

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

LINDA W. WEISS,  
Appellant,

DOCKET NUMBER  
NY-0707-16-0149-J-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: February 16, 2016

Linda W. Weiss, Slingerlands, New York, pro se.

Kimberly Negley, Esquire, St. Louis, Missouri, for the agency.

Stephen F. Butera, Esquire, Clarksburg, West Virginia, for the agency.

Xan DeMarinis, Esquire, Washington, D.C., for the agency.

**BEFORE**

Arthur S. Joseph  
Chief Administrative Judge

**FINAL DECISION (WITH ANALYSIS AND FINDINGS)<sup>1</sup>**

**INTRODUCTION**

On January 16, 2016, the appellant,<sup>2</sup> SES-0670, Director, Albany, New York Stratton Veterans Administration Medical Center (AVAMC), filed a timely

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<sup>1</sup> A final decision was issued on February 5, 2016 to comply with the 21-day time limit in 38 U.S.C. § 713(e). The analysis and findings were not included because of a major technical problem associated with the preparation of this decision and an exhaustive review of the voluminous appeal file.

appeal with the Merit Systems Protection Board (the Board) challenging her removal from Federal service, effective January 12, 2016. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. 38 U.S.C. § 713(e)<sup>3</sup>; 5 U.S.C. § 7701(b)(1).

The appellant initially requested a hearing, but later waived her right to have one. *Compare* AF, Tab 1, *with* AF, Tabs 51, 52. Hence, the appeal was decided on the written record after each party presented their arguments and evidence and submitted rebuttal arguments. For the reasons stated below, the agency's action is REVERSED.

### Background

The appellant has held a number of positions with the agency since August 27, 1973. *See* AF, Tab 11 at 8-14. Since September 12, 2010, and at all times relevant to this appeal, she served as Director of AVAMC, which was a position in the Senior Executive Service (SES). *See* AF, Tab 1 at 8; Tab 11 at 15. In her role as Director of AVAMC, she had “overall responsibility for planning, organizing, directing, coordinating, controlling, reviewing, evaluating, and improving medical, administrative, and supporting operations of a health care facility/system which administers a variety of medical care and treatment.” AF, Tab 57 at 6. Part of her responsibility was to ensure that “issues raised by veterans, their families and/or representatives are adequately addressed” and to “identify and resolv[e] problems which may inhibit accomplishing the facility’s

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<sup>2</sup> Although the appellant was previously represented by an attorney, she submitted a pleading on January 28, 2016, indicating that he no longer represented her due to his medical status. *Compare* Appeal File (AF), Tab 1 at 3, *with* AF, Tab 64 at 3. Therefore, the appellant is now appearing pro se.

<sup>3</sup> 38 U.S.C. § 713 was implemented under Veterans' Access to Care through Choice, Accountability and Transparency Act of 2014, Pub. L. No. 113-146.

patient care mission.” *Id.* at 7-8. The appellant’s position description further provides that:

A large portion of the work involves making decisions and determinations for which there are no written precedents. In the multitude of professional and administrative matters involved, consistent use of sound management judgment is required. In order to operate effectively in this position, the Director must demonstrate health system administration skills and maturity of judgment reflecting significant management experience at a highly responsible level in a comparable health environment. Interpretation of VA regulations and policies must be made in such a manner as to ensure that they contribute to accomplishing the health care facility and VISN (Veteran Integrated Services Network) and that their intent is carried out.

*Id.* at 9.

The instant appeal involves the appellant’s responsibilities as Director of AVAMC as they relate to her actions between March 20 – July 12, 2015, and another AVAMC employee, Marilee Sweet. *See, e.g.*, AF, Tab 48 at 23-25. The agency appointed Ms. Sweet to the position of Nursing Assistant in June 2009. AF, Tab 27 at 92. In December 2011, Associate Director for Patient and Nursing Services (ADPNS) Deborah Spath proposed Ms. Sweet’s removal based upon a number of charges that included physical and verbal patient abuse. *Id.* at 72-74. The appellant was the deciding official in that matter. *Id.* at 70-71. She sustained some, but not all of the charges and specifications. *Id.* at 70. Most notably, the appellant did not sustain the charge of physical patient abuse, which stemmed from an allegation that she had roughly shoved food in the mouth of a patient, but she did sustain the verbal patient abuse charge. *Id.* at 70, 73. Rather than remove Ms. Sweet, the appellant suspended her for one day. *Id.* at 67, 68, 70. A subsequent performance appraisal, covering the period from October 2012 through September 2013, rated Ms. Sweet as “Excellent.” *Id.* at 44-45.

In July 2014, a patient alleged that Ms. Sweet had been rough when administering care, she hit him, and she threatened him. AF, Tab 25 at 11, 21;

*but see* AF at 11-20 (responses from Ms. Sweet and a nurse that witnessed the encounter, both indicating that the patient had been aggressive and Ms. Sweet merely protected herself), 24 (report from another nurse, describing the patient as having a history of aggressive behavior). As a result, the agency temporarily discontinued Ms. Sweet's contact with patients, detailing her to kitchen duties. *See* AF, Tab 25 at 11, Tab 68 at 4. Around that time, several prior complaints that implicated Ms. Sweet came to light. *See, e.g.*, AF, Tab 25 at 7-8 (complaint), 11 (complaint), 27 (complaint), 29 (complaint). For example, two generally alleged that Ms. Sweet had been rude and rough when administering care and another complained that she called him a jerk when he sought her help. AF, Tab 25 at 7-8; Tab 26 at 22-23.

