

12752
26 June 2008

From: Commanding Officer, Naval Support Activity - North Polemas (NSA-NP)
To: Jeffrey G. Walls, Police Officer, GS-0083-06

Subj: DECISION TO EFFECT YOUR 30-DAY CALENDAR SUSPENSION

Ref: (a) Department of the Navy, Civilian Human Resources Manual, Subchapter 752
(b) 5 C.F.R. Part 752
(c) Letter of Proposed Suspension for Thirty (30) Calendar Days, issued 9 June 2008
(d) Your Written Reply, received 12 June 2008
(e) Collective Bargaining Agreement between Commander, Navy Region, Naval District Washington (CNRNDW) and the Fraternal Order of Police, NDW Labor Committee

Encl: (1) Merit Systems Protection Board (MSPB) Appeal Form
(2) MSPB Regulations

1. In accordance with references (a) and (b), reference (c) proposed your suspension without pay for thirty (30) calendar days based on your Inappropriate Conduct and Negligent Behavior. Reference (c) furnished specifications which management felt justified such action. Reference (c) further advised you I would give consideration to any explanation(s), fact(s), or rebuttal you elected to present to me upon exercising your right to reply to the proposed action. My decision concerning the action proposed in reference (c) is outlined below.

2. I carefully reviewed references (a) through (c) and reference (d), your written reply, as well as the related case file before making any decision. I concluded from my review of the record the reasons and specifications as outlined in reference (c) are sustained by a preponderance of the evidence. I also concluded the penalty proposed in reference (c) is appropriate and your actions adversely affected the efficiency of the service.

3. You responded to reference (c) in reference (d). Although you stated you had "bought counsel from several attorneys to include Mr. Paul Murphy Esq. Attorney at Law, and Loran Grenini, Counsel for the Equal Opportunity and Employment Commission," I note for the record that you failed to formally designate a representative to me in writing as required by reference (c) if you desired representation in this matter. For the record, I also note that you submitted an email to me on 25 June 2008 in which you reproduced the first paragraphs of reference (d) and requested a meeting. Reference (c) notified you that you had the right to any reply you elected to submit orally, or in writing, or both, but that such reply or any extension request had to be received by me within ten (10) calendar days of your receipt of reference (c), thus no later than 19 June 2008. As your email request was received on 25 June 2008 and you were on clear notice concerning your right to submit a timely reply, I will not consider that email or any information contained

DEFENDANT'S
EXHIBIT
9

12752
5 May 09

From: Commanding Officer, Naval Support Activity-North
Potomac (NSA-NP)
To: Jeffrey G. Walls, Police Officer, GS-0083-06

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

Ref: (a) Department of the Navy, Civilian Human Resources
Manual, Subchapter 752
(b) 5 CFR Part 752
(c) Your Proposed Removal, issued 30 Mar 09
(d) Request for Medical Documentation and
Clarification of Leave Status Letter, issued
10 Feb 09
(e) E-mail between Col Larry Graves and you, 12 Feb
through 15 Apr 09
(f) Your Oral Reply, received 13 Apr 09
(g) Decision to Effect Your 30-Day Calendar
Suspension, issued 2 Jul 08
(h) Letter from Your Attorney, received 29 Apr 09
(i) Collective Bargaining Agreement between Naval
District Washington (NDW) and the Fraternal Order
of the Police NDW Labor Committee (FOP)

Encl: (1) Merit Systems Protection Board (MSPB) Appeal Form
(2) Merit Systems Protection Board (MSPB) Regulations

1. In accordance with references (a) and (b), reference (c) proposed your removal from the Federal service based on your Unauthorized Excessive Absence, and furnished specifications which management felt justified such action. Reference (c) also advised you I would give consideration to any explanation, facts, or rebuttal you elected to present to me upon exercising your right to reply to the proposed action. My decision concerning the action proposed in reference (c) is outlined below.

2. Before making any decision, I carefully reviewed references (a) through (f) and the related case file that was also made available for your review. I concluded from my review the reasons and specifications as outlined in reference (c) are sustained by a preponderance of the evidence. I also concluded your actions adversely affected the efficiency of the service because you have not reported to work since 13 Jan 09, you have been scheduled to work,



Subj: DECISION TO EFFECT YOUR 30-DAY CALENDAR SUSPENSION

danger. She could have suffered, if she was not already suffering, a medical emergency which would require immediate attention. Although you stated medical personnel were contacted, this only occurred later on after you had left and returned to the scene. The individual could have wandered into traffic or been assaulted. Your actions put her at unnecessary risk. As a police officer, I expect you to know better and exercise sounder judgment.

d. You contended that no supervisor intervened and had they intervened, you would have followed their instruction. I find, although you alerted dispatch to the situation, you did not request supervisory assistance. Requesting such assistance was your responsibility had you felt unable to provide an appropriate response. It was not until Sgt. Gregory Waters happened to overhear your radio transmission that he in fact intervened. It was Sgt. Waters that directed you via dispatch to call him. During your conversation with him, he directed you to return to the vehicle immediately and put you on notice that your absence had placed the incapacitated woman at risk. You are reminded that Sgt. Waters is a lead police officer and is responsible for directing the work assignments on behalf of NSA-NP police management. Although you remarked in reference (d) that he was on administrative duties, this fact does not diminish his delegated authority to give instructions or your responsibility to obey them.

e. You disputed the fact that you should have contacted the Metropolitan Police Department (MPD) when you first became aware of the situation and alerted dispatch. Even assuming it was dispatch's sole responsibility to contact MPD concerning the incident and request assistance because the incident occurred within MPD's jurisdiction, you instructed dispatch at 0115 hours to hold off on contacting local police department and that you would "attempt to try to find someone who could give her a ride home". In so doing, you took it upon yourself to handle the situation alone. When you instructed dispatch to hold off from contacting MPD, you exhibited a very poor judgment. You directly and negatively contributed to and impacted the situation. It was not until 0154 hours that you confirmed to dispatch that MPD was on the scene. Therefore, your actions created a delay of more than a half hour in providing an appropriate response and assistance to the woman.

f. You further contended that NSA-NP police management is incompetent and that there is no policy or directive that addresses the situation you faced on 25 May 2008. These assertions, even when assuming for the sake of argument were true, do not excuse your misconduct. I find that a reasonable person would not advise dispatch to not call local police and would have remained on the scene until the appropriate police and medical responders had arrived. Such actions were inappropriate and negligent. Moreover, as a police officer, I hold you to a higher standard of conduct and judgment, which, by your actions, you fell far short of meeting. Furthermore, management relies on an officer's judgment to follow and enforce policy and directives. Notwithstanding the instructions you have received at roll call addressing off-base situations, there cannot be a policy or directive that covers and addresses every conceivable situation a police officer

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may encounter, and therefore, the officer's good judgment is even more important and necessary in order to appropriately respond to situations.

4. Based on the foregoing analysis of reference (c), the record, and your reply, reference (d), I have concluded that all charges (both Specifications A and B of Inappropriate Conduct as well Specification A of Negligent Behavior) are supported and upheld by preponderant evidence. Furthermore, I find that the penalty proposed in reference (e) promotes the efficiency of the service. In reaching this decision, I considered as aggravating factors the nature and seriousness of the offense, the potential for injury to the woman, your standard of conduct as a police officer, the effect this misconduct has had on management's confidence in your abilities and judgment, the notice of management's expectations communication to you via the letters of caution you recently received, and the fact that a reasonable person, given similar circumstances, would have acted differently (e.g. made sure the appropriate authorities were contacted and remained on the scene). Furthermore, I find your actions, which involved a member of the public, reflected poorly on and could bring notoriety to NSA-NP. To your credit, I have considered your length of service (SCD 04-09-2001, 7 years), your acceptable job performance, lack of a disciplinary record, the adequacy of alternative options and deterrent sanctions, and the singularity of the incident, but find they do not warrant effecting a lesser penalty. I find that this action is supported by a preponderance of the evidence, is reasonably proportionate to the nature and severity of your misconduct, and promotes the efficiency of the service.

5. You will be suspended without pay from NSA-NP, effective 20 July 2008 through 18 August 2008. Your last day of active duty status prior to the start of your suspension will be 19 July 2008. You are expected to return to work on 19 August 2008.

6. You may grieve this suspension through the grievance procedure negotiated by the Fraternal Order of Police and Commander, Navy Region, Naval District Washington, reference (e), or appeal to the Merit Systems Protection Board (MSPB), but not both. You may appeal this suspension to the Merit Systems Protection Board (MSPB). An appeal to MSPB may be made by submitting enclosure (1) or information required by enclosure (2) to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205, Alexandria, VA 22314-2840. Petitions of appeal to MSPB must be filed no later than thirty (30) calendar days after the effective date of this suspension to be considered timely filed. Therefore, if you do not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

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7. Copies of applicable regulations as well as the official case file are available to you and/or your representative through the Labor-Management Relations Department, Human Resources Office, Washington Navy Yard, 1411 Parsons Avenue, SE, Building 101, Washington, D.C. 20374-5041. If you require assistance or additional information, you may consult with C. Tom Crease, Labor-Employee Relations Specialist, HRO-W, on (202) 433-5128.

(s) *Scott Merritt*
CDR SCOTT MERRITT

I acknowledge receipt of this notice on

2 July 2008 *Refuse to sign*
Date Employee's Signature

Copy to:
CNIC/DW HR Satellite Office

Witness: *Andrew Obermeyer*
AM

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JEFFREY G. WALLS,
Appellant,

DOCKET NUMBER
DC-0752-08-0709-1-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: November 26, 2008

Jeffrey G. Walls, Capitol Heights, Maryland, pro se.

Gari Jo Green, Esquire, Washington, D.C., for the agency.

BEFORE
Michelle M. Hudson
Administrative Judge

INITIAL DECISION

On July 24, 2008, the appellant, a Police Officer, GS-0083-06, for the agency's Naval Support Activity, North Potomac (NSA-NP), filed an appeal from the agency's action suspending him for 30 calendar days, commencing on July 20, 2008. The Board has jurisdiction over the appeal. See 5 U.S.C.A. §§ 7701(a), 7511(a)(1)(A), 7512, and 7513(d). For the reasons set forth below, the appellant's 30-day suspension is **AFFIRMED**.

