UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

GARY T. HODGE, SR.,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
PH-0752-16-0163-I-3

DATE: August 28, 2017

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

Lauren Russo, Esquire, Philadelphia, Pennsylvania, for the agency.

Marcus S. Graham, Esquire, Pittsburgh, Pennsylvania, for the agency.

BEFORE
Michael T. Rudisill
Administrative Judge

INITIAL DECISION

On January 19, 2016, the appellant timely filed an appeal challenging the agency's action which resulted in his reduction in grade and pay from Supervisory Veterans Service Examiner, GS-0996-15 to Veterans Claims Examiner, GS-0096-13, effective January 10, 2016. The Merit Systems Protection Board (Board) has jurisdiction over this matter pursuant to 5 U.S.C. §§ 7511-13. At the appellant's request, a hearing was conducted in Philadelphia, Pennsylvania on April 10, 2017. For the reasons set forth below, the agency's action is AFFIRMED.

Background

The following facts were adduced during the hearing and from other record evidence:

The appellant was employed as a Supervisor, Veterans Service Representative in the agency's Regional Office located in Philadelphia, Pennsylvania. The appellant has been employed by the agency since July 26, 1993.

By notice issued on July 10, 2015, the agency informed the appellant that it proposed to remove him from his federal position for conduct unbecoming a federal employee; lack of candor; and 3 specifications of failure to provide oversight. *See* Initial Appeal File (IAF), Tab 3, Subtab 4H. On December 30, 2015, the agency's deciding official issued a decision sustaining all of the charges and specifications but mitigating the proposed action from a removal to a reduction in grade and pay from Supervisory Veterans Claims Examiner, GS-0996-15 to Veterans Claims Examiner, GS-0996-13, effective January 10, 2016. *See id.* at subtab 4D. This appeal to the Board ensued.

General legal standards

To sustain an adverse action before the Board, an agency must establish by preponderant evidence that there is a factual basis for the charged conduct and that disciplinary action, based on the proven conduct, promotes the efficiency of the service. *See* 5 U.S.C. § 7513(a) and 7701(c)(1)(B); *see also Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). Preponderant evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support the conclusion that the matter asserted is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2) (2016). With respect to any affirmative defenses, an appellant bears the burden of proof by preponderant evidence. *See* 5 U.S.C.

§ 7701(c)(2); 5 C.F.R. § 1201.56(a)(2) (2016). In this case, I note that the appellant has not alleged any affirmative defenses.

The charges

The agency charged the appellant with conduct unbecoming a federal employee, to wit:

> Specification: During the Office of Inspector General investigation into allegations of misuse of position and failure to disclose financial obligations at the Philadelphia Regional Office, it was discovered you failed to disclose your spouse's income as a Medium on the Office of Government Ethics Form 450, Confidential Financial Disclosure report for income earned in the previous year. Part I of the form required you to report your spouse's income in excess of $1000. You failed to report income on the 2013 ($6960) and 2014 ($12,850) as required by the Department of Veterans Affairs.

The agency also charged the appellant with lack of candor, to wit:

> Specification: On November 18, 2014, during an Office of Inspector General investigation you were asked about your spouse's activities as a Medium and her income from the business. Initially you advised you had no knowledge of her activities or income from the business and suggested it was just a hobby with minimal income. Upon further questioning you stated "we paid for a vacation." You admitted it was "the first year she's been consistent with it and so we will declare all that this year." During subsequent questioning, you later admitted your spouse earned $6960 in 2012; $12,850 in 2013; and $13,955 in 2014 for her services as a Medium. This is a lack of candor during an investigation which is a violation of the VA Directive 0700 which requires your full cooperation and candor during an investigation. As Pension Center Manager aware of recent Office of Inspector General investigations, as well as the notoriety of this case and others in this office, this behavior is unbecoming of an employee of the Department of Veterans Affairs and reflects badly on the mission of the VA.

