UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DAVID T. TINSLEY,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
AT-0752-04-0116-I-1

DATE: April 20, 2004

Thomas G. Roth, Esquire, West Orange, New Jersey, for the appellant.

Toby D. McCoy, Esquire, and Monica Pantos, Esquire, Alexandria, Virginia, for the agency.

BEFORE
Richard W. Vitaris
Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On about November 10, 2003, David T. Tinsley timely appealed the action of the agency removing him from the position of Supervisory Special Agent GM-1811-14 (Criminal Investigator), with the Miami, Florida, Field Division of the Drug Enforcement Administration (DEA) effective October 28, 2003.

The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d) and 7701(a). The hearing the appellant requested was held on March 15-17, 2004, at Miami, Florida. For the reasons stated below, the agency action is MITIGATED.

ANALYSIS AND FINDINGS

1. Undisputed facts.

The appellant, a Supervisory Special Agent with the DEA, was assigned to the Miami Field Division as the Group Supervisor (GS), for Enforcement Group 43. In December 1996, Group 43, under the appellant's supervision, initiated an investigation targeting the drug and money laundering activities of several high-level Columbian drug traffickers. This Operation was code-named "Operation Cali-Man." Authorization to launder drug proceeds of specific targets and to use the proceeds generated by the undercover operation was subsequently requested and approved by the Attorney General of the United States in August 1997, by means of the Sensitive Activities Review Committee (SARC).

In SARC operations, law enforcement agents are allowed to engage in what would otherwise be an illegal activity, specifically laundering drug proceeds and acceptance of "commissions" which are used to further fund the law enforcement operation. Operation Cali-Man had the authority to launder up to $10 million dollars.

The document authorizing Operation Cali-Man authorized the use of funds generated by the undercover operation—the commissions—for "reasonable and necessary expenses" of the Operation but specified that "[e]xpenditures of under $1,000 will be approved by the Group Supervisors and expenditures in excess of $1,000 will require ASAC [Assistant Special Agent-in-Charge] authorization/signature. An expenditure over $10,000 will require SAC [Special Agent-in-Charge] approval." SARC Proposal, Article XIV, ¶ 9. Such approval is required "[p]rior to expending any commission funds. . . ." *Id.* at ¶ 10.

In December 1998, Group 43 re-established Mr. Baruch Vega and Mr. Roman Suarez as confidential sources to assist in Operation Cali-Man. Baruch Vega has been a source of information for several Federal law enforcement agencies, including the Federal Bureau of Investigation (FBI), the Customs

Service and the DEA. Roman Suarez had been a source of information for the DEA. Some of Baruch Vega's Columbian contacts were fugitives and/or targets of Operation Millennium, a multi-jurisdictional, multi-agency investigation that tied drug trafficking activity within the United States to the highest levels of the international cocaine trade. Due to his ability to interact with high-level Colombian drug traffickers, Mr. Vega was utilized to facilitate the surrender and cooperation of several Operation Millennium targets. During the course of Operation Cali-Man, agents under the appellant's supervision traveled with Mr. Vega on several occasions to and from Panama in furtherance of these activities.

In October 1999, discussions at the Miami Field Division of the DEA led to a management decision that the appellant's Group 43 would assist Group 9 in the surrender and transportation of an indicted Operation Millennium fugitive, Mr. Orlando Sanchez-Cristancho. It was further decided that, since Mr. Cristancho was indicted under Operation Millennium, Group 9 agents would handle his debriefing first, although Group 43 would have access to him afterwards.

As a result of several meetings held in the weeks before his surrender, the decision was made to covertly bring Mr. Cristancho from Panama to Miami, Florida. Mr. Cristancho was brought from Panama to Florida aboard a private aircraft leased from Aero Group Jets by Mr. Vega.

On or about November 17, 1999, the appellant received an invoice from Aero Group Jets in the amount of $23,200 for the rental of the aircraft used to transport Mr. Cristancho. The appellant directed one of his subordinates, Special Agent (SA) Lawrence Castillo, to indicate on the invoice that the expense was authorized by SAC Vincent Mazzilli. The appellant also told his immediate supervisor, ASAC Ernesto Perez, that the lease of the jet had been approved by SAC Mazzilli. The appellant directed the payment and filing of the invoice with the Operation Cali-Man records.

On or about February 14-15, 2002, the appellant was interviewed by Office of Professional Responsibility (OPR) investigators, in the course of an official

administrative inquiry, regarding the authorization of the use of the private jet for the transportation of Mr. Cristancho. The appellant stated that it was authorized by SAC Mazzilli, ASAC Perez, and himself. In statements made to OPR investigators, ASAC Perez and SAC Mazzilli denied approving the expenditure of funds for the lease of a private jet.

2. The agency failed to prove that the appellant made a false statement to OPR investigators (Charge 1) or that he created a false, misleading, or inaccurate document (Charge 2) with regard to whether he had SAC and ASAC approval for the charter of a private jet.

Charges 1 and 2 concern the appellant's charter of a private aircraft to transport Orlando Cristancho from Panama to the United States to surrender to U.S. law enforcement.

Mr. Cristancho was a major drug kingpin. Country Attaché Jay Bergman, the DEA Attaché to Panama, testified that Cristancho was considered by DEA to be a "top level trafficker," or "head of an organization," or someone "classified under [DEA's] system as one of the highest. . . drug violators, someone in a command and control capacity." Hearing Transcript (HT) at 537. Former Assistant U.S. Attorney Edward Ryan, who prosecuted Medillin Cartel kingpin Fabio Ochoa, testified that "[Cristancho] was seen as somebody who was sort of something of a hub in a wheel situation, where he had connections to many of the different players in the Millennium indictment, and specifically the bigger names, which included Bernal-Madrigal and Fabio Ochoa." HT at 557. According to Assistant U.S. Attorney Ryan, the surrender and cooperation of Cristancho was viewed as a "major coup" because he could also work proactively in an undercover capacity and could produce "huge results" because he was so well placed with the Colombian drug trafficking community. HT at 557-58.

Charge 1 alleges that the appellant made a false statement to OPR investigators when he told them that he had the approval of SAC Mazzilli and

ASAC Perez to charter the private jet used to Mr. Cristancho from Panama to Miami, Florida. Charge 2 alleges that the appellant created a false, misleading, or inaccurate document when he directed SA Castillo to indicate on the invoice that the expense was authorized by SAC Mazzilli. To prevail, the agency must prove the charges by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Preponderant evidence is "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c1)(2).