BACKGROUND

By memorandum dated June 6, 2008, Colonel Larry Graves, Chief of Police, NSA-NP, proposed to suspend the appellant for 30 calendar days, based on the following charges: (1) Inappropriate Conduct; and (2) Negligent Behavior. Appeal File (AF), Tab 6, Agency's Response, sub-tab 4J. The appellant filed



written replies to the proposed action dated June 12 and 25, 2008. *Id.*, sub-tab 4C, pp. 1-8.

By memorandum dated June 26, 2008, Commander Scott Merritt, Commanding Officer, NSA-NP, found that the charges were supported by a preponderance of the evidence, that the appellant's actions adversely affected the efficiency of the service, and that the penalty imposed was appropriate. *Id.*, sub-tab 4A. Thus, Commander Merritt decided to suspend the appellant for 30 calendar days, effective from July 20, 2008 through August 18, 2008. *Id.*

The appellant filed the instant appeal from the 30-day suspension. AF, Tabs 1 and 2. In addition to challenging the misconduct charged, the appellant raised two affirmative defenses in connection with his suspension: (1) that the agency violated the Privacy Act when taking the removal action; and (2) that the agency committed a prohibited personnel practice when taking the 30-day suspension, in that the misconduct charged was merely a pretext for Lieutenant Anton O'Bryant's and Sargent Gregory Water's attempt to improperly discipline him, because they believed that he was trying to demean them as supervisors. AF, Tab 12, Summary of Prehearing Telephone Conference. The appellant clarified during the prehearing conference that he is not alleging any prohibited discrimination in this appeal. *Id.* The appellant requested a hearing, which was held on October 21, 2008. *See* AF, Tab 14, Hearing Tapes.

ANALYSIS AND FINDINGS

Legal Standard

The agency must prove the charges that were sustained in the decision to suspend him by preponderant evidence. 5 U.S.C. § 7701(c); 5 C.F.R. § 1201.56(a)(1)(ii). 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(c)(2). The agency must also demonstrate that disciplinary action will

individual.

Specification B: After discovering the situation with Ms. Santamaria on 25 May 2008, you reported you instructed Ms. Santamaria to have a friend or relative to pick her up and take her home. She responded to you that she had no one to pick her up. You then instructed her to give you her keys and identification card. After giving them to you,

you reported you observed that "she gave me her keys and she passed out in the back seat of her vehicle." It was inappropriate for you to take her vehicle keys and identification because you were out of jurisdiction, lacked the authority to do so and should have awaited DC MPD intervention.

Reason 2: Negligent Behavior

Specification A: At approximately 0127 hours on 25 May 2008, the dispatcher called to check on the status of your interaction with Ms. Santamaria. You replied "[m]y status is that we're gonna go ahead and let her sleep it off and I'll be back to check on her from time to time. She's well behaved and I'm just going to continue on patrol." At approximately 0130 hours, Dispatch instructed you to call Sgt. Waters immediately. You advised Sgt. Waters that you had left a note in the car indicating that you had Ms. Santamaria's keys. Sgt. Waters instructed you to return to the vehicle immediately. At approximately 0154 hours, you called the dispatcher to inform it that you returned to this scene and that Police Officer Roundtree of the DC MPD had reported to the scene. George Washington Regional Medical Center was contacted and Ms. Santamaria was brought to the Center by ambulance for medical attention. You should have not left the scene and you should have remained there until DC MPD arrived. By leaving the female alone whom you observed was severely incapacitated and driving away to "continue on patrol," you were negligent and your actions unnecessarily put her health and safety at risk.

The agency also stated in the proposal notice as follows:

2. I am very concerned with the misconduct you demonstrated responding to the incident described above. First, your actions delayed response by DC MPD because you advised the dispatcher to "hold on at this time" from contacting local police. You have been periodically instructed that if you observe an incident off-base, you should contact dispatch and ensure local police are alerted. You needed to immediately contact DC MPD because you were out of jurisdiction and they take appropriate and expeditious action. Second, you took the woman's keys and identification and did not return them until you had subsequently left and returned to the scene. You had no authority to do so and this action was not supported by policy or directive. Furthermore, you exhibited poor judgment when you took it upon yourself to take possession of the keys and identification instead of allowing DC MPD to properly respond. Regarding your negligent behavior, given the circumstances

involved, you should have not driven away and remained on the scene, especially as you had already identified that she was incapacitated. I find that you failed to use such care and judgment as I would reasonably expect you exercise given the circumstances. In this case, you only returned after you had received direct instruction to do so. The woman was left at unacceptable risk and could have been assaulted, walked into traffic, or suffered a medical emergency. Although you suspected she was suffering from alcohol overuse, you did not know if the condition was caused by or exaggerated by another factor, such as diabetes or other substance use. As you did not know the actual cause of the individual's incapacitation, the conduct you exhibited was inappropriate in that you: neither contacted DC MPD nor medical responders; acted out of your jurisdiction, and; [were] negligent when you left the woman alone and unprotected against physical harm. Your failure to provide an appropriate response and alert the responsible authorities may have exaggerated the conditions from which she was already suffering because your inactions created a delay in medical services....

AF, Tab 6, Agency's Response, sub-tab 4J.

In support of the above charges,¹ the agency submitted a "Transcript of Communication Between Jeffrey Walls and NDW Regional Operations Center (ROC)" on May 25, 2008, which is consistent with those communications cited in the charges. AF, Tab 6, Agency's Response, sub-tab 4E. The agency also submitted a copy of the "Incident Report," dated May 25, 2008, that was prepared by the appellant, a memorandum dated May 25, 2008, from Sgt. Gregory Waters to Cpl. Jeffrey Walls concerning the incident, a copy of the "Event Chronology" dated May 25, 2008, regarding the incident, a copy of Corporal. L. Bethea's sworn statement of June 25, 2008, about the May 25th incident, and a copy of the MPD report of the incident, all of which were consistent in all significant respects with the facts as were cited by the agency in its charges. *Id.*, sub-tabs 4D and 4F-4I. In addition, Sgt. Gregory Waters, who was monitoring the police radio on the evening of May 25, 2008, and the appellant, both testified as to the sequence of

¹ Since both of the charges resulted from the same incident on May 25, 2008, I will analyze them together.

events that transpired during the incident at issue. Their testimonies were also consistent, in all significant aspects, with the facts as were cited by the agency in its charges.

In his response to the proposed suspension, the appellant noted that he took only Ms. Santamaria's keys, and not her identification, as was stated in the specifications of the "Inappropriate Conduct" charge. However, Commander Merritt explained that, even assuming that the appellant did not take Ms. Santamaria's identification, but only her keys, the appellant had no authority to take the personal property of a private citizen on a public roadway outside of the agency's jurisdiction, and then take that property with him when he left the scene.

In defense of both the "Inappropriate Conduct" and "Negligent Behavior" charges, the appellant argued that no supervisor intervened, and that had they done so, he would have followed their instructions. With regard to this argument, Sgt. Waters testified that, although the appellant alerted dispatch to the situation, he did not request supervisory assistance, and that requesting such assistance was the appellant's responsibility if he felt that he was unable to provide an appropriate response to the situation. Sgt. Waters also testified that, when he heard the appellant's radio transmission during the incident, he did in fact intervene, and that he directed the appellant, via dispatch, to call him. Sgt. Waters additionally testified that he directed the appellant to immediately return to Ms. Santamaria's vehicle, and that he put the appellant on notice that his absence from the scene had placed the incapacitated woman at risk.

The appellant also challenged the agency's argument that he should have contacted the MPD when he first became aware of the situation during the May 25, 2008 incident, and alerted dispatch. The agency argued, however, that even assuming that it was dispatch's sole responsibility to contact MPD concerning the incident, and to request assistance because the incident occurred within MPD's jurisdiction, the appellant nonetheless instructed dispatch at 0115 hours to "hold off" on contacting the local police department and that he would "attempt to try

to find someone who could give her a ride home." The appellant testified that he "[did] not recall" telling dispatch to "[h]old on at this time," when asked if the MPD was on the scene when he first reported the incident.

To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

With regard to the above, I note first that, during his testimony, the appellant did not deny telling dispatch to hold off on contacting the MPD when he first reported the incident, but only that he "did not recall" having done so. The appellant's testimony concerning this matter indicates that he was uncertain of what he actually told dispatch during the incident, and that uncertainty was weighed in my determination as to whether he had told dispatch to "hold off," as charged. Moreover, the transcript of the communication between the appellant and dispatch that was submitted by the agency supports that agency's contention in this regard, although I note that the transcription is not certified, and I have weighed its significance accordingly. AF, Tab 6, Agency's Response, sub-tab 4E. The agency's description of the appellant's statements to dispatch during the May 25, 2008 incident is also plausible, as it is consistent with the actions that the appellant took after he spoke with them. Had the appellant not told dispatch to hold off calling the MPD, I think it is likely that he would have been expecting the MPD to report to the scene at that time, and he would have waited for them, rather than continuing on patrol as he admits he did.

For all of the above reasons, I find it more credible that the appellant told dispatch to hold off contacting the MPD during the May 25, 2008 incident, and I so find. I also agree with the agency that by telling the dispatch to hold off calling the MPD, he took it upon himself to initially handle the situation alone.

The appellant also argued that NSA-NP police management is incompetent, that there is no policy or directive that addresses the situation he faced during the May 25, 2008 incident, and that he had never been trained as to what actions he should have taken. With regard to the above, Sgt. Waters testified that the appellant had been trained as to what to do when dealing with incidents that are outside of the agency's jurisdiction, during the annual training that he would have received every year in the three years that he was employed there, and by instructions given during roll call. Sgt. Waters also testified that the MPD should have been called to the scene since the incident was outside of the agency's jurisdiction, and that the appellant should have waited for the MPD to arrive at the scene.

Lt. O'Bryant testified that the appellant definitely should not have left the scene as he did during the May 25, 2008 incident, and that the proper procedure would have been to request assistance from the MPD. Lt. O'Bryant also testified that management has discussed "jurisdiction issues" during the annual training, and that jurisdiction issues have also been discussed "a few times" during roll call.

Colonel Larry Graves testified that all police officers are given training concerning jurisdiction and their responsibilities. Commander Merritt testified that he has every assurance that all police officers have had sufficient training to know how to respond to an incident such as that which the appellant was involved with on May 25, 2008.

Sgt. Waters, Lt. O'Bryant, and Commander Merritt also explained during their respective testimony that police officers cannot be trained for every possible situation that they will face, and that they are expected to "use common sense."