After the July 2014 allegation of physical abuse, the agency compiled information about the complaints involving Ms. Sweet. *See* AF, Tab 20 at 19-24. In the days that followed, the appellant convened an Administrative Investigation Board (AIB). *See id.* at 10. She requested that the AIB investigate allegations of patient abuse, reports of charge nurses not following patient care standards, and claims of unit members failing to follow hospital policy. *Id.* The AIB issued its findings in September 2014.<sup>4</sup> AF, Tab 19 at 9-17. Among other things, the AIB concluded, "In the allegations of patient abuse, it appears abuse has occurred on [Ms. Sweet's unit] in the forms of physical, emotional, verbal,

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<sup>4</sup> Consistent with agency policy, the AIB defined patient abuse as including "physical, psychological, emotional, financial, sexual, or verbal abuse." AF, Tab 19 at 10. It further indicated that "patient abuse may also include such actions as intentional omission of care; willful violation of a patient's privacy; willful physical injury; intimidation; verbal harassment or ridicule; sexually or financially exploitive relationships; or any action or behavior that conflicts with a patient's rights." *Id.* Moreover, the AIB report noted that "Intent to abuse is not necessary. The patient's perception of how he/she was treated is an essential component of the determination as to whether abuse occurred." *Id.*

intimidation, psychological, omission of care, violation of patient's rights, and violation of patient's privacy.”<sup>5</sup> *Id.* at 16.

At the conclusion of the AIB, agency's Regional Counsel reviewed its findings. *See* AF, Tab 40 at 5-6. On November 18, 2014, attorney Dafni Kiritsis sent the appellant a memorandum concerning the AIB's legal sufficiency. *Id.* Ms. Kiritsis opined that although there were some inconsistencies in the statements of witnesses, broad themes emerged. *Id.* at 5. Her memorandum closed with the following:

You can accept the [AIB] team's findings and conclusions in whole or in part and/or reach your own findings and conclusions. I recommend that you accept the findings of fact and conclusions and that you heavily consider the additional considerations noted by the [AIB] team. The report is legally sufficient.

*Id.* at 6.

Citing the AIB, ADPNS Spath issued a December 29, 2014 notice, proposing Ms. Sweet's removal based upon charges of patient abuse and inappropriate behavior towards a patient. *Id.* at 30-32. The appellant was again the deciding official in the matter. *Id.* at 16-18. After receiving Ms. Sweet's reply, the appellant did not sustain either charge; Ms. Sweet received no discipline. *Id.* The appellant later explained that, in her opinion, the initial investigation did not reveal adequate evidence to prove the allegations in Ms. Sweet's proposed removal. AF, Tab 44 at 21-28. Among other things, she opined that the report was ambiguous in that it found that there “appear[ed]” to be abuse and there was as much evidence weighing against a finding of abuse as

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<sup>5</sup> The AIB report spoke only in these broad terms; although it cited to evidence gathered as part of the investigation, the AIB report did not provide a detailed analysis. *Id.* at 16.

there was evidence weighing in favor of it.<sup>6</sup> *Id.* at 21, 23-24. Although ADPNS Spath proposed the action, and she indicated that she was not comfortable with returning Ms. Sweet to duty after these most recent allegations, ADPNS Spath echoed many of the appellant's concerns with the AIB conclusions and proving that Ms. Sweet had committed the charged misconduct. *See* AF, Tab 41 at 81-96.

On January 30, 2015, the appellant and ADPNS Spath implemented a plan that detailed Ms. Sweet from her permanent position in the Community Living Center (CLC) to the Intensive Care Unit (ICU) under the supervision of the ICU nurse manager. *E.g.*, AF, Tab 40 at 15; Tab 67 at 51. Her days were essentially split in half – she spent the mornings in the CLC and the afternoons in the ICU. *See* AF, Tab 40 at 15; Tab 67 at 41. While in the CLC, Ms. Sweet underwent "direct observation and close supervision" as well as "extensive re-education" with Lauren Dunn, a Restorative Nurse and instructor for certified nursing assistant programs, as well as Dr. Caitlyn Holley, a Psychologist. AF, Tab 41 at 5, Tab 67 at 41. While in the ICU, Ms. Sweet was assigned to a nurse and prohibited from performing any patient care duties alone. AF, Tab 67 at 46-47.

In a February 4, 2015 letter to Dr. Carolyn M. Clancy, Interim Under Secretary for Health at the agency, an anonymous individual alleged that Ms. Sweet was still engaging in patient care even though she had been found to have committed patient abuse. AF, Tab 40 at 8. An AIB was later empaneled to determine the veracity of the allegations in the letter received by Dr. Clancy. *See, e.g.*, AF, Tab 47 at 15; Tab 67 at 35.

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<sup>6</sup> The appellant also indicated that while the AIB did not result in discipline of Ms. Sweet, it did result in a shakeup among the nurse managers. AF, Tab 44 at 22, 27-28.

Meanwhile, on or about March 13, 2015, Ms. Dunn wrote a report which outlined her conclusions after weeks of observing Ms. Sweet in the CLC. AF, Tab 41 at 5-6. That report included the following:

Overall, her impatience at times, speaking in a sharp loud voice, rough handling while turning a resident, lack of regard for physical privacy, or ignoring residents' behavioral or verbal cues could be interpreted as a lack of empathy or insensitivity. It became apparent however, that she has concrete thinking and may not be able to recognize the importance of behavioral, verbal or environmental cues that can affect the communication, psychosocial interactions and care of residents. By providing task focused care only, she was often unaware of the obvious residents' expressed or non-verbal communications. She missed behaviors that started to escalate or didn't notice how her actions caused the resident's pain or upset. She does not appear to grasp the meaning or significance of these cues which are essential for resident to communicate their choice and needs. This was particularly apparent when she provided care for those having PTSD, dementia or other special care needs. When she is given directions to change her interventions, she persists in doing what is comfortable for her.

Although her current skills would have been sufficient in the past, she lacks the ability to meet the needs of the resident in the current paradigm of Resident Centered Care. Based on Ms. Sweet's pattern of behaviors with providing care to patients and residents without insight or ability to alter/demonstrate to effectively shift her care to meet the total needs of the patient/resident population, I recommend that she not be assigned to direct care for residents or patients, as these behaviors will continue.

*Id.* at 6. Ms. Dunn met with several individuals, including ADPNS Spath, ICU Nurse Manager Margaret Rogers, and the appellant, on March 20, 2015, where she discussed her observations and the draft report. AF, Tab 47 at 45; Tab 54 at 5; Tab 67 at 43, 47. Thereafter, the meeting attendees engaged in some discussion concerning the possibility of reassigning Ms. Sweet to another position (Supply Technician) that did not involve patient care. *E.g.*, AF, Tab 66 at 9, Tab 67 at 47; Tab 68 at 5.

