U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board
1615 M Street, NW
Washington, DC 20419-0002

Phone: (202) 653-7200; Fax: (202) 653-7130; E-Mail: mspb@mspb.gov

Clerk of the Board

July 24, 2017

Robert J. MacLean
883 Rhonda Place SE
Leesburg, VA 20175

Dear Mr. MacLean:

Enclosed please find a new copy of the initial decision issued in your appeal, MSPB Docket No. SF-0752-06-0611-C-1. After review by the Transportation Security Administration's Sensitive Security Information (SSI) office, it was determined that the initial decision did not contain any SSI, so the enclosed copy has had all protective markings removed.

Should you have any questions, please contact my office.

Sincerely,

Jennifer Everling
Acting Clerk of the Board

Enclosure

cc: Thad M. Guyer, Esq.
T.M. Guyer and Ayers & Friends, PC
116 Mistletoe Street
Medford, OR 97501

Thomas Devine, Esq.
Government Accountability Project
1612 K Street, NW, Suite 1100
Washington, DC 20006

Eileen Dizon Calaguas, Esq.
Department of Homeland Security
Transportation Security Administration
Office of Chief Counsel
450 Golden Gate Avenue, Suite 1-5246
San Francisco, CA 94102

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

ROBERT J. MACLEAN,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
SF-0752-06-0611-C-1

DATE: July 18, 2017

Thad M. Guyer, Esquire, Medford, Oregon, for the appellant.

Thomas Devine, Esquire, Washington, D.C., for the appellant.

Eileen Dizon Calaguas, Esquire, San Francisco, California, for the agency.

BEFORE
Franklin M. Kang
Administrative Judge

INITIAL DECISION

INTRODUCTION

The Board issued a decision on November 3, 2015, reversing the agency's removal of the appellant from his position effective April 11, 2006. *MacLean v. Department of Homeland Security*, MSPB Docket No. SF-0752-06-0611-M-1, slip op. (Initial Decision, November 3, 2015). This initial decision became the final decision of the Board on December 8, 2015 when the parties declined to seek further review. *Id.* The appellant filed this petition for enforcement (PFE) after the agency was ordered to pay back pay, restore the appellant, and provide the appellant with consequential relief. Compliance Appeal File (CAF), Tab 1.

In the underlying action, the appellant timely appealed the Transportation Security Administration's (TSA) decision to remove him from the position of Federal Air Marshal (FAM), with duties in Los Angeles, California, effective April 11, 2006. Initial Appeal File 1 (IAF-1), Tabs 1, 4. On October 5, 2006, an administrative judge dismissed the appeal without prejudice at the request of the appellant. IAF-1, Tab 29. On October 15, 2008, the appellant timely refiled the appeal. Initial Appeal File 2 (IAF-2), Tab 1. On June 22, 2009, the Board issued an Opinion and Order (O&O) addressing matters certified for interlocutory appeal. *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4 (2009); IAF-2, Tab 27. A hearing was held on November 5, 2009, as specified below. Hearing Compact Disc (HCD). The appellant traveled from California to Virginia to appear with his attorneys from the Board's Washington Regional Office by video-conference, while the agency appeared from the Board's Western Regional Office in California as well as the Washington Regional Office. *Id.* Through the first initial decision (ID), the agency's action was affirmed as a matter within the jurisdiction of the Board. IAF-2, Tab 86; *see* 5 U.S.C. §§ 7511-7513 and 7701.

Through a subsequent O&O that followed the appellant's petition for review, the Board affirmed the ID as modified. *MacLean v. Department of Homeland Security*, 116 M.S.P.R. 562 (2011). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) thereafter vacated *MacLean*, 116 M.S.P.R. 562, and remanded the matter for the Board to determine whether the appellant made a protected disclosure under the Whistleblower Protection Act (WPA). *MacLean v. Department of Homeland Security*, 714 F.3d 1301 (Fed. Cir. 2013); Remand Appeal File (RAF), Tab 1. The Supreme Court of the United States thereafter affirmed the judgment of the Federal Circuit, and the Board remanded this case to the administrative judge for further proceedings. *Department of Homeland Security v. MacLean*, 135 S.Ct. 913 (2015); RAF, Tabs 2, 3. This administrative

judge reversed the appellant's removal as noted above. *MacLean*, slip op. The appellant filed this PFE thereafter. CAF, Tab 1.

The Board has the authority to enforce its final decision. 5 C.F.R. § 1201.112(a)(3). In a PFE, an agency must prove that it is in compliance with the decision. *See Zuniga v. United States Postal Service*, 56 M.S.P.R. 572, 575 (1993). An agency's assertions of compliance must include a clear explanation of its compliance actions supported by documentary evidence. *Vaughan v. Department of Agriculture*, 116 M.S.P.R. 319, ¶ 5 (2011). The appellant may rebut the agency's evidence of compliance by making "specific, nonconclusory, and supported assertions of continued noncompliance." *Brown v. Office of Personnel Management*, 113 M.S.P.R. 325, ¶ 5 (2010). For the reasons set forth below, the appellant's petition for enforcement is DENIED.

ANALYSIS AND FINDINGS

Applicable Law

When an appellant has filed a petition for enforcement with the Board, the agency has the burden of proving it has complied with a final Board order. *See, e.g., Beckwith v. Department of Veterans Affairs*, 78 M.S.P.R. 668, 670 (1998); *Spates v. U.S. Postal Service*, 70 M.S.P.R 438, 441 (1996). Under the Board's regulations, an administrative judge can issue an initial decision finding compliance if the agency has made a good faith effort to take all actions to achieve compliance with a final decision of the Board. *See* 5 C.F.R. § 1201.183(a)(4). When an agency has made good faith efforts to take the actions necessary to comply with the Board's final order, the appellant's petition for enforcement may be dismissed as moot. *See Kolassa v. Department of the Treasury*, 59 M.S.P.R. 151, 155-56, (1993); *Burch v. U.S. Postal Service*, 52 M.S.P.R. 26, 28 (1991).

Background

At the time of his removal, the appellant, born in 1970 with a service computation date in 1992, was a preference eligible FAM, SV-1801-9, assigned to Los Angeles, California. IAF-1, Tab 4, Subtab 4F; IAF-2, Tab 45, Exhibit S. It is undisputed that the appellant was an employee pursuant to 5 U.S.C. § 7511(a)(1) at the time of his removal.

According to a Report of Investigation in the record evidence, based on a September 2004 report of an unauthorized media appearance by the appellant, the agency initiated an investigation. IAF-1, Tab 4, Subtab 4J. Following an investigative interview conducted by the agency's Immigration and Customs Enforcement Office of Professional Responsibility, the agency's investigators concluded, *inter alia*, that the appellant made an unauthorized release of information to the media. *Id.* On September 13, 2005, the appellant received a Proposal to Remove (proposal or proposed removal), charging the appellant with Unauthorized Media Appearance, Unauthorized Release of Information to the Media, and Unauthorized Disclosure of Sensitive Security Information (SSI). *Id.*, Subtab 4G. On April 10, 2006, Special Agent in Charge Frank Donzanti issued a decision on the proposed removal, sustaining only the third charge and the proposed penalty. *Id.*, Subtab 4A. The third charge, Unauthorized Disclosure of Sensitive Security Information (SSI), is accompanied by a single specification. IAF-2, Tab 67 at 5-6. The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government-issued mobile phones that all remaining overnight (RON) missions up to a specified date would be cancelled, or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. *Id.* On May 10, 2006, the appellant timely filed his petition for appeal. IAF-1, Tab 1.

