (Appeal Record (AR), Tab 1). The

Board has jurisdiction over Ms. Graves' appeal pursuant to 38 U.S.C. § 713(e) and 5 U.S.C. § 7701(b)(1). Ms. Graves requested a hearing and that hearing was held in Chicago on January 25th and 26th. Closing statements were taken on January 27th.

The statute imposes severe time restrictions and we also had to deal with the aftermath of a historic storm on the east coast. Both of these factors impacted the amount of time I was able to allow for testimony and the availability of the witnesses, also the method that we were able to use to examine the witnesses. I did, however, take approximately 10 hours of testimony in this matter.

Before I give my decision I want to mention that the time constraints under which this appeal had to be processed made for an incredibly difficult two-and-a-half weeks for everyone involved. Looking at the record in this matter, in excess of approximately 3,800 pages, it is more than obvious that since the day this appeal was file, the parties have been working almost 24/7. That being said, I would like to commend counsel on both sides for the diligence and civility they exhibited during the processing of this appeal.

For the reasons that follow, I conclude (1) the Agency proved its charge by preponderant evidence creating a rebuttable presumption that the transfer penalty was reasonable; (2) that the Appellant failed to prove her affirmative defenses by preponderant evidence; and (3) that the Appellant rebutted the presumption and established that the penalty was unreasonable under the circumstances of this case. Accordingly,

the Agency's action is reversed.

BACKGROUND AND PROCEDURAL HISTORY

At the time this action was taken, Ms. Graves was employed as the Director of the Veteran Affairs Regional Office in St. Paul, Minnesota. She was appointed to this position on October 19, 2014. Prior to becoming Director of the St. Paul office, Ms. Graves served as the Eastern Area Director of the Veterans Benefits Administration (VBA) in Washington, D.C. since 2010. Both of these positions were Senior Executive Service positions. Ms. Graves was appointed to the Senior Executive Service in 2005. (AR, Tab 30).

On October 29th, 2015 Deputy Secretary Sloan Gibson issued Ms. Graves a Pending Action Memorandum notifying her he intended to transfer her pursuant to the Veterans' Access, Choice and Accountability Act of 2014. (This Act is codified at 38 U.S.C. § 713) from the Senior Executive Service to a General Schedule position at the
GS-15, Step 1 level for the charge of Failure to Exercise Sound Judgment. Deputy Secretary Gibson sustained the Pending Action Memorandum (PAM) against Ms. Graves on November 20th, 2015 and Ms. Graves filed an appeal with the Board on November 27th, 2015. After the Agency filed a Motion to Dismiss based on its recision of the action and Ms. Graves stipulated to that dismissal, I dismissed her first appeal on December 3rd, 2015. (See, Kimberly Graves. Department of Veterans Affairs, CH-0707-16-0112-J-1.)

On December 3rd, 2015, Deputy Secretary Gibson

issued Ms. Graves a second Pending Action Memorandum using the same charging language as the initial action notifying her that he again planned on transferring her to a GS-15 position. The basis for the transfer from the Senior Executive Service to a General Schedule position was the same as with the first action, one charge of Failure to Exercise Sound Judgment.

The specification accompanying the charge stated: In March, 2014 Antione Waller, Director of the St. Paul Veterans Affairs Regional Office, expressed interest in being reassigned to the east coast. In May, 2014 you participated in facilitating Mr. Waller's relocation to the Baltimore Regional Office at government expense by signing official government documents as the recommending official for Mr. Waller's reassignment and relocation benefits. You expressed interest in the St. Paul vacancy Mr. Waller's reassignment created as early as July 18, 2014, before Mr. Waller's relocation was effective. On or about October 19, 2014 you were reassigned to the position previously occupied by Mr. Waller. You received relocation benefits pursuant to this reassignment.

By failing to fully extricate yourself from the activities surrounding Mr. Waller's relocation and then by accepting a reassignment to Mr. Waller's former position and relocation benefits from the Department, you created the appearance that these transactions were approved for reasons other than the best interests of Veterans. I consider this a failure to exercise the sound judgment I expect from a Senior Executive. (AR, Tab 1).

Ms. Graves submitted a written response to the Pending Action Memorandum and on January 6th, 2016 Deputy Secretary sustained the charge set forth in the Pending Action Memorandum. (AR, Tabs 1 and 23). On January 9th, 2016 the Appellant submitted an appeal under 38 U.S.C. § 713(d)(2)(A). (AR, Tab 1).

STIPULATIONS AND ADMISSIONS

Three stipulations were reflected in my summary of the pre-hearing conference dated January 19th, 2016, which are as follows:

1. The relocation benefits the Appellant received did not violate any statute, law, rule or regulation.
2. The pay that the Appellant continued to receive after her transfer to St. Paul did not violate any statute, law, rule or regulation, and it was an amount that was within the Senior Executive Service pay band applicable for her position in St. Paul.
3. The criminal referral regarding the Appellant to the U.S. Attorney's Office was declined.

Pursuant to the parties' agreement these stipulations were placed on the record at the start of the hearing. In addition, the parties filed as part of the record in this appeal a stipulation regarding Jose Riojas, who was the Chief of Staff to Secretary McDonald. And lastly, the Agency's response to Ms. Graves' requests for admissions and amended

requests for admissions were accepted into the record. (AR, Tabs 47, 62, 68 and 74).

