UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON, Appellant, v. DEPARTMENT OF ENERGY, Agency.	DOCKET NUMBER AT-1221-96-0948-W-3 AT-1221-98-0250-W-1 AT-1221-98-0623-W-1 DATE: APR 2 9 1999

Robert Seldon and Sarah Levitt, Esquires, Project On Liberty and the Workplace, Washington, D.C., for the appellant.

Isaiah Smith and Don Crockett, Esquires, Washington, D.C., for the agency.

BEFORE

Stuart A. Miller
Administrative Judge

INITIAL DECISION

INTRODUCTION

On September 26, 1996, December 13, 1997, and April 29, 1998, the appellant timely filed individual-right-of-action (IRA) appeals against the Department of Energy. The appellant alleges that the agency took the following personnel actions in retaliation for his whistleblowing activity: (1) rating him as exceeds fully successful instead of outstanding on his 1995 performance appraisal; (2) removing duties from his work responsibilities, *i.e.*, doing surveillances; and, (3) giving him a letter of admonishment

and directed reassignment.[1] In each instance, the appellant first sought corrective action with the Office of Special Counsel (OSC) before coming to the Board. *See* 5 U.S.C. §§ 1214(a)(3) and 1221(a). Thus, the Board has jurisdiction over the appeal. The hearing the appellant requested was conducted in Knoxville, Tennessee, on June 30-July 2, 1998.

For the reasons set forth below, the appellant's request for corrective action is GRANTED.

BURDENS OF PROOF

In an IRA appeal, as here, for the Board to order corrective action, the appellant must prove by preponderant evidence that he made a disclosure described under 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the personnel actions being appealed. *See Clark v. Department of the Army*, 997 F.2d 1466, 1470 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 920 (1994); 5 C.F.R. § 1209.7(a). If the appellant meets that burden, no corrective action will be ordered if the agency shows by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosure. *See id.*; 5 C.F.R. § 1209.7(b).

ANALYSIS AND FINDINGS

Background and Disclosures

The appellant began his employment with the agency on January 2, 1990, and he holds the position of General Engineer, GS-14, in the Office of Environment, Safety and Health, at Oak Ridge Laboratory, Oak Ridge, Tennessee. His position is also referred to as a Resident EH or ESH. The essential duties of his position require that he do surveillances, studies and reports on accident and safety incidents and issues.[2] The

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[1] The three cases were joined for processing and hearing. The appellant filed another IRA appeal which was also joined with these cases, Docket Number AT-1221-97-0470-W-3, challenging his 1996 performance appraisal. However, that appeal was dismissed as withdrawn during processing.

[2] Incidents include both accidents and reportable occurrences which are distinguished by the "threshold level."

agency's employees in Oak Ridge are divided into two separate areas and functions: those that work directly with the contractor and contractor employees, and those that are part of the oversight responsibility of headquarters, such as the office where the appellant was assigned. The contractor's management is referred to as "line" management.

Not long after starting his career with the agency, the appellant began making disclosures of: fraud, waste, and abuse; violations of law, rule and regulation; and, specific dangers to public safety and health. In these appeals, the appellant submitted evidence of having made more than 20 disclosures from 1991 to 1998. And, the agency stipulated that the appellant made these disclosures.[3] In presenting his case, however, the appellant chose to testify regarding only six (6) of his disclosures.[4]

The appellant testified that, in early 1993, he did a review of programs in the Oak Ridge Operations in which he found a program "that was broken." He testified that there were no records of accidents, investigations or corrective measures that were recommended or implemented. This was important because it was essential to have a history in order to identify root causes to prevent the same problems from reoccurring both at Oak Ridge and across the agency (DOE). *See* Appellant's Exhibit K, pp. 8-10. He wrote a draft report of his findings and attached it to a "larger" report which was furnished to his management chain (Senior Residents Cooper and Hillman).