On August 31, 2006, the agency's SSI Office Director issued a final order (AFO) on SSI related to this appeal, stating in part that the information in question constituted SSI under the SSI regulation then in effect, as the information concerned specific FAM deployments or missions on long-distance flights. *See* IAF-1, Tab 29. The first underlying ID explained that the appellant intended to seek review of the AFO, and dismissed the appellant's appeal without prejudice to refiling. *Id*. The ID thereafter became the final decision of the Board. *See id*. On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit (9th Circuit) denied the appellant's petition for review of the AFO. *MacLean v. Department of Homeland Security*, 543 F.3d 1145 (9th Cir. 2008).

On October 15, 2008, the appellant timely refiled this appeal. IAF-2, Tabs 1, 2. At the time of the events at issue, inclusive of the specification before the Board, the appellant was assigned to the FAM service center in Las Vegas, Nevada. *See* IAF-2, Tab 45, Exhibit X; IAF-2, Tab 49, Exhibit PPP. On February 10, 2009, the Board granted a motion to certify specific rulings for interlocutory appeal affecting the appellant's affirmative defenses under the WPA that were subsequently addressed by the Court as set forth below. IAF-2, Tab 23; *MacLean*, 112 M.S.P.R. 4; RAF, Tabs 1, 2. As set forth above, the sole charge before the Board was Unauthorized Disclosure of SSI. IAF-2, Tab 67 at 5-6.

Based on a careful review of the record evidence as set forth in greater detail in the underlying ID, in particular the sworn statement and testimony of the appellant, I found the agency has shown by preponderant evidence that on July 29, 2003, the appellant informed the reporter that all Las Vegas FAMs were sent a text message on their government-issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987); *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994). With respect to the characterization of this information, the 9th Circuit ruled that the information contained in the text message qualifies as SSI because it contained specific details of aviation security

measures regarding deployment and missions of FAMs. *MacLean*, 543 F.3d 1145. Accordingly, I found that the agency met its burden of proving by preponderant evidence that information on RON deployments at issue was SSI; I further found that the agency had met its burden of proving by preponderant evidence that the information disclosed by the appellant to the reporter on July 29, 2003 was SSI. *Id*.

With respect to the reporter's status, it was undisputed that the reporter was not authorized to receive this information. *See* HCD (testimony of the appellant). Within the agency's SSI regulations, it was undisputed that the reporter was not a person with a "Need to Know" within the meaning of the Interim SSI Policies and Procedures in effect as of November 13, 2002. IAF-1, Tab 4, Subtab 4N. Accordingly, I found that the agency had shown by preponderant evidence that the media person to whom the SSI was disclosed, was not a covered person within the meaning of SSI regulations. *Hicks*, 62 M.S.P.R. at 74. Because this person was not authorized to receive SSI, I found in the underlying ID that the agency had shown by preponderant evidence that the disclosure of SSI by the appellant to the reporter was unauthorized. *Id*. Thus, the specification and charge were sustained by preponderant evidence as set forth in greater detail in the underlying ID. *Id*.

The appellant alleged that the agency discriminated and retaliated against him based on his membership and leadership status with a professional association in violation of 5 U.S.C. § 2302(b)(10); and that this alleged discrimination and retaliation violated his First Amendment rights. IAF-2, Tab 67 at 5-6. After carefully reviewing the record evidence, I found that the appellant failed to prove his claims under section 2302(b)(10) as set forth in the underlying ID. IAF-2, Tab 84. The appellant next claimed that the agency violated his rights under the First Amendment. *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Smith v. Department of*

Transportation, 106 M.S.P.R. 59, 78-79 (2007). After carefully reviewing the record evidence, I found that the appellant failed to prove his claim that the agency violated his rights under the First Amendment as set forth in the underlying ID.

On review, the Board agreed that the charge was correctly sustained, and the Federal Circuit did not find the appellant's arguments challenging the agency's charge to be persuasive. *See* RAF, Tab 1; *MacLean*, 116 M.S.P.R. 562. The Board agreed that the appellant's First Amendment right of free speech was not violated, agreed that the appellant did not prove his claim under section 2302(b)(10), and concluded that the appellant's disclosure to the reporter was not protected whistleblowing. *Id*. The Federal Circuit did not further address the First Amendment claim, agreed with the Board's conclusion about the section 2302(b)(10) claim, and found that the appellant's disclosure may qualify for WPA protection. *Id*. The Federal Circuit vacated and remanded this matter to the Board for a determination of whether the appellant's disclosure met the other requirements under section 2302(b)(8)(A), stating in its second footnote that neither party argued that the Whistleblower Protection Enhancement Act (WPEA) applied to this appeal. RAF, Tab 1. The Court affirmed the judgment of the Federal Circuit. RAF, Tab 2. This matter was remanded to the Board for further proceedings on the WPA as noted above. RAF, Tabs 1-3, 6.

On remand, I found that the appellant showed by preponderant evidence that he made a protected disclosure of information that was reasonably believed to evidence a violation of law, rule, or regulation, and a substantial and specific danger to public safety. *MacLean*, slip op. I further found that the appellant showed by preponderant evidence that the disclosure was a contributing factor in the agency's personnel action. *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 113 (1998), citing *Scott v. Department of Justice*, 69 M.S.P.R. 211, 236 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). The record reflected that the primary reason for the appellant's removal was the appellant's disclosure of SSI

information contained in the 2003 text message. IAF-2, Tab 84. The sole charge and specification before the Board centered on the agency's assertion that the appellant made an unauthorized disclosure of this same information as set forth in the underlying ID while the testimonial evidence presented by the witnesses reflect that this same disclosure was the primary basis for the appellant's removal. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). To this point, the agency conceded that it could not meet its burden under *Carr*. RAF, Tab 14. Thus, I found that the agency was unable to meet its burden. *Id*. Because the agency did not meet its burden of showing by clear and convincing evidence that it would have removed the appellant absent his whistleblowing disclosures, I reversed the agency's actions. I ordered the agency to (1) cancel the removal and restore the appellant as of April 11, 2006; (2) pay back pay and interest; and (3) provide the appellant consequential relief as appropriate pursuant to 5 C.F.R. § 1201.202(b).

Petition for Enforcement

The appellant filed this PFE alleging, *inter alia*, that: (1) the agency failed to deposit $138,036.18 in his Thrift Savings Plan (TSP) account; (2) the agency owes the appellant $104,975.05 in consequential damages, for health and dental expenses and travel expenses; and (3) the agency failed to put the appellant in the position he would have been in absent the retaliation by failing to promote him, adding that the agency has failed to pay the increased compensation to which the appellant would have been entitled based on "unlawfully denied promotions." CAF, Tab 6 at 15-16. The appellant further requested a fact finding hearing in his request, citing 5 C.F.R. 1201.183(a)(3) to support his request. CAF, Tab 6 at 10-11. Included in his initial filings and exhibits were materials related to the appellant's removal, a series of documents regarding safety concerns the appellant witnessed, and correspondence with the agency regarding his TSP account. CAF, Tab 4.