For ease of analysis, these charges will be discussed together because both charges turn on the credibility of the appellant and SAC Mazzilli. The crux of the issue is whether the appellant lied about having sought and obtained the required authority from SAC Mazzilli to lease a private aircraft at an expense of $23,200. If so, Charge 1 must be sustained because the appellant lied to OPR investigators. Charge 2 must also be sustained because by instructing SA Castillo to note on the invoice for the aircraft charter that SAC Mazzilli had approved the expenditure, the appellant would have created a false, misleading, or inaccurate document. On the other hand, if the appellant's testimony that he had SAC Mazzilli's approval were truthful, or if the appellant reasonably believed he had SAC Mazzilli's approval, then both these charges must fail.

In support of the charges, the agency presented the testimony of SAC Mazzilli. SAC Mazzilli flatly denies that he ever approved the expenditure. HT at 149, 150, 153, and 154. Indeed, he testified that the DEA had its own Airwing headquartered in Texas, which was available for missions, to include covert ones, and, therefore, if the subject of using a private plane had come up, he would have questioned why the DEA Airwing could not have been used instead. HT at 150. SAC Mazzilli stated that he would certainly have recalled a discussion regarding the charter of an aircraft because he (Mazzilli) had never used a chartered plane in his entire career with DEA. Moreover, the record reflects that ASAC Perez,

who did not testify at the hearing, has no recollection of the approval. Agency File, Tab 4x, Subtab 119, pp. 94, 97.

The appellant, on the other hand, testified just as flatly that he did receive SAC Mazzilli's approval. The appellant testified about a meeting with SAC Mazzilli at which he believed that ASAC Perez was also present. According to the appellant, SAC Mazzilli principally wanted to know whether the appellant and his group could actually get Mr. Cristancho to surrender, and the appellant suggested that they could. During the course of that discussion, the appellant mentioned to SAC Mazzilli that they could bring Mr. Cristancho in on a jet that would cost around $20,000. HT at 669-71.

The appellant further testified that, during that meeting, he also mentioned what Mr. Cristancho could do for the DEA, including using him proactively, using him against the remaining Millennium defendants and possibly using him against Mexican police officers with whom he had contact. SAC Mazzilli seemed more concerned about the nature and extent of Mr. Cristancho's cooperation after his arrival than how he would get here. HT at 669-71. Finally, the appellant testified that

> When we finished the conversation Mr. Mazzilli says to me. He took his two fingers, I'll never forget, and he looked at me and said, "Go do it, get him in here and get him in here now." As God is my witness that's exactly what he said, and that's exactly what we were able to do.

HT at 671.

I credit the appellant's testimony over that of SAC Mazzilli for several reasons: First, the appellant's testimony is corroborated by that of Associate SAC Sandalio Gonzalez. Second, the appellant presented highly persuasive polygraph evidence to support his credibility. And lastly, the appellant, a highly respected and talented law enforcement officer, had no motive whatsoever to lie about SAC Mazzilli's approval of the aircraft charter.

Associate SAC Sandalio Gonzalez, a member of the Senior Executive Service and currently the SAC of the El Paso Field Division, testified that, in his view, SAC Mazzilli had approved the appellant's charter of the aircraft. Associate SAC Gonzalez, who was both the appellant's second-level supervisor and SAC Mazzilli's immediate subordinate, testified that at a lengthy meeting which he attended during which SAC Mazzilli, in his presence, essentially instructed the appellant to do whatever he had to do to get Mr. Cristancho into the United States and to cooperate in the Millennium case. Specifically, Associate SAC Gonzalez testified:

> Q: Were you ever at a meeting when certain instructions were given to Mr. Tinsley?
>
> A: Yes.
>
> Q: And tell us about that meeting.
>
> A: Well in that meeting Dave indicated that his group had the means to get Cristancho to surrender and that they could do that. They could bring him in. And Mr. Mazzilli told him to go ahead and bring him in. "Do whatever you have to do to bring him in."
>
> Q: And that's basically what he said?
>
> A: Basically, yes.
>
> Q: Now what did you understand that to mean when he said it?
>
> A: To me that meant that the services or resources of Group 43 were going to be used to accomplish this. And this was going to be an operation that was going to be covered or paid for by Group 43 with the Commission Account. (HT 468-69).

HT at 468-69.

On cross-examination, the agency attempted to portray Associate SAC Gonzalez's testimony as ludicrous by suggesting that SAC Mazzilli's saying "Do whatever you have to do to bring him in," would not mean that the appellant did not have to comply with the restrictions imposed on Operation Cali-Man by the SARC, such as the restriction that expenditures in excess of $10,000 required the prior approval of the SAC.

Associate SAC Gonzalez clarified his testimony stating:

> Q: Do you interpret that to mean to do absolutely anything he could do to get him in?
>
> A: Of course not.
>
> Q: So there is some limit on it?
>
> A: Well we're Law Enforcement Officers. Anything legal.
>
> Q: Would you also interpret that to mean subject to the authority that you have?
>
> A: Well sure. Subject to the authority that the SAC has.

HT at 504-05. (emphasis added).

I questioned Associate SAC Gonzalez about this point personally in order to ensure I fully understood his testimony. Associate SAC Gonzalez made it absolutely clear that his interpretation of SAC Mazzilli's statement to the appellant was that the appellant would be authorized to use any appropriate means necessary to bring Mr. Cristancho in, consistent with all the authority that SAC Mazzilli could give him including the lease of a private jet.

I give great weight to Associate SAC Gonzalez's testimony. As the Associate SAC, Mr. Gonzalez was SAC Mazzilli's alter ego. Unlike the appellant who was several levels below the SAC in the chain of command, Associate SAC Gonzalez, like SAC Mazzilli was a Senior Executive with DEA, worked directly with SAC Mazzilli, and knew him well. I find the fact that Associate SAC Gonzalez himself believed that SAC Mazzilli had approved the charter of the aircraft to be persuasive evidence that the appellant would have reasonably believed the same thing.