His second "major" disclosure took place following the fire at the TRISTAN Experiment, a nuclear reactor. Initially, the appellant was appointed to the Board that investigated the fire by Sherry Langenfelter, Director of DOE Operations in Chicago. The Chairman of the Board of investigation was Mr. Wunderlick. The appellant testified that he discovered long-standing safety violations by DOE and its contractors that, in his view, contributed to the cause of the fire. He stated that he was told by

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[3] Though the agency stipulated that the appellant made the disclosures and conceded that the appellant was a whistleblower, the agency did not stipulate that the appellant had a reasonable belief as to the accuracy of the disclosures. Thus, the appellant was required to prove his reasonable belief as to his disclosures.

[4] The appellant chose those disclosures that he believed were most substantively important and relevant to the case as a whole.

Wunderlick that the report would be limited only to the direct cause of the fire and the report would not be a safety review even in the face of his finding that there were no safety reviews for TRISTAN for 15 years and no safety plan in place. He identified other problems as well: operators had no procedure for responding to airborne alarms so they assumed the alarm was spurious and did nothing when the fire started; there was no procedure for de-energizing equipment; and, a "cultural" problem existed in that management would not discuss safety issues.

When he was told by Wunderlick that the report would be limited and Wunderlick refused to share data with him, the appellant quit the Board.[5] When the Board's report was issued and the appellant read it, he believed that the report was severely deficient and he made his opinion known in writings to many parties including the Office of Nuclear Safety, the Defense Nuclear Safety Board,[6] the Office of Special Counsel, Congressman Dingle and the Inspector General. *See* Appellant's Exhibit CK (Inspector General's Report). According to the appellant, certain procedures were changed, to include revamping the accident investigation program, in response to his concerns.

In 1996, the appellant did another surveillance at Oak Ridge wherein he identified the same problems he previously identified in 1993 concerning the lack of reporting and documentation of safety occurrences/accidents and corrective measures, also known as lessons learned. Then, in February 1997, a welder was burned to death while welding at the K-25 plant. An investigation, not involving the appellant, was conducted and a report issued in late April 1997. The appellant noted that the "judgment needs" section of this report was nearly identical to that of two prior investigations involving the potential for welders to "catch fire" but the report failed to mention the two prior reports. The appellant believed that, if the reporting system was properly maintained and recommendations enforced, this fatality could have been

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[5] The appellant testified that his quitting the Board was also motivated by his wife's pregnancy and medical problems.

[6] The appellant explained that he wrote to the Department of Defense, Defense Nuclear Safety Board, because, even though Defense had no involvement in TRISTAN, they had similar experiments at other sites.

prevented.[7] He was also critical of the report which was prepared by his supervisor, Fred Volpe. He made his criticism known in writing to the Inspector General and his management chain.

The appellant's fourth disclosure concerned the Closure of Pre-1995 Safety Findings. In his words, "our findings were dropping off the screen." The appellant testified that "we keep finding the same things wrong but our records of findings and corrective measures don't exist." And, he testified that he told Neil Goldenberg, Associate Deputy Assistant Secretary for Oversight, about the problem. And, the report of the General Accounting Office, in his view, supports his disclosure. *See* Appellant's Exhibit I. The appellant explained that that he wrote a memo to a Mr. Singer reporting that 4-years worth of data was wiped out and another memo reporting the same problem with sites other than Oak Ridge. *See* Appellant's Exhibits G and H. Interestingly, after writing these memos, according to the appellant, he could no longer access the database where the information was stored.

The appellant's fifth disclosure involves safety conscious work environment. In 1993, the appellant testified that he voiced concerns to management that he was finding things that were "wrong" but management would not pass the information on to line management. *See* Appellant's Exhibits AL and K (p. 8 and 13). Again, in late 1996 or early 1997, the appellant documented in his K-25 plant surveillance that fear of reprisal was a factor in workers' not reporting safety issues. *See also* Appellant's Exhibits AF and AG. His supervisor, William Cooper, Senior Resident, did not want this finding in the report. The appellant believed that Cooper feared it would upset line management. The appellant, however, sent a copy of his draft report to line management.[8] *See* Appellant's Exhibits AI, CR, DC, AT and AU.

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[7] Indeed, in one prior incident, a welder reported scorch marks on his clothing. This indicated that a welder could catch fire and not be aware of it because of the protective clothing he was wearing. One recommendation, according to the appellant, was to have a "fire watch," another employee to observe the welder. In the fatality, the welder caught fire and was unaware of it, according to Fred Volpe, the report's author, until it was too late.