In a series of subsequent filings, detailed below, the appellant alleged that the agency engaged in ongoing retaliation against the appellant by giving him no substantive work, alleged that it repeatedly failed to promote him, alleged that the agency acted with bad faith in removing him, alleged that the agency lied to Congress about the appellant's removal and TSA practices, and made a variety of other allegations related to the agency's behavior leading up to his removal and since his reinstatement. *See generally* CAF, Tabs 6, 12, 19, 25, 26, 59. The appellant also made a variety of allegations and arguments related to the agency's compliance with the second ID. Specifically, in addition to the requests in his initial PFE, he states that he is owed an adjustment to his back pay because of taxes and financial choices he was forced to make because of his removal, that he would have made different investment choices in the TSP and should be credited the earnings he would have made accordingly, that he lacks equity in his home because of the turmoil caused by his removal, that he was forced to be retrained once he was reinstated, that he is filing for bankruptcy because of the financial hardship caused by him removal, and a variety of other allegations about the agency's conduct and failure to place him in *status quo ante*.

The appellant argues that the Board should look to the WPEA when determining what relief the appellant is entitled to. CAF, Tab 12 at 8. Specifically, the appellant argues that because the WPEA applies to all personnel actions occurring after December 27, 2012, the effective date of the act, then the agency's ongoing failure to promote the appellant is subject to the WPEA, and the appellant is entitled to relief. CAF, Tab 12 at 8-9. I note that the appellant's WPEA argument is new to this proceeding and that the underlying ID is predicated on the applicability of the WPA as noted above. He further requested a hearing on these matters.

Through subsequent submissions, the appellant argues that his net pay was reduced after he moved to a high tax state, he lost his mortgage interest deduction, and he would have transferred his TSP funds eight times to various

investments had he not been separated. CAF, Tabs 27, 28. The agency moved to strike those submissions as untimely, which I denied on November 30, 2016. CAF, Tab 39. The agency moved for dismissal for lack of timeliness based on its February 3, 2016 Notice of Compliance that the appellant states he received on the following day, which I denied. CAF, Tab 8 at 5; CAF, Tab 9, Exhibit 1; CAF, Tab 11 at 5. In response to this petition, the agency states that it has complied with the orders contained in the ID. The record reflects that the agency deposited "the remaining deposit of $127,741.56" in the appellant's TSP account. CAF, Tab 13.

On April 8, 2016, the agency filed a notice indicating that the appellant failed to initiate discovery and therefore the record should close. CAF, Tab 14. The appellant responded on April 9, 2016, requesting that the Board order the agency to produce 6 years of resumes of promoted FAMs and stating that the appellant and his counsel understood the resumes to be forthcoming from the Office of Special Counsel, thereby explaining the appellant's failure to make a specific request. CAF, Tab 15 at 4-7.

On May 18, 2016, I issued an order pertaining to the settlement of two attorney's fees matters related to the appellant's underlying appeal, MSPB Docket Numbers SF-0752-06-0611-A-2 and SF-0752-06-0611-A-3. CAF, Tab 22. I further ordered that certain submissions to MSPB Docket Number SF-0752-06-0611-A-1 be moved to the compliance matter at hand, per the appellant's request. *Id*. On November 30, 2016, I issued an order allowing in all of the appellant's filings and the agency's responses thereto and denying the agency's various motions to strike. I ordered the agency to show that it corrected the appellant's TSP balance. I further ordered the appellant to "submit proof of pecuniary damages which are quantifiable and usually can be objectively documented. To this point, the appellant is ORDERED to timely file evidence and argument to support his claim for consequential damage awards sought in this matter as described above." CAF, Tab 39 (bold print removed).

On January 17, 2017, the agency filed a motion objecting to the appellant's ongoing filings after the close of record. CAF, Tab 52. On January 18, 2017, the appellant filed a response to the agency's objections to the appellant's submissions. In it, he responds to several of the agency's statements, characterizing them as the agency's attempt to quash previously unavailable evidence. CAF, Tab 53. On March 1, 2017, the appellant filed a declaration entitled, "Permission for the Agency to Communicate with Members of Congress and their Staffers" wherein he states that he grants the agency permission to discuss the matter at issue here and another matter the appellant has in front of the EEOC. CAF, Tab 54. On March 16, 2017, the agency filed a motion objecting to the appellant's filings as irrelevant and untimely. CAF, Tab 56.

On May 5, 2017, the appellant filed a declaration entitled, "Previously Unavailable Evidence of the Agency's disregard for Merit Systems Principals." CAF, Tab 59. In the declaration, the appellant states that the agency avoids compliance with, *inter alia*, the Civil Service Reform Act. *Id*.

On June 10, 2017, the appellant filed a document entitled, "Appellant's Declaration: Previously Unavailable Evidence of the Agency's Disregard for Merit Systems Principals that Encourage Managers and Senior Executives to Provide False Testimony with Impunity." CAF, Tab 60. The appellant's filing contains testimony offered by its employees regarding an agency manager's discipline for misconduct that occurred in 2015. *Id*.

On July 17, 2017, the appellant filed a submission with his declaration and attachments entitled "Declaration: Previously Unavailable Evidence of Top Comparator in Assertion of Retroactive Demotions" wherein the appellant, *inter alia*, states that he learned that a "then-J Band" supervisor was promoted to "K Band" on January 26, 2016 approximately seven years after this individual's "gross negligence allowed the Hispanic cleaning lady to be kidnapped and tortured" in a bathroom, adding that others told him that "the agency may have engaged in an elaborate cover-up in order to hide the fact that a negligent coward

exists" and that the appellant heard that the appellant's current supervisor was in charge of the operations center when the 2009 attack occurred. CAF, Tab 61 (upper case lettering, underlining, and bold print in original removed). The appellant compares this individual's actions in 2009 with the appellant's exemplary level service. *Id*. The appellant attaches the affidavit of a former coworker describing his actions to intervene in the situation above and states that while he received a cash award for his actions, others were more formally recognized for their intervention. *Id*.

The agency has maintained throughout its filings that the appellant's ongoing submissions are untimely or irrelevant and therefore should be stricken from the record. While the appellant has submitted numerous filings that are not relevant to this compliance matter as set forth in greater detail below, for completeness I accept all submissions from the appellant into the record. The agency's submissions are also accepted in their entirety into the record.

To the extent that the appellant submitted irrelevant information, including congressional testimony and correspondence, news articles, information related generally to the agency's management and behavior, and other items not related to the relief he is requesting in this compliance proceeding, I have reviewed each item for relevance to the compliance proceeding at hand and note that the Board's jurisdiction is limited. The matter at hand is the agency's compliance with the underlying ID and I will address all issues related thereto raised by both parties.