Finally, the agency charged the appellant with 3 specifications of failure to provide oversight, to wit:

> The Supervisory Veterans Service Representative 0996 310 34760-A, Pension Management Center Manager position description states that you are responsible, within the framework of broad policies

established by VA Central Office, for implementing the law, policies, and procedures by means of supplemental directives, interpretations, and procedural instructions; resolving and making final determinations on questions of interpretation of regulations, precedent decisions, instructions and other controlling guidelines. On May 20, 2013, Fast Letter (FL) 13-10, Guidance on Date of Claim issues, was issued to all Veterans Benefits Administration Regional Offices. The purpose of the guidance was "establishing dates of claim including guidance for previously unadjudicated claims that are found or "discovered" in the claims folder."

Specification 1: As Acting Veterans Service Center Manager (May to September 2013) and Pension Center Manager, you are responsible for ensuring your assigned units are in compliance with any rules, regulations, including FL 13-10 and to appropriately address any violations or indications of noncompliance. On March 5, 2014, Robert Pomarico, IPC Coach, sent an email to Karen Fei, Assistant Pension Center Manager, regarding the discovered claims process. Ms. Fei responded "again there is no cutoff date, anything outside of what is in your mail backlog will need a memo." You were copied on the email and failed to address the misapplication of FL 13-10 by the PMC personnel.

Specification 2: As Acting Veterans Service Center Manager (May to September 2013), and Pension Center Manager, you are responsible for ensuring your assigned units are in compliance with any rules, regulations, including FL 13-10 and to appropriately address any violations or indications of noncompliance. On December 27, 2013, you sent an email in response to a query by Robert Pomarico on cesting claims with a date earlier than 02-01- 13. The email stated "I don't think the FL specified a cutoff date. I thought it just said if something was discovered we use a current date. If we get something late, it's probably been discovered and then forwarded to us. We can probably use it to justify a later date of claim, at the very least we should be using this guidance on any bucket cases that are found. Right now the bucket cases are anything with a DOC prior 06-01-13." This guidance is outside of the guidelines of FL 13-10. You had a responsibility to ensure compliance with FL 13-10 and failed to do so.

> Specification 3:[*] As Acting Veterans Service Center Manager (May to September 2013), and Pension Center Manager, you are responsible for ensuring your assigned units are in compliance with any rules, regulations, including FL 13-10 and to appropriately address any violations or indications of noncompliance. On July 23, 2013, Darrell Mills, Acting Pension Center Manager, sent an email to PMC Coaches regarding "Guidelines for Establishing EP's for claims pending one year or greater: Mr. Mills clarified FL 13-10 and stated in the email ' Please be advised that a found or "discovered" claim as defined by FL 13-10 means "ANY" claim that is one year or older regardless of circumstances (this would include claims that need to be re-cested to correct a cesting error). In fact this guidance applies to any claim that will be one year or older by November 1, 2013.' You were copied on the email response. This guidance is contrary to the guidance outlined in FL 13-10. You received this email and failed to dispute or question the guidance which differed from FL 13-10. As a result of your inaction, directions were given to staff to apply the provisions of FL 13-10 to claims already under end product control that had to be reestablished.

See IAF, Tab 4H.

The conduct unbecoming charge is sustained.

The general charge of conduct unbecoming has no specific elements of proof, but instead is established by proving that the appellant committed the acts alleged in support of the "conduct unbecoming" label. *See, e.g.*, *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, 12 (2006). The general charge may be sustained as long as the reasons for the proposed action were described in sufficient detail to allow the employee to make an informed reply, and if the efficiency of the service suffered because of the misconduct. *See Cross v. Department of the Army*, 89 M.S.P.R. 62, 68 (2001).

Based on the record evidence, I find that the appellant was required to and wholly failed to timely disclose his spouse's income on the Office of Government

[*] During the hearing, the agency withdrew specification 3 of charge 3 so that specification will receive no further consideration.