Also on or around March 20, 2015, the appellant and/or ADPNS Spath discussed the aforementioned report and alternative job placement with Ms.

Sweet and her union representative. *See, e.g.*, AF, Tab 60 at 4; Tab 65 at 5; Tab 68 at 5. Ms. Sweet indicated that if the position of Supply Technician were offered, she would accept it. *Id.* Accordingly, the agency sought a position description for the permanent reassignment of Ms. Sweet from Nursing Assistant to Supply Technician. AF, Tab 60 at 5. On June 3, 2015, the agency received that position description, and on July 12, 2015, Ms. Sweet was assigned to the Supply Technician position. *Id.* at 4-5.

On July 31, 2015, the AIB that had been convened due to the anonymous complaint submitted its completed report. AF, Tab 47 at 15-32. The investigators found,

[Appellant] did not act appropriately when she disregarded the conclusions of the AIB she convened and did not sustain any of the charges against Ms. Sweet. [Appellant] had enough evidence to sustain discipline against Ms. Sweet and she had the responsibility as the Medical Center Director to do so.

*Id.* at 16, 27-28. Subsequently, on September 1, 2015, the agency's Office of Accountability and Review recommended "appropriate action" against the appellant "for her failure to hold a subordinate accountable for patient abuse. *Id.* at 42-24.

On November 9, 2015, Deputy Secretary Sloan Gibson issued a notice of pending action, proposing the appellant's removal based upon a single charge of "Failure to Take Timely Action." AF, Tab 48 at 23-25. The accompanying specification alleged, "Despite receiving information in March 2015 indicating that Nursing Assistant Marilee Sweet should not be involved in direct patient care, you failed to assure her removal from direct patient care until July 12, 2015."<sup>7</sup> *Id.* at 24. On November 17, 2015, the appellant filed a written

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<sup>7</sup> The agency's charge is specifically limited to the appellant's purported failure concerning the period between March 2015 and July 12, 2015. *See* AF, Tab 48 at 23-25. Accordingly, this decision will only address that which the agency charged; it will not address any other possible improprieties. *See, e.g.*, AF, Tab 12 at 7 (criticizing the appellant's decision not to sustain the 2014 proposal to remove Ms. Sweet and



response to the proposal notice. *Id.* at 12-21. On January 11, 2016, Deputy Secretary Gibson issued his decision sustaining the charge against the appellant and removing her from service, effective January 12, 2016. *Id.* at 5-6, 8-10. This Board appeal followed.

## ANALYSIS AND FINDINGS

### Legal Standards for SES Removal Cases

The SES is a corps 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 Cir. 1994). They are expected to conform to a higher standard of conduct than other employees. *See Dolezal v. Department of the Army*, 58 M.S.P.R. 64, 71 (1993), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994); *Walcott v. U.S. Postal Service*, 52 M.S.P.R. 277, 284 (1992) (an agency can hold a high-ranking supervisor to a higher standard of conduct for purposes of penalty), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table).

Congress' recent passage of the Veterans' Access, Choice, and Accountability Act of 2014, highlights its very low tolerance for misconduct by members of the SES at the Department of Veterans Affairs (DVA). Pub. L. No. 113-146, Title VII, § 707 (2014). Congress granted the DVA Secretary the ultimate authority to determine when the removal of an SES member at the agency is warranted. More specifically, under 38 U.S.C. § 713(a), the agency "may remove an individual employed in a senior executive position at the Department of Veterans Affairs from their SES position if the Secretary determines the performance or misconduct of the individual warrants such removal." 38 U.S.C. §§ 713 (a). Section (g)(2) defines the term "misconduct" to

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criticizing the appellant for allowing Ms. Sweet's initial transfer to the ICU, which occurred in January 2015); *Minor v. U.S. Postal Service*, 115 M.S.P.R. 307, ¶ 10 (2010) (finding that an administrative judge erred in substituting a different specification for the one invoked by the agency because the Board is required to review an agency's decision on an adverse action solely on the grounds invoked by the agency).

include “[n]eglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.” 38 U.S.C. § 713(g)(2).

If the DVA Secretary exercises the aforementioned authority, 38 U.S.C. §§ 713(d), (e) provides for Board review, at which time the agency must prove the charge(s) by preponderant evidence. *See* 5 C.F.R. § 1210.18(a). The Board is required to review the agency’s decision on a disciplinary action solely on the grounds invoked by the agency; it may not substitute a more adequate or proper basis. *See Minor*, 115 M.S.P.R. 307, ¶ 10.

If the agency proves misconduct by the appellant, its chosen penalty is presumed reasonable and will be upheld unless the appellant adduces preponderant evidence that the agency’s chosen penalty is unreasonable under all the circumstances of the case. *See* 5 C.F.R. §§ 1210.18(a), (d). If the appellant meets that burden, the agency’s action must be reversed. *See* 5 C.F.R. § 1210.18(a), (d).

#### Charge: Failure to Take Timely Action

The gravamen of the charge is that after receiving Ms. Dunn's findings and recommendation on March 20, 2015, that Ms. Sweet be removed from direct care of patients and residents, the appellant failed to ensure that Ms. Sweet was removed from such care until July 12, 2015. *See, e.g.*, AF, Tab 48 at 24. The agency asserted, without objection, that the charge is akin to neglect of duty because the appellant failed to take timely action to ensure that Ms. Sweet was not involved in direct patient care after March 20th. *E.g.*, AF, Tab 14 (January 19, 2016 telephonic conference recording), Tab 67 at 19.

A charge of “neglect of duty” is akin to that of “negligence,” which may be defined as “a failure to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit.” *See, e.g., Thomas v. Department of*

*Transportation*, 110 M.S.P.R. 176, ¶ 9 (2008), *aff'd*, 330 F. App'x. 920 (Fed. Cir. 2009); *see also Mendez v. Department of Treasury*, 88 M.S.P.R. 596, ¶ 26 (2001). To establish the appellant's duty, the agency must prove that the appellant either knew or should have known of that duty. *See Green v. Department of Navy*, 61 M.S.P.R. 626, 630–31 (1994), *aff'd*, 36 F.3d 1116 (Fed. Cir. 1994) (Table).