Hearing Request

At the outset, I address the appellant's request for a fact finding hearing related to this compliance matter. To support his request for a hearing, the appellant cites 5 C.F.R. § 1201.183(a)(3), which states that in a compliance matter such as this a "judge may convene a hearing if one is necessary to resolve matters at issue." Here, I find that a hearing is not necessary to resolve the

compliance matters at issue. The compliance issues raised by the appellant do not require a hearing to resolve based on the opportunities for the parties to submit an extensive amount of information into the record as set forth above. The issues raised can be resolved by the existing record evidence. Accordingly, no hearing will be held in this compliance matter.

Compensatory and Consequential Damages

As discussed above, the appellant claims he is entitled to both compensatory damages and consequential damages. Consequential damages have been available to whistleblower claimants since the amendments to the WPA. They are available when the Board orders corrective action in a whistleblower case such as this one. In 2012, compensatory damages were added as available relief to appellants in whistleblower actions with the WPEA. Consequential damages are generally construed to exclude non-pecuniary losses and are designed to reimburse out of pocket costs. *Bohac v. Department of Agriculture*, 239 F.3d 1334, 1342 (Fed. Cir. 2001). The WPA allows damages as follows, "back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages." 5 U.S.C. 1221(g)(1)(A) (1994). The WPEA adds to this provision to include "compensatory damages (including interest, reasonable expert witness fees, and costs)." 5 U.S.C. § 1221 (2012).

The first issue to address is whether the appellant is eligible, as he claims, for compensatory damages under the WPEA. For the following reasons, I conclude that he is not. The appellant's underlying removal occurred in 2006, and this PFE arises under that removal. While the litigation related to this PFE was ongoing, Congress amended the statute to allow for compensatory damage in cases such as this. The Board subsequently held that compensatory damages would not be available in cases pending at the time of enactment of the WPEA. *King v. Department of the Air Force*, 119 M.S.P.R. 663, ¶¶ 8-31 (2013). Thus, while the appellant argues that the continued agency actions are ongoing

prohibited personnel practices occurring since the statute was changed, the action at issue in this PFE relates to the agency's behavior in 2006. This matter was pending in 2012 when the WPEA was enacted and is therefore governed by the WPA as decided in *King*. To the extent the appellant is arguing the agency is engaging in new whistleblower reprisal or prohibited personnel actions, he may seek remedy for that reprisal separately. As to damages related to his 2006 removal and the remedies he is allowed under the law at that time, he is eligible to seek consequential damages only as permitted under WPA, which was in effect at the time of his removal.

Consequential damages are available in cases where an appellant prevails on a whistleblower reprisal individual right of action appeal or when the Board orders corrective action in a Special Counsel complaint. *Seibel v. Department of the Treasury*, 87 M.S.P.R. 260, 266 n.3 (2000). In a case such as this, the Board has indicated that an appellant who prevails with whistleblower reprisal as an affirmative defense is eligible for consequential damages. In order to be a reimbursable consequential damage, the appellant must show a connection to his removal. The costs, such as a medical cost, must be proven with reasonable certainty. *Pastor v. Department of Veterans Affairs*, 87 M.S.P.R. 609, ¶ 19 (2001). The appellant must provide more than bare assertions to support an award of consequential damages, and must submit evidence establishing that the claimed damages were reasonable, foreseeable and causally related to the agency's whistleblowing reprisal. *Id.* Our reviewing court has held that consequential damages as defined under the relevant statute are limited to out-of-pocket costs and do not include non-pecuniary damages. *Bohac*, 239 F.3d 1335. Thus, in the case of sick or annual leave used, there is no out of pocket expense to be reimbursed. *Carson v. Department of Energy*, 64 Fed. Appx. 234, 240-41 (Fed. Cir. 2003 nonprecedential). The appellant has the burden to prove his consequential damages, including that they are both reasonable and foreseeable. *Carson v. Department of Energy*, 92 M.S.P.R. 440, ¶ 15 (2002). Thus, he must

prove both that he incurred "consequential damages" and that the damages were "reasonable and foreseeable," i.e., causally related to the agency's reprisal against him. *Johnston v. Department of the Treasury*, 100 M.S.P.R. 78, ¶ 13 (2005). The Board and its reviewing court have held that the language of the WPA should be narrowly construed as it relates to consequential damages and that only items similar in nature to those enumerated in the statute should be covered. *Id*.

Back Pay

The appellant's allegations related to his back pay center on his tax liability. He does not allege that the agency miscalculated his gross back pay, but instead that his net back pay is incorrect. On August 11, 2016, the appellant submitted a declaration entitled, "Correction of the Agency's June 18, 2015 Back Pay Statement After Adjusted Taxes." CAF, Tab 27. In it, the appellant states that his tax preparer corrected mistakes with his back payment, resulting in a net back pay amount of $303,508.87 instead of the original $636,206.14. The difference is the result of an increase in both federal and state tax liabilities. The federal tax liability withheld from the appellant's back payment was $11,828.32 rather than the $277,045.01 calculated by his tax preparer. The state tax liability withheld from the appellant's back payment was $1,758.20 rather than the $69,238.78 calculated by his tax preparer. CAF, Tab 27 at 5. In the narrative of the declaration, the appellant states:

> 7. My tax liability was significantly increased due to the September 12, 2004 initiation of the investigation that resulted in my removal. That investigation compelled me to request a voluntarily lateral permanent transfer from a downsizing office to the desperately understaffed field office in California—the only field office in that state prior to my transfer.
>
> 8. My permanent transfer request was approved 35 days after the Agency's removal probe began.
>
> 9. Later I sold my Nevada home in order move into my mother's California home.
>
> 10. Moving in with my mother allowed me to significantly reduce my living expenses in anticipation of and after my removal.

> 11. No longer having a primary residence mortgage made me unable to deduct nine years of mortgage interest payments, therefore significantly increasing my 2015 tax liability.
>
> 12. The Agency's removal investigation forced me to relocate from a state with no income tax to a state with highest income tax rate in the U.S.
>
> 13. Agency's nine-year lump NET payment was taxed at the highest income tax bracket for the tax year of 2015, further increasing my tax liability.

CAF, Tab 27 at 5-6.

In response, on August 17, 2016, the agency submitted a response to the appellant's statement on back pay. CAF, Tab 31. In it, the agency argues that the appellant's pleading should be stricken as untimely, that the tax consequences of a back pay award are not within the Board's authority to address, and that the appellant should not receive consequential damages from the sale of his home and subsequent inability to deduct mortgage interest payments. CAF, Tab 31 at 5-6. As discussed above, the appellant's submissions have all been accepted to the record.

The Board has authority to adjudicate the merits of back pay disputes. *Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25 (1984). When computing back pay for an employee such as the appellant in the instant case, the provisions of the Back Pay Act govern. The Back Pay Act (and its implementing regulations) provide for paying the employee the back pay she would have earned but for an "unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). Benefits include the restoration of back leave. *Vitanza v. U.S. Postal Service*, 94 M.S.P.R. 385, 390 n.3 (2003). Satisfactory evidence of compliance must include an explanation of how the agency arrived at its figures and an accurate accounting of any deductions. *Blanchard v. Department of Justice*, 40 M.S.P.R. 513, 515 (1989); *Woodson v. Department of Agriculture*, 94 M.S.P.R. 289, ¶ 6 (2003) (the agency must provide evidence of compliance which includes a clear

explanation of its compliance efforts supported by understandable documentary evidence).