Although the agency argues that ASAC Perez's prior statements do not substantiate the appellant's testimony, I find that they do. In his affidavit, ASAC Perez states:

> Although I have no specific recollection of having discussed the matter of the private aircraft with GS Tinsley in advance of the trip, I cannot state categorically that I did not do so. If GS Tinsley states that he discussed it with me in advance, I cannot say that he is wrong or incorrect. His recollection may simply be better than mine.

* * *

> In any event, I did authorize the lease of the jet when I signed the monthly report weeks later. Cristancho was a major violator whose cooperation was potentially extremely valuable to the DEA. Moreover, although I do not specifically recall discussing it with GS Tinsley in advance, I would have had no problem authorizing the expenditure before it occurred.

Appellant's Exhibit A.

On April 2, 2003, a polygraph examination of the appellant was conducted by George B. Slattery, a Diplomate and Board Certified Forensic Examiner and principal shareholder of Slattery Associates, Inc. The polygraph examination related directly to the false statement and false document specifications in Charges 1 and 2.

Mr. Slattery testified that the appellant was telling the truth when he answered these relevant questions:

> Q: Regarding whether your alleged personal conversations with Vincent Mazzilli and Michael Kane concerning those charges against you; do you intend to answer truthfully each question about that?
>
> (A) Yes.
>
> Q: Did Vince Mazzilli really verbally approve to you the lease of that private aircraft to bring Orlando Sanchez-Cristancho to Miami?
>
> (A) Yes.

HT at 628-29.

In considering whether to allow polygraph examinations into evidence, and in determining the weight to be given such evidence, the Board will consider a number of factors. The principal factors cited by the courts in denying admissibility include: (1) the possibility that a person who is in fact practicing deception might "beat the machine" and appear truthful, *Meier v. Department of Interior*, 3 M.S.P.R. 247, 253 (1980); (2) the likelihood that a jury would give significant, if not conclusive, weight to a polygrapher's opinion as to a witness' truthfulness in responding to a question bearing on an ultimate issue in a criminal case, *id.*; and (3) the party's failure to lay an adequate foundation for the

testimony by demonstrating the polygraph's substantial reliability and acceptance and establishing the competence of the examiner and the examination technique. *Id.*

I find the polygraph examination in this case to be admissible and highly probative. Mr. Slattery is a renowned polygrapher with impressive credentials. Appellant's Exhibit E. Mr. Slattery has been a polygraph examiner for more than 41 years. During that time, he has conducted at least 15,000 separate examinations, and has supervised at least 20,000 examinations. HT at 613. He utilizes the Baxter Technique, which is rated as the top polygraph technique in terms of validity, accuracy and reliability. Studies have shown that such technique produce results in the 97-98% accuracy range. HT at 611-12.

Mr. Slattery has been the President of the Florida Polygraph Association on two occasions, the Chairman of its Board of Directors on 3 occasions and has held numerous other offices relating to both law enforcement and private industry. He is also a full member of the American Polygraph Association, the American Association of Police Polygraphers and the National Polygraph Association. HT at 612-13. He has been qualified on numerous occasions as an expert polygrapher in both federal and state courts. HT at 614.

In his career, Mr. Slattery has conducted polygraphs for numerous law enforcement agencies, including the DEA itself, and has trained polygraph examiners for law enforcement agencies. He has even set up polygraph programs for state and local law enforcement agencies in Florida. HT at 611-12, 615-16. SA David Stephens, a former Operation Cali-Man case agent who is currently a DEA polygraph examiner testified that Mr. Slattery has an excellent reputation within the polygraph community. (HT 608).

It is improbable that the appellant could have contemplated "beating the machine" with Mr. Slattery. Historically, 75-80% of those who take polygraphs with Mr. Slattery fail them, in the sense that the examinees are found by him to be deceptive. HT at 616. Moreover, the accuracy of Mr. Slattery's polygraph

findings are frequently independently verified either by confessions or other means. HT at 616-17. Mr. Slattery testified that, in his opinion, there was no doubt that the appellant provided truthful responses to the relevant questions because his charts were "textbook clear" HT at 629.

According to the agency, the "appellant was zealous, eager, and willing to take risks to accomplish what he believed should be done. Appellant's arrogance led him down a path of self-destruction." I disagree and see no motive whatsoever for the appellant to charter an aircraft for Mr. Cristancho without the necessary approval. The appellant was not on the flight. He did not benefit at all from the use of a charter aircraft except the added security gained by the Operation since several witnesses testified that the Cali Drug Cartel knew the tailnumbers of DEA Airwing aircraft. The appellant had little to gain and an outstanding career to lose by violating the SARC in this way.

As the agency acknowledges in its closing argument, the appellant was put in charge of Operation Cali-Man specifically because of his extensive knowledge and expertise in running undercover SARC approved money-laundering operations. The appellant's performance of duty was rated outstanding before, during, and after his work on Operation Cali-Man. To my mind, it is improbable that the appellant would jeopardize a superb career by knowingly violating the SARC in order to charter the aircraft in question.

Additionally, the return of Mr. Cristancho to the United States was an extremely high-visibility operation within DEA. Witness after witness testified that Mr. Cristancho was a major Columbia drug kingpin and that his surrender to the DEA was a major coup for the Miami District. The principals involved had numerous meetings, and the appellant coordinated Mr. Cristancho's surrender with numerous authorities within and without DEA to include the Central Intelligence Agency (CIA) and the U.S. Attorney's Office. Indeed, the appellant used the CIA to bring Mr. Cristancho to the chartered aircraft surreptitiously, without going through Panamanian airport security or customs. The appellant

simply made no attempt to conceal the use of a chartered aircraft. And, an Assistant U.S. Attorney and various DEA agents from Group 9 were at the Fort Lauderdale airport to greet the plane.

As Associate SAC Gonzalez testified:

> I think it was widely known that we had brought this guy out of Panama in an aircraft, a non-DEA aircraft and that it was paid for by the Group 43 out of the commissions account. I think that was widely known in my Division. I think throughout that part of DEA Miami that was involved in this, which was, you know, quite a few people and basically the Top Management levels and maybe a couple other ASAC's. And the periphery that might have been interested in the case or maybe had to lend people for security or whatever. This was something that—Orlando Cristancho, as I said before, was a big catch.

HT AT 508.

Under these circumstances, I find it highly improbable that the appellant would have violated the SARC by improperly chartering an aircraft when dozens of senior officials, to include his own SAC, Associate SAC, and ASAC would inevitably learn about it.