Here, the appellant acknowledges receiving Ms. Dunn's evaluation and recommendation concerning Ms. Sweet on March 20, 2015. AF, Tab 54 at 5. She also acknowledges that Ms. Sweet remained detailed to the position of Nursing Assistant in the ICU until she was converted to the position of Supply Technician, on July 12, 2015. AF, Tab 60 at 4-5. However, the appellant disputes the agency's allegation that she engaged in any impropriety.

Although the appellant acknowledges receiving Ms. Dunn's evaluation and recommendation concerning Ms. Sweet at the March 20, 2015 meeting, AF, Tab 54 at 5, the record is somewhat unclear as to what information was conveyed at that time. In a statement provided under oath for this appeal, Ms. Dunn detailed seven specific interactions between Ms. Sweet and patients during the observation period that were deemed inappropriate. *See* AF, Tab 67 at 42-43. Examples include leaving a patient exposed while bathing him, speaking in a sharp and loud tone, and failing to recognize a patient's expressed discomfort while moving him. *Id.* at 42-43. According to Ms. Dunn, these incidents were included in her March 2015 report, which she read to the appellant during the March 20, 2015 meeting. *Id.* at 43. However, the actual report, which was made available in this appeal, does not detail or otherwise identify those specific instances. *See* AF, Tab 41 at 5-6; *but see* AF, Tab 44 at 32 (interview with appellant, where she referenced an example of Ms. Sweet reportedly failing to notice a patient's reaction); Tab 67 at 47 (Rogers declaration, indicating that Ms. Dunn discussed "several incidents" where Ms. Sweet failed to recognize patient needs and concerns at the meeting). Nevertheless, Ms. Dunn's report

clearly recommends that Ms. Sweet “not be assigned to direct care for residents or patients.” AF, Tab 41 at 6. In a sworn declaration, Ms. Dunn indicated that this recommendation was not limited to resident care in the CLC, but all direct patient care. AF, Tab 67 at 43. Ms. Dunn explained, “while Ms. Sweet had excellent time management skills and excelled in prioritizing and providing task centered personal care, her impatience at times, speaking in sharp loud voice, rough handling while turning a resident, lack of regard for physical privacy, or ignoring residents’ behavioral or verbal cues could be interpreted as a lack of empathy or insensitivity.” *Id.* According to Ms. Dunn, the appellant commented at the conclusion of the meeting, “some people are just not able to do certain jobs,” or words to that effect.<sup>8</sup> *Id.*

While testifying before the AIB, the appellant seemed to corroborate Ms. Dunn’s claim, indicating that she knew that Ms. Sweet’s “days of direct patient care were over” following the March 20, 2015 meeting. AF, Tab 44 at 35-36. Accordingly, she engaged Ms. Sweet and her union representative, Christine Polnak, about the possibility of reassignment to a non-patient care position, after which, Ms. Sweet agreed. *E.g.*, AF, Tab 60 at 4.

The appellant maintains that she subsequently took appropriate action concerning Ms. Sweet in having her reassigned to the Supply Technician position.

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<sup>8</sup> Assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). The following factors affect the weight to be accorded to hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency’s explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants’ accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; (8) credibility of declarant when he made the statement attributed to him. *Id.* at 87.

*See* AF, Tab 67 at 9-11. For example, during the period in question, the AVAMC sought a position description for the Supply Technician position from VISN. AF, Tab 60 at 4. The position description was classified and returned to AVAMC on June 3, 2015, and Ms. Sweet was reassigned to the position on July 12, 2015. *Id.* at 4-5. Thus, the appellant did take remedial actions after the March 20, 2015 meeting in that she and other necessary parties immediately began to take steps to create a Supply Technician position and get buy-in from Ms. Sweet to accept the reassignment. *See, e.g.*, AF Tab 60 at 4-5; Tab 66 at 9-11; Tab 68 at 5-6.

The appellant also maintains that, when asked during the March 20, 2015 meeting, the nursing professionals expressed no objections about Ms. Sweet remaining in the ICU until the agency could effectuate her permanent reassignment. *See* AF, Tab 66 at 9. Therefore, she argued, at least initially, that her actions were appropriate because Ms. Sweet remained in the ICU and under the prior restrictions limiting her patient interactions following the March 20, 2015 report. *See, e.g.*, AF, Tab 48 at 14-16; Tab 66 at 14. However, the record reflects otherwise.

ICU Nurse Manager Rogers provided a sworn statement indicating that she attended a meeting in late March 2015 with the Human Resources Chief and ADPNS Spath, where it was determined that Ms. Sweet needed to be made whole. AF, Tab 67 at 47. Accordingly, contrary to the appellant's prior assertions, all prior restrictions were lifted and Ms. Sweet performed patient care tasks independently from that point until her reassignment on July 12, 2015. *See id.* Ms. Rogers indicated that she witnessed Ms. Sweet performing tasks independently, tasks that included ambulating with patients, performing finger sticks, drawing blood, and performing EKGs. *Id.* Ms. Rogers' sworn statement also indicates that Ms. Sweet floated to other units for part of that period, though there is no indication whether she independently performed patient care duties while floating. *See id.*

Although there is significant evidence to suggest that the appellant may have mistakenly believed that Ms. Sweet would remain under patient care restrictions during the relevant period, March 20 – July 12, 2015, Ms. Rogers' sworn statement establishes that she was under no such restrictions. *Compare* AF, Tab 44 at 32-33, Tab 54 at 4-5, Tab 66 at 9, *with* AF, Tab 67 at 47. The appellant presented no evidence to refute Ms. Rogers' eyewitness account. Instead, she has responded to Ms. Rogers' statement by alleging that the lifting of Ms. Sweet's restrictions was done without her knowledge or approval. AF, Tab 69 at 8.