Cpl. Loretta K. Bethea testified, however, that she was not aware of any training that was provided during roll call, and that she does not believe that the agency's police officers receive adequate training.

While I have considered all of the above record evidence concerning the charges, as well as the appellant's defenses to those charges, I am convinced that the appellant was trained to call the MPD when an incident occurs outside of the agency's jurisdiction, during the agency's annual training, if not additionally during roll call. I also find that the appellant should have known to call the MPD during the May 25, 2008 incident since the matter took place outside of the agency's jurisdiction, and that his failure to do so amounted to "inappropriate conduct," and "negligence" as charged. Even more importantly, I find that the appellant exercised very poor judgment when he left Ms. Santamaria alone in her car and continued on his patrol during the May 25, 2008 incident (rather than waiting for the MPD and medical responders to arrive), and that his actions in this regard were both "inappropriate" and "negligent" as charged.

The record shows that it was not until 0154 hours that the appellant confirmed to dispatch that the MPD was on the scene, and his inaction created a delay of more than a half hour in providing an appropriate response and assistance to Ms. Santamaria. I agree with the agency that Ms. Santamaria was left at an unacceptable risk and that she could have been assaulted, walked into traffic, or suffered a medical emergency when left alone. While the record indicates that the appellant did receive training which should have prepared him to properly handle an incident such as that which occurred on May 25, 2008, I also agree with the agency that had he exercised good judgment during the incident, he definitely would have known better than to leave the scene as he did.

In light of the above, I find that the agency has proven by preponderant evidence, the "Inappropriate Conduct" and "Negligent Behavior" charges. Both charges are therefore sustained.

The appellant's Affirmative Defenses

In addition to challenging the charged misconduct, the appellant raised two affirmative defenses in connection with his suspension: (1) that the agency violated the Privacy Act when taking the suspension action; and (2) that the agency committed a prohibited personnel practice when taking the 30-day suspension, in that the misconduct charged was merely a pretext for Lt. O'Bryant's and Sgt. Water's attempt to improperly discipline him because they believed that he was trying to demean them as supervisors. AF, Tab 12, Summary of Prehearing Telephone Conference.

The appellant's allegation that the agency violated the Privacy Act when taking the removal action

Under 5 U.S.C. § 7701(e)(2), an agency action may not be sustained if the employee or applicant for employment shows harmful error in the application of the agency's procedures in arriving at such decision. To establish an allegation of harmful procedural error, an appellant must show by preponderant evidence that any procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. In other words, the burden is on the appellant to show that the error was harmful, i.e. that it caused substantial harm or prejudice to his rights. See 5 C.F.R. § 1201.56(c)(3); see also *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

The appellant alleged that the agency violated the Privacy Act by erroneously sending information concerning his case to an incorrect address. AF, Tabs 10 and 12. The Board, however, is not authorized to consider claims that an agency violated the Privacy Act. *Narmoye v. Department of the Air Force*, 65 M.S.P.R. 80, 83 (1994). The proper forum for making such allegations is the appropriate Federal district court after exhaustion of administrative remedies. *Id.* Therefore, I find that the Board cannot consider the appellant's allegation that the

agency violated the Privacy Act, so his allegation of harmful procedural error in this regard is without merit.

The appellant's argument that the agency committed a prohibited personnel practice when taking the suspension action

The appellant alleged that the agency committed a prohibited personnel practice when taking the 30-day suspension, in that the misconduct charged was merely a pretext for Lt. O'Bryant's and Sgt. Gregory Water's attempt to improperly discipline him, because they believed that he was trying to demean them as supervisors. AF, Tab 12, Summary of Prehearing Telephone Conference. The appellant's argument concerning this matter does not appear to be an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b), and he has not cited any specific section of that statute that he believes was violated. Nonetheless, in the event that this allegation amounts to a prohibited personnel practice, I allowed the appellant to testify concerning it, and I approved two of the witnesses (Cpl. James Waters and Cpl. Loretta Bethea) that he requested to testify in support of this affirmative defense.

As discussed previously with regard to the charges, the appellant testified that he believed that Lt. O'Bryant and Sgt. Gregory Waters did not provide him with adequate training to deal with the type of incident that is the subject of the charges.

Cpl. James W. Waters is detailed to the agency's Communications Center, and he is a union representative. Cpl. Waters testified that Lt. O'Bryant "has a way of harassing the appellant," and that, in his opinion, Lt. O'Bryant "has it in for the appellant." Cpl. Waters also testified that he heard Lt. O'Bryant laughing about the May 25, 2008 incident the next day.

Cpl. Loretta K. Bethea was assigned to the South Gate of the Potomac Naval Annex on the evening of the May 25, 2008 incident. Cpl. Bethea opined that Lt. O'Bryant and Sgt. Gregory Waters wanted to retaliate against the appellant, although she "d[oes] not know the reason." Cpl. Loretta Bethea also

stated that, to her knowledge, Lt. O'Bryant did not assist the appellant during the May 25, 2008 incident.

I have carefully considered the appellant's allegation in this regard and the above evidence in support of this affirmative defense. However, I am not persuaded that the appellant's suspension (which is the only personnel action that is before me in this appeal) was the result of any improper motives by either Lt. O'Bryant or Sgt. Waters. As discussed previously, I have found that the agency's charges in this case are supported by the evidence, and I note that the appellant's own version of the incidents charged are in all material respects consistent with the facts cited by the agency. Moreover, the appellant has not alleged that either Col. Graves (the proposing official), or Commdr. Merritt (the deciding official), were biased against him, or that they were in any way improperly influenced by either Lt. O'Bryant or Sgt. Waters, when they respectively proposed and decided to suspend the appellant. Thus, the appellant's second affirmative defense concerning this matter also fails.

The agency has established that the 30-day suspension was taken for such cause as promotes the efficiency of the service.

The appellant's charged misconduct, which is directly related to the performance of his duties as a police officer, has been sustained. Sgt. Waters testified that, had something happened to Ms. Santamaria when the appellant left her alone in her car during the May 25, 2008 incident, the agency may have been subjected to some liability. Commdr. Merritt also testified that "serious potential repercussions" could have resulted from the appellant's actions during the May 25, 2008 incident.

As stated in the notice of proposed suspension, Ms. Santamaria could have been assaulted, walked into traffic, or suffered a medical emergency when the appellant left the scene during the May 25, 2008 incident. Accordingly, I find the agency's decision to discipline the appellant in this case was taken for such cause as promotes the efficiency of the service.

The penalty imposed is reasonable.

In reviewing the penalty selected by an agency, the Board will only determine if the agency conscientiously considered all relevant factors and exercised management discretion within the tolerable limits of reasonableness. See *Montalvo v. U.S. Postal Service*, 55 M.S.P.R. 128, 132 (1992); *Douglas v. Veterans Administration*, 5 M.S.P.R. at 306. The agency is not required to show that the penalty it selected is the best penalty but, rather, must only establish that the penalty it selected is reasonable. See *Martinez v. Department of Defense*, 21 M.S.P.R. 556, 558 (1984), *aff'd*, 765 F.2d 158 (Fed. Cir. 1985) (Table). The Board will not disturb an agency's penalty if it is the maximum reasonable penalty that may be imposed after considering all of the relevant factors. See *Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320-21 (1981).

The record shows that Commdr. Merritt properly considered the relevant *Douglas* factors when deciding what penalty to impose in this case. See Testimony of Commdr. Scott Merritt. See also AF, Tab 6, Agency's Response, sub-tab 4B. The record also shows that the appellant was previously issued letters of caution on April 29, 2008 and December 13, 2007, which placed him on notice that further disciplinary action could be taken for inappropriate conduct.² AF, Tab 6, Agency's Response, sub-tabs 4K and 4L.

The appellant's misconduct was serious, particularly given the potential ramifications and liability for the agency which could have resulted from the May 25, 2008 incident. However, I am convinced, and it is important to note, that the appellant's actions during the May 25, 2008 incident resulted solely from his sincere efforts to assist a young woman in a crises in the only manner that he could conceive of at that time without subjecting her to possible criminal prosecution. I also believe that the appellant truly thought that he had resolved the situation by simply taking her keys and leaving the note. Nonetheless, despite

² I note that the prior letters of caution were considered only for this purpose.

the appellant's good intentions, he exercised poor judgment when he failed to anticipate the potential serious ramifications of not immediately contacting the MPD, and of leaving Ms. Santamaria alone at the scene. While I am certainly sympathetic to the appellant's situation, I find that a 30-day suspension to impress upon him that such actions cannot be tolerated in the future, is reasonable.

Based on the above, I find that a 30-day suspension is within the bounds of reasonableness. Consequently, the 30-day suspension will not be disturbed.

DECISION

The agency's action suspending the appellant for 30 calendar days is **AFFIRMED**.

FOR THE BOARD:

/s/
Michelle M. Hudson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 31, 2008, 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 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. You must establish the date on which you 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 for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal

court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review 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>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be 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 more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date 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 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).

JUDICIAL REVIEW

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

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

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

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). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.ca9c.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.

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.

12752
30 Mar 09

From: Security Installation Program Director, Naval
Support Activity-North Potomac (NSA-NP)
To: Jeffrey G. Walls, Police Officer, GS-0083-06
Subj: PROPOSED REMOVAL

Ref: (a) Department of the Navy, Civilian Human Resources
Manual, Subchapter 752
(b) 5 CFR Part 752
(c) Request for Medical Documentation and
Clarification of Leave Status Letter, issued
10 Feb 09
(d) E-mail between Col Larry Graves and you, 12 Feb
through 26 Feb 09
(e) Collective Bargaining Agreement between Naval
District Washington (NDW) and the Fraternal Order
of the Police NDW Labor Committee (FOP)
(f) Decision to Effect Your 30-Day Calendar
Suspension, issued 2 Jul 08

1. I am proposing your removal from the Federal service in accordance with references (a) and (b) to promote the efficiency of the service. This action is based on the following reasons and specifications:

Reason: Excessive Unauthorized Absence

Specification: As background, you have been on leave since 10 Nov 08. The medical documentation you submitted on 15 Nov 08 covered your approved absence until 12 Jan 09. On 12 Jan 09, Lt. Anton O'Bryant informed you, via telephone call, that you needed to submit appropriate medical documentation to justify your continued absence. The documentation you submitted on 3 Feb 09, that was signed by your physician on 12 Jan 09, states you have left knee pain. However, this documentation was not sufficient to support your continued absence.