In finding that that I credit the appellant's testimony over that of SAC Mazzilli, I make no finding that SAC Mazzilli deliberately lied. Rather, it is far more likely that, during the long meeting on the appellant's operational plan for bringing Mr. Cristancho to the United States, SAC Mazzilli simply missed the appellant's brief mention of his intent to charter a plane through inattention. As the appellant testified, there was no discussion regarding the use of a charter aircraft. It was simply one detail in a lengthy operational plan which the appellant briefed to the SAC.

The agency offers a specious conspiracy theory to explain the testimony of the appellant and Associate SAC Gonzalez. The agency argues that the appellant, Associate SAC Gonzalez, and even ASAC Perez were somehow annoyed that Group 9—which reported to Associate SAC Kane—rather than the appellant's Group 43—which reported to Associate SAC Gonzalez and ASAC Perez—were

given primary responsibility over the debrief of Mr. Cristancho. In other words, the agency would have me belief that the appellant, a highly respected law enforcement officer, and Associate SAC Gonzalez, a member of the Senior Executive Service and currently the DEA's SAC for the El Paso District, deliberately lied about SAC Mazzilli's approval because of a turf dispute between Associate SAC Gonzalez and Associate SAC Kane.

I find this explanation utterly preposterous. I find it far more likely that SAC Mazzilli, who by his own admission was not a micromanager (HT at 233) and did not seek out the details regarding Mr. Cristancho's surrender (HT at 233) was just not listening during the 20 seconds out of a lengthy meeting the appellant took to mention that he wanted to rent a plane for about $20,000 to transport Mr. Cristancho out of the country. When, at the end of that meeting, SAC Mazzilli said "Go do it, get him in here and get him in here now," the appellant took that to mean that his operational plan had been approved in its entirety, to include his plan to rent an aircraft. And, to be sure, nothing SAC Mazzilli said later would have led the appellant to believe otherwise. Indeed, SAC Mazzilli's words persuaded Associate SAC Gonzalez to believe, as the appellant did, that SAC Mazzilli had approved allowing the appellant to do whatever he needed to do within the SAC's authority to bring the notorious Cristancho into the United States.

While an expenditure of $20,000 in most Federal agencies is something which would require a variety of approvals by contracting officers, budget analysts, and others, it bears repeating that the aircraft charter did not involve appropriated funds. Under the SARC, the appellant was able to use commission funds—the drug money earned by the DEA's undercover operation—for this expenditure, not taxpayer money. The SARC's only requirement was that the expenditure be approved by the appropriate authority and that the expense be reasonable and necessary.

It is noteworthy that, on December 16, 1999, Associate SAC Gonzalez, ASAC Perez, and the appellant certified that the charter of the aircraft was reasonable and necessary in the regular report filed by Operation Cali-Man to Headquarters, DEA. Agency File, Tab 4x, Subtab 120, Exhibit H. Operation Cali-Man was audited that same month and its books approved by the prestigious public accounting firm of KPMG Peat Marwick. *Id.* The appellant and Associate SAC Gonzalez both testified that the aircraft charter expense was reasonable and necessary to keep the surrender of Mr. Cristancho clandestine. Four years later and in light of hindsight, the agency may think otherwise. I do not. In any case, I find that the appellant reasonably believed that SAC Mazzilli had approved the use of commission funds for this purpose. Therefore, charges 1 and 2 are NOT SUSTAINED.

3. (Charge 3) The agency proved in part that the appellant failed to exercise proper supervision over his subordinates.

a. Specification's 1 and 2 are not sustained.[1]

It is undisputed that a DEA agent is required to prepare in investigative report, known as a DEA-6 after the form number, to document any law enforcement activity or intelligence gathered during the course of an official investigation. The agency contends in specification 1 that the appellant, as Group Supervisor, failed to adequately supervise his subordinates by ensuring that adequate DEA-6's were prepared. In a similar vein, it is undisputed that a DEA agent must ensure that the confidential source files contain adequate documentation, typically DEA-6's, to substantiate the benefit derived from payments made to confidential sources. The agency contends in specification 2 that the appellant failed to adequately supervise his subordinates by ensuring that

[1] The agency withdrew specification 3.

the confidential source files contain adequate DEA-6's to support confidential source payments.

Two confidential sources, Baruch Vega and Roman Suarez were actively involved in the negotiation of the surrender and cooperation of the highest level Colombian drug traffickers and fugitives in both Panama and Miami. The agency contends that their activities were not documented as required by DEA policy. In addition, the agency contends that their confidential source files were devoid of any record of their activities; containing little more than an activation DEA-6, and one DEA-103 record of payment, reflecting a single $2000 payment to a source who the appellant testified was cooperating solely for money. HT at 700-01.

SA Kempshall testified that she and a team of OPR investigators went through each and every travel voucher and country clearance or travel authorization for which the justification was the debriefing of confidential sources. She further testified that a thorough review of the entire Cali-Man case file, the confidential source files, and classified reports revealed that there were no investigative reports documenting the activities of Messrs. Vega and Suarez during these trips to Panama, with the exception of the surrender of Orlando Cristancho.

This charge is a highly subjective one because, while everyone agrees on the general rule regarding the preparation of DEA-6's, no DEA rule or regulation specifically provides when investigative reports are required to be written by an agent. Even the agency's main witness on this charge, SA Elizabeth Kempshall, the lead OPR Investigator in the appellant's case, could not point to any provision in the DEA manual which provides guidance as to the circumstances under which a DEA-6 must be prepared. HT at 91-92. At bottom, then, the preparation of a DEA-6 is within the sound discretion of the Special Agent. In other words, a matter of judgment. With regard to the appellant's failure to supervise, there is

simply no mathematical formula to determine how many DEA-6's his subordinate, SA Castillo, should have prepared.

Importantly, SA Kempshall testified that in the vast majority of instances, investigative activity in Operation Cali-Man was meticulously recorded in DEA-6 investigative reports. HT at 79. The appellant testified that more than 2,000 DEA-6's were written in Operation Cali-Man. HT at 644.

Evaluation of the evidence with respect to this charge is further complicated by the fact that not all of the relevant DEA-6's were presented to the Board. SA Kempshall testified that during her investigation she came across references to SA Castillo having writing investigative reports that were later classified by Miami Field Division management. She further stated that such classified reports would normally be removed from the case file or the confidential source file. HT 87-88. The appellant testified that there were classified DEA-6's in Cali-Man that were neither found in the agency file nor produced in discovery. HT 663, 723-25.