STANDARDS AND BURDENS APPLICABLE TO THIS APPEAL

Before I get started, I wish to acknowledge the Appellant's assertion that the statute - 38 U.S.C. § 713 - is unconstitutional. I advised the parties at the prehearing conference that I do not have the authority to declare a statute unconstitutional. (AR, Tab 62). I cite Special Counsel v. Bianchi, 57 M.S.P.R. 627, 633 (1993); but just indicating that for the record, as I promised the Appellant I would, and her counsel.

As to the legal standards of my review and burdens: The Agency must prove its charged misconduct by preponderant evidence. See 5 C.F.R. § 1210.18(a). Preponderant evidence is that 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.
See 5 C.F.R. § 1201.4(q).

If the Agency meets its burden, a rebuttable presumption is created that the decision to transfer the Appellant was warranted and the Appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case. See 5 C.F.R. § 1201.18(a).

If the Appellant rebuts the presumption as to the penalty, the Agency's action must be reversed. Mitigation of

penalty by the Administrative Judge is not authorized. See 5 C.F.R. § 1201.18(d).

As to determining whether the penalty is unreasonable, I note that the Board's well-known penalty decision Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), is not applicable to this appeal under 38 U.S.C. § 713. I will, however, use the Douglas Factors as instructive along with any other bases the parties present for my consideration. I note that some of the Douglas Factors were cited by the Deputy Secretary when he arrived at his decision. The ultimate decision that I make as to the reasonableness of the penalty is being made on the totality of the circumstances in this case.

As to her affirmative defenses, the Appellant must prove them by preponderant evidence pursuant to 5 C.F.R. § 1210.18(b)(3). In addition, in resolving credibility issues, I have considered the seven elements set forth in Hillen v. Department of the Army, 35 M.S.P.R. 453, 458 (1987).

As I advised the parties during the pre-hearing conference and then memorialized in my pre-hearing summary (AR, Tab 62), the fact that evidence is hearsay went to the weight I gave the evidence but not its admissibility. I did not entertain any objections based on hearsay during the hearing because of time constraints, but advised counsel they were free to discuss the weight I should give any hearsay evidence in closing statement. I have applied the factors set out in Borninkhof v. Department of Justice, 5 M.S.P.R. 77, 87 (1981).

Charged conduct typically consists of two parts, a name or a label, that generally characterizes the misconduct and a narrative description of the alleged acts that constitute the misconduct. See Alvarado v. Department of the Air Force, 103 M.S.P.R. 1, ¶14 (2006).

The charged conduct in this case is failure to exercise sound judgment. I find this is a generic charge because the charge itself does not have specific elements of proof. Where an Agency uses general charging language for its label, language which does not describe the misconduct with particularity, one must look to the specification to determine what conduct the Agency is relying on as the basis for its proposed disciplinary action. See LaChance v. Merit Systems Protection Board, 147 F.3d 1367, 1372 (Fed. Cir. 1998); Boltz v. Social Security Administration, 111 M.S.P.R. 568, ¶¶ 16 and 17 (2009).

In examining the charge against Ms. Graves I am required to review the Agency's decision solely on the grounds invoked by the Agency; that is, I may not substitute a more adequate or proper basis. See Minor v. United States Postal Service, 115 M.S.P.R. 307, ¶ 10 (2010).

Based on my review of the charge, using the language chosen by the Agency in crafting its charge, I find Ms. Graves was charged with creating an appearance of impropriety based on the approvals of Antione Waller's reassignment to Baltimore from St. Paul and Ms. Graves subsequently taking Mr.

Waller's position in St. Paul because she failed to fully extricate herself from the activities surrounding Mr. Waller's reassignment.

I reviewed this charge that Ms. Graves had placed against her of Failing to Exercise Sound Judgment by creating an appearance of impropriety under an objective standard, i.e., whether the actions would appear improper to a reasonable person with knowledge of the relevant facts under the circumstances. See Special Counsel v. Nichols, 36 M.S.P.R. 445, 455 (1988); see also 5 C.F.R. § 2635.105(b)(14).

My findings as to the history of the activities surrounding the charge levied against Ms. Graves are as follows:

Before that, let me point out that in the record, which is voluminous as I mentioned previously, are numerous documents that indicate concern over relocation benefits, the reassignment process, and the pay retention policies utilized by the Veterans Administration. For the most part, and unless I specifically note as such, these documents are not relevant to my decision and I did not consider them. The VA not only did not charge Ms. Graves with anything relating to these issues, but it was stipulated by the Agency that Ms. Graves' pay retention and relocation benefits did not violate any law, rule or regulation. (AR, 62; Stipulations entered in hearing record). Whether or not these are valid concerns, they would have to be addressed in an appropriate forum. These issues are simply not before me to decide or to comment on. The task before me is dictated by the law and what the law requires me to

do is limited to three things in this matter: (1) determining if the VA proved its charge by preponderant evidence; (2) determining if Ms. Graves rebutted the presumption that the penalty imposed was reasonable; and (3) whether Ms. Graves sustained her burden as to her affirmative defense; nothing more and nothing less.