Subj: PROPOSED REMOVAL

Furthermore, you were issued reference (c), which warned you of the consequences. Specifically it stated that "failure to provide this information and/or absence without leave will result in appropriate discipline and adverse action taking place." Reference (d) notified you that you were in an AWOL status from 13 Jan 09 onward and put you on notice regarding management's expectations. I find that both references (c) and (d) put you on clear notice that you would be carried AWOL and provided the necessary actions and instructions for you to take in order to justify your absence from work. Despite this notice, you have not justified your absence and you remain on AWOL. Therefore, I find that your refusal to provide the medical documentation, reference (c), and 428 hours of AWOL of absences are beyond reasonableness. As you occupy a full-time position in this department, your continued absences are having an adverse impact on workplace operations and cannot be tolerated. While reference (a) defines a charge of excessive unauthorized absence as more than five (5) consecutive workdays, you have been absent without leave for more than fifty-three (53) days. Despite clear expectations and consequences you failed to provide the required documentation to correct your AWOL. Your failure to justify your absence has caused serious concern which has irreparably caused me to question my confidence in your ability and willingness to serve as a police officer at NSA-KP coupled with your recent 30-day suspension for Inappropriate Conduct and Negligent Behavior are aggravating factors. I have also considered mitigating factors such as your length of service (SCD 04-09-2001), and the deterrent effect of lesser actions, but find they do not warrant proposing a lesser penalty. Therefore, I conclude that your proposed removal is warranted, supported by a preponderance of the evidence, and, if upheld, will promote the efficiency of the service.

3. You have the right to reply orally or in writing, or both and furnish affidavits and other documentary evidence. Your reply should support why you feel this action should not take place. You are entitled to be represented by a representative of your choice.

Subj: PROPOSED REMOVAL

7. Copies of applicable regulations as well as the official case file are available to you and/or your representative through the Labor and Employee Relations Department, Human Resources Office-Washington, 1411 Parsons Highway SE, Suite 100, Washington Navy Yard, DC 20374-5041. If you require assistance or additional information concerning your rights, you may consult with Jessica Crawford, Labor-Employee Relations Specialist, Human Resources Office, Washington, on (202) 433-5128.


RICHARD J. SYPHER

Copy to:
Designated Deciding Official
HRO-W

12752
5 May 09

From: Commanding Officer, Naval Support Activity-North
Potomac (NSA-NP)
To: Jeffrey G. Walls, Police Officer, GS-0083-06

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

Ref: (a) Department of the Navy, Civilian Human Resources
Manual, Subchapter 752
(b) 5 CFR Part 752
(c) Your Proposed Removal, issued 30 Mar 09
(d) Request for Medical Documentation and
Clarification of Leave Status Letter, issued
10 Feb 09
(e) E-mail between Col Larry Graves and you, 12 Feb
through 15 Apr 09
(f) Your Oral Reply, received 13 Apr 09
(g) Decision to Effect Your 30-Day Calendar
Suspension, issued 2 Jul 08
(h) Letter from Your Attorney, received 29 Apr 09
(i) Collective Bargaining Agreement between Naval
District Washington (NDW) and the Fraternal Order
of the Police NDW Labor Committee (FOP)

Encl: (1) Merit Systems Protection Board (MSPB) Appeal Form
(2) Merit Systems Protection Board (MSPB) Regulations

1. In accordance with references (a) and (b), reference (c) proposed your removal from the Federal service based on your Unauthorized Excessive Absence, and furnished specifications which management felt justified such action. Reference (c) also advised you I would give consideration to any explanation, facts, or rebuttal you elected to present to me upon exercising your right to reply to the proposed action. My decision concerning the action proposed in reference (c) is outlined below.

2. Before making any decision, I carefully reviewed references (a) through (f) and the related case file that was also made available for your review. I concluded from my review the reasons and specifications as outlined in reference (c) are sustained by a preponderance of the evidence. I also concluded your actions adversely affected the efficiency of the service because you have not reported to work since 13 Jan 09, you have been scheduled to work,



Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

and your absence has not been authorized. Your unauthorized absence totals 77 days or 648 duty hours. Your excessive unauthorized absence has had and continues to have a negative impact on the efficiency of NSA-NP, and warrants your removal from the Federal service. I therefore uphold the penalty as proposed in reference (c) based on the following analysis.

3. Based on the following analysis, I uphold the penalty as proposed in reference (c). You have been on leave since 10 Nov 08. Your leave was approved until 12 Jan 09, therefore you have been absent without leave (AWOL) since 13 Jan 09. Per reference (d), I find you were on clear notice that you were and would remain AWOL from 13 Jan to present unless you provided adequate documentation to justify your absence. Reference (d) notified you that failure to provide documentation justifying your absence would "result in appropriate discipline and adverse action taking place." Additionally, e-mails between you and Col. Larry Graves, reference (e) where you acknowledged receipt of reference (d), demonstrated that you were aware that documentation to support your absence was needed.

Per reference (f), you let me know that you were aware of Col. Graves order to return to duty or provide documentation to support your absence, but have been experiencing family difficulty with: your Aunt's stroke; arranging for in-home care for your Aunt sometime in Jul 08; and her subsequent death; your sister's cancer; your Uncle's cancer; your cousin who is in Iraq; your cousin who is in China; and the rest of your family who refuses to assist with the care of your sister and uncle. You also explained that you are being transported back and forth from Mississippi, by your cousin, in an attempt to transfer your sister's care to Johns Hopkins Hospital in Baltimore, MD. You further explained that you were suffering from a purported on-the-job injury that would require surgery. As a complication to this surgery, you explained that: your disability claim through Tri-Care was dismissed because you had "over used" your medical; Tri-Care recommended you go to the VA because you have 5% disability for your knee; you contacted Col. Graves to inform him of your impending surgery on 15 Apr 09. When your timelines of the events began to not add up, I asked you for clarification. You

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

stated that you were at NSA-NF for a couple of weeks during Nov 08 when you re-injured yourself at the South Gate; Sgt. Waters asked you to stay despite the injury and you agreed to do so; the next day, you went to Andrews Air Force Base for treatment and you were told to "take it easy" during Nov 08. To further add confusion, you claimed you went "back" to Tri-Care who issued you a "no work permit" for the last week of Sep 08; Col. Graves told you to call in with a status update during your absence; you went home to Mississippi in Nov 08 after your MSPB appeal of your thirty (30) day suspension; your Aunt was "throwing fits;" Tri-Care "revoked" your insurance coverage because you "used up" your coverage on your left knee but coverage was still available for your right knee; your doctors in Mississippi were "outraged" by your request for medical documentation as they see over 60 patients a day and do not have the time to provide documentation of care; you e-mailed Col. Graves and told him to give you a "couple of weeks" to finish working with your sister; your aunt died on 16 Feb 09; your uncle was waiting for your cousin; you were trying to move your sister to Johns Hopkins; you were sleeping on a cot in a little room so your sister could have your room; your sister's husband ran off; you solicited your entire family to help but they refused. I asked if you were aware that your FMLA request was denied and you said you were but you thought you had "more than enough" leave available, that you had more than 400 hours, that you figured it out and had 300 hours or "something" with 122 hours of use-or-lose, and you had the LES to prove it. When I asked you for the LES you said you didn't have it on you, there was some problem with the computer, but you would fax it to me. I advised you that you had until close of business on 13 Apr 09 to produce this evidence. On 14 Apr 09, you faxed a LES statement indicating you had 453.75 hours of available leave as of 11 Oct 09, however on 15 Apr 09 you had a total of 53.5 hours which does not even come close to covering your 648 hours of unauthorized absence. You also claimed you were unaware that your purported on the job injury was not covered by FECA. I asked you if you verified confirmation that you were covered by FECA and you said no that you "just thought it was covered." I asked you if you provided medical documentation for your FECA claim and you said you supplied a CA-1 form. I reminded you that a CA-1 form must be followed up with medical documentation and then I asked you if you provided that documentation and you

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

said you had not. You again said that you knew you had enough leave to "cover" you until you went back to "ortho," you had over 400 hours, you took a calculator and added it up. I asked you if you could prove it to which you responded that you could, once you got home, and got to a computer. I reminded you that you had requested the meeting in order to furnish me with information that you felt was missing from the record and then I asked you what proof, evidence, or affidavits you brought with you? You told me you gave your CA-1 form to Lt. Obryant; you were confused as to where it might have gone; between here and Mississippi you were confused; you knew your supervisor had the report; you didn't know where it was; you were dealing with the VA hospital; that the VA up here is willing to work with you; Dr. Shuratt may return you to some type of limited duty; your doctor was concerned about what would happen to you in an emergency where you may have to move quickly; you thought you might reinjure yourself. I reminded you that your personal doctor could not order Navy to place you on limited duty, that it was your responsibility to have your doctor provide information concerning your medical status including any impact upon your duties as a police officer but it is up to management to determine whether or not you could return to work including whether or not limited duty was available. At that point you told me that for the last few days you were feeling better; that you would talk to Dr. Shuratt to get a knee brace; they found all sorts of "stuff" in your knee; that being injured on the job was new to you; that you were just trying to do everything you were told to but your knee was tricky and the status changes day to day. Once again, I asked if you submitted documentation to justify your absence and you told me you e-mailed Col. Graves. I reminded you that your e-mail is not the same as documentation from your doctor. You said: Dr. Peterson (from the VA hospital) told you that the best they can do is provide a copy of your records; you requested the records "weeks ago;" that it takes time; the computer staff is busy; the VA needs a release form from your doctor; and the VA needs "some other" signature. I reminded you that you still have not provided the records nor do you indicate that you ever will, to which you replied that you understood, you can get your doctor to draft a note stating they will not draft the letter. You continued that you didn't understand because you had over 400 hours of leave

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

and you were injured on the job. I told you to prove it and you said you would get the CA-1 form; you are trying to get your sister situated at Johns Hopkins; that your brother had to remind you to call work or you would have forget. I told you that I was not unsympathetic to your family situation but you had made a conscious decision to focus on your family and not on maintaining your position, that you made a catastrophic decision based on the presumption of workers compensation and/or other leave as being approved. Once again, I asked you if you had any evidence, any thing in writing to prove or support your assumption or justify your absence. You said you submitted doctor's notes saying you were sick. I reminded you that they only covered your absence until 12 Jan 09. You claimed you had submitted another doctor's note to cover your absence until April 2009 for your knee surgery. I reminded you that submitted or requested does not mean leave is approved. You said you submitted paperwork to Lt. Seila Applin. As you had not mentioned Lt. Applin until this point, I asked you if you thought there was some type of vendetta or conspiracy to keep your documentation, none of which you could provide a copy of, from reaching the correct person. You then claimed you submitted other documentation-an obituary or something, then changed your mind and said you submitted something else but you were not sure what. I asked you if you knew your FMLA request had been denied and you admitted that you did but the agency had been "sympathetic" to your problems so you thought you were fine. I said there is a major distinction between sympathetic and approved. You said you gave paperwork to Sgt. Waters and you had leave; I said prove it. You then replied that you were not anticipating having to submit paperwork but you would fax it to me. I pointed out that your presentation of events was based on "I was told this-I was told that" and was nearly void of substance. You responded that you were just doing what your supervisor told you to-but you were not doing what your supervisor told you to because you did not present the medical documentation to support your absence. You then told me again that Tri-Care would not cover your left knee but they would your right, that it had something to do with your yearly rate and percentages or some "little bit" about your knee. I asked you if it was possible Tri-Care thought you were cleared for duty? You said no. You went on to tell me that: you took your social security card to Andrews; your social card was expired; you had to go somewhere else

resources of the parties to stay the Board's proceedings pending development and potential resolution of the case in court.