Here, the agency provided detailed documentary evidence of how it arrived at the appellant's gross back pay amount. The appellant has not disputed that evidence. Additionally, the appellant does not dispute the agency's deduction of his other earnings during the back pay period. Instead, the appellant's focus is on the tax withholdings. While the appellant makes a variety of arguments related to the damages he sustained because of the removal – particularly focusing on the expenses associated with the sale of his home and his eventual relocation – he is focused specifically on the tax consequences of such damages. The Board has held that it lacks jurisdiction to consider tax relief or withholding issues. *See Quackenbush v. Department of Justice*, 45 M.S.P.R. 543, 544 (1990). The Board has refused to rule on whether the amount of income tax withheld from an appellant's back pay award is correct because it does not fall within its limited jurisdiction. *Id*. Furthermore, the appellant fails to provide a convincing basis for his tax liabilities as a consequential damage. Accordingly, the appellant is not entitled to relief due to high tax withholdings.

Thrift Savings Plan

On June 17, 2016, the appellant contacted the TSP service center, conveying that all of his contributions "from April 11, 2006 to present must be corrected according to 100% allocation into the C Fund." CAF, Tab 33 at 13. The appellant similarly conveyed to the agency on June 21, 2016 his desire to have "all of the April 11, 2006 to May 26, 2015 calculations, changed back to the C Fund[.]" *Id*. at 23-24. The agency agreed with the appellant's position, and supported the appellant's request to have all allocations to the C fund, adding:

> I understand that you have been in touch with the TSP Board (Margaret McFerren) on 6/29/2016 and she has advised that, in fact, the "breakage"/interest calculation from 2006 was based on the rate of return for the C-Fund. We will follow-up and have requested a

> history report from TSP to show the current status of your account and the allocation.

Id. at 20. On August 5, 2016, the appellant wrote the agency:

> Hi Gregory, I just made all of the allocation changes to get all of my TSP funds to be retroactively paid under the C Fund back to April 11, 2006. Attached PDF is proof. Please let me know if this suffices.
>
> Appreciatively,
>
> Robert MacLean

Id. at 18. On August 9, 2016, the agency continued to assist the appellant with his retroactive C fund election. *Id*. at 17.

As noted above, the agency states that it deposited the remaining amounts into the appellant's TSP account, and the appellant's TSP statement reflects that as of August 10, 2016, his C fund was valued at $367,126.76. CAF, Tab 13; CAF, Tab 33 at 36 (August 10, 2016 Account Information). On this same date, the appellant asked to have his TSP funds retroactively moved eight times between various funds from 2006 to 2015 as set forth below. CAF, Tab 33 at 34.

On August 15, 2016, the appellant filed a declaration asking for corrections to his TSP balance. Specifically, the appellant states that he would have transferred his balance between funds during the period when he was not working for the agency. The appellant requests transfers as follows:

1. 1st transfer: April 11, 2006 to December 31, 2007; 100% into the I Fund
2. 2nd transfer: January 1, 2008 to December 31, 2008; 100% into the F Fund
3. 3rd transfer: January 1, 2009 to December 31, 2010; 100% into the S Fund
4. 4th transfer: January 1, 2011 to December 31, 2011; 100% into the F Fund
5. 5th transfer: January 1, 2012 to December 31, 2012; 100% into the I Fund
6. 6th transfer: January 1, 2013 to December 31, 2013; 100% into the S Fund
7. 7th transfer: January 1, 2014 to December 31, 2014; 100% into the C Fund
8. 8th transfer: January 1, 2015 to May 3, 2015; 100% into the G Fund

CAF, Tab 28. In support of his request, the appellant states, "I would have confidently performed these TSP interfund transfers had my economic situation

and career with the Agency been stable—progressing with within Band salary increases, bonuses, and promotions—and without all of the years of forced litigation, unemployment, and constant financial anxiety." *Id*.

On August 25, 2016, the agency submitted a response to the appellant's request for a TSP adjustment. In its response, the agency argues that the appellant's submission is untimely, that the Board lacks authority to order such a reallocation of TSP funds, and that the agency met its obligations to the appellant with regards to his TSP funds. CAF, Tab 32. Specifically, the agency argues that the appellant gave contradictory instructions when selecting his TSP contributions upon his reinstatement, that the Thrift Board, which administers the TSP followed appropriate regulations in calculating the appellant's losses or gains on the amount, termed breakage, and that the appellant's request is for unjust enrichment. *Id*.

The record reflects that the agency agreed with the appellant's request to have these past amounts in the C fund based on the appellant's June 21, 2016 representation that he had a documented history of 15 years straight of allocating 100% into the C fund, and his argument that absent such a standard, everyone would retroactively choose a series of funds that made the most money, *Id*. at 21. Specifically, the appellant informed the agency:

> Does it not make sense to go back to the history of past allocations, otherwise would not everyone in a situation like mine simply choose the fund or perhaps a series of funds that made the most money? I have a documented history of 15 years straight of allocating 100% into the C Fund - I can provide all of my statements to you going back to 1997.

Id. Here, the record reflects that the agency and TSP official referenced above agreed with the appellant's reasoning and acted on his request discussed above. *See id*. While the appellant now argues that he is entitled to the allocations specified above, the record reflects that the agency completed its TSP deposits for the retroactive period, and assisted the appellant with having the funds deposited

into the requested fund based on his "documented history" as set forth above. *Id*. Accordingly, the appellant is not entitled to the additional relief sought on this point.

Medical, Dental, and Other Expenses

With regards to the appellant's health care costs, the appellant did not elect retroactive health insurance coverage. IAF, Tab 9 at 27. The appellant argues that he should be reimbursed for health insurance premiums he paid. He argues that the agency's position that he needed to retroactively choose insurance in order to receive reimbursement isn't logical and will result in the appellant not being made whole. CAF, Tab 12 at 10-11. It is undisputed that if he had elected such coverage, he would have been liable for the employee portion of premiums. The appellant is eligible for reimbursement for premiums for individual health insurance that he may have converted into. IAF, Tab 9 at 27. He has not provided information to the agency indicating that he converted into such an individual policy. *Id*. While the agency argues that the medical expenses aren't reimbursable because the appellant did not elect retroactive health coverage, the agency is incorrect. In a reversal of a misconduct action, without an affirmative defense of whistleblower reprisal, the agency would be correct. However, in cases such as this, where consequential damages are permitted and medical expenses in particular are specifically enumerated in the statute as recoverable, whether or not the appellant opts to have retroactive health coverage isn't at issue. Instead, the issue is whether the costs are related to the agency's wrongdoing. *See Johnston*, 100 M.S.P.R. 78. And it is here that the appellant's claim for medical expenses falters. The appellant included detailed amounts of expenses he is owed but provided no receipts or other documentation of such expenses. On January 11, 2017, the appellant filed "Correction and Supporting Evidence of Agency's False Assertion of Failure to Provide Proof of Payment Associated with Consequential Damages Claims." CAF, Tab 51. In it, he included screen shots of e-mails to the agency that he claims included attachments in support of his claim for

consequential damages. The appellant, however, failed to include the attachments themselves. *Id*. He also provided detailed descriptions of medical problems he had, including panic attacks and teeth grinding caused by stress, but he fails to include receipts or bills to show the cost of these incidents. CAF, Tab 40 at 8-9; 39-41. He also fails to include medical documentation that connects his symptoms to his removal. There are no letters or statements from his physicians nor is there similar documentation from other providers. Without this information, I cannot determine the nature and extent of the appellant's costs nor can I determine that they are related to his removal.