Ethics Form 450, Confidential Financial Disclosure report. This was income that his wife earned as a Medium. Part I of the form required the appellant to report his spouse's income in excess of $1000, yet the appellant failed to report said income on his 2013 form in the amount of $6960 and on his 2014 form in the amount of $12,850. *See* IAF, Tab 3, Subtabs 4S, 4O. I further find that the appellant disclosed this information during the agency's Office of Inspector General investigation into allegations of misconduct at the Philadelphia Regional Office. *See* I-3 File, Tab 8, pp. 13-22 of 493. I note that the OGE Form 450, Confidential Financial Disclosure Report, states: "…the purpose of the report is to assist employees and their agencies in avoiding conflicts between official duties and private financial interests or affiliations." It further states that "…falsification of information or failure to file or report information required to be reported may subject employee to disciplinary action by their agency or other authority and that knowing and willful falsification of information required to be reported may also subject the employee to criminal prosecution." Part I of the form requires an employee to report for his spouse: (1) all sources of salary, fees, commissions, and other earned income greater than $1,000, and (2) honoraria greater than $200. Once completed, an employee must certify that "the statements I have made on this form and all attached statements are true, complete, and correct to the best of my knowledge."

The appellant does not dispute that he was required to accurately complete the OGE Form 450 for the years in question nor does he dispute that he did not include his wife's income on those forms. He also does not dispute the accuracy of the amounts of his wife's income identified in the agency's charge which he failed to disclose. Rather, the appellant testified that he was unaware that his wife was making money in what he long considered her "hobby" as a Medium. So, according to the appellant, when he completed the OGE Form 450s for the years in question, he was unaware that his wife had earned income greater than $1,000 and that's the reason he did not report it. But, as stated above, knowledge

is not an element of the agency's conduct unbecoming charge. Here, I find that the general charge was described in sufficient detail in the proposal notice such that the appellant was able to make an informed reply. I further find that the efficiency of the service suffered because of the misconduct. *See Cross v. Department of the Army*, 89 M.S.P.R. 62, 68 (2001). Indeed, the purpose of the OGE Form 450 is to aid in the avoidance of conflicts of interest between official duties and an employee's private financial interests or affiliations. In other words, to promote transparency, a concept that in today's government appears to have lost some currency, but is important to the efficiency of the service nonetheless. Moreover, transparency can only be attained if information is accurately reported and this is what the appellant wholly failed to do in this instance. Thus, I find that the agency has established by preponderant evidence its charge of conduct unbecoming a federal employee and that charge is sustained.

The lack of candor charge is sustained.

The agency may prove lack of candor by demonstrating that the appellant failed to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete. *See Smith v. Department of Interior*, 112 M.S.P.R. 173; 16 (2009) citing *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). To prove a lack of candor charge the agency must prove (1) that the appellant gave incorrect or incomplete information; and (2) that he did so knowingly. *See Fargnoli v. Department of Commerce*, 123 M.S.P.R. 330, ; 17 (2016); *see also O'Lague v. Department of Veterans Affairs*, 123 M.S.P.R. 340, ; 13 (2016). Lack of candor does not require proof of an intent to deceive, but it 'necessarily involves an element of deception. *See Ludlum* at 1284; *see Parkinson v. Department of Justice*, 815 F.3d 757, 766 (Fed. Cir. 2016); *Rhee v. Department of the Treasury*,

117 M.S.P.R. 640, 11 (2012), overruled in part on other grounds by *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015).

In the case at bar, the agency alleged that on November 18, 2014, during an Office of Inspector General investigation the appellant was asked about his spouse's activities as a Medium and her income from the business. Evidently, the appellant advised investigators that he had no knowledge of his wife's activities or income from the business and suggested it was just a hobby for her with minimal income. As the questioning progressed, however, the appellant stated that "we paid for a vacation." He also admitted it was "the first year she's been consistent with it and so we will declare all that this year." During subsequent questioning, he admitted that his wife earned $6,960 in 2012; $12,850 in 2013; and $13,955 in 2014 for her services as a Medium. To establish that the appellant made the statements attributed to him in the charge, the agency provided a verbatim transcript of the appellant's interview. *See* IAF, Tab 3, Subtab 4M. Based on the transcript, it is clear to me that initially the appellant failed to disclose to the investigators certain information that under the circumstances should have been disclosed, i.e., that he had paid for a family vacation using his wife's earnings and then he disclosed the exact amount of his wife's earnings over a three-year period which completely undercut his initial statements that he had no knowledge of his wife's activities or income from the Median business and his suggestion that it was just a hobby for his wife with minimal income. Consequently, I find that the agency has established by preponderant evidence that the appellant initially provided investigators incorrect or incomplete information during the interview on November 18, 2014.