There are no Board regulations specifically governing the dismissal of an appeal without prejudice. *See Zell v. Department of the Army*, 57 M.S.P.R. 86, 87 (1993). It is well settled that dismissal of an appeal without prejudice is a procedural option that is committed to the sound discretion of the administrative judge. *See Gidwani v. Department of Veterans Affairs*, 74 M.S.P.R. 509, 511 (1997).

A favorable decision by the district court on the appellant's complaint may obviate the need for him to proceed with the instant appeal. Consequently, in the interests of fairness and judicial economy, I have determined that the agency's unopposed request has merit, and that the instant appeal should be dismissed without prejudice to the appellant's right to refile. Accordingly, the appellant may refile his appeal no sooner than 36 days from the date of the instant decision (which date appears at the top of page 1 of this decision, below the docket number and to the right of the case caption) and in no event later than May 3, 2010. Any documents already submitted in this appeal should not be resubmitted with the refiled appeal.

DECISION

The appeal is **DISMISSED WITHOUT PREJUDICE** to the appellant's right to refile as set forth above.

FOR THE BOARD:

/s/
Raphael Ben-Ami
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on February 9, 2010, unless a petition for review is filed by that date or the Board reopens the case on its own

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

had to go against you but you were not judging her; you submitted everything the "worker's comp lady" told you to; she told you that you had to get your supervisor's signature; you wanted her to take a copy and she wouldn't; you gave a copy to Lt. Applin; Obryant lost the report.

On 29 Apr 09, I received a copy of a letter from Stephen D. Scavuzzo, reference (h), reporting to be your attorney. The letter notes that you will not have access to the requested documentation until 5 May 09. The letter incorrectly identifies your proposed removal based on disability; your removal is factually and documented for excessive unauthorized absence. You were repeatedly warned that you had to submit medical documentation to support your absence and you were provided a generous opportunity to supply said documentation. You failed to do so.

Despite clear notice to you that you would be carried in an AWOL status pending your submission of appropriate documentation and the resulting adverse administrative action that would take place, as of today you have failed to supply any documentation to support your absence. As per reference (g), you have placed all blame for your refusal to submit documentation to support your absence on external loci of responsibility; everyone else is to blame, for your failure to follow clear instructions. However, you know your opportunity to support your position was during your reply, but you did not provide a single document to change the outcome to reference (c), only a litany of unsubstantiated assertions.

4. I have considered aggravating factors such as the seriousness of this offense and the relationship it has to your position in making my decision to uphold your proposed removal from the Federal service. I find that your excessive unauthorized absence cannot be tolerated because as a police officer it is your job to follow instruction. Your misconduct coupled with your past disciplinary history, reference (g), and the excessive period of time (77 days equaling 648 duty hours) that you have been on unauthorized absence, erodes my confidence in your ability to effectively perform police officer duties. Therefore, your continued employment as a police officer is contrary to the efficiency of the service, warrants your removal, and no lesser action would be sufficient to deter you from future misconduct.

Subj: DECISION CONCERNING YOUR PROPOSED REMOVAL

I have also considered mitigating factors, such as your length of service (SCD 4/09/2001), and your acceptable performance record but find they do not warrant a lesser penalty. As described in section 3 above, you have refused to accept responsibility for your actions and you blame others for your refusal to submit documentation to support your absence. Therefore, I conclude that this proposed action is warranted, supported by a preponderance of the evidence, and will promote the efficiency of the service.

5. You will be removed from the Federal service effective 9 May 09. Before separation, you must make arrangements with your supervisor to pick up your belongings, if any, from the worksite, and checkout through the security offices.

6. You may grieve this removal in accordance with reference (i) through the grievance procedure negotiated by NDW and the Fraternal Order of the Police Labor Committee Naval District Washington (FOP) no later than fifteen (15) calendar days from the effective date of your removal, or appeal to the MSPB, but not both. An appeal to MSPB may be made by submitting enclosure (1) or information required by enclosure (2) to the Merit Systems Protection Board, Washington, D.C. Regional Office, 1800 Diagonal Road, Suite 205, Alexandria, VA 22314-2840. An appeal to MSPB must be filed no later than thirty (30) calendar days after the effective date of this removal to be considered timely filed. Therefore, if you do not submit an appeal within the time set by statute, regulation, or order of a judge; it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

7. Copies of applicable regulations as well as the official case file are available to you and/or your representative through the Labor-Management Relations Department, Human Resources Office, Washington Navy Yard, 1411 Parsons Avenue, SE, Building 101, Washington, D.C. 20374-5041. If you require assistance or additional information, you may consult with Jessica Crawford, Labor-Employee Relations Specialist, HRO-W, on (202) 433-5128.


CDR S. A. MERRITT

Copy:
Attorney of Record
HRO-W

Formal Complaint of Employment Discrimination

DEFENDANT'S EXHIBIT
13

For DON Use ONLY INT NUMBER Filing Date

INFORMATION ABOUT YOU:

Name: Jeffery Walls Social Security Number: 587 15 1656
 Address: 6901 Melchite Place Home Phone () 301 653 9713
 City/State: Capital Heights MD Zip Code: 20743 Work Phone ()

INFORMATION ABOUT YOUR REPRESENTATIVE (if applicable):

Representative's Name: Stephen Scavuzzo Esq Note: You are not required to have a representative.
 Address: @ 200 Greensboro Drive Phone (703) 311 8770
Suite 900 Fax ()
 City/State: Herndon VA Zip Code: 22102 Is your representative an attorney? Yes No

INFORMATION ABOUT THE COMPLAINT:

Name of Activity where the alleged discrimination took place? Department of the Navy Washington Navy Yard
 Did you work for the Department of the Navy at the time? Yes No If yes, what was your position (title/series/grade), and facility?

Describe the action(s) or policy(ies) you believe was (were) discriminatory. Be specific and include dates. If you need more space, attach an extra page(s).
The separation from Federal Service effective May 9, 2009
Violated my rights under the Rehabilitation Act of 1973 and
CFR provisions

What do you believe was (were) the reason(s) for the alleged discrimination? Check the appropriate box(es) and write in specific details. For example: If it was because of your race, what is your race? If it was because of your age, what is your date of birth?
 Race (Specify) National Origin (Specify)
 Color (Specify) Age (Please include birth date)
 Religion (Specify) Disability (Specify) Knee and back injuries
 Sex (Specify) Retaliation (Previous EEO activity date)

What remedy(ies) do you seek for the alleged discrimination? If you need more space, attach an extra page(s). List

Reinstatement, Back Pay, Compensatory Damages, Attorneys Fees

Did you discuss this(ese) issue(s) with an EEO Counselor? Yes No Counselor's name?

Did you file a grievance under a negotiated grievance procedure? Yes No Filing date(s)?

Did you file a Merit Systems Protection Board (MSPB) appeal? Yes No Filing date(s)?

Signature (OR HAVE YOUR ATTORNEY SIGN FOR YOU) Jeffery Walls by Jeff Scavuzzo DATE (MONTH/DAY/YEAR) 8-11-09

EEO-OTR 11-09



MERIT SYSTEMS PROTECTION BOARD FORM 185-1

Appeal Form--Appellant and Agency Information

Please type or print legibly.

OMB No. 3124-0009

1. Name (last, first, middle initial)
Walls, Jeffrey

2. Present Address (number and street, city, state, and zip code)
Address: 8901 Malchito Place
City, State, Zip Code: Capitol Heights, Maryland, 20743, United States of America

3. Telephone numbers (include area code) and E-Mail Address
You must notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.
Home: (301) 350-9078 Work: _____
Fax: _____ Other: (301) 653-9713
E-mail Address: wallsjgw@hotmail.com Other Phone Type: Mobile _____

4. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)
 Yes No

5. Name and address of the agency that made the decisions or took the action you are appealing (include bureau or division, street)
Agency Name: Department of the Navy
Bureau: Naval District Washington
Address: 1014 N. Street, SE, Suite 200
City, State, Zip code: Washington, District of Columbia, 20374, United States of America

6. Your Federal employment status at the time of the decision or action you are appealing:
 Temporary Permanent Applicant
 Term Retired Seasonal
 None

7. Type of appointment (if applicable):
 Competitive SES Excepted
 Postal Service Other

8. Your occupational series, position title, grade, and duty station at the time of the decision or action you are appealing (if applicable):
Occupational Series: GS-0083 Position Title: Police Officer
Grade: 06 Duty Station: North Potomac Annex

9. Are you entitled to veteran's preference? See 5 U.S.C. 2109.
NOT APPLICABLE

10. Length of Government Service (if applicable):
5 Years 1 Months

11. Were you serving a probationary or trial period at the time of the decision or action you are appealing?
NOT APPLICABLE

Appeal Number: 200903902
Submission Date: 11/23/2009 11:50:39 PM
Confirmation Number: 22748

DEFENDANT'S EXHIBIT

14

2009-11-23 11:50:39 AM



MERIT SYSTEMS PROTECTION BOARD FORM 185-1

Appeal Form—Appellant and Agency Information

Please type or print legibly.