To the extent the appellant may have been confused about the required documentation, he failed to submit further evidence of his expenses despite the November 30, 2016 Order requiring he do so. Rather than submit documentation showing pecuniary loss, however, the appellant continued to submit congressional records, newspaper articles, and other items that do not address his request for consequential damages. While he mentioned his health care expenses, he named them in a declaration rather than providing evidence to support his claims. CAF, Tab 51. As discussed above, the appellant's medical expenses could be eligible consequential damages, but his failure to provide any records corroborating those expenses prevents him from recovering these amounts. In order to recover, the appellant would need to provide documentation as to the amount and nature of the expense. For such expenses as teeth grinding caused by stress, doctor and dentist notes stating the cause or nature of his complaint along with costs would suffice. Without necessary documentation, the appellant's expenses have no basis for recovery and neither the Board nor the agency has the ability to confirm the amount and extent of the expenses. Unfortunately, the appellant’s request for medical and other costs is therefore denied.

Sick Leave Balance

The appellant requests restoration of 280 hours of sick leave to address his ongoing medical and dental problems. CAF, Tab 40 at 5. As discussed above,

leave balances are non-pecuniary losses and therefore, ineligible for restoration as a consequential damage. Accordingly, the appellant's request for sick leave restoration is denied.

Working Conditions and Promotions

While the appellant makes a variety of allegations regarding the agency's conduct leading up to his removal and since his reinstatement, throughout his filings and allegations is the undergirding theme of bad faith on the agency's behalf. If an appellant believes that action subsequent to cancellation of an adverse personnel action constitutes reprisal for the exercise of an appeal right, the employee may petition to the Board for compliance to stop harassing tactics that might not be independently appealable. *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 247 (1980). An allegation of reprisal is cognizable in an enforcement proceeding because an employee who is being retaliated against has not been returned to the *status quo ante*. *Ciulla v. United States Postal Service*, 42 M.S.P.R. 111, 114 n.3 (1989). Unsubstantiated and conclusory allegations of harassment or retaliation do not make a compliance issue, however. *See Singletary v. United States Postal Service*, 79 M.S.P.R. 76, 80 (1998). Allegations of harassment and retaliation must be specific. *See O'Connell v. Department of the Navy*, 73 M.S.P.R. 235 (1997). To show that the appellant has been subjected to reprisal, he must show that: (1) he engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action could, under the circumstances, be retaliation; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988). Reprisal is distinct from unhappiness upon returning to work and the appellant is not guaranteed a congenial workplace, no matter how desirable. *Williams v. Department of the Navy*, 79 M.S.P.R. 364, 367 (1998).

In a compliance proceeding, it is appropriate for an appellant to raise failure to restore to *status quo ante* but appellants are not entitled restoration to a

better position. *Oates v. Department of Health and Human Services*, 64 M.S.P.R. 349, 351 (1994). While the Board doesn't require perfect consistency as to all aspects of the appellant's pre and post removal positions, his return to work must involve placing the appellant in a position with all the essential privileges of the previous position. *Black v. Department of Justice*, 85 M.S.P.R. 650, ¶ 6 (2000). There must be a substantial assessment of the scope of duties and responsibilities compared with the appellant's former position. *Hernandez v. United States Postal Service*, 87 M.S.P.R. 418, ¶ 13 (2001). There is nothing preventing the parties from negotiating a reassignment to suit their mutual interests.

The appellant's arguments regarding his restoration to duty focuses on two points: his current working conditions and the agency's alleged failure to promote him as he would have been absent the agency's actions. I begin by addressing the appellant's arguments with regards to the promotions, as they make up the bulk of his allegations and submissions.

Throughout his submissions in this compliance action, the appellant argues that the agency failed to promote him and that this failure is a failure to return him to the *status quo ante*. He further argues that failure to promote him is retaliation by the agency against him for being a whistleblower. According to the appellant, had he stayed on duty in 2006, he would have been promoted above the I Band FAM position to which he was restored in 2015. To support his argument, the appellant states that other equally or less qualified FAMs were promoted during the time he was out of duty. He also provides extensive records of correspondence with the agency and between the agency and Congress regarding his various requests for and applications to promotions. The appellant submitted an agency memo to him entitled, "Response to Request Regarding J Band Assessment and Hiring Preference" dated December 17, 2015. CAF, Tab 4 at 65. This memo refers to the appellant's earlier written request for an explanation as to why he was not selected for a promotion and stating that the appellant was eligible for such a promotion because of the retaliation he experienced under

5 U.S.C. § 3351. *Id*. In the letter, the agency states that the TSA Handbook prevents the appellant from receiving a promotion to a supervisory level without formal competition. *Id*. The agency goes on to state:

> [T]he Agency has allowed you to enter the J Band Promotion assessment process which began in June 2015. As part of the process, you will receive assessment score following completion of the assessment process. Once you receive a score, you will be able to apply for available Job Opportunity Announcements. This is being done outside the normal promotion process (as opposed to making you wait until the 2016 J Band promotion process) so as to give you earlier access to promotion opportunities.

CAF, Tab 4 at 65-66.

Included in the appellant's response is the agency response to the congressional letter. In it, the agency provides data on promotions showing that:

- Of all FAM who has worked for the agency since 2005, 58.3% have not been promoted.
- Of employees who were I Band like the appellant, 11.91% had been promoted between 2006 and 2016.
- 98.2% of FAMs in the Los Angeles Office were not promoted; 1.8% were promoted.
- 41.7% of FAMs who have worked for the agency since 2005 have not been promoted.
- 31% of the FAMs who have worked for the agency since 2005 have received more than one promotion.
- 73.4% of FAMs have received an in position increase since 2005.

CAF, Tab 36 at 28-29.

On January 8, 2016, the agency informed the appellant that he passed all assessments in the Supervisory Federal Air Marshal announcement. CAF, Tab 19 at 62. "As a result, you are eligible to apply for subsequent Supervisory Federal Air Marshal SV-1801-J positions announced during this promotion cycle. Keep in mind that specific Supervisory Federal Air Marshal SV-1801-J Job

Opportunity Announcements (JOAs) may have specialized experience requirement that applicants need to meet in order to be considered qualified." CAF, Tab 19 at 62.