Also, as to the Office of Inspector General Report, there was no dispute that the Office of Inspector General Report concluded, and this was well recognized by all the witnesses I believe, that Ms. Graves coerced Mr. Waller into taking the reassignment in Baltimore in order that she could take his position in St. Paul. That, however, is not what the Agency charged in the matter that is before me. And to the extent any evidence from the Office of Inspector General investigation contained bias, inconsistencies or error, I have conducted my own independent review of the related testimony and documents as to how they related to the charge that was filed in this appeal and that is before me. See Jackson v. Veterans Administration, 768 F.2d 1325, 1329 (Fed. Cir. 1985) (holding that the Board has de novo authority to adjudicate facts of a disciplinary action).

FINDINGS

I want to preface when I start the findings, because of how I interpreted the charge that was before me, I have made some findings to put the whole matter in context, but a lot of what I'm finding ultimately will not be relevant in my decision.

In March, 2014 Ms. Graves was the Director of the Eastern Region. Her areas of responsibility included the Regional Office in Baltimore, Maryland. (AR, Tab 30).

In March 2014, Mr. Waller was the Director of the St. Paul, Minnesota Regional Office. In February or March 2014, Mr. Waller contacted Christopher Holly. (AR, Tab 5 at 102, Tab 30, Tab 66 at 191, and Testimony, Holly). At the time in question he was the Deputy Chief of Staff for the Veterans Benefit Administration in Washington and most likely, during that time in question, Mr. Holly was the Acting Director of Human Resources for the Veterans Benefits Administration. Mr. Waller and Mr. Holly were also acquainted with each other as Mr. Waller was Mr. Holly's mentor through a VA Assistant Director Development Program.
Testimony, Holly).

Based on Mr. Holly's testimony I find that the Senior Executive Service position opened in Baltimore when the Director stepped down. When Mr. Waller contacted Mr. Holly in March 2014, Mr. Waller expressed an interest in the Baltimore position. Mr. Holly referred to Mr. Waller as "testing the waters" and Mr. Waller indicated her was going to discuss his interest with Ms. Graves, Beth McCoy and Diana Rubens. During a later conversation with Mr. Holly, Mr. Waller told Mr. Holly that once he put his name in for the Baltimore position he was pressured by Ms. Graves, Ms. McCoy and Ms. Rubens to take the position. (Testimony, Holly).

Mr. Waller initiated the first call to Ms. Graves

to inquire about the Baltimore position. (AR, Tab 22 at 40, 321, 322, Tab 66 at 150, and Testimony, Graves and Waller). Allison Hickey, Retired Brigadier General with the Air Force, who at the time in question was the VA's Under Secretary for Benefits, testified that she does not remember specifically but believes Ms. Rubens first raised the idea with her about Mr. Waller going to Baltimore and General Hickey was thrilled with the idea. (Testimony, Hickey). There is no dispute from the evidence that (1) at the time in question the Baltimore Regional Office was in dire straits; (2) there was congressional pressure to make things right at the Baltimore VA and (3) that Mr. Waller was considered by many in the VA to be a perfect fit for that position. (Testimony of Graves, Hickey, Holly, McCoy, Pummill, Rubens and OIG Testimony at Tab 22 of Graves, Hickey, Pummill).

Once Mr. Waller's name was floated for going to Baltimore, General Hickey testified she wanted to press ahead and make it happen. She did not want anything to derail Mr. Waller coming to Baltimore. After that was decided, General Hickey knows that there were some financial concerns raised by Mr. Waller, mainly because he was in a difficult financial position because of his Minnesota residence. General Hickey said those issues were being addressed by others in the VA, mainly Danny Pummill. (AR, Tab 66 at 181 – 188), Testimony, Hickey, Pummill and Rubens.

Ms. Graves was the recommending official for Mr. Waller's reassignment to Baltimore and General Hickey signed and approved Ms. Graves' recommendation and sent it on to Jose

Riojas, the Secretary of the VA's Chief of Staff, for final approval. (AR, Tab 5 at 21 – 26). After the financial details were reworked and subsequently approved General Hickey sent a letter, which was standard operating procedure, to pertinent members of Congress indicating that Mr. Waller was appointed to the Director position in Baltimore as of July 14, 2014. (AR, Tab 66 at 180).

David Leonard testified he is currently the Director of the Detroit Regional Office. Mr. Leonard has known Ms. Graves since the late 1990's and she was his boss for approximately six years; they are close friends. When Ms. Graves was the Eastern Area Director, Detroit would have been one of her responsibilities and it was common for her to make site visits to the Regional Offices.

In June 2014, she made a site visit to Detroit. On June 4, 2014, Mr. Leonard and Ms. Graves had dinner. Among other things, they discussed her professional situation which Mr. Leonard described as not good. Mr. Leonard said Ms. Graves was having some health issues and felt a lack of respect and pressure in her current position from people above her, mainly General Hickey. During their conversation, Ms. Graves expressed a desire to leave her position as Eastern Area Director. They discussed the Director position for Lincoln, Nebraska, which would be close to her family, but it was unavailable. They discussed St. Paul and Ms. Graves stated that this was the first time she brought it up with anyone.

According to Mr. Leonard, Ms. Graves had interest

in potentially going to St. Paul because she wanted out of her current job. Ms. Graves told Mr. Leonard she was going to discuss it with her ex-husband who was the former Acting Under Secretary for the Veterans Affairs, and she did so later that evening and conveyed her interest to Ms. Rubens the following day. (Testimony, Leonard and Graves).