[8] The appellant's admits his sending the draft report to line management was not wise and he should have handled the situation differently.

Lastly, the appellant alleges he made disclosures about the support services contractors in 1991 and 1992. He testified that he complained to management and the Inspector General that the use of these contractors/consultants was excessive and wasteful, *i.e.*, they did a lot of 'make work." His complaints initially were verbal but subsequently they were reduced to writing.

There was no evidence introduced to counter the appellant's assertions regarding his reasonable beliefs in the accuracy and veracity of his disclosures. Indeed, the numerous exhibits cited herein support his assertions. Moreover, regarding the TRISTAN disclosure, David Rohrer, Safety and Occupational Health Manager, Office of Security Evaluations, Office of Oversight, testified that some of what the appellant alleged was correct. And, Cooper testified that he agreed with the appellant that there was waste in the contract support services consultants program. Thus, based on the above, I find that the appellant made each of the disclosures discussed above, that he had a reasonable belief as to each, and that each disclosure evidences either fraud, waste and abuse; a violation of law, rule or regulation; or a specific danger to public health and safety.

The agency retaliated against the appellant for his protected whistleblowing

As shown above, the appellant contends that his rating of "exceeds fully successful" on his 1995 performance appraisal (in lieu of an "outstanding" rating), the removal of critical duties from his job assignments (surveillances) in mid-1997 and the December 19, 1997 letter of admonishment and reassignment to the agency's offices in Germantown, Maryland, were motivated by retaliation for his whistleblowing. I find, for the reasons below, that the appellant proved by preponderant evidence that retaliation for whistleblowing was a contributing factor in these personnel actions.[9] I further find that, with the exception of the 1995 appraisal, the agency failed to prove by

[9] The removal of the appellant's surveillance duties constitutes a personnel action as a significant change in duties. 5 U.S.C. § 2302(a)(2)(A)(xi).

clear and convincing evidence that it would have taken the same actions in the absence of the whistleblowing activity.[10]

The crux of this case was summed up in the testimony of Fred J. Volpe, Deputy Director of EH Residents. Volpe, like the other management officials, testified that "DOE protocol" required EH residents to submit their reports through management and that it was the senior resident and upper level management who would determine what matters would and would not be contained in the final report. Any deviation from this protocol was unacceptable and intolerable.

For instance, the numerous drafts of the letter of admonishment contained an allegation that the appellant deviated from protocol when he reported to Senator Fred Thompson problems associated with the investigation of transuranics (TRUs). Volpe testified that the appellant deserved to be admonished for this because he took internal information, which may not be accurate information, outside the office. He added that, both he and Goldenberg were upset by this incident. He added that this was one of the reasons why the appellant ceased being assigned surveillances. He went on to explain that if the senior resident does not sign off on a report of surveillance, the contents of that report of surveillance should not be disclosed to anyone. He iterated that it is DOE protocol not to release information outside the agency. He further explained that any employee can contact the Inspector General regarding fraud, waste, and abuse, but if a safety issue is involved, it is not fraud, waste and abuse. The implication of this testimony is that DOE management does not believe that safety issues should be reported to the Inspector General and it illustrates a total lack of understanding of an employee's rights under the Whistleblower Protection Act.

The appellant testified that, in May or June 1997, he noticed he was no longer being given surveillances as part of his duties. And, in July 1997, he was told that he would not be given any surveillances to do. The appellant believed that he had plenty of time in which to do surveillances and still do the other duties he was being assigned and

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[10] As explained herein, I find that the agency proved by clear and convincing evidence that the appellant would have received a rating of "exceeds fully successful" on his 1995 appraisal absent his whistleblowing activity.

complained to management about his not being assigned surveillances. *See* Agency Exhibit 40. In his words, he felt like he was being "put on a shelf."