HEARING: You may have a right to a hearing before an administrative judge. If you choose to have a hearing, the Board will notify you when and where it is to be held. If you do not want a hearing, the Board will make its decision on the basis of the submission of the parties.

12. Do you want a hearing? Yes No

E-Filing: Registration as an E-File enables the appellant to file any or all of his/her pleadings with the Board in electronic form. Registration also means he/she consent to accept service of all pleadings filed by other registered E-Fileers and all documents issued by the Board in electronic form. He/she will receive these as PDF documents at the e-mail address you provided the Board. If registered as an E-Fileer, he/she may file any pleading, or portion of a pleading, by non-electronic means. The appellant can withdraw his/her registration as an e-filer at any time.

13. Do you wish to register the appellant as an E-Fileer in this appeal?
 Elect to E-file for appellant Decline to E-file for appellant

14. I certify that all of the statements made in this form and all attached forms are true, complete, and correct to the best of my knowledge and belief.

Matthew B. Estes, Appellant's Representative

Date:

Appeal Number: 200903902

MSPB Form 185-1, Page 2 (5/1/2002)

Submission Date: 11/23/2009 11:50:38 PM 5 CFR Parts 1201, 1205, and 1209

Confirmation Number: 22748



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Complete this form and attach it to MSPB Form 185-1 in either of the following situations:

- You are raising a claim—in connection with an appeal of an agency action or decision for which you have completed MSPB Form 185-2 or MSPB Form 185-3—that the agency action or decision was based on whistleblowing. See 5 U.S.C. 2302(b)(8) and 5 C.F.R. 1209.2(b)(2).
- You are filing an Individual Right of Action (IRA) appeal authorized by the Whistleblower Protection Act (WPA) after first filing a complaint with the Office of Special Counsel (OSC) and exhausting the procedures of that office. See 5 U.S.C. 1214(a)(3), 1221, and 2302(b)(8), and 5 C.F.R. 1209.2(b)(4).

Threatening, proposing, taking, or not taking a personnel action based on whistleblowing is one of the twelve statutory prohibited personnel practices set forth at 5 U.S.C. 2302(b). The Prohibited Personnel Practices statute, 5 U.S.C. 2302, does NOT apply to all personnel actions or to all Federal employees. Please review the definitions of "personnel action," "covered position," and "agency" at 5 U.S.C. 2302(a) to be sure that both you and the action or decision that you claim was based on whistleblowing are covered by those definitions before you complete and submit this form.

If this is an IRA appeal, your appeal will consist ONLY of a completed MSPB Form 185-1 and MSPB Form 185-5. (You may also attach MSPB Form 185-6 if you are requesting a stay and/or MSPB Form 185-8 if you are designating a representative.) In an IRA appeal, the Board may consider ONLY the claim that the agency action or decision was based on whistleblowing. It may not consider the merits of the agency action or decision, nor may it consider any claims other than the claim that the action or decision was based on whistleblowing.

If you are requesting that the Board stay the personnel action or decision, also complete and attach MSPB Form 185-6. See 5 C.F.R. 1209.8 and 1209.9.

Please type or print legibly.

OMB No. 3124-0009

Please submit only the attachments requested in this form at this time. You will be afforded the opportunity to submit detailed evidence in support of your appeal later in the proceeding.

If you filed a complaint with the Office of Special Counsel (OSC) using Form OSC-11 (8/00) before filing this appeal, you may attach a copy of Part 2, Reprisal for Whistleblowing, of the OSC form together with any continuation sheet or supplement filed with OSC. This will give the Board the information requested in questions 1 through 4, attach Form OSC-11.

Name (last, first, middle initial) Walls, Jeffrey

THE WHISTLEBLOWING DISCLOSURE(S) - Answer questions 1 and 2 regardless of whether this is an IRA appeal or a claim that an appealable agency action or decision was based on whistleblowing. A whistleblowing disclosure is a disclosure of information that you reasonably believe evidences a violation of any law, rule, or regulation; gross mismanagement; a gross

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

See Additional Disclosure for Response.



MERIT SYSTEMS PROTECTION BOARD FORM 185-5
Whistleblower Claims or Individual Right of Action (IRA) Appeal

Please type or print legibly.

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

See Additional Disclosure for Response.

THE AGENCY PERSONNEL ACTION OR DECISION - Answer question 3 regardless of whether this is an IRA appeal or a claim that an appealable agency action or decision was based on whistleblowing. Answer questions 4 and 5 ONLY if this is an IRA.

2. Provide a chronology of facts concerning the agency action or decision that you claim was based on whistleblowing and explain why

See Continuation Sheet for Response.

4. Identify the agency action or decision that you claim was based on whistleblowing (see 5 U.S.C. 2303(a) for covered personnel actions) and provide the date (month, day, year) of the action or decision. (Attach any decision letter, and/or SF-50 that you received in

On 05/09/2009 Appellant was removed from federal service by the Commander Merrill for alleged Unauthorized Excessive Absence. Appellant believes this was merely a pretext for Appellant's whistleblowing.

Date: 05/09/2009

Check the appropriate box below to indicate whether the action or decision was:

Threatened Proposed Taken Not Taken

5. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

See Continuation Sheet for Response.



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Please type or print legibly.

FILING WITH OFFICE OF SPECIAL COUNSEL (OSC) - Answer questions 6 through 8 ONLY if you previously sought corrective action from the OSC concerning the same disclosure(s) and the same agency personnel action or decision that you described in your answers to questions 1 through 4. If this is an IRA appeal, you MUST exhaust OSC procedures before you may file an appeal with the Board.

6. Provide the date that you filed your request to the Office of Special Counsel for corrective action (month, day, year).

05/26/2009

7. Have you received written notice of your right to file this appeal from the OSC?

Yes

No

REQUEST FOR CONSEQUENTIAL DAMAGES

8. Are you requesting an award of consequential damages in connection with your whistleblower claim? See 5 C.F.R. 1201.202(b).

Yes

No

STAY REQUEST - If you are requesting that the Board STAY the agency action or decision that is the subject of your whistleblower appeal, complete and attach MSPB form 185-6. If you ALREADY requested a stay from the Board in connection

9. Please provide the date (month, day, year) you filed your stay request:

NOT APPLICABLE

10. Provide the location of the MSPB office where you filed your request.

NOT APPLICABLE

11. Has there been a decision of your stay request?

NOT APPLICABLE

Appeal Number: 200903902 MSPB Form 185-5, Page 3 (8/1/2002)
Submission Date: 11/22/2009 11:50:38 PM 5 CFR Parts 1201 and 1206
Confirmation Number: 22748



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 09/2006

Starting in the Fall of 2006, and continuing through 2007, Appellant disclosed to Chief of Police Naval Support Activity - North Potomac (NSA-NP), Colonel Larry Graves, both orally and in writing, that certain supervisors were misrepresenting their hours to receive additional overtime. Appellant disclosed this information because he believed it to be an abuse of authority as well as a gross waste of funds. Appellant witnessed supervisors misrepresenting the amount of time that they worked and claiming that they participated in training which they did not actually complete all in order to receive additional overtime payments. Appellant disclosed this first to Colonel Graves orally in the Fall of 2006 and later in the Summer of 2007 in the form of a written grievance. Appellant also alleged in the grievance that Colonel Graves knew of this practice and was complicit in the gross waste of funds and abuse of authority. Colonel Graves refused to investigate or act on the disclosure. Appellant later disclosed this information to Commander Scott Meritt, Commanding Officer NSA-NP, as well as several Federal Agencies including Department of Defense Office of Inspector General.

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Colonel Larry Graves
Title: Chief of Police NSA-NP
Address: 1411 Parsons Avenue, SE Suite 100

City, State, Zip Code: Washington, DC, 20374, United States of America



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 09/12/2007

In the Fall of 2006, through 2007, Appellant disclosed to Colonel Larry Graves, Chief of Police NSA-NP, that certain supervisors appeared to be receiving large bonuses while training requests were being denied for officers due to alleged lack of funds. Appellant believed this to constitute gross waste of funds and asked Colonel Graves to investigate the matter. Appellant submitted this in writing in the form of a written grievance on September 12, 2007, to Colonel Graves. Colonel Graves refused and informed Appellant that it was none of his business. Appellant also later disclosed this the excessive bonuses to Commander Scott Merrill, Commanding Officer NSA-NP, and Deputy Director Troy High, Deputy Director NSA-NP. Appellant also disclosed this to several Federal Agencies including the DOD/OIG in August, 2007.

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Colonel Larry Graves
Title: Chief of Police NSA-NP
Address: 1411 Parsons Avenue, SE, Suite 100

City, State, Zip Code: Washington, DC, 20374, United States of America

Appeal Number: 200903902 MSPB Form 185-5 Additional Disclosure
Submission Date: 11/22/2009 11:50:38 PM Page 2
Confirmation Number: 22748



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 09/2006

Starting in the Fall of 2006, and continuing through 2007, Appellant disclosed to Chief of Police Naval Support Activity - North Potomac (NSA-NP), Colonel Larry Graves, both orally and in writing, that certain supervisors were misrepresenting their hours to receive additional overtime. Appellant disclosed this information because he believed it to be an abuse of authority as well as a gross waste of funds. Appellant witnessed supervisors misrepresenting the amount of time that they worked and claiming that they participated in training which they did not actually complete all in order to receive additional overtime payments. Appellant disclosed this first to Colonel Graves orally in the Fall of 2006 and later in the Summer of 2007 in the form of a written grievance. Appellant also alleged in the grievance that Colonel Graves knew of this practice and was complicit in the gross waste of funds and abuse of authority. Colonel Graves refused to investigate or act on the disclosure. Appellant later disclosed this information to Commander Scott Merritt, Commanding Officer NSA-NP, as well as several Federal Agencies including Department of Defense Office of Inspector General.

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Commander Scott Merritt
Title: Commanding Officer NSA-NP
Address: 1411 Parsons Avenue, SE, Suite 100
City, State, Zip Code: Washington, DC, 20374, United States of America



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 09/2006

In the Fall of 2006, through 2007, Appellant disclosed to Colonel Larry Graves, Chief of Police NSA-NP, that certain supervisors appeared to be receiving large bonuses while training requests were being denied for officers due to alleged lack of funds. Appellant believed this to constitute gross waste of funds and asked Colonel Graves to investigate the matter. Colonel Graves refused and informed Appellant that it was none of his business. Appellant also later disclosed this the excessive bonuses to Commander Scott Merritt, Commanding Officer NSA-NP, and Deputy Director Troy High, Deputy Director NSA-NP. Appellant also disclosed this to several Federal Agencies including the DOD/OIG in August, 2007.