Based upon the aforementioned evidence, I find that the agency supported its charge by preponderant evidence. In reaching that finding, I note that during the March 20, 2015 meeting, Ms. Dunn reported her observations of Ms. Sweet's deficiencies and recommended that the appellant remove Ms. Sweet's duties involving direct patient care. The appellant herself recognized there were issues as to whether Ms. Sweet was suitable to perform nursing assistant duties involving direct care. Nevertheless, Ms. Sweet independently performed patient care duties for several more months. Although the appellant may have devoted efforts to reassigning Ms. Sweet, she failed to exercise proper oversight or monitoring in the interim. It appears that she did not make any inquiry to confirm whether Ms. Sweet's duties remained limited while the reassignment action was processed. The record reflects that the appellant had the authority to detail Ms. Sweet away to another position not involving direct patient care duties while the appellant was working on the reassignment action, but she did not exercise that authority. A person of ordinary prudence in the same situation with equal experience as the appellant would person would have exercised appropriate oversight and monitoring of the situation.

I find that, under the circumstances of this case and in light of the mission of the agency, the appellant should have known that Ms. Sweet's status warranted her immediate and continued attention. Indeed, such a failure to exercise

appropriate oversight is inconsistent with the mission of the agency. The appellant is a Member of the SES and Director of AVAMC, who is held to a higher standard of conduct than a subordinate employee, clearly would be expected to have known this.

I find, based on evidence of record, a person of ordinary prudence in the same situation and with equal experience as the appellant would have either removed Ms. Sweet from direct care duties entirely pending her reassignment to the Supply Technician position or exercised appropriate oversight and monitoring to ensure that Ms. Sweet had close supervision and monitoring while performing those duties. *See Thomas*, 110 M.S.P.R. 176, ¶ 9. Such a failure to exercise appropriate oversight is inconsistent with the mission of the agency. Although there are no indications that Ms. Sweet engaged in any impropriety during the relevant period, the risk of inadequate care existed. The agency was not required to wait until there was actual harm before taking such action. *See Boatman v. Department of Justice*, 66 M.S.P.R 58, 59 (1994) (holding that the agency need not wait until harm actually occurs stating “[t]hat more dire consequences did not occur is a matter of chance.”). Consequently, the agency’s charge is SUSTAINED.

#### Affirmative Defenses

An appellant must prove any affirmative defense by preponderant evidence. 5 C.F.R. § 1201.4(q); 5 C.F.R. §§ 1210.18(b)(3), (c). In her appeal form, the appellant alleged that the agency had committed a number of harmful errors, though the arguments appear to be substantive defenses to the charged misconduct, rather than genuine allegations of harmful error. *See AF*, Tab 1 at 6. She next alleged that the agency’s action amounted to retaliation for her efforts to provide a reasonable accommodation for Ms. Sweet. *Id.* She lastly contended that in the weeks following her proposed removal, the appellant disclosed a number of prohibited personnel practices or retaliation and abuse of

authority to the Deputy Secretary, and she filed an equal employment opportunity (EEO) complaint against the Deputy Secretary. *Id.*

Following her appeal, I issued a January 16, 2016 affirmative defenses order. AF, Tab 4. That order provided the legal standards for proving harmful error, whistleblower retaliation, and retaliation for engaging in EEO activity. *Id.* The order directed the appellant to specifically identify the factual bases for her affirmative defenses by January 22, 2016. *Id.* However, the appellant failed to submit a response specifically addressing any affirmative defense she intended to pursue. *See* AF, Tab 52. Moreover, the appellant failed to show good cause for her failure to do so and her closing brief contained no arguments concerning any affirmative defense. *See* AF, Tab 63. Nevertheless, I will attempt to address any affirmative defense that she may have intended to raise and to pursue.

#### *Harmful Error*

Harmful error is an “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. 5 C.F.R. § 1201.4(r). Although the appellant used the term “harmful error” in her initial pleading, the accompanying allegations were more appropriately addressed while determining whether the agency met its burden and whether the penalty is reasonable. *See* AF, Tab 1 at 6 (alleging that the agency committed harmful error by ignoring the types of duties Ms. Sweet performed during the relevant period, and ignoring the fact that there were no complaints involving Ms. Sweet during that period).

The appellant claimed during a recorded telephonic conference on January 26, 2016, that the agency committed harmful error by taking the removal action against her after she had not sustained the charges in the 2014 notice of proposed removal of Ms. Sweet. AF, Tab 61. To prove harmful error, the



appellant must show, by preponderant evidence, that there was a law, rule or regulation applicable to the removal proceedings, the agency did not follow it, and that, if it had been followed, the agency was likely to have reached a different decision on her removal. *See* 5 C.F.R. §§ 1201.4(r), 1201.56(b)(2)(i)(C), 1210.18(c); *Cornelius v. Nutt*, 472 U.S. 648, 657-59 (1985) (harmful error is not defined in 5 U.S.C. § 7701 and the Board defines it by regulation). Here, I find no law, rule, or regulation that would preclude the agency from taking the instant removal action despite her having not sustained the proposed removal of Ms. Sweet. Accordingly, I find that the harmful error claim is without merit.

#### *Retaliation for EEO Activity*

In her initial appeal form, the appellant appeared to suggest that her removal was taken because she filed an informal discrimination complaint after Deputy Secretary Gibson issued the November 9, 2015 notice of pending removal action. AF, Tab 1 at 6. She also suggested that agency retaliated against her for providing an employee with a reasonable accommodation. *Id.* She reportedly filed an informal discrimination complaint on December 23, 2015, and on January 4, 2016, her EEO counselor sent a demand letter to Deputy Secretary Gibson who has not responded it. *Id.*<sup>9</sup> To the extent that she is raising such a