General Hickey nominated Ms. Graves to be reassigned to the position of Regional Director in St. Paul in September, 2014 and that request was approved by Mr. Riojas in early October, 2014. General Hickey was concerned about Ms. Graves' declining performance in her position as the Eastern Director when she nominated Ms. Graves to be reassigned. General Hickey had no concerns about Ms. Graves being reassigned to St. Paul and it never crossed her mind it would not be appropriate for Ms. Graves to go to St. Paul because Ms. Graves recommended Mr. Waller's reassignment. (Testimony, Hickey).

General Hickey testified that she still believes today that Mr. Waller and Ms. Graves' reassignments were in the best interest of the VA. In addition, General Hickey does not believe that the Office of Inspector General report was fair and that the conclusions and recommendations of the Inspector General report were not an appropriate result of the evidence that the Inspector General considered.

General Hickey resigned her position as Under Secretary in October, 2015 although, according to General Hickey, she was not pressured to resign. She did not like the political attacks that were taking place at the time of her

resignation and she resigned after the Inspector General report in an effort to, in her words, if I have them correctly, "take the oxygen out of the political fight." (Testimony, Hickey).

Based on Mr. Holly's testimony I do find that when a Senior Executive Service transfer is being proposed through a directed reassignment in the Veterans Benefits Administration, the selecting or recommending official puts forward the name. It then goes to the Under Secretary for approval who in turn forwards it for consideration and approval by the Secretary of the VA's Chief of Staff. (Testimony, Holly).

Those being my findings of the activities surrounding the events that are relevant to this appeal and now I will discuss my analysis of the charge.

ANALYSIS

First off, let me comment on the credibility of the witnesses — with the exception of Mr. Waller and Mr. Pummill — I found all of the witnesses to be fully credible. As to Mr. Waller, I will simply state that I found some of his answers inconsistent with documents and other credible testimony, however, based on my analysis of the charge, I do not need to reply on his testimony. I will address any issues with Mr. Pummill's credibility later in my decision.

Let me start by saying that based on my findings, Ms. Graves did not coerce Mr. Waller to take the St. Paul position and Mr. Waller was clearly thought to be a great choice in March, 2014 for the Baltimore position. These conclusions, however, do not assist in deciding the charge brought against

Ms. Graves.

CHARGED CONDUCT

As I indicated earlier, Ms. Graves is charged with creating an appearance of impropriety based on the approvals of Antione Waller's reassignment to Baltimore from St. Paul and subsequently taking Mr. Waller's position in St. Paul because she failed to fully extricate herself from the activities surrounding Mr. Waller's assignment. I must look to the statutory authority under which Deputy Secretary Gibson brought this action in order to evaluate the charge.

The particular language of the statute at issue, Section 713(a)(1) of Title 38, authorizes the removal if the Secretary determines the performance or misconduct of the individual warrants it. This section gives very broad authority to the Secretary of Veterans Affairs in determining what constitutes misconduct for an employee in the Senior Executive Service at that Agency. And it is well established that I must interpret the statute based on its plain language. Hawkins v. United States, 469 F.3d 993, 1000 (Fed. Cir. 1996).

Based on the plain language of the statute it is clear that the VA has significant discretion. And it is not for me to determine what standards of conduct the VA should require its senior managers to meet. Cf. Jackson v. Department of Veterans Affairs, 97 M.S.P.R. 13, ¶ 14 (2004). In other words, the Deputy Secretary of the VA is entitled under the statute to determine what he requires of his core management officials, those in the Senior Executive Service. The VA is clearly

entitled to have Senior Executives who exercise sound judgment and if they fail to do so the VA has the right to remove them from the ranks of its executives.

The charge of giving the appearance of impropriety is a legitimate exercise of an Agency's authority to prescribe certain conduct as a matter of management discretion. See Rayfield v. U.S. Department of Agriculture, 13 M.S.P.R. 4444, 449 (1982) citing Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981).

And it is important to note under Board law, that when charging the appearance of an impropriety, the conduct does not have to occur. The Agency is not required to prove that the Appellant actually engaged in improper conduct to support the charge of an appearance of impropriety. See e.g., Neuman v. U.S. Postal Service, 108 M.S.P.R. 200 (2008); also Suarez v. Department of Housing and Urban Development, 96 M.S.P.R. 213, ¶¶ 31-32 (2004).

Relying on the Agency's choice of language in crafting the charge, by Ms. Graves creating an appearance of impropriety, that is taking the position of the person that she reassigned, she failed to exercise sound judgment. And then the Agency in its charge gave the alternative to not creating the appearance, that the alternative would have been to fully extricate herself from the activities surrounding Mr. Waller's reassignment. Based on the charge, the Board law and the plain language, Ms. Graves was required under the circumstances, even if she had never thought about taking the position in St. Paul

until after Mr. Waller was in Baltimore, to say I should not put my name in for this position because even though I did not do anything wrong, this will look like it was done for reasons other than in the best interest of the Veterans. Or simply, this will look bad. That is what creating the appearance of an impropriety is. Again, let me reiterate, no bad conduct has to occur when the charge is based on an appearance. We've all been involved in situations in life where we know nothing bad occurred but we look at another individual in any forum as a reasonable person and say, but this will look bad.