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Commander Scott Merritt
Title: Commanding Officer NSA-NP
Address: 1411 Parsons Avenue, SE, Suite 100
City, State, Zip Code: Washington, DC, 20374, United States of America

Appeal Number: 200903902 MSPB Form 185-5 Additional Disclosure
Submission Date: 11/23/2009 11:50:38 PM Page 4
Confirmation Number: 22748



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 12/22/2008

Appellant disclosed to Colonel Larry Graves that certain supervisors were engaging in harassment of Appellant due to a lawsuit that Appellant had filed against them in Prince Georges County Court in Maryland, as well as in perceived retaliation for prior protected disclosures that Appellant had made. Appellant believed that the harassment constituted not only an abuse of authority but a violation of law, rule or regulation. Appellant notified Colonel Graves in writing that the supervisors, were engaging in harassment of the Appellant while he was on leave due to a work related injury by informing others that they would retaliate against him when he returned to duty. Appellant requested a leave of absence out of fear of retaliation, following the threats of retaliation, which he believes constituted an abuse of authority on the part of his supervisors. Colonel Graves did not take any action in regards to this complaint and refused to grant any leave of absence. Colonel Graves later proposed Appellant's removal due to alleged excessive absences resulting from Appellant's injury and a death in Appellant's family.

□

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Colonel Larry Graves
Title: Chief of Police, NSA-NP
Address: 1411 Parsons Avenue, SE, Suite 100
City, State, Zip Code: Washington, DC, 20374, United States of America



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 03/12/2009

Appellant disclosed to Commanding Scott Merritt, Commanding Officer NSA-NP, that he believed that his supervisors, including Colonel Graves, were engaging in harassment and retaliation against him while he was on leave due to an on duty injury. Appellant informed Commander Merritt that his supervisors had expressed an intention to retaliate against him upon his return from leave. Appellant believed that such actions by his supervisors constituted both abuse of authority and a violation of law, rule or regulation. Commander Merritt did not take any action in regards to this complaint. Commander Merritt later removed Appellant from his position for alleged excessive absences due to his injury related absence from duty.

□

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Commander Scott Merritt
Title: Commanding Officer NSA-NP
Address: 1411 Parsons Avenue, SE, Suite 100
City, State, Zip Code: Washington, DC, 20374, United States of America



MERIT SYSTEMS PROTECTION BOARD FORM 185-5

Whistleblower Claims or Individual Right of Action (IRA) Appeal

Additional Disclosure

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below.

Date: 01/12/2007

Appellant sent a letter to the Commandant, Naval District Washington, on January 12, 2007, in regards to perceived retaliation by supervisors at the North Potomac Annex against officers who reported misconduct and other offenses by management. In this letter, Appellant discloses that during an investigation he was ordered by his supervisors to sign a statement that had been altered. Appellant refused to sign the statement and was held against his will for approximately six hours. Appellant believes this to be an abuse of authority as well as a violation of law, rule or regulation. Appellant believes that this letter and the information disclosed therein were later disclosed to Colonel Larry Graves and Commander Scott Merritt, which are the officials who later proposed and approved Appellant's removal from the Agency.

n

2. Provide the name, title, and office address of the person to whom each disclosure described in your answer to question 1 was made.

Name: Rear Admiral Patrick J. Lorge
Title: Commandant Naval District Washington
Address: 1411 Parsons Avenue, SE, Suite 100
City, State, Zip Code: Washington Navy Yard, DC, 20374, United States of America



Merit Systems Protection Board Form 185-5
Whistleblower Claims or Individual Right of Action (IRA) Appeal

Continuation Sheet

3. Provide a chronology of facts concerning the agency action or decision that you claim was based on whistleblowing and explain why you believe that it was based on whistleblowing.

Between 2006 and 2008, Appellant made several complaints and grievances, both orally and in writing, regarding abuses of authority, gross waste of funds and violations of laws, rules and regulation by the Agency.

In the Fall of 2006, Appellant orally complained to Colonel Larry Graves that supervisors were fraudulently receiving overtime by arriving to work early and not working only to receive the additional hours of overtime and thus deny those funds for more important uses such as training of officers. Appellant also complained that supervisors would obtain additional overtime by signing in to training but not actually attending the training. Appellant knew of this abuse first hand by witnessing it himself as well as from other officers who witnessed the same abusive practices. Appellant later submitted the same complaint in the form of a written grievance to Colonel Graves and later by letter to Commanding Office of NSA-NP, Commander Scott Merritt. Neither Commander Merritt nor Colonel Graves ever took any action in regards to this complaint.

In 2007, Appellant also complained to Colonel Graves and Commander Merritt that supervisors were receiving excessive and wasteful bonuses from the Agency. Appellant believed that these bonuses were being awarded, despite the Agency claiming it did not have funds for training of officers, and this was confirmed in the Fall of 2007 at a farewell party for a departing supervisor who received a \$28,000 bonus. Appellant believed this constituted an abuse of authority and a gross waste of funds and asked that it be investigated by the Agency. Appellant submitted a written grievance to Colonel Graves on this issue on September 12, 2007. Neither Commander Merritt nor Colonel Graves took any actions in regards to this issue.

Appellant also submitted complaints to the DOD/OIG, NCIS, and DOJ in 2007 regarding these issues. It is believed that Cmdr. Merritt and Col. Graves knew of Appellant's disclosure to these agencies and that this led to numerous petty and unsubstantiated disciplinary actions against Appellant in late 2007. More importantly, these disclosures eventually contributed to Col. Graves refusing to accept Appellant's legitimate medical excuse for being absent from work in 2008 and eventually contributed to Appellant's removal by Cmdr. Merritt.

Appellant endured harassment from his supervisors and Col. Graves as a result of filing various grievances involving the issues discussed above and for filing complaints with federal agencies. Appellant raised this issue to Col. Graves in December, 2008, stating that he was facing harassment from supervisors and that he had learned that his supervisors intended to retaliate against him upon his return to duty from leave due to an injury. Col. Graves refused to address this issue. Appellant then raised the issue of harassment and retaliation to Cmdr. Merritt to no avail.

In November, 2008, Appellant aggravated an earlier on duty injury to his knee and was forced to take leave as a result. Appellant was unable to return to duty on January 13, 2009, due to his injury and familial circumstances. Appellant attempted to provide documentation and information to support his extended absence but Col. Graves refused to accept much of the information provided by Appellant. Appellant tried to work with the Agency to provide appropriate documentation to prevent a determination of AWOL but the Agency refused to cooperate. Colonel Graves proposed to remove Appellant on March 30, 2009, and Commander Merritt decided to remove Appellant on May 6, 2009, effective May 9, 2009.

Appellant believes that the real cause of his removal was that Col. Graves and Cmdr. Merritt wanted to remove him due his various complaints and grievances containing protected disclosures. Appellant also believes that Cmdr. Merritt and Col. Graves perceived him to be a whistleblower and this directly contributed to his removal.



Merit Systems Protection Board Form 185-5
Whistleblower Claims or Individual Right of Action (IRA) Appeal

Continuation Sheet

5. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

Appellant seeks (1) reinstatement, (2) payment of back pay, leave, and other lost employment benefits plus interest since the removal's effective date, (3) payment of attorney fees resulting from this action, and (4) removal of the termination letter and related documentation from Agency personnel files.



MERIT SYSTEMS PROTECTION BOARD FORM 185-9

Designation of Representative Form

A representative helps and counsels a party in the preparation, presentation, or defense of the case. The representative appears with, or for, the party at hearings, settlement discussions, teleconferences, or other proceedings before the Board. The representative does not have to be an attorney. You may proceed without a representative and represent yourself. You may use this form to designate an organization or a person who has agreed to represent you in your case before the Board. If you are representing yourself, you do not need to fill out this form. (The Board's regulations on representatives are found at 5 CFR 1204.21.) By designating a representative, you agree to allow the Board to give your representative all information concerning the appeal.

The address and telephone number of the representative must be correct so that all communications are received on time by the representative. Any changes of this designation must be sent in writing to the MSPB office handling the case and to the other party.

If you file this designation WITH your appeal, the Board will send a copy of the designation, along with a copy of your appeal, to the other party. If you file this designation AFTER you have filed your appeal, you MUST send a copy to the other party and you MUST send proof to the Board that you have sent a copy to the other party.

Please type or print legibly.

OMB No. 3124-0009

DESIGNATION: The individual or organization named below is hereby designated to represent:

NAME AND ADDRESS OF APPELLANT:

I hereby designate Estes, Matthew, D. to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. I understand that any limitation on this settlement authority must be filed in writing with the Board.

Representative's address (number and street, city, State and Zip) Address: 1990 M. Street, N.W. City, State, Zip: Washington, District of Columbia,	Representative's telephone numbers (include area code) Office: (202) 955-1100 Fax: (202) 955-1101 Other: Other Phone Type: E-mail Address: mestes@worklaws.com
Representative's employer name: Berry & Berry, PLLC Representative's Entity Type: Private Attorney	

Service Method for Representative :

Electronic Filing US Postal Mail

Jeffrey Walls

Appellant's Signature Date

Please send this form with your appeal if you are designating a representative. If you do so after you have filed your appeal, send this form to the Board office where your appeal is pending, and provide a copy to the other party. Board regulations require that all copies of your communications with the Board after an appeal has been filed be served on the other party.

Appeal Number: 200903902

MSPB Form 185-9 (en/2002)
5 CFR Parts 1201, 1206, and 1209

Submission Date: 11/23/2009 11:50:38 PM
Confirmation Number: 22748

e-Appeal Attachment Transmittal

Appeal Number: 200903902
 Appellant Name: Mr. Jeffrey Walls
 Agency Name: Department of the Navy

Please check the box for each document included with this transmittal.