The appellant testified that, at the request of the FBI, he wanted the bare minimum of a paper trail for Mr. Vega. Both the DEA and FBI used Vega as a confidential source. The FBI specified that Vega would be a "non-testifier." That is, he would never be used to testify in criminal trials. This status was necessary because Vega was called a "FCI-CI" or Foreign Counterintelligence Service Confidential Informant, who had been brought in by the CIA. As the appellant put it, "I'm having my agents cut him out every chance they can. I don't want him documented. I don't want him in our Case File any more than we have to." HT at 710.

The trips to Panama at issue here were confidential source recruiting trips. The plan was for Mr. Vega to "introduce" SA Castillo to drug traffickers and then to get out of there, so he would be in no position to have to testify regarding what conversations, if any, took place. For that reason, it was the appellant's judgment that few DEA-6's were required regarding Mr. Vega because Vega was a non-

testifier and, moreover, his activities did not yield investigative leads. And, as stated previously, at least one classified DEA-6 was prepared and was kept under lock and key in the Miami SAC's safe in order to safeguard the information contained therein.

Where, on the other hand, Mr. Vega's actions resulted in information or investigative leads, they were reported on a DEA-6. For example, a DEA-6 was prepared to reflect that the appellant used Mr. Vega to charter the airplane used for the surrender of Mr. Cristancho. The appellant explained that he did not want to put the DEA's name, or the name of a DEA undercover agent, on the rental contract for the aircraft. HT at 706.

In addition, the record contains the following DEA-6's or other memoranda:

(1) a memorandum from SA Castillo to the appellant concerning a meeting SA Castillo had with traffickers in Panama City on September 29, 1999. Agency File, Tab 123, Exhibit 13.

(2) A 5-page DEA-6 by SA Castillo concerning a meeting and debriefing which Castillo and others had with a confidential source in Panama City on October 19, 1999. Agency File, Tab 123, Exhibit 13.

(3) A 3-page DEA-6 by SA Castillo concerning the debriefing of another confidential source in Panama City on October 18, 1999. Agency File, Tab 4x, Subtab 123, Exhibit 13.

(4) A memorandum by SA Castillo referring to meetings which he and another agent had with various individuals on or about November 11, 1999, in Panama City. Agency File, Tab 123, Exhibit 13.

(5) A DEA-6 report by SA Castillo referring to a meeting which he had with a confidential source in Panama City on November 13, 1999. Agency File, Tab 4x, Subtab 123, Exhibit 13.

(6) A 5-page DEA-6 by SA Castillo referring to a debriefing of a confidential source in Panama City on December 7, 1999.

(7) A 21-page DEA-6 relating to the detailed debriefing of a confidential source called "Rasguno" in Panama City on January 13, 2000.

Contrary to SA Kempshall's testimony that there was only one DEA-6 pertaining to Mr. Cristancho's surrender, I find that there were at least seven other DEA-6's generated by SA Castillo. And, there could have been more. As stated previously, SA Kempshall was aware of at least one classified DEA-6 and the appellant testified that there were even more.

Finally, the appellant testified that his rationale for writing DEA-6's was based on reason and common sense. He made it known that his agents were expected to generate reports for enforcement activities and debriefings of individuals that would result in the gathering of productive intelligence information. If no worthwhile intelligence information was gathered, or if the recruiting session did not progress beyond the "feeling out" stage, then the appellant did not require a DEA-6. HT at 644-48. There is nothing in the DEA Agent's Manual inconsistent with the position that the appellant took with his agents in Cali-Man. Moreover, no agency witness testified to explain why the appellant's rationale was wrong, or why, under the circumstances, more DEA-6's should have been written.[2] The appellant explained his rationale for minimizing the number of DEA-6's concerning Mr. Vega and it appears sound. No other witness testified on this point, or explained why I should say that the appellant was wrong in accommodating the FBI's request that Mr. Vega's involvement be downplayed.

Because the quality and quantity of DEA-6's to be generated is a matter of discretion and judgment, I cannot sustain these specifications. The agency has

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[2] SA Kempshall testified that the DEA-6's were inadequate. However, she testified that she was aware of only one. Her testimony was clearly erroneous since, as stated previously, the agency file itself contained 7 more, and there might have even been more still if the classified DEA-6's were produced.

simply failed to explain why, under the circumstances, the appellant's judgment call regarding the number of DEA-6's required was wrong.

The agency somehow suggests that the efficiency of the service was harmed by the expenditure of over $10,000 in drug laundering "commission" funds for SA Castillo's trips to Panama. Parenthetically, I note that these funds were certainly reasonable and necessary. They resulted in not only Mr. Cristancho's surrender, the importance of which was discussed above, but also in the seizure off the coast of Chile of about 9,000 kilograms of cocaine from the vessel "NATIVA", one of the largest seizures in the history of DEA. HT 543-44 (J. Bergman) & HT 661-62 (Appellant).

b. Specifications 4 and 5 are sustained.[3]

The agency also alleges that the appellant failed to supervise SA Castillo, a subordinate agent because: (1) SA Castillo was alone on an aircraft with a confidential source and his associates, with no other law enforcement officials present (Specification 4); and (2) SA Castillo negotiated the surrender of a fugitive in Miami (Mr. Cristancho) without the presence of another law enforcement official (Specification 5). The Proposal Letter acknowledged the fact that the appellant was unaware of the fact that SA Castillo did not have another agent with him on these occasions, but suggests that because he was unaware of these matters, he failed to adequately supervise SA Castillo.

The appellant does not dispute that SA Castillo traveled alone with a drug target and his associates. Nor does the appellant dispute that SA Castillo negotiated Mr. Cristancho's surrender without another law enforcement officer present. And, it is undisputed that a DEA Special Agent is required to have another law enforcement officer present whenever they are in the company of a confidential source or a drug target.

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[3] The agency withdrew specification 3.

The appellant argues that a charge of failure to adequately supervise should not be sustained because the appellant supervised the largest and most active Group in the Miami Field Division, with as many as 24 agents and task force officers under his supervision at any one time. In sum, the appellant contends that because Operation Cali-Man was such a big case, it is unreasonable for the agency to expect that the appellant would know where each agent was, and what he was going, at every moment of each day.