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<sup>9</sup> The appellant also alleged in her initial appeal form that she disclosed prohibited personnel practices of retaliation and abuse of authority and prohibited personnel practices to the Deputy Secretary in her November 17, 2015 response letter to the notice of proposed removal. AF, Tab 1 at 6. However, I am unable to discern any viable whistleblowing claim. The substance of the argument in that initial pleading merely recounted her criticisms of the AIB and its conclusion that she should be held administratively responsible for failing to discipline Ms. Sweet. *Id.* Moreover, she did not show good cause for failure to respond to the January 16, 2016 affirmative defenses order which required to provide information concerning such a claim and offered no explanation for her failure to so. *See* AF, Tab 3. In addition, when I asked the appellant to identify her affirmative defenses during the January 26, 2016 prehearing conference, she did not state that she was asserting whistleblower reprisal. *See* AF,

claim, she did not, however, respond to my January 16, 2016 affirmative defenses order, which required her to submit further information. *See* AF, Tab 3. Moreover, when asked during the telephonic conferences on January 22 and 26, 2016, to assert all her affirmatives defenses, she did not raise such a reprisal claim as an affirmative defense. *See* AF, Tabs 51 and 61. She similarly failed to raise such a claim in her closing brief. *See* AF, Tab 66. She may, however, have raised that claim in a subsequent rebuttal submission. *See* AF, Tab 69. Accordingly, I will now consider the matter.

An appellant may establish EEO reprisal using direct evidence or any of three types of circumstantial evidence: a convincing mosaic of evidence from which a discriminatory intent may be inferred; evidence of disparate treatment of similarly situated comparators; or evidence that the agency's stated reason is not worthy of credence but rather a pretext for discrimination. *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶¶ 42-43 (2015). A convincing mosaic can be inferred from evidence of suspicious timing, ambiguous statements, behavior towards and comments directed at other protected employees, and other relevant "bits and pieces" of evidence. *Id.* ¶ 42 (quoting *Troupe v. May Department Stores Company*, 20 F.3d 734, 736-37 (7th Cir. 1994)). If an appellant shows by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action, violating 42 U.S.C. § 2000e-16, the Board will inquire whether the agency has shown by preponderant evidence that it still would have taken the contested action in the absence of the discriminatory or retaliatory motive. *Id.*, ¶¶ 49-51. If the agency meets that burden, its violation will not require reversal of the action. *Id.*, ¶ 51.

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Tab 61. Accordingly, I find that even if the appellant's initial appeal form could be construed as raising a whistleblower reprisal affirmative defense, she later abandoned it.

Here, the appellant failed to cite any location within the record where the complaints in question may be available, and after reviewing the voluminous filings, I have been unable to locate them. In any event, Deputy Secretary Gibson, who was the proposing official and the deciding official, issued the proposal to remove the appellant prior to her purported EEO complaint. *Compare* AF, Tab 1 at 6, *with* AF, Tab 48 at 23-25. Although the decision to remove the appellant was dated soon after the purported discrimination complaint, I also find no basis for concluding that this timing supports the appellant's bare assertion of reprisal. In fact, the appellant has failed to identify any evidence to suggest that the deciding official was even aware of the appellant's EEO complaint against him. Also, as previously indicated, the agency supported its charge. I find that the proven charge constitutes a legitimate business reason for the agency's action. I find that the appellant failed to produce any evidence that the real reason for the action was reprisal for her discrimination complaint. Therefore, I find that she failed to prove the claim.

The appellant also alleged in her appeal and the recorded telephonic conference on January 26, 2016, that the agency action was taken in retaliation for her efforts to provide reasonable accommodation to Ms. Sweet by reassigning her to the Supply Technician position. AF, Tab 1 at 6; Tab 61. She has not, however, introduced any supportive evidence. It is possible that the agency's decision to remove the appellant was motivated by her decision not to sustain Ms. Sweet's proposed removal in 2014. *See, e.g.*, AF, Tab 12 at 7 (agency brief, critical of appellant's handling of allegations against Ms. Sweet prior to the period at issue in their charge); Tab 47 at 16, 27-28 (AIB report, dated weeks before the appellant's proposed removal, recommending the appellant be held responsible for not upholding the proposed removal of Ms. Sweet). However, I find no evidence that supports a finding that the agency was improperly motivated by the appellant's subsequent attempts to place Ms. Sweet in another position – an act that the appellant characterizes as a reasonable accommodation

and one that the agency has not interfered with. Instead, the record suggests that the agency's motivation(s) were entirely based upon the appellant's role in Ms. Sweet being permitted to continue dealing with patients, something that the agency claims to have been avoidable even if Ms. Sweet was being given a reasonable accommodation. *See, e.g.*, AF, Tab 70 at 5-6. As previously indicated, I found the agency established a legitimate business reason, i.e., essentially neglect of duty, for taking the removal action. I find that the appellant failed to prove that the action was taken in reprisal for providing Ms. Sweet with a reasonable accommodation. Accordingly, I find that the appellant has failed to establish this affirmative defense.

The penalty was unreasonable under the circumstances.

The Board generally analyzes the agency's penalty selection, including penalties assessed to members of the SES, under the statutory "efficiency of the service" standard, as interpreted by *Douglas* and its progeny. *See* 5 U.S.C. §§ 7513(a), 7701(b)(3); *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280, 307-08 (1981). That general rule places the burden of proving the reasonableness of the agency's penalty selection on the agency. *See* 5 C.F.R. § 1201.56(b)(1). However, as indicated earlier, the newly enacted legislation under which the Board exercises jurisdiction over this appeal narrowly circumscribes the Board's authority regarding review of the agency's penalty. 38 U.S.C. § 713(a)(1). In interpreting 38 U.S.C. § 713, the Board concluded that the efficiency of the service standard and *Douglas* do not apply, and that the express statutory language creates a rebuttable presumption in favor of the agency's discretion to select the appropriate penalty. 79 Fed. Reg. 63031, 63032 (Oct. 22, 2014).<sup>10</sup>

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<sup>10</sup> The Board's final rule implementing this new legislation instructs as follows:

Penalty review. As set forth in paragraph (a) of this section, proof of the agency's charge(s) by preponderant evidence creates a

Thus, proof of the charged misconduct shall create a presumption that the imposed penalty was warranted. 5 C.F.R. §§ 1210.18(a), (d). However, the appellant may rebut this presumption by establishing that the penalty was unreasonable under the circumstances of the case. *Id.* If she does so, the agency's action must be reversed because mitigation of the penalty by the administrative judge is not authorized. *Id.*