Management's witnesses, Volpe, Goldenberg and Raymond J. Hardwick, Jr., Director of ES Residents (the appellant's first-line supervisor as of June 1997), testified that the appellant was given other duties to do in lieu of surveillances which, in their view, constituted a full-time job. However, when pressed regarding the decision to take surveillances away from the appellant, they admitted it was a conscious decision based on their "fear" of what the appellant would write in a surveillance report. It was clear from their testimony that what they feared was the appellant including a section on "chilled atmosphere," *i.e.*, employees' failure to report safety violations out of fear of reprisal. I found this testimony to be, at best, incredible. For, every management witness testified that it was the mission of EH residents to investigate and report on safety related issues. Indeed, Cooper described the EH mission as "an official whistleblower on safety." It strikes me, therefore, that any employees' reluctance to report safety violations and safety issues would point toward mission failure and be a material and significant issue in possibly each and every report.

Management, however, did not accept the appellant's assertions that there was a chilled atmosphere at any particular DOE facility. They each testified that they did not believe the reluctance to report safety violations at Oak Ridge was any worse that at any other facility. Such statements beg the question, however, for if the workers at every facility are in fear of retaliation or reprisal for reporting safety violations, no one facility would be worse than any other but the situation would be, nonetheless, unacceptable. Every facility would require some corrective measure.

This dichotomy is best explained by Cooper's testimony regarding his attempts to do a report on chilled atmosphere. Cooper testified that he interviewed several contractor employees who told him that they were in fear of reprisal if they reported safety violations, but that they refused, because of that fear, to give Mr. Cooper signed statements to that effect. When Cooper reported his findings to Hardwick, Hardwick told Cooper that, in the absence of hard evidence, *i.e.*, statements expressing fear, they could not write a report saying there is a chilled atmosphere. In my view, if employees cannot report safety violations outside the agency and contractor employees fear reprisal

for reporting them to DOE, then the issue of chilled atmosphere can never be alleviated and the underlying safety issues may never surface. The absence of the hard evidence is, itself, sufficient evidence of a chilled atmosphere and would, on its own, have been sufficient to justify the writing of a report. Yet, Cooper testified that Hardwick told him not to write a report because, in Cooper's view, Hardwick feared damaging DOE's relationship with the contractor. And, it is this fear of management, *i.e.*, damaging relationships with the contractor, that, in my view, pushed management to retaliate against the appellant for his protected disclosures.

In the letter of admonishment and reassignment, the agency cited five incidents/reasons for the admonishment. The first of these was that, during a videoconference of EH residents, the appellant disrupted the conference and other employees by slapping the table and proclaiming "bullshit." The appellant does not deny that he slapped the table and said "bullshit," however, he explained that the video equipment was on mute so that only the two employees in the room with him heard what he said and he did not believe it disrupted them. Further, he contends, and Cooper agrees, that these conferences were "open" meetings for the free exchange of ideas and thoughts. One of the other employees in the room with the appellant, Ms. Branson, agreed with the appellant that the video equipment was muted and she stated that his conduct did not disrupt the meeting. Yet, this charge appears in the letter of admonishment.

A second charge involves a memo the appellant wrote via e-mail to individuals both inside and outside the Office of Oversight wherein he complains that Volpe used the word "disgruntled" in describing employees who complain about safety violations or file other complaints. Interestingly, Volpe wrote two memos on this subject, the first of which states that he intended nothing derogatory in the use of the word "disgruntled" and pokes fun at the appellant's challenging it by saying, "Are we having fun yet?" In the second memo, Volpe questions whether he even used the phrase. I found Volpe's testimony that the word "disgruntled" carries no negative connotation to strain the limits of credulity and I find it even more unreasonable that the agency would chastise the appellant for complaining about Mr. Volpe's conduct and not chastise Mr. Volpe for making the remark in the first instance.