While these considerations are certainly relevant on the issue of penalty, they do not constitute a defense to the charge. Despite his heavy work load, the appellant should have known that SA Castillo was alone in the presence of a confidential source and the confidential source's associates. In the first place, the appellant himself had approved a telex requesting country clearance for SA Castillo and Task Force Officer (TFA) Gomez to travel to Panama with Mr. Vega and another confidential source from November 22, 1999, to November 24, 1999. Agency File, Tab 4x, Subtab 122, Exhibit 15. Yet, TFA Gomez did not make the trip. It is improbable that the appellant was unaware that TFA Gomez, who was under the appellant's supervision, did not travel to Panama.

In addition, the appellant knew or should have known that an associate of Mr. Vega also made the trip, specifically Vega's attorney, Mr. Daniel Forman. The reason that the appellant should have known this is that SA Castillo flew to Panama at no expense to the government because Mr. Forman paid for a private aircraft for the group. Since the appellant authorized SA Castillo's travel and subsequently approved Castillo's travel expenses, the appellant would have known in advance that Castillo was traveling on Mr. Forman's plane because of the need to estimate the cost of the trip for purposes of obtaining required approvals.

Even assuming that the appellant did not know, in advance, that TFA Gomez was not accompanying SA Castillo on the November 22-24, 1999 trip, he would have learned afterwards when he reviewed and approved SA Castillo's

travel vouchers. Despite that, the appellant again permitted SA Castillo to travel alone with Mr. Vega when the two returned to Panama on December 6-8, 1999. As in the prior trip, the appellant requested country clearance for SA Castillo by telex, and in the telex it is clear that SA Castillo was to be the only law enforcement officer on the trip, along with Mr. Vega and two other confidential sources. Agency File, Tab 4x, Subtab 122, Exhibit 19. As with the earlier trip, SA Castillo's expenses were paid by Mr. Forman.

Further corroboration that SA Castillo met alone with drug traffickers, sources and associates, and the appellant's knowledge of it can be found in SA Castillo's sworn statement to OPR, in which SA Castillo not only admits to traveling and meeting alone with drug traffickers, but states that he always notified the appellant of his activities and had the appellant's express approval to do so. Agency File, Tab 4x, Subtab 122.

Accordingly, specifications 4 and 5 of Charge 3 and Charge 3 are SUSTAINED.

3. (Charge 4) The agency proved in part that the appellant did not follow written instructions.

a. Specification 2 is not sustained.[4]

Specification 2 alleges that the appellant failed to obtain SAC approval for expenses over $10,000. The written instruction referred to in this specification is the SARC's requirement regarding approval of expenses over $10,000 previously discussed in section 1, above.

The agency alleges that the appellant incurred four charges in excess of $10,000 without obtaining prior approval. In addition to the charter of the aircraft discussed in section 1, above, the charges are: (1) $14,570 in surveillance equipment, (2) $11,526.50 for SA Castillo's travel, and (3) $11,400 for SA

[4] The agency withdrew specification 1.

Melendez's travel. Except for the lease of the aircraft, the agency concedes that all of the expenses incurred were ratified by the SAC after the fact, but the agency insists that the appellant did not obtain specific prior approval.

To support this allegation, the agency relies again on the testimony of SAC Mazzilli who testified that he did not give prior approval of the expenses at issue here. On the other hand, the appellant testified that the policy for the approval of Operation Cali-Man expenses was verbal approval in advance of the expenditure, and written approval after-the-fact on the relevant monthly report which lists each individual expenditure. HT at 676-81. The appellant testified that he did obtain prior verbal approval, if not from SAC Mazzilli than from Associate SAC Gonzalez. *Id.*

I credit the appellant's testimony over that of SAC Mazzilli. Importantly, the appellant's testimony was corroborated by the testimony of his second-line supervisor, Associate SAC Gonzalez. *Hillen*, 35 M.S.P.R. at 460-61, who testified:

> Expenditures were approved verbally whenever something—any money had to be spent from the Commission's Account. The process was for the Supervisor to discuss it with the Assistant SAC. If the Assistant SAC felt, or if the nature of the expenditure was such that he had to check with myself or the SAC then he would do so.

HT at 477. SAC Mazzilli's predecessor, SAC William Mitchell testified to the same effect (HT at 585-86), as did Associate SAC Gonzalez's predecessor, Associate SAC Frank Tarallo (HT at 571-72).

Associate SAC Gonzalez also testified that he had delegated authority from SAC Mazzilli to approve SARC expenses on operational matters under his control:

> Q: Okay, what understanding did you have with him as to when you could sign?
>
> A: Mr. Mazzilli had given me the authority to sign for him on operational matters involving my side of the house.

Q: Would that be generally, or under circumstances where he wasn't available?

A: No, that was a general delegation that he made. He told me one day.

HT at 461-63.

The most probative evidence on the issue of whether the SAC approved the expenditures are the monthly Operation Cali-Man reports. The appellant testified without contradiction that the monthly report has a section entitled "Significant Problems Encountered," which is supposed to contain discussion of any problems with the Operation, to include any violations of the SARC which might have occurred. In other words, if an expenditure in excess of $10,000 had been made without prior approval of the SAC, that fact should have been noted in that section of the monthly report, even if the expense were "reasonable and necessary." The fact that SAC Mazzilli himself, or Associate SAC Gonzalez in his stead, signed each and every Operation Cali-Man monthly reports and failed to note any "problems" substantiates the appellant's assertion that he did, in fact, obtain prior verbal approvals of the "reasonable and necessary expenses" over $10,000. Obviously, if the appellant had not done so, SAC Mazzilli or Associate SAC Gonzalez, the appellant's third- and second-line supervisors, respectively, and Senior Executives with DEA, can be expected to have complied with the SARC themselves, and noted the "problem" in the appropriate section of the monthly report. This is powerful evidence that no such problem existed.

b. Specifications 3-8 are sustained.

Specifications 3 through 8 of Charge 4 allege that the appellant failed to follow written instructions because he authorized payments, generally consisting of reimbursement of expenses, to confidential sources who had been deactivated. The parties stipulated: (1) that when these expenses were incurred, the individuals were active, registered confidential sources; and (2) that they were reimbursed for these expenses after they had been deactivated.