On April 11, 2016, the appellant filed a motion requesting that the head of the agency review the appellant's rejection from job vacancy # FAM-16-997714. CAF, Tab 16. Attached to the motion is a letter dated April 6, 2016 to then Secretary of Homeland Security Jeh Johnson, demanding a response within 30 days, a copy of which to be filed with Board. *Id*. The letter alleges, *inter alia*, that the agency acted with bad faith in 2006 and 2009 with regards to the appellant's removal and that the agency's attorneys were not forthright in their submissions to the Board. The appellant concludes by asking for the agency to promote him to a J Band Supervisory Air Marshal. *Id*. at 14. Throughout the letter, the appellant quotes extensively from congressional record and testimony related to the agency and the Board's ID. *Id*. In response, the agency filed a motion to strike on April 13, 2016, stating that the appellant's submissions were untimely and irrelevant. CAF, Tab 17; *see* CAF, Tab 18.

On June 30, 2016, the appellant submitted more exhibits to the Board. Included was a June 30, 2016, letter to the TSA Administrator Peter Neffenger asking for a review within 30 days of the appellant's denied transfer request to #16-19 Lateral Reassignment Opportunity: I Band Federal Air Marshal; Flight Operations Division, Law Enforcement Liaison Section and the appellant's resume and relevant application materials. CAF, Tab 23. The appellant also included a closure letter for an investigation into the appellant's alleged showing of an "inappropriate video in the workplace." CAF, Tab 23 at 24. Also included is the record of a temporary detail that the appellant was assigned to, and a new assignment he was given at the conclusion of the detail. *Id*. at 30, 32. The appellant later withdrew this request, on August 7, 2016, because the agency ordered the appellant deployed as a field operational "visual Intermodal Prevention and Response" FAM on July 27, 2016. CAF, Tab 26. According to

the appellant, the decision "reverses Agency Headquarters' long-standing orders that were subjecting Appellant to a hostile work environment and potentially violating 18 U.S.C. § 1513(e):

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interferes with the lawful employment or livelihood of any person, for providing to a law enforcement office any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years or both.

CAF, Tab 26.

On August 7, 2016, the appellant submitted another letter to Neffenger asking him to review the appellant's rejection from Supervisory Federal Air Marshal, SV-1801-J, Job Opportunity Announcement number FAM-16-142735 in Herndon, VA. CAF, Tab 25. On August 15, 2016, the appellant submitted a letter dated August 12, 2016 to Neffenger requesting information on promotions of FAMs from 2005 onward and reasoning for the appellant's current work assignments. CAF, Tab 29. The letter is signed by Senator Chuck Grassley and the chairs and ranking members of the House Committee on Oversight and Government Reform, the Subcommittee on Transportation and Public Assets, and the Subcommittee on Government Operations. *Id*.

On August 17, 2016, the agency submitted a response to the appellant's request for the head of the agency review dated August 7, 2016. CAF, Tab 30. In its response, the agency states that the Board lacks jurisdiction to hear the claim contained within the appellant's request and that 5 U.S.C. § 3352, cited by the appellant as supporting his requests, does not apply to TSA's personnel system, and if it did, it would not apply in the case of a promotion and would only apply to a transfer. CAF, Tab 30 at 4.

On September 27, 2016, the appellant filed a declaration entitled, "Reply to Agency's September 12, 2016 secondary response to seven members of congress' August 12, 2016 interrogatories." CAF, Tab 36. In the response, he states that the agency was not truthful in its reply to Congress, specifically with regard to its

claim that the appellant was performing substantive work for the agency when he worked for the Agency's Freedom Center Emergency Preparedness Section from February 29, 2016 to April 13, 2016. CAF, Tab 36 at 14. The appellant details his work, seating assignment and working conditions during the detail and claims that he was assigned no substantive work. Eventually, the appellant was placed on Non-Mission Status. The appellant further argues that its response fails to show that the appellant should not have been promoted upon his return to duty. CAF, Tab 36 at 21. Among his arguments are comparisons to other agency employees, including one who left government service and later returned at a higher pay band, another one (that the agency refers to in its submissions as Employee A) did not have similar performance ratings and did not have prior law enforcement experience, and another employee (that the agency refers as Employee B) that also did receive high performance ratings and had been disciplined. CAF, Tab 36 at 23-24. The agency also provided a list of accomplishments the appellant achieved during his detail from February 29, 2016 through April 13, 2016, and an explanation of his work assignments during and around that period. *Id*. at 30.

On September 29, 2016, the agency responded to the appellant's claim that he was retaliated against in violation of 18 U.S.C. § 1513, stating that the Board does not have jurisdiction over such a claim. CAF, Tab 37. Specifically, the agency argues that the statute at issue is a criminal statute, that the appellant cannot file an action with the Board under the statute, and that the underlying facts at issue are from around the time of the appellant's removal. CAF, Tab 37. The appellant responded to the agency's filing, stating that the appellant was providing the underlying document to supplement the record and was not making any claim against the agency. CAF, Tab 38.

As to the appellant's desire to be promoted, the Board has held that an employee is not entitled to restoration to a better position. *See Oates*, 64 M.S.P.R. 349. While the appellant appears to argue that FAMs move up as a

matter of course within the agency, the evidence provided by the appellant shows that they do not. The data provided to Congress by the agency shows that over half of FAMs don't move beyond the I Band, that none within the appellant's original Los Angeles office were promoted, and that promotions to supervisory FAM positions are competitive. Additionally, the agency has taken the appellant's desire to be promoted seriously. The agency permitted the appellant to be considered for a promotion outside of its regular schedule because he was restored to duty. While the appellant charges that the agency violated various statutory requirements, they do not apply to the case at hand or the appellant is misreading them. As discussed above, the Board's jurisdiction is limited. The Board has no authority over criminal statutes, and I need not reach the agency's argument that § 3352 does not apply to it because it allows for transfers, not promotions, when an appellant prevails. Specifically the statute allows an appellant "to transfer to a position of the same status and tenure as the position of such employee." 5 U.S.C. § 3352.

The record reflects that the appellant was returned to duty promptly. The appellant was restored in the I band, which the agency provided evidence for being the full performance level of the FAM. CAF, Tab 9 at 26. Subsequently, the appellant was reassigned from the Los Angeles, CA office to the Washington, DC regional office. CAF, Tab 9 at 23. The record reflects that the reassignment was voluntary. On July 2, 2015, the appellant sent the Regional Supervisory Air Marshal in Charge a memo accepting a transfer to the agency's Washington Field Office. CAF, Tab 4 at 70. In the memo the appellant states that he does not want the transfer to be a term of settlement or a transfer under § 3352. CAF, Tab 4 at 71.

The appellant's claims as to his working conditions upon return to his position lack merit. At various times, the appellant alleges he is dissatisfied with the uniform he must now wear, that he was forced to retrain, and that he has been put in a meaningless position. He further alleges that he would have been

promoted in the interim years and should be above the I band. As to the training, the appellant was out of work for several years as the litigation of matter continued. By the time he was reinstated, it was 9 years from his removal. Under those circumstances, where his job is one of public safety, it is reasonable for the agency to require him to retrain. It is not a failure to put the appellant back to *status quo ante* to ensure he is properly trained to do the job as he did before he was removed. Nor is a change in uniform a working condition change significant enough to warrant redress.