The third charge involves the appellant's letter of October 27, 1997, to line management. The appellant is chastised herein for not following "protocols." However, the record is replete with instances of other individuals not following protocols, albeit different protocols. For instance, Cooper testified that he heard that the appellant had made a statement that the appellant would stick a pencil in someone's eye. Cooper then told two employees they could go home, informed everyone in DOE management of the appellant's alleged misconduct, and went outside the agency and reported this incident to Mr. Richardson, Deputy Manager for the contractor at Oak Ridge. When questioned why he went outside the agency, Cooper testified that he thought the contractor needed to know. Neil Goldenberg testified that, in a conference call with Ms. Branson, Ms. Branson told him that the appellant used the phrase "sticking a pencil in the eye" as a figure of speech. It was clear that Cooper reported this "heinous event" without first checking with the eyewitness. Yet, Mr. Goldenberg testified that he believed Mr. Cooper gave an honest report about what he heard and that Cooper merely made an honest mistake. I find it incredulous that the agency would continually criticize the appellant for going outside of internal management structure with his reports of safety violations yet completely excuse Cooper's reporting a threat in the workplace without first corroborating the facts.

A fourth charge in the letter of admonishment involves the appellant's e-mail to the Director of the Oak Ridge National Laboratory stating that DOE management was suppressing safety items and he was willing to discuss this with them. Again, the appellant is chastised for going directly to the contractor with his views regarding safety issues which are not approved by his management. I note, as discussed earlier, that a welder died as the result of the suppression or loss of information regarding safety issues dealing with a welder catching fire while performing welding duties. It strikes me that the appellant's attempt to raise safety issues to the individual most directly affected by them is not misconduct justifying an admonishment under these circumstances.

DOE management that testified at the hearing all made a point of stating that the appellant would report information that he had yet to verify and it was this aspect of his reporting that concerned them. Yet, when Cooper went outside management's chain

without verification, he merely made an honest mistake. And, this was not the first incident where Cooper went outside protocol. Cooper testified that he heard that a contractor employee, Mr. Morgan, was being terminated from his employment. Cooper testified that he believed Morgan was being terminated for reporting safety violations to the contractor and DOE. Cooper then took it upon himself to meet with contractor management and intervene on Morgan's behalf and Morgan's job was ultimately saved. Management was aware of Mr. Cooper's stepping outside protocol and did nothing.

The last item in the letter of admonishment concerns the appellant's memo and supporting affidavits to the Deputy Manager of the contractor at Oak Ridge. In this memo, the appellant made known his "six-year mission" to bring safety issues to the forefront at DOE and his concomitant frustrations and then responded to Cooper's report of him being a threat to the workplace.[11] As discussed above, the incident which resulted in Cooper's report that the appellant was a threat was a hollow, insupportable characterization of what occurred. Yet, the agency saw fit to admonish the appellant when he simply tried to defend himself, his name, and his reputation by responding to the allegation.

Regarding the reassignment, Alison Davidow, Team Leader of Headquarters, Employee-Labor Relations Team in the Office of Personnel for the Assistant Secretary for Human Resources and Administration, testified that it was her idea to reassign the appellant and she recommended it to the appellant's management chain. She testified that she believed relationships in the EH office at Oak Ridge were strained, particularly between Cooper and the appellant, and that the situation at Oak Ridge needed to be stabilized and the appellant placed where he could contribute to the agency. When pressed on cross-examination, Ms. Davidow admitted that part of her motivation in making this recommendation was that she was tired of dealing with all of the appellant's complaints and grievances.

Hardwick testified that he made an independent decision to reassign the appellant based on Davidow's recommendation and for the reasons Davidow gave. However,

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[11] The affidavits concerned only the subject of the appellant being a threat to commit workplace violence.

when informed that Cooper had already transferred out of Oak Ridge at the time of the reassignment and was not expected back, Hardwick could provide no explanation for why the appellant's reassignment was necessary to cool relationships in the Oak Ridge office.

I found Hardwick's testimony about his reasons for the admonishment and reassignment to be superficial at best. Indeed, when pressed on each and every issue noted in the letter of admonishment, Hardwick was incapable of providing any details. It was obvious that Hardwick, a new supervisor, who the agency argues was insulated from the appellant's history and thus had no motive to retaliate, was merely doing upper-level management's bidding. Nevertheless, Hardwick testified that he was fully briefed about the appellant even before he arrived at Oak Ridge.