It is uncontroverted that the agency policy requires that payments can only be made to activated confidential sources. The appellant admits that the allegations contained in these specifications are factually accurate and constitute technical violations of a provision of the DEA Agent's Manual. The appellant argues, however, that they are so hyper-technical as to constitute nitpicking. Because in all six instances, these individuals incurred legitimate expenses while working for DEA as a registered confidential source and, after being deactivated for whatever reasons, they were still entitled to reimbursement for the expenses they legitimately incurred on behalf of DEA. Moreover, it is undisputed that the appellant's mistake could have been avoided easily merely by preparing a one sentence DEA-6 to say that the confidential source was reactivated for the limited purpose of being reimbursed funds due to him and was thereafter immediately deactivated.

The agency argues that these violations are not hypertechnical at all. I agree with the agency. By making these payments in the manner that he did, there was no record of the payments in the confidential source files as required by the DEA Agent's Manual Section 6612. As a result there is no way for anyone other than the appellant to inspect these payments to ensure accuracy or necessity. Further, without a record of payment (DEA-103s) or other documentation in the confidential source file there is no way for anyone other than the appellant to determine the total amounts transferred to these confidential sources. This can lead to grave consequences for DEA if a confidential source testifies at a hearing and a discrepancy arises over the amount of monies actually paid to the source by DEA.

It is undisputed that the appellant paid these inactive confidential sources without reactivating them first as he was required to do by the DEA Agent's Manual. The appellant's arguments, while relevant to penalty, are not a defense. Accordingly, specifications 3-8 of Charge 4 and Charge 4 are SUSTAINED.

4. (Charge 5) The agency proved that the appellant used poor judgment in approving a portion of his own travel expenses.

Finally, the agency charged the appellant with poor judgment because, during Operation Cali-Man, he instructed his subordinates, including SA Kevin Pederson, SA Daniel Saavedra, and SA Thomas Walden, to charge his "personal" travel expenses on their government travel charge cards. The agency has conceded that although the term "personal" is used here, the expenses incurred were legitimate Operation Cali-Man expenses, reasonable and necessary to the operation.

The appellant did not use his own government travel card for these expenses because he did not have one at the time. By having his subordinates put the appellant's airline and hotel expenses on their credit cards and later file for reimbursement on their own travel voucher, the appellant was essentially approving his own travel expenses rather than following the proper procedure of preparing his own travel voucher and forwarding it to his own supervisor for review and approval. The appellant testified that he was wrong in doing this but, since the reimbursement check went to his subordinates rather than to himself, he didn't think of it as self-approving his own travel.

The procedure for having a superior approve travel vouchers and travel-related expenses is a necessary internal control to prevent travel fraud. While no fraud occurred here, the appellant exercised poor judgment by having his subordinates pay and receive reimbursement for his own travel expenses. Accordingly, the charge is SUSTAINED.

5. The agency action does not promote the efficiency of the service.

a. Nexus.

In addition to proving the charge against the appellant, the agency must show that the action taken promoted the efficiency of the service. 5 U.S.C. § 7513(a). The first issue under this standard is whether there is a nexus between

the charges and the efficiency of the service. The appellant has stipulated to nexus. Thus, I need not consider this issue further. 5 C.F.R. § 1201.63. *See Graham v. Department of the Air Force*, 46 M.S.P.R. 227, 237 (1990).

b. Penalty.

The agency must further establish that the penalty was reasonable under the particular circumstances of this case. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 307-08 (1981). Review of the penalty imposed by an agency is generally "exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not the Board." *Id.* at 301. Where, as here, the Board sustains fewer than all of the agency's charges, the Board may not independently determine a reasonable penalty. *See LaChance v. Devall*, 178 F.3d 1246, 1259 (Fed. Cir. 1999). Nevertheless, unless the agency has indicated that it desires that a lesser penalty be imposed if fewer than all the charges are sustained, the Board may mitigate to the maximum reasonable penalty, if mitigation is warranted, or it may impose the same penalty as that imposed by the agency as the maximum reasonable penalty, based on a balancing of the factors set out in *Douglas*, 5 M.S.P.R. at 307-08.

In this case, the very serious charges alleging integrity violations—that the appellant made a false statement and directed a subordinate to falsify a document—were not sustained. Charge 3, Failure to Adequately Supervise, Charge 4, Failure to Follow Written Instructions, and Charge 5, Poor Judgment, were sustained. Those charges, while sounding serious, are very minor in comparison to the charges which were not sustained, particularly when examined in context.

In Charge 3, the appellant was guilty of omission rather than commission. He simply did not anticipate and prevent SA Castillo's misconduct. As explained previously, Operation Cali-Man was a major undercover investigation and the appellant supervised up to 24 people. That was probably too many because the

appellant, despite his reputation as a hands on supervisor, failed to learn about and prevent SA Castillo from traveling alone with a confidential source and the confidential source's known associates.

In Charge 4, the appellant paid deactivated confidential source's without going through the paperwork exercise of drafting a short DEA-6 to reactivate the source for the limited purpose of paying him monies due. While that paperwork should have been completed, and the appellant's failure to do it could have negative consequences, it was a relatively minor technical failure given the overall scope of the appellant's responsibilities under Operation Cali-Man, particularly when the mistake caused no actual harm.

Finally, in Charge 5, the appellant allowed subordinates to pay and be reimbursed for the appellant's hotel and airline expenses, bypassing the requirement that the appellant's supervisor review and approve the appellant's travel. That prophylactic rule is intended to prevent travel fraud and is important. But, in this case, there was no travel fraud of any kind and the travel expenses incurred were subsequently ratified by the appellant's superiors who certified that the travel expenses were reasonable and necessary to Operation Cali-Man.

In the face of these offenses, which are relatively minor when viewed in context, the appellant has an overwhelming amount of evidence in extenuation and mitigation. Operation Cali-Man brought Group 43, under the appellant's leadership, a significant number of DEA's highest awards. In 1997, his group received the DEA Administrator's Award for Investigations for Cali-Man. In 1998, a number of individual agents in Group 43 received the DEA Administrator's Award for Cali-Man. And in 1999, Group 43 agents continued to receive Sustained Performance Awards and Quality Step Increases for Operation Cali-Man. During the entire tenure of Operation Cali-Man, the appellant received outstanding ratings from his supervisors, and Group 43 got consistently outstanding Inspection reviews with no significant negative findings.