Even if a lesser standard was applied (and I am mentioning this even though I do not believe a lesser standard would apply, but a lot of the arguments from the parties relied on the June 5th date), that the requirement to fully extricate herself in order to not create an appearance of impropriety did not come to fruition until she knew she was interested in the job, and I find that date to be June 5th, based on both Mr. Leonard and Ms. Graves' testimony. I also point to the fact that when Ms. Graves testified before me she said that she wanted to sleep on it after she had dinner with Mr. Leonard and she then said that's why she didn't text Ms. Rubens until the morning of June 5th. When I looked back at Ms. Graves' testimony before the Inspector General, and although they did not ask her a date, they asked her when she decided she wanted to go to St. Paul and her response was that she woke up one morning and realized she needed to do something different. (AR, Tab 22 at 52). And I found that supported Ms. Graves' statement

that June 5th was when she decided it, after her dinner with Mr. Leonard and seeking Mr. Leonard's advice and counsel as her friend.

So again, to repeat, that even if the requirement had been to fully extricate herself in order not to create an appearance of impropriety, and it would not come to fruition until she knew she was interested in the job on June 5th, the Agency's burden still would have been met. In June and July, prior to Mr. Waller's reassignment being officially approved, Ms. Graves was copied on e-mails and in one instance Ms. Graves even made an inquiry in an e-mail as to how Mr. Waller should go about setting up a meeting with Mr. Pummill to discuss the financial issues. Thus, even under this lesser standard, when Ms. Graves received any contact or e-mails from anyone at the VA after June 5th, the date she decided she was going to consider St. Paul (it was the earliest date the evidence provided me with), Ms. Graves should have gone to Ms. Rubens or General Hickey and asked to be recused from any knowledge or involvement with Mr. Waller's reassignment. In other words, she should have, as the Agency charged, fully, and I'm emphasizing the word fully, extricated herself.

So in summary, by failing to fully extricate herself from the activities surrounding Mr. Waller's reassignment before and after June 5th, coupled with taking the position he used to hold, equaled the appearance of an impropriety. Bottom line, Ms. Graves should have known taking the job would not look good to the public the VA serves.

Ms. Graves indicated in pleadings that it was the culture of the VA that Senior Executive Service employees move around a lot and the record was clear on that. And this suggests the charged conduct against Ms. Graves was not actually misconduct. In other words, how could you create an appearance of misconduct if there was an accepted practice to do this within the VA. That argument has some appeal but in order to be successful Ms. Graves would have had to produce some evidence, not simply that it was the culture of the VA for Senior Executive Service officials to move around. But based on the charging language which was the specification in this case, the evidence would have to be that it was the culture in the VA for a Senior Executive Service official to recommend the reassignment of another employee and then for the recommending official to take the position of the individual he or she recommended be reassigned. And the Appellant did not present any evidence to support that argument.

Accordingly, I conclude under an objective standard, that is, whether the actions would appear improper to a reasonable person with knowledge of the relevant facts under the circumstances, that the Agency has proven that her accepting the position of the individual she recommended be reassigned created the appearance of an impropriety which resulted in her failing to exercise sound judgment. Therefore, based on the evidence I conclude the Agency did prove by preponderant evidence that Ms. Graves failed to exercise sound judgment.

AFFIRMATIVE DEFENSES

Ms. Graves has raised the affirmative defense harmful procedural error and she has also raised a due process violation. Both relate to the allegation that the Agency failed to give full and impartial consideration to the Appellant's reply to the Deputy Secretary's Pending Action Memorandum as well as all the evidence of record before transferring the Appellant. And that the failure to do so was in violation of the Agency's procedures and her due process rights. The parties agree that the Appellant has the burden of proving her affirmative defenses by preponderant evidence. See 5 C.F.R. § 1210.18(b).

Despite the fact that an Agency has proved its charge, an adverse action cannot be sustained if an Appellant establishes an affirmative defense.

I want to note in the record that in addition to the affirmative defenses brought up by Ms. Graves in her filing, one was raised during the testimony yesterday of Deputy Secretary Gibson relating to an executive plan, an assessment plan I believe it may have been called. There was some confusion during the testimony when Deputy Secretary Gibson initially said that he relied on it. It was later determined that this was something that was part of the pre-hearing submissions and it was not something that he had at the time. This was one document that Ms. Graves had signed on as a recommending official that would have been in May of 2014 that

would have identified how Mr. Waller was supposed to approach his position, for lack of a better word. I have determined that that was not a due process violation. I did not think the evidence was clear as to exactly when that became part of the record and when Ms. Graves was given that. However, even if she was not given it, and I do not think Deputy Secretary Gibson relied on it, but even if he had I would find that it was cumulative based on all the other documents that he had received.

So going back now to the affirmative defenses that Ms. Graves raised in her filing before the Board. The essential requirements of due process are prior notice and an opportunity to respond. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985). With a claim of denial of due process, an Appellant must prove that the Agency did not provide her with meaningful opportunity to respond to its proposal notice. See Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1376 (Fed. Cir. 1999). An Appellant must establish that the Agency denied her prior notice of denied her a meaningful opportunity to reply based on the timing, place and circumstance of the procedures used. Homar v. Gilbert, 520 U.S. 924, 930 (1997).

With her claim of harmful error, an Appellant must prove there was a law, rule or regulation applicable to the proceedings, that the agency did not follow it, and that if it had been followed, the Agency was likely to have reach ed a different decision on her transfer. See 5 C.F.R. §§

1201.56(c)(3), 1210.19(c).