Here, as noted earlier, Deputy Secretary Gibson served as the proposing and deciding official in the appellant's removal action. *See* AF, Tab 48 at 8-10, 23-25; Tab 67 at 34-39. His decision letter indicates that after reviewing the evidence file and the appellant's written response, he found that that appellant's misconduct was serious and "inconsistent with the Department's core values and mission of public service." AF, Tab 48 at 8. In a sworn statement provided for this appeal, he elaborated on the bases for his decision. AF, Tab 67 at 35-36. According to Deputy Secretary Gibson, the appellant had a duty to "act at all times in a manner that is truly Veteran-centric by identifying, fully considering, and appropriately advancing the interest of Veterans." *Id.* at 35. He further indicated that the appellant was expected to "ensure that the safety of Veteran patients is at the forefront of every decision" she made. *Id.* at 36. He declared that "Unnecessarily exposing patients to potential harm by permitting an employee who . . . was known to have committed patient abuse in the past to continue to provide hands-on-care to patients is contrary to the values" he expected. *Id.*

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presumption that the Secretary's decision to remove or transfer the appellant was warranted. An appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case, in which case the action is reversed. However, the administrative judge may not mitigate the Secretary's decision to remove or transfer the appellant.

5 C.F.R. § 1210.18(d).

Arguing against her removal, the appellant presented a sworn statement detailing her record, which includes more than 42 years of service for the agency without any prior discipline. AF, Tab 66 at 4-5; *see also* AF, Tab 11 at 8-14. Her statement, which is unrebutted in this regard, reflects a very successful career, including a number of accomplishments specific to her tenure as Director AVAMC.<sup>11</sup> AF, Tab 66 at 4-5. One of those accomplishments is evidenced by a letter from Deputy Secretary Gibson, dated just days after he proposed the appellant's removal. AF, Tab 10 at 18; Tab 66 at 5. The letter congratulates the appellant because AVAMC had been recognized as "one of the Highest Performing Hospitals in Healthcare Quality for 2015," something he deemed a "remarkable achievement." *Id.*

Many of the appellant's arguments concerning the merits of the agency's charge are more relevant to the presumptively reasonable penalty. To that end, while I find that the agency proved its charge, I do not find that the evidence the agency presented supports the severity alleged. *See, e.g.*, AF, Tab 67 at 4-31. In other words, the agency proved that the appellant should have done more, but the appellant proved that her actions were not as egregious as the agency suggests.

In terms of the severity of the appellant's failure to take timely action, I first note that the agency has consistently insinuated that Ms. Sweet was a clear, present, and imminent danger to patients. While arguing before me, the agency has even, at times, erroneously claimed that Ms. Sweet was previously disciplined for physical abuse of a patient. *Compare* AF, Tab 67 at 9, with AF, Tab 27 at 70, 72-73. However, the evidence the agency presented reflects a more complicated situation. For example, although there had been prior complaints involving Ms.

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<sup>11</sup> To the extent that the agency may disagree with the appellant's assertions concerning her career and accomplishments at AVAMC, they failed to present any argument or evidence, other than those related to Ms. Sweet.

Sweet in the CLC, and some had been substantiated, Ms. Sweet had also received high marks for performance. *Compare* AF, Tab 27 at 70-74, *with* AF, Tab 27. at 41-45. In fact, the appellant received contrasting opinions about Ms. Sweet on the very day the agency has relied upon as key in establishing the appellant's duty to act. During the March 20, 2015 meeting, while Ms. Dunn conveyed her negative report concerning Ms. Sweet's performance in the CLC, two ICU Nurse Managers, Ms. Rogers and Ms. Wettig, informed the appellant that Ms. Sweet was performing successfully and positively contributing to their unit with no issues over the same period. AF, Tab 66 at 8-9; *see also* AF, Tab 67 at 47. The appellant reportedly asked the nursing professionals if there were any objections to Ms. Sweet continuing to work in the ICU under the previously imposed restrictions, and none were raised.<sup>12</sup> AF, Tab 66 at 9. Moreover, the record fails to establish, or even suggest, that Ms. Sweet engaged in any impropriety or caused any harm following that March 20, 2015 meeting. *See, e.g.*, AF, Tab 60 at 5. Although the positive reviews, the acquiescence of others, and the absence of actual harm do not negate Ms. Dunn's negative reports, all are relevant in considering the seriousness of the appellant's offense.

I next note that while Ms. Dunn's March 2015 report did recommend removing Ms. Sweet from patient care based upon her observations in the CLC, her recommendation does not reflect as dire a situation as the agency seems to argue. *See* AF, Tab 41 at 6. For example, the agency has repeatedly argued that the appellant, as Director, had the authority to remove any employee suspected of

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<sup>12</sup> I note that the only evidence reflecting the positive report and absence of any objection from ICU managers is the sworn statement from the appellant herself. *See* AF, Tab 66 at 8-9. However, the agency presented no evidence to the contrary. The agency did submit a statement from one of those managers, Ms. Rogers, but her statement is noticeably devoid of any opinion about Ms. Sweet's performance or concern about her return to the ICU. *See* AF, Tab 67 at 46-47.

potential abuse, and she should have immediately exercised that authority following Ms. Dunn's report. *E.g.*, AF, Tab 67 at 21-22, 37. However, while Ms. Dunn's report did reflect significant cause for concern, she did not specifically allege that Ms. Sweet abused any patient or posed an imminent danger of doing so. *See* Tab 41 at 5-6. Ms. Dunn instead indicated that Ms. Sweet's skills "would have been sufficient in the past," but were insufficient under current standards. *Id.* at 6. She described Ms. Sweet's improprieties as acts that "could be interpreted as a lack of empathy or insensitivity." AF, Tab 41 at 6, Tab 67 at 43. This context is also relevant in considering the seriousness of the appellant's offense.