In his tenure with DEA, the appellant earned 12 Outstanding, 1 Excellent and 1 Fully Successful Evaluation. His Fully Successful evaluation occurred in 1987, his first year with DEA. The appellant was nominated for the DEA Administrator's Award of Honor for Investigations four times and received two Sustained Superior Performance Awards. The appellant also received five Outstanding Law Enforcement Officer Awards from the U.S. Attorney's Office in Miami. Agency File, Tab 4f, Subtab o. Prior to these offenses, the appellant had an unblemished record.

At the hearing, all of the appellant's prior supervisors, to include SAC Mazzilli had overwhelmingly positive things to say about him and his performance as a DEA agent and supervisor. HT at 594 (Associate SAC Tarallo); HT at 588 (SAC Mitchell); HT at 457-58 (Associate SAC Gonzalez); HT at 178 (SAC Mazzilli).[5]

The appellant's mistakes in connection with his supervision of Operation Cali-Man must be evaluated against his successes. Operation Cali-Man was an extraordinarily successful investigation which produced superior results for the DEA's Miami Field Division. On June 9, 2000, SAC Mazzilli sent a closing report to the Chief of Domestic Operations, DEA Headquarters, relating to, among other things, the statistical accomplishments and achievements of Operation Cali-Man:

U.S. Currency Seized: $65.5 million

U.S. Currency Laundered subsequent to SARC approval: $5.8 million

Drugs Seized: 13,852 kilograms of cocaine

206 Arrests of Drug Violators and Money Launderers

47 Title III Intercepts (Wiretaps) Initiated

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[5] The charges against the appellant were proposed by the DEA Board of Professional Conduct and were decided by DEA's agency-wide deciding official. No current or former executive of the DEA's Miami District Office was involved in the bringing of the charges against the appellant.

67 Vehicles seized, worth over $2.2 million

Agency File, Tab 4a, Subtab gg.

Associate SAC Gonzalez testified that during the time it was being run, Operation Cali-Man was "one of the most successful operations in DEA. . ." HT at 458. He added that the success of Operation Cali-Man was due in large measure to the appellant who had the "largest group in the division" and "was a leader of men." HT at 460. Former Associate SAC Tarallo emphasized that during the period 1997-98, Group 43 seized more than $29 million in drug proceeds, more than the rest of the entire Miami Field Division combined. HT at 572-74. See also HT 583-84, 588 (SAC Mitchell).

As a SARC, Operation Cali-Man was subjected to stringent and intensive review. Three separate Headquarters units—DEA's Office of Inspections ("IN"), DEA's Financial and Money Laundering Section ("DOF") and the Office of Undercover and Sensitive Operations ("OUS")—routinely inspected and audited Cali-Man. In many instances, teams consisting of representatives for IN, DOF, and OUS would travel to Miami from DEA Headquarters and conduct in-depth inspections and audits of Cali-Man. As a result of these audits and inspections, Cali-Man got high marks, and no significant negative findings were ever made with respect to the case. More significantly, none of the violations reflected in Charges 3, 4 and 5 were ever seen as problematical by any of the inspectors from IN, DOF, or OUS. Thus, it is fair to say that the appellant's failures as reflected by the sustained charges were isolated.

In his hearing testimony, SAC Mitchell testified about his conversations with representatives of Peat Marwick, the accounting firm that audited Operation Cali-Man's books and records on a monthly basis:

> I remember this one specific time they did a complete audit of Cali-Man. Afterwards, I remember we sat down with Joey Sullivan he said, "Mitch I've got to tell, these are the best books I have ever seen, in Cali-Man. I mean it is superbly documented.

HT at 587.

Because these offenses, the first in a highly lauded law enforcement career, are relatively minor when contrasted with the appellant's positive achievements, and because, unlike the charges which were not sustained, involve no issue of integrity, I find that the appellant's potential for rehabilitation is high. His misconduct was isolated, with nothing to indicate it will ever be repeated. Moreover, it occurred while the appellant was conducting an extremely complex and stressful undercover operation, supervising dozens of subordinate law enforcement personnel, and coordinating the surrender of a major Cali Cartel drug kingpin.

The appellant impressed me as a highly responsible professional law enforcement officer who is committed to achieving agency goals. If anything, the appellant's problems were the result of an excess of zeal, since, in light of 20/20 hindsight, the appellant appears to have taken on more responsibility than he could have been reasonably expected to achieve. His supervisors, including three current or former members of the Senior Executive Service had the highest possible opinion of the appellant and his job performance.

Based on the foregoing, I conclude that the agency has failed to show that the action taken promotes the efficiency of the federal service. 5 U.S.C. § 7513(a). I am satisfied that the maximum reasonable penalty for the sustained charges is a seven-day suspension.

6. The appellant failed to prove his claim of harmful error.

The appellant raised a claim of harmful error/violation of due process asserting that the deciding official had relied upon material evidence that was not provided to the appellant prior to his written and oral responses. The appellant contends that this violated *Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368, 1375-76 (Fed. Cir. 1999), which held that an employee's due process rights could be violated by the deciding official's receipt, on an ex parte basis, of "additional material information that [might] undermine the objectivity required

to protect the fairness of the process." *Id.* at 1376. The court held further, however, that "not every ex parte communication [was] a procedural defect so substantial and so likely to cause prejudice" that it was fatal to the action at issue, and that only those that "introduce[d] new and material information to the deciding official [would] violate the due process guarantee of notice." *Id.* at 1376-77.

In this case, the appellant did not present any evidence to support such a conclusion. In fact, the only evidence of any matters considered by the deciding official outside of the agency file were summaries of the 17 volumes of evidence contained within the agency filed. Because this merely distilled the contents of a voluminous record, I find that it was not material. Accordingly, the affirmative defense must fail.

DECISION

The agency's action is MITIGATED.

ORDER

I **ORDER** the agency to cancel the removal and substitute therefore a seven-day suspension, and to retroactively restore appellant effective **October 28, 2003**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the

agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

Richard W. Vitaris
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 **May 25, 2004**, 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:

CERTIFICATE OF SERVICE

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

Appellant

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April 20, 2004
(Date)

Renee Leach-Carlos
Paralegal Specialist