Next, the agency must establish that the appellant provided the incorrect or incomplete information "knowingly." *See Fargnoli*, 123 M.S.P.R. at 330. The appellant testified that he had no knowledge that his wife was making any money being a Medium and that explains his initial statements to investigators. I find the appellant's testimony in this regard totally incredible. *See Hillen v.*

Department of the Army, 35 M.S.P.R. 453, 458 (1987). Indeed, the appellant's explanation is inherently improbable. First, if the appellant did not know of his wife's income, he, at the very least, had a duty to ask, especially since he was required to complete the OGE Form 450s wherein he had to certify that the information provided was true and complete. I simply find it hard to believe that the appellant would certify information on an official government document without even verifying with his wife that she had no income. Nevertheless, during the hearing, the appellant testified that he did not even inquire of his wife about her income before completing the forms. He simply assumed that she was not making any money being a Medium. Next, the appellant testified that he has a special needs child as well as his mother-in-law living with him which can undoubtedly be very expensive. Yet, the appellant never even asked his wife what, if any, money she was making. Finally, and perhaps most telling, the appellant ultimately admitted to investigators that he had paid for a vacation using money his wife had provided. So, the appellant's averments that he had no knowledge as to his wife's income strain credulity. Accordingly, I find that the agency has established by preponderant evidence that the appellant provided investigators incorrect or incomplete information during his interview on November 18, 2014 and that he did so knowingly. The lack of candor charge is sustained.

<u>The agency failed to establish the charge of failure to provide oversight by preponderant evidence</u>.

The gravamen of the agency's failure to provide oversight charge is the allegation that the appellant did not have his subordinate employees properly implement Fast Letter (FL) 13-10 which provided guidance on Date of Claim issues in all Veterans Benefits Administration Regional Offices. Specifically, the purpose of the guidance was "establishing dates of claim including guidance for previously unadjudicated claims that are found or "discovered" in the claims

folder." According to agency witnesses, the agency promulgated FL 13-10 on May 20, 2013 and rescinded it in June 2014. The FL, again according to agency witnesses, was designed to address the issue of processing claims in a timely manner, which, in turn, was expected to help relieve media and Congressional pressure being exerted on the agency over this issue. Hearing CD (HCD).

The agency charged that the appellant failed to provide oversight to his employees on December 27, 2013 and on March 5, 2014 with respect to their implementation of FL 13-10. Yet, two of his subordinate employees, Karen Fei and Lucy Filipov, testified at the hearing that the appellant never told them to disregard FL 13-10 and that he reasonably tried to implement its provisions notwithstanding the fact that the guidance was extremely confusing. Even the agency's Eastern Area Director, Kim Graves, testified that while the Philadelphia office appeared to be the most confused about the guidance offered in FL 13-10, other regional offices under her supervision were also confused and had problems following the guidance. Indeed, during the course of the hearing testimony on the issue of FL 13-10, it became abundantly clear to me that the guidance was confusing and I was not convinced that any of the employees responsible for implementing it, including those at the Area Office, knew precisely what they were supposed to do. This confusion was apparently so rampant that the agency decided to rescind FL 13-10 just over a year after its promulgation. Based on the testimony of Fei, Filipov and the appellant, I am convinced that the appellant did not fail to oversee his employees' implementation of the guidance in FL 13-10. Rather, I find that the appellant tried his level best to implement a confusing set of guidelines that even other supervisors in other regional offices were having problems implementing correctly. Thus, I find that the agency has failed to establish by preponderant evidence specifications 1 and 2 of the failure of oversight charge and that charge is therefore not sustained.

Nexus

An agency may take a disciplinary action only for such cause as to promote the efficiency of the service. *See* 5 U.S.C. § 7512. The nexus requirement means, for the most part, that the agency has shown that its action promotes the efficiency of the service, in that there is a clear and direct relationship between the articulated grounds for the adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified by Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987).