In her sworn statement, again unrebutted in this regard, the appellant indicated that remedial action was complicated by Ms. Dunn and Dr. Holley telling her that Ms. Sweet had a cognitive disorder, which may have both caused her improprieties and required reasonable accommodation under the law. AF, Tab 66 at 8; *see also* AF, Tab 65 at 5. The agency counters that even if Ms. Sweet qualified for a reasonable accommodation, the "appellant had the obligation to synthesize the facility's obligations under the Rehabilitation Act with her duty to ensure safe patient care." AF, Tab 70 at 5-6. While my sustaining the charge necessarily reflects agreement that the appellant should have done more after receiving the March 20, 2015 report, the appellant did not sit by idly. Instead, the appellant immediately acted to put a plan in motion that would permanently reassign Ms. Sweet – a plan that would remove her from patient care, utilize the skills she excelled at, and fulfill a need at AVAMC. *See, e.g.*, AF, Tab 60 at 4-5, Tab 66 at 9-11, Tab 68 at 5-6. These facts are also relevant in considering the severity of the appellant's offense.

As discussed above, the appellant repeatedly expressed her belief that Ms. Sweet remained in the ICU, under significant limitations that included one-on-one supervision, throughout the relevant period. *See, e.g.*, AF, Tab 44 at 32-33; Tab 66 at 9. She asserts that any lifting of those restrictions occurred without her



approval or knowledge. AF, Tab 67 at 47; Tab 69 at 9. The agency has presented arguments to the contrary, but I find them unsupported. *See, e.g.*, AF, Tab 41 at 97-98; Tab 67 at 24, 47. I find that the record suggests the appellant was under the impression, albeit a mistaken one, that Ms. Sweet would remain in the ICU, where she had done nothing wrong, under constant supervision. And while it may seem counterintuitive, given the vulnerable nature of patients requiring intensive care, the record establishes the ICU as the place where Ms. Sweet's patient interaction was least likely to cause harm due to a number of factors, including its patient to provider ratio. *See, e.g.*, AF, Tab 41 at 96; Tab 66 at 8-9; Tab 68 at 4. Therefore, to the extent that Ms. Sweet did not remain in the ICU under constant supervision during the relevant period, the record suggests that the appellant's failure was one of omission. To be clear, if the appellant had met the agency's expectations, Ms. Sweet would not have been permitted to work with patients at all, regardless of any restrictions. Nevertheless, the aforementioned context again goes to the seriousness of the appellant's offense.

When he proposed the appellant's removal, Deputy Secretary Gibson indicated that he considered a number of factors to determine the appropriate penalty. AF, Tab 48 at 24. However, his proposal did not detail any factors that one might expect to weigh against the most severe possible penalty – removal. *Id.* at 23-25. In his decision letter, Deputy Secretary Gibson indicated that he considered the appellant's response to the charge. *Id.* at 8-10. However, while that written response alluded to many of the aforementioned considerations, such as her more than 42 years of service for the agency, complications stemming from attempts to provide reasonable accommodation, and the ICU being the most controlled unit available, Deputy Secretary Gibson's decision letter did not. *Id.* at 8-10.

In the absence of a hearing in this appeal, Deputy Secretary Gibson submitted a sworn statement, but that statement also fails to discuss any factors

that one might expect to weigh against removal.<sup>13</sup> See AF, Tab 67 at 34-39. Instead, both his decision letter and sworn statement generally discuss how he found the appellant's misconduct serious and "inconsistent with the Department's core values and mission of public service." E.g., AF, Tab 48 at 8. Deputy Secretary Gibson indicated that the appellant had a duty to "act at all times in a manner that is truly Veteran-centric by identifying, fully considering, and appropriately advancing the interest of Veterans," but failed to do so by "unnecessarily exposing patients to potential harm." AF, Tab 67 at 35-36.

After reviewing the record as a whole, I find that the single proven offense before me is serious, and I recognize that senior managers are held to a higher standard of conduct than other employees. See *Dolezal*, 58 M.S.P.R. at 71; *Walcott*, 52 M.S.P.R. at 284. I also recognize that the law creates a presumption that the chosen penalty is reasonable. 38 U.S.C. § 713; 5 C.F.R. §§ 1210.18(a), (d). However, I must determine whether the appellant has rebutted that presumption.

The record fails to establish that the deciding official considered any of the previously discussed mitigating matters, including the fact that the offense was not as serious as the agency has argued. In that regard, although the March 2015 report placed the appellant on notice that remedial action was necessary, the record does not reflect as simple, obvious, or dire a situation as the agency has presented. In addition, it is interesting to note that the record fails to establish or even suggest that the agency has disciplined any other individuals for their role in

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<sup>13</sup> Curiously, Deputy Secretary's sworn statement speaks of the "gravity of the charges, both separately and together," as well as his having "sustained all of the charges." AF, Tab 67 at 38. However, there was only one charge and one attendant specification in the proposal notice. AF, Tab 48 at 8-10, 23-25.

this matter. While the agency may rightfully expect someone in the appellant's senior position to take further precautionary measures under the circumstances, the fact remains that she did immediately act in a way that remedied the problem, permanently, with no resulting harm. To be clear, this decision should not be interpreted as minimizing the agency's concerns for the well-being of veterans or criticizing the agency's high expectations in that regard. Nevertheless, based on the foregoing, I find that the facts and circumstances as presented by the record before me demonstrate that it is unreasonable to remove an employee who has very positively contributed to the agency for more than 42 years for this one offense.

In conclusion, I find that appellant has rebutted the presumption that the penalty was reasonable. If 38 U.S.C. § 713 did not prohibit it, I would mitigate the penalty. However, because that is not allowed, the only option is to reverse the action outright. 5 C.F.R. §§ 1210.18(a), (d). Therefore, agency's decision to remove the appellant from the Federal service is REVERSED.

### **DECISION**

The agency's action is REVERSED.

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 Arthur S. Joseph  
 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.

### **ORDER**

I ORDER the agency to cancel appellant's removal from the position of SES-0670, Director, AVAMC and to restore her effective January 12, 2016. *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.

I 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. I 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 this Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, I ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

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.

### **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 of this decision. Pursuant to 5 C.F.R. § 1210.20(d)(2), 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.



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## **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.