As to the appellant's claims regarding retaliation, the appellant submitted evidence that he requested a non-flight position. The congressional records he submits show that during a short detail where the appellant states he had no work, the agency outlined a variety of activities he completed or participated in. The appellant further states that the agency did not grant him a ground-based assignment in 2015. CAF, Tab 12 at 19. For those who were granted a ground based assignment, the average score of the test used was 12.6667. *Id.* The appellant received 9.3333. *Id.* In short, while the appellant makes a variety of claims about failure to restore him to *status quo ante,* he fails to meet his burden. As discussed above, the appellant is not guaranteed a congenial work place. His assertions regarding the agency's behavior towards him are either refuted by the record or are bare assertions.

The appellant points to the testimony of Andrew Colsky, the former director of the agency's Office of Sensitive Security Information Office, to show that the agency had motive to retaliate and lacks credibility. CAF, Tab 12 at 19. In his submissions regarding compensatory damages, the appellant dedicates significant space to the details leading up to his removal and events during the litigation related to it. CAF, Tab 50. To the extent the appellant is attempting to relitigate his underlying removal, the Board has ruled in the appellant's favor and ordered relief. The Board has no authority to further question the appellant's reversed removal, and any evidence as to the agency's behavior leading up to the

removal is not relevant to the inquiry at hand – whether or not the agency has fully complied with the Board's orders. To the extent the appellant is alleging the agency acted or is acting in bad faith, the agency's obligation is to comply with the Board's order in the ID. Further complicating the appellant's various complaints is the fact that the appellant has since engaged in a voluntary transfer. While the appellant focuses on the agency's alleged failure to promote him, he fails to provide enough evidence that he was not meaningfully restored to his job.

Bankruptcy Costs, Home Equity, and Expenses

In his response to the Board's order dated November 30, 2016, requesting evidence supporting the appellant's request for compensatory and consequential damages, the appellant includes a long list of additional expenses that he requests damages for, including the following:

> 6. My spouse, my three minor children, and I since July 2016 have lived in a $605,000- mortgaged Leesburg, Virginia residence with almost no equity. Most of my peers are living in residences with up to 21 years of mortgage payments. In March of 1999, I purchased a home on 21 Edmonton Way, Rancho Santa Margarita, California 92688 for approximately $198,000; Zillow.com today estimates that home is now valued at $811,749.[] I sold my Rancho Santa Margarita home in 2001 to relocate to the Agency's Las Vegas, Nevada Federal Air Marshal Service ("FAMS") field office. It was not after the sale of my home was a single field office proposed for California.
>
> 7. The Agency's incorrect calculation of my backpayment and failure to calculate eight retroactive 401k Thrift Savings Program ("TSP") payments has burdened me with approximately $250,000 in California Franchise Tax Board ("CAFTB") and Federal Internal Revenue Service ("IRS") taxes, tax attorney fees, and bankruptcy attorneys' fees from California and a Washington DC law firm.
>
> 8. Due to stress-grinding my teeth at night, my dentist in Virginia has told me that I will need up to $9,800 to have a third tooth removed and replaced with an implant, a new implant for one of the two teeth already removed, and numerous filings due to receding gums and bone loss.
>
> 9. I have to wear a night-guard in my mouth every night to prevent further tooth, gum, and bone loss. The night-guard often causes me

> to gag and wake up forcing me to remove it and attempt to get more hours of sleep.
>
> 10. In January 2017, I will have to incur an early TSP funds withdrawal penalty in order to pay off my approximately $230,000 in taxes and tax penalties.
>
> 11. The OPM and PERSEC officials were fully aware of my approximately $450,000 of debt yet were sympathetic enough to grant me a non-interim TOP SECRET security clearance on December 16, 2016.
>
> 12. My bankruptcy attorney, H. Jason Gold of Nelson Mullins Riley & Scarborough LLP ("Nelson Mullins") in Washington DC, plans to file my bankruptcy next year in order to discharge approximately $200,000 in debt I occurred in 2007 trying to start a janitorial company that failed due to the Great Recession of 2008. Normally specializing in corporate bankruptcies as the Partner and Chair, Bankruptcy and Financial Restructuring Practice Group for Nelson Mullins, Mr. Gold personally took my case out of sympathy and gratitude for my July 2003 whistleblowing.
>
> 13. To date, the Agency refuses to pay the fees owed to the Government Accountability Project ("GAP") nonprofit, nongovernment group attorneys who have been representing me pro bono in this matter since October of 2009.
>
> 14. Most all of my time-consuming pleadings to this court have to be by Appellant declaration given the fact GAP is underfunded and understaffed.

CAF, Tab 40 at 4-7.

Many of the appellant's listed damages are addressed in other portions of this decision above, including the medical and dental expenses, the tax consequences, and the TSP contributions. The appellant also has separate matters related to attorneys' fees that have been separately docketed, addressing his requests as they relate to his representation and the cost. While the appellant appears to be requesting attorney's fees or some other compensation for his work, the Board does not provide attorney's fees to appellants. Appellants regularly appear in front of the Board without representation. The right to attorney's fees is for prevailing appellants who are represented by an attorney. The appellant's

separate attorney's fees actions are the appropriate way for his attorneys, but not the appellant himself, to be compensated. Moreover, as set forth in the detailed order received by the appellant and his attorneys on November 30, 2016, he is required to submit proof of his damages, and was ordered to timely file evidence to support his request for consequential damages. CAF, Tab 39. While the appellant continued to file a series of submissions in the seven months that followed, inclusive of documents sent to the agency and fees for insolvency counseling, the appellant did not submit evidence to the Board supporting his claim for related expenses as set forth in greater detail above. *Id.*

With regards to the other allegations the appellant makes like the costs associated with his bankruptcy, his home equity, and his assertion that he was approved to receive government assistance while he was out of work, the appellant has failed to show that those costs are contemplated by the statute authorizing consequential damages and that they are reasonable and foreseeable. As discussed above, the Board construes consequential damages under the WPA narrowly and awards for costs like those enumerated in the statute. Here, the appellant's financial hardship is foreseeable – periods of long unemployment reasonably lead to financial hardship. However, the specific needs of the appellant are not foreseeable or reasonable. Many people lack equity in their homes, and the appellant's period of unemployment overlaps with a period of substantial loss of home equity in the United States. The appellant's move and lack of equity are not reasonably related to his job loss. Additionally, home equity is not the kind of cost the WPA contemplates as a consequential damage. *See generally Johnston*, 100 M.S.P.R. 78. The same is true of the appellant's bankruptcy. While medical expenses and travel expenses are reasonably foreseeable, the exact nature of an individual's finances and choices make the likelihood of bankruptcy extremely variable. Here too, the nature of the expense is not that contemplated by the WPA and is not closely related to the list of expenses contained in the statute (i.e. medical costs). *See id.* The appellant's

other financial costs, therefore, are not consequential damages within the meaning of the statute and the appellant's request for damages is denied.

DECISION

The appellant's petition for enforcement is DENIED.

FOR THE BOARD: _____

Franklin M. Kang
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **August 22, 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.