In this case Ms. Graves argues that the Agency violated its written procedure requiring that the Secretary or his designee will give full and impartial consideration to the Senior Executive's reply, if any, and all evidence of record.

In order for the opportunity to respond to be meaningful the deciding official must actually consider an employee's timely response to a proposed action. See Hodges v. U.S. Postal Service, 118 M.S.P.R. 591, ¶ 6 (2012). Here, Ms. Graves alleges Deputy Secretary Gibson had already decided to transfer her before she responded to the notice of pending action, thus failing to give her response meaningful consideration and thereby violating her pre-removal due process rights. Specifically, she argues that the Agency was under intense political pressure to take action against her and that Deputy Secretary Gibson bowed to this pressure without regard to her position.

In support of her argument she cites to numerous public comments and other documents from individuals expressing their desire that she be removed from her position. (AR, Tab 66 at 16 – 121). These documents include correspondence between Representative Jeff Miller and Deputy Secretary Gibson discussing the situation. (AR, Tab 24 at 179-182). It is apparent from the record in this matter that the VA was under political pressure to take action against Ms. Graves. Regardless, Deputy Secretary Gibson's testimony removes any doubt in my mind that he yielded to this pressure.

I found his testimony very credible that he took his job as deciding official very seriously, that no Agency official pressured him to reach a particular result and that despite the congressional attention and, for that matter, media attention, he personally felt no pressure to take a particular action against Ms. Graves. And that he does not allow Congress to pressure or influence him in his performance of his official duties as Deputy Secretary.

He further explained in detail his decision-making process and the evidence that he took into account in arriving at his decision when he testified in this matter. And in those materials he testified on a couple of occasions that he considered Ms. Graves' response to the Notice of Pending Action. (Testimony, Gibson).

Weighing the evidence of the political pressure against the evidence of impartiality by deciding official, I find that Ms. Graves has not proven that she was deprived on a meaningful opportunity to respond to the action before her transfer. I do not find sufficient reason or any reason to disbelieve Deputy Secretary Gibson's sworn testimony. Further, Deputy Secretary Gibson, in some of his responses to Congress, only promised an appropriate action would be taken. I have also considered that despite the repeated demands for her removal, Deputy Secretary Gibson used independent judgment when he decided to transfer Ms. Graves rather than remove her, demonstrating that he was not delivering a requested outcome.

For the reasons stated, I conclude that Ms.

Graves did not establish by preponderant evidence that the VA committed a harmful procedural error and I further do not find any due process violation.

PENALTY

The statute under which this action was taken limits the board's authority regarding review of the Agency's penalty. As set forth in 5 C.F.R. § 1210.18(d), proof of the Agency's charge by preponderant evidence, which I have found, creates a presumption that the Deputy Secretary's decision to transfer the Appellant was warranted. An Appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of this case. If that happens then the action is reversed.

Applying the regulation, the penalty of transferring Ms. Graves out of the Senior Executive Service is reasonable unless and until she puts forward sufficient evidence to prove otherwise. See 2 McCormick on Evidence, ¶¶ 342, 344 (7th Ed.)

As mentioned earlier, in determining whether the penalty was unreasonable I must look to the totality of the circumstances, and I have considered the totality of the circumstances. First off, as part of that, Ms. Graves' position as a member of the Senior Executive Service, the specific group of VA federal employees that this statute was created to address.

As noted by the Office of Personnel Management, the Senior Executive Service leads America's workforce. As a

keystone of the Civil Service Report Act of 1978, the Senior Executive Service was established to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality. These leaders possess well-honed executive skills and share a board perspective on government and a public service commitment that is grounded in the Constitution. Members of the Senior Executive Service serve in key positions just below the top presidential appointees. Senior Executive Service members are the major link between these appointees and the rest of the federal workforce. And that, again, was from the Office of Personnel Management's website.

The Board has recognized that the Senior Executive Service is a core of elite federal managers held to a very high standard of conduct. Baracker v. Department of the Interior, 70 M.S.P.R. 594, 602 (1996). And the Board's principle that an individual can be held to a higher standard of conduct based on membership in the Senior Executive Service was recently confirmed as still valid in Prouty v. General Services Administration, 122 M.S.P.R. 117, ¶ 19 (2014).

I find it reasonable for the VA to require meticulous ethical behavior for the member of its Senior Executive Service. As noted by Deputy Secretary Gibson in his January 6th letter, an appearance of impropriety has a potential to cause the American public to lose trust in the VA to make sound business decisions in the best interest of Veterans. (AR,

Tab 1). The Deputy Secretary determined that based on Ms. Graves' years of service, unblemished record and her talents that she should still be working for the VA. (AR, Tab 1). But because of her failure to exercise sound judgment by creating the appearance of the impropriety he no longer wanted her to be a member of the Agency's Senior Executive Service. This, in and of itself, was not unreasonable.

At this point, I could still find, despite Ms. Graves' unblemished record with the Agency and years of dedicated service, that those factors were outweighed by the seriousness of her misconduct, creating the appearance of an impropriety, and its relation to her position as a member of the Senior Executive Service. In fact, had the penalty removal been proposed I would have found that to be an unreasonable penalty under the totality of the circumstances, but a transfer to the highest General Schedule position might not have been unreasonable. Ms. Graves was simply and appropriately being held to a higher standard of conduct because of her membership in the Senior Executive Service. However, my inquiry cannot stop here if I appropriately consider the totality of the circumstances in this case.