Based on all the above, I find that the appellant proved that his whistleblowing was a contributing factor in the taking away of his surveillance duties, the letter of admonishment, and the reassignment. Regarding the agency's burden to present clear and convincing evidence that it would have taken the same actions absent the appellant's disclosures, I note that the agency offered little other evidence than that discussed above, *i.e*, the appellant repeatedly went out of protocol and he committed the offenses listed in the admonishment. The agency's other evidence is that the appellant brought these actions on himself by using phrases such as "liars," "thugs," and "retaliators" in his numerous complaints, e-mails and disclosures. While I am not unsympathetic to the agency's anger at its managers being labeled as liars and thugs, the appellant's use of these phrases is wholly insufficient to justify any of the actions present in this appeal.

In addition, the agency's position here is that it had the right to take these actions because of the fact that the appellant was making disclosures, i.e., going outside the agency, such as the letter to Senator Thompson. Therefore, it would be nonsensical for them to argue that absent the disclosure, it would have taken the same action anyway. Consequently, I further find that the agency wholly failed to prove, by clear and convincing evidence, that it would have taken these same actions absent the appellant's protected disclosures.

However, as noted above, I reach a different conclusion regarding the 1995 performance appraisal. The appellant believes that his 1995 performance appraisal should have been rated outstanding but was rated one level lower, at exceeds fully successful, in retaliation for his whistleblowing. I note that the appellant failed to introduce any evidence to justify his belief that he deserved an outstanding rating. Rather, he chose only to question the agency's evidence as to why he merited an exceeds fully successful rating.

David Rohrer was the appellant's supervisor at the time of the 1995 rating. He testified that the appellant did several reports during the rating period. One such report was the Safety Envelope report at Oak Ridge National Laboratory dealing with hazard classifications for five accelerators. He further testified that the appellant did three Employee Concerns Surveillances: Oak Ridge National Laboratory, K-25 AND Y-12. Regarding these surveillances, Rohrer testified that nothing about them really stood out, that they were all at an observation level with no issues or concerns identified. As for other reports, he rated the appellant's Fernald report a "2," the Savannah River Plant (SRP) report a "4," and the Oak Ridge report a "5." His testimony in this regard was unassailed.

He also testified regarding a surveillance at Johnson Control. He noted that the appellant failed to identify certain issues and he testified about his notes contained in the margins that questioned safety issues in this report. Though the appellant disputed Rohrer's testimony about the Johnson Control report, he admitted that there was room for disagreement.

Oliver Lynch, the reviewer on this appraisal, testified that the appellant's failure to have respirator qualifications also accounted for the exceeds rating. Though he admitted that the requirement to maintain that qualification had been abandoned, he said the requirement existed by implication. He explained that some facilities have signs that require a respirator to enter the facility. Thus, he concluded that, though the requirement was not codified, it existed nevertheless. Although the appellant contends that the requirement for a respirator is fallacious, there was no evidence presented to indicate otherwise. I find, therefore, the agency proved by clear and convincing

evidence that it would have rated the appellant exceeds fully successful on his 1995 performance appraisal absent his whistleblowing.

DECISION

The appellant's request for corrective action is granted.

ORDER

The agency is Ordered to cancel the letter of admonishment, cancel the directed reassignment, and return to the appellant the full range of duties and work assignments consistent with his position description and past assignments.

INTERIM RELIEF

If a petition for review is filed, I **ORDER** the agency to provide interim relief to appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final. If an agency files a petition or cross petition for review and fails to submit evidence that it has complied with the provisions of 5 C.F.R. § 1201.115(b)(1) or (2), the Board may dismiss the agency's petition for review. If the agency does not return the appellant to appellant's former position, duties, and tour of duty at appellant's former duty station, it must justify its failure to do so by making an "undue disruption determination" in accordance with 5 U.S.C. § 7701(b)(2)(A). Such a determination must be communicated to the appellant in writing no later than the deadline for filing a petition for review. The agency must include with its petition for review evidence that such a determination has been duly made and communicated to the appellant or its petition may be dismissed.

FOR THE BOARD:

Stuart A. Miller
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on 2 - JUN 1999, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you 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. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

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

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

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

ATTORNEY FEES

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

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

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 PARTIES

If this decision becomes the final decision of the Board, a copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8).

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

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April 29, 1999
(Date)

Barbara Walton-Mapp
Legal Assistant