It is well-settled that agencies are entitled to expect their workers to be honest, trustworthy, and candid. *See, e.g., Ludlum v. Department of Justice*, 87 M.S.P.R. 56, 68 ¶ 28 (2000), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002); *Brown v. United States Postal Service*, 64 M.S.P.R. 425, 433 (1994). Thus, lack of candor strikes at the very heart of the employer-employee relationship and constitutes actionable misconduct. *See Crickard v. Department of Veteran Affairs*, 92 M.S.P.R. 625, 632 ¶ 18 (2002); *Ludlum*, 87 M.S.P.R. at 68¶ 28. Moreover, the appellant's lack of candor goes to the core of his trustworthiness and reliability as a senior-level agency official. *See Sanders v. Department of Justice*, 65 M.S.P.R. 595, 603 (loss of trust is a significant aggravating factor given the nature of the employee's responsibilities), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table).

With respect to the conduct unbecoming charge, I note that the appellant admitted that he knew he must report his spouses' income on the government ethics forms but he inexplicably failed to even inquire of her as to her income. As previously stated, agencies are entitled to expect their workers to be honest, trustworthy, and candid. The appellant failed on all three counts and this adversely affects his ability to perform as a supervisor due to management's loss of trust. Thus, I find a sufficient connection between the appellant's misconduct and the agency's mission and therefore a nexus between the sustained charges and the efficiency of the service.

The agency's selected penalty is reasonable.

In reviewing the penalty selected by an agency, the Board will only determine if the agency conscientiously considered all relevant factors and exercised management discretion within the tolerable limits of reasonableness. *See Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280, 306 (1981). The agency is only required to show that the penalty it selected is reasonable and it is not required to show that the penalty selected is the best penalty. *See Martinez v. Department of Defense*, 21 M.S.P.R. 556, 558 (1984), *aff'd*, 765 F.2d 158 (Fed. Cir. 1985) (Table).

Where, as here, not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *See O'Lague*, 123 M.S.P.R. 340, ¶ 18. In such a case, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Id.* Here, the agency did not indicate that it desired a lesser penalty if the failure of oversight charge was not sustained. In assessing the reasonableness of the penalty, the Board will consider such factors as the nature and seriousness of the offense, the employee's past disciplinary record, the consistency of the penalty with the agency's table of penalties, and the consistency of the penalty with those imposed on others for similar offenses. *See Douglas*, 5 M.S.P.R. at 305–06.

The record reflects that the deciding official, Beth Murphy (formerly Beth McCoy), considered the relevant *Douglas* factors. *See* IAF, Tab 3, Subtab 4D. The factors she considered in her written decision letter were consistent with her testimony concerning what she considered in mitigating the proposed penalty of removal to a reduction in grade and pay. HCD.

In sum, Ms. Murphy considered the nature and seriousness of the offenses. *Id.* She deemed the conduct unbecoming and lack of candor charges to be the

most serious charges leveled against the appellant and testified that those, by themselves, would have been enough, in her mind, to support the reduction in grade. *Id.* I concur. Such misconduct is highly inappropriate, especially as the appellant was a supervisor. The appellant clearly had a duty to provide complete and accurate information both on his OGE Form 450s as well as to investigators during his interview. He failed at both.

Ms. Murphy testified that she considered, as mitigating factors, the appellant's length of service, lack of a past disciplinary record, good performance evaluations and the fact that he had progressed through the ranks to become a GS-15 supervisor. She believed that the appellant still has something to offer the agency but she also believed that he could not remain a supervisor because of the loss of trust due to his misconduct. That's why she mitigated the proposed penalty of removal to a reduction in grade and placed the appellant in the highest vacant nonsupervisory position. Again, I agree with Ms. Murphy's penalty analysis.

Based on all of the above, I find that the agency-imposed penalty supports the efficiency of the service and was reasonable. *See, e.g., Sublette v. Department of the Army*, 68 M.S.P.R. 82, 89–90 (1995) (a demotion, and not removal, was the maximum reasonable penalty for conduct unbecoming a federal employee). Consequently, the agency's penalty of removal will not be disturbed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____
Michael T. Rudisill
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 2, 2017**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

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

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice to the Appellant Regarding Your Further Review Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain

why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

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

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.