Ms. Graves asserts that she received disparate treatment, that is the Agency failed to impose the same discipline on similarly situated members of the Senior Executive Service for similar conduct. That is how I view her disparate treatment allegation. This assertion speaks to the propriety of the penalty, not the viability of the charge itself. Although I

noted earlier that the Douglas Factors are not applicable to a proceeding under 38 U.S.C. § 713, I find them instructive when considering the totality of the circumstances as to whether Ms. Graves has produced significant evidence to rebut the presumption of reasonableness. With that comes the concept of impermissible disparity. In other words, where the Agency treats similarly situated employees differently, a concept I find not only useful but significant in this matter.

Ms. Graves presented the testimony of Danny Pummill. Mr. Pummill is currently acting as the Under Secretary for Benefits and his actual career position (which he held at the time of the events surround this appeal) is Principal Deputy Under Secretary for Benefits, a Senior Executive Service position with the VA.

Mr. Pummill gave sworn testimony to investigators with the Office of Inspector General investigating actions related to this appeal. (AR, Tab 22 at 217). Mr. Pummill's Office of Inspector General testimony is vital to determining whether Ms. Graves' transfer penalty was reasonable. Mr. Pummill's testimony before me was inconsistent at times with his Office of Inspector General testimony. For example, his testimony before me indicated he had very limited involvement in decisions involving transfers of high level VA employees and not much influence, but his Office of Inspector General testimony indicates otherwise. I find his Office of Inspector General testimony to be more credible. It was closer in time to the events in question, was much more specific and he provided

numerous details as to the events related to this appeal. Furthermore, Mr. Pummill testified before me that his Office of Inspector General testimony was true and accurate.

It is clear from numerous parts of his Office of Inspector General testimony that Mr. Pummill was extensively involved in the reassignments of Mr. Waller, Ms. Graves and Mr. McKendrick and Ms. Rubens. I will give some examples from his testimony before the Office of Inspector General, which is found at Tab 22 in the record and his testimony is from pages 217 through page 238.

When asked to describe his involvement in the Veterans Benefits Administration's plan to move Diana Rubens from the Deputy Under Secretary, Mr. Pummill explained that he is the principle Deputy Under Secretary and that he along with the staff would have conversations on all of the vacancies; who should fill them, when we should fill them, what were their qualification, what other issues, how fast we need to get them there, so pretty much as a matter of routine. He stated while he was not the final decision authority he guesses he has a big play in how it works. (AR, Tab 22 at 219).

He further stated he was involved in who was going to be going to Philadelphia for probably about six months. He also discussed the process that is used for any Director move in the Veterans Benefits Administration. (AR, Tab 22 at 220).

He also said Under Secretary Hickey would come to him and say they are getting ready to move some employees and his first question would be to determine what it meant from a

budgetary standpoint and he would check with the fiscal office. He then stated, “And then we would normally have a, a conversation, you know, Secretary to Deputy Secretary, on, you know, what do you think? Should we do this? Is this the right person for the job? Um, I’m usually involved in it all along. I just don't get the formal sign off on it. That’s all.” (AR, Tab 22 at 223).

He reiterated this position later in his testimony by saying that the first thing he looks at is the budget and then he tries to determine if it's the right guy. He again referred to, “we” have these questions. And in this case he's referring to Mr. McKendrick, we had these questions, "like, you know, he's not doing a really good job there and there's some family issues, et cetera." (AR, Tab 22 at 224).

When talking about Mr. Waller's situation and him going to Baltimore, Mr. Pummill explained that Ms. Rubens would have probably come to him at the beginning; it was a combination at the beginning when they realized there were problems in Baltimore and the former Director stepped down. And Mr. Pummill explained that he knew that they had a problem at Baltimore and they had a vacancy, so it was both of those. And he said he would go to Ms. Rubens – to use his quote . . . “so, I would go to Diana and say I need a list of, of potential candidates. . . ". Ms. Rubens would provide the list and they would go down the list and “say, okay, first of all, which, which, ones are willing to move, you know? . . . and later, “are they the right people?” (AR, Tab 22 at 226).

Mr. Pummill also testified that he wanted Ms. Graves removed form her area office because he did not think that she was the right person to be the Area Director. But he later testified that she was “very, very successful” as a Regional Office Director. When he had discussions with others about the fact that she was not doing her job as the Area Director, Mr. Pummill stated, "Well, then find her a damn RO and put her in it. I think that's exactly what I said." (AR, Tab 22 at 226, 227).

The last couple of sections that I referenced actually did not directly relate to his testimony here, but again shows he was inconsistent by saying he was not involved. It also goes to his opinion that Ms. Graves needed to be moved out of the Area Director position for the Eastern Region. Later again talking about his involvement in moving people, he states, “Well, first we’ll go down the list of who, who’s our strongest people.” (AR, Tab 22 at 228).

It is clear from numerous parts of his testimony before the Office of Inspector General that Mr. Pummill was extensively involved in the reassignments of Mr. Waller, Ms. Graves, Mr. McKendrick and Ms. Rubens. In addition, Mr. Pummill was directly in Ms. Graves' chain of command as demonstrated by Ms. Graves' testimony that Mr. Pummill was her second line supervisor. This is further demonstrated by Mr. Pummill being designated as Ms. Graves' reviewing official on her 2013 and 2014 performance reviews. (AR, Tab 66 at 130 – 146).

Based on Mr. Pummill's involvement, as

demonstrated by his IG testimony, the e-mails he was involved in, his own testimony in this matter, and testimony from Ms. Graves, Ms. Rubens and Mr. Waller, there is no question that he had full knowledge in two situations – the situations involving Ms. Graves and Ms. Rubens.

Going back to his testimony before the Office of Inspector General when he is discussing Ms. Graves and Ms. Rubens he said, "The fact that she [Ms. Rubens] went to an RO and Kim [Ms. Graves] went to an RO was like . . . an atomic bomb in VBA, but that was the kind of atomic bomb we needed to shake things up . . . And it took a lot of maneuvering to, to get that position, to get Diana to an RO, to get Kim to an RO . . . " (AR, Tab 22 at 234).

So I may be repeating myself here, but again, based on those statements there is no question that he had full knowledge in Ms. Graves and Ms. Ruben's situations, two situations where a member of the Senior Executive Service had recommended and were involved in the reassignment of other Senior Executive Service members and were taking the positions of the reassigned individuals as well as receiving relocation benefits in conjunction with their reassignments. Not only did Mr. Pummill have full knowledge, but his Inspector General testimony and the admissions of the Agency indicate he not only fully supported the actions but thought they were in the best interest of the VA and Veterans, at the time the actions occurred and now. (AR, Tabs 47 and 74). There was no evidence whatsoever that at any point Mr. Pummill said, time out

everyone, this doesn't look good. Or to be more articulate, Ms. Graves and/or the Agency are creating the appearance of an impropriety because she was the recommending official as to Mr. Waller's reassignment to Baltimore and she is now taking his prior position.

The Agency admitted that it set a target date of December 31, 2015, to consider the appropriate action to take against Mr. Pummill and as of last week admitted it has not issued any disciplinary or adverse action against Mr. Pummill in relation to the events arising from the Office of Inspector General report. (AR, Tab 47 at 123). And although having this knowledge, the Agency proceeded to charge and discipline Ms. Graves.

Deputy Secretary Gibson admitted that he believes Mr. Pummill may have had an opportunity to advise Ms. Graves to extricate herself from the process but stated whether that would go to lacking sound judgment is different. (Testimony, Gibson). I do not see it as different.

If Ms. Graves is going to be disciplined for failure to exercise sound judgment by creating the appearance of impropriety then it would only be reasonable if any other Senior Executive Service members (I do note here that Diane Rubens, also a Senior Executive Service member, was disciplined and her matter is currently pending before the Board) involved in the same situation were disciplined as well. It is especially telling in this situation when the other Senior Executive Service member was Ms. Graves' supervisor and a direct report to

General Hickey. Mr. Pummill failed to exercise sound judgment as much, if not more, because of his higher position, as Ms. Graves did. And I find the failure of Mr. Pummill to be treated in a similar fashion makes Ms. Graves' penalty unreasonable under the circumstances of this case.

Ms. Graves also brought up Beth McCoy and the Corporate Senior Executive Management Office as comparators. I did not find enough similarities to consider Beth McCoy a valid comparator and there was no evidence presented to me as to who specifically in the Corporate Senior Executive Management Office processed the packages, that is, were they the same person and did they have the type of duties and responsibilities where they should have known to say something.

I also consider it relevant in analyzing the totality of the circumstances that Ms. Graves' chain of command completely knew what the circumstances were and never once raised any concerns. And some to this day still say there was no appearance of impropriety created. It was not something Ms. Graves hid from them as far as her involvement with Mr. Waller's reassignment. Ms. Graves' chain of command — Diana Rubens, Danny Pummill, Allison Hickey and Jose Riojas, all of them except I'll note with the possible exception of Mr. Riojas because as noted in his testimony before the Inspector General he indicated his lack of familiarity with the circumstances and the paperwork. So with the possible exception of Mr. Riojas, those other individuals in Ms. Graves' chain of command knew what Ms. Graves' involvement was and not only did they think it

was vitally important to get Mr. Waller to Baltimore, they thought it was important to get Ms. Graves to St. Paul. They not only endorsed the actions when they happened, but they continue to endorse the actions.

I find the sentiment expressed by the Board in Prouty v. General Services Administration, 122 M.S.P.R. 117 (2014), regarding knowledge and acquiescence, helpful in analyzing the totality of the circumstances regarding the reasonableness of the penalty.

Knowledge and acquiescence of Ms. Graves' reassignment to St. Paul by Ms. Graves' chain of command are readily apparent and if no one in her chain said, wait, this will not look right when they approved her reassignment, how can a penalty be imposed against Ms. Graves for not saying that.

I conclude Ms. Graves put forward sufficient evidence to prove the penalty of transferring her out of the Senior Executive Service was unreasonable. Therefore, she rebutted the presumption and established that the penalty was unreasonable under the circumstances of this case.

DECISION

Based on the decision I have announced, the Agency's action is Reversed.

This concludes my decision pursuant to 38 U.S.C. § 713(c)(2). This decision is final and not subject to further appeal. Thank you for your time. Safe travels everyone.

(Whereupon, at 12:12 p.m., the above-entitled bench decision was concluded.)