<input type="checkbox"/>	Name of Attachment	Attachment Processing Status	File Name/Delivery Method
<input type="checkbox"/>	Agency Decision Letter	Upload with e-Appeal	Y:\Walls, Jeffrey\DECISION LETTER.pdf
<input type="checkbox"/>	Whistleblowing, OSC Notice, Right to Appeal (185-S, Q6)	Upload with e-Appeal	Y:\Walls, Jeffrey\20090918 Decision Letter from OSC.pdf
<input type="checkbox"/>	Designation of Representative Form	Submit in paper form (mail, fax or other method)	Fax
<input type="checkbox"/>	SF-50, Notification of Personnel Action	Document not available or not applicable	N/A

2 copies must be submitted of all documents submitted in hardcopy.
 Send documents to be submitted in paper form to:
 Washington DC Regional Office
 1800 Diagonal Road Suite 205
 Alexandria, Virginia 22314-2840
 United States of America

 Phone: (703) 756-6250
 Fax: (703) 756-7112

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JEFFREY WALLS,
Appellant,

DOCKET NUMBER
DC-0752-10-0162-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: January 5, 2010

Matthew D. Estes, Esquire, Berry & Berry, Washington, D.C., for the
appellant.

Brad C. Hendricks, Washington, D.C., for the agency.

BEFORE
Raphael Ben-Ami
Administrative Judge

INITIAL DECISION

The appellant timely appealed his removal. For the following reasons, the appeal is DISMISSED WITHOUT PREJUDICE.

The agency by motion dated December 30, 2009, requested that I dismiss this appeal without prejudice because the appellant currently has pending in the United States District Court for the District of Columbia a case in which he alleges that he was removed in retaliation for whistleblowing, a claim which he also raises in connection with the instant appeal. See Appeal File, Tab 13. The agency contends that it "should not be required to litigate the same dispute at the same time in two different forums." *Id.* I spoke with the parties' representatives by phone on January 4, 2010, and they agreed that it would conserve the



resources of the parties to stay the Board's proceedings pending development and potential resolution of the case in court.

There are no Board regulations specifically governing the dismissal of an appeal without prejudice. *See Zell v. Department of the Army*, 57 M.S.P.R. 86, 87 (1993). It is well settled that dismissal of an appeal without prejudice is a procedural option that is committed to the sound discretion of the administrative judge. *See Gidwani v. Department of Veterans Affairs*, 74 M.S.P.R. 509, 511 (1997).

A favorable decision by the district court on the appellant's complaint may obviate the need for him to proceed with the instant appeal. Consequently, in the interests of fairness and judicial economy, I have determined that the agency's unopposed request has merit, and that the instant appeal should be dismissed without prejudice to the appellant's right to refile. Accordingly, the appellant may refile his appeal no sooner than 36 days from the date of the instant decision (which date appears at the top of page 1 of this decision, below the docket number and to the right of the case caption) and in no event later than May 5, 2010. Any documents already submitted in this appeal should not be resubmitted with the refiled appeal.

DECISION

The appeal is **DISMISSED WITHOUT PREJUDICE** to the appellant's right to refile as set forth above.

FOR THE BOARD:

/s/
Raphael Ben-Ami
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on February 9, 2010, 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 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. You must establish the date on which you 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 for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review 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>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be 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 more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that

you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date 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 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).

JUDICIAL REVIEW

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

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

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

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). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. 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.

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.



DEPARTMENT OF THE NAVY
NAVAL OFFICE OF EEO COMPLAINTS MANAGEMENT
AND ADJUDICATION
814 SICARD STREET SE SUITE 100
WASHINGTON NAVY YARD, D.C. 20374-5070

Mr. Jeffrey Walls
6901 Mallichite Place
Capital Heights, MD 20743

MAY 05 2010

Re: DON No. 09-61139-02126

Dear Mr. Walls:

This is the Department of the Navy's final decision on your Equal Employment Opportunity (EEO) complaint filed August 5, 2009. At the time of the actions giving rise to your complaint, you were employed as a Police Officer, GS-0083-06, with the Naval Support Activity, North Potomac, Washington, DC (Activity).

You claimed discrimination on the basis of physical disability (knee and back injuries), when, on May 9, 2009, you were removed from the Federal service.

The Department of Defense, Investigations and Resolution Division investigated your complaint. You were provided a copy of the Investigative File. Your removal claim constitutes a "mixed case" which is an agency action that is appealable to the Merit Systems Protection Board (MSPB). Accordingly, your complaint was reviewed in this Office for a final agency decision, which will include appeal rights to MSPB, 29 C.F.R. § 1614.302(d)(2) and (3). The complaint was received in this Office on March 23, 2010.

The case record concerning your complaint has been carefully reviewed. It is the decision of this Office that you were not discriminated against as alleged. The rationale for this decision is set forth in enclosure (1), "Analysis of the Case." Since you are not a prevailing party, you are not entitled to payment of attorney's fees, costs, or compensatory damages. No corrective action, pursuant to 29 C.F.R. § 1614.501, is required.

This is the Final Decision of the Department of the Navy on your allegation of discrimination. If you are dissatisfied with this decision, you have the following appeal rights:



P.03

0770 010 303 8770

JUN-11-2010 10:12 AM SCAVUZZO

In accordance with 29 C.F.R. § 1614.302(d), you may file a Notice of Appeal with the Merit Systems Protection Board at any time up to thirty (30) calendar days after receipt of this decision. The Notice of Appeal should be addressed to:

Regional Director
Merit Systems Protection Board
1800 Diagonal Road
Suite 205
Alexandria, VA 22314-2840

As an alternative, you may file an appeal electronically. Visit the MSPB website at www.mspb.gov and follow the link to e-Appeal.

At the same time you provide information to the Merit Systems Protection Board, you MUST send a copy of the submission to this Office. Such notice should be addressed to:

Department of the Navy
Naval Office of EEO Complaints Management
and Adjudication
614 Sicard Street S.E., Suite 100
Washington Navy Yard, DC 20374-5072

Service upon the Department of the Navy of any statement or brief in support of your appeal is mandatory. In or attached to the appeal to the Merit Systems Protection Board, you must certify the date and method by which service was made on this Office.

An appeal shall be deemed filed on the day it is postmarked, or, in the absence of postmark, on the date it is received by the Merit Systems Protection Board. A copy of the Merit Systems Protection Board Appeal Form 185 is enclosed.

YOUR RIGHT TO GO TO FEDERAL COURT

In accordance with 29 C.F.R. § 1614.310, you may file a civil action in an appropriate U.S. District Court:

a. within thirty (30) calendar days of receipt of this decision unless an appeal is filed with the Merit Systems Protection Board in accordance with the procedures above; or

b. within thirty (30) calendar days of receipt of notice of the final decision or action taken by the Merit Systems Protection Board, if you do not file a petition for consideration with the Equal Employment Opportunity Commission; or

c. within thirty (30) calendar days of receipt of notice that the Equal Employment Opportunity Commission has determined not to consider the decision of the Merit Systems Protection Board; or

d. within thirty (30) calendar days of receipt of notice that the Equal Employment Opportunity Commission concurs in the decision of the Merit Systems Protection Board; or

e. if the Equal Employment Opportunity Commission issues a decision different from the decision of the Merit Systems Protection Board, within thirty (30) calendar days of receipt of the notice that the Merit Systems Protection Board concurs in and adopts in whole the decision of the Equal Employment Opportunity Commission; or

f. if the Merit Systems Protection Board does not concur with the decision of the Equal Employment Opportunity Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within thirty (30) calendar days of receipt of notice of the decision of the Special Panel; or

g. after 120 calendar days from the date of filing a formal complaint if there is no final action or appeal to the Merit Systems Protection Board; or

h. after 120 calendar days from the date of filing an appeal with the Merit Systems Protection Board if the Merit Systems Protection Board has not yet made a decision; or

i. after 180 calendar days from the date of filing a petition for consideration with the Equal Employment Opportunity Commission, if there is no decision by the Commission, reconsideration decision by the Merit Systems Protection Board, or decision by the Special Panel.

j. Special Deadline for Age Discrimination Suits. As to any claim based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a), not only must you file suit within ninety (90) days of receipt of this decision, you MAY only have SIX YEARS FROM THE DATE OF THE ALLEGED DISCRIMINATION TO FILE

allegations of age discrimination in a lawsuit. See Lehman v. Makshian, 453 U.S. 156 (1981); 29 U.S.C. 633a(f); and 28 U.S.C. 2401. Filing an appeal to the Commission will not stop that time from running. If the time limit is close to expiring, you should consider whether or not you wish to file a civil suit. You may be barred from filing such a suit, should you allow the time limit to expire, even if you have an appeal in process with the Commission.

k. Who is the Proper Defendant. If you file a lawsuit, you must sue the Secretary of the Navy by name and title. Presently, the proper defendant is, "Ray Mabus, Secretary of the Navy." Failure to list Mr. Mabus's name and his title may result in the dismissal of your case. Rule 25 (d) (2), Federal Rules of Civil Procedure. Do not sue your supervisor, your unit, your base commanders, or the Department of the Navy.

YOUR RIGHT TO COUNSEL

1. If you choose to file a lawsuit and you do not have an attorney or are unable to obtain one, you may request the court to help you locate an attorney to represent you. The clerk's office of the nearest U.S. District Court is the best place to contact in order to find out if the court can help you locate an attorney. If you cannot afford an attorney, the clerk's office will explain how you may request the court to appoint an attorney to represent you without payment of any fees or costs. If you need this kind of help, you should contact the court as soon as possible. YOUR DEADLINE TO FILE SUIT WILL NOT BE TOLLED WHILE YOU ATTEMPT TO GET AN ATTORNEY. IF YOU ARE GOING TO FILE A LAWSUIT, YOU MUST DO SO WITHIN THE APPROPRIATE TIME LIMIT WITH OR WITHOUT AN ATTORNEY.

Jamie Kajouras
JAMIE KAJOURAS
Director

Enclosures:

- (1) Analysis of the Case
- (2) MSPB Appeal Form 185

Copy to: (w/o encl. (2))
Department of the Navy
Human Resources Office-Washington
c/o EEO Office
1411 Parsons Avenue, SE, Suite 300
Washington Navy Yard, DC 20374-5033

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8200 Greensboro Drive
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June 11, 2010

Clerk's Office
Merit Systems Protection Board
1800 Diagonal Road
Suite 205
Alexandria VA 22314

RECEIVED MSPB
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MRO

Re: Jeffrey Walls

APPEARANCE TO CONTEST JURISDICTION / NOTICE OF APPEAL

This is filed on behalf of Jeffrey Walls 6901 Melchite Place Capitol Heights MD 20743. The Appellant was removed from federal service on May 8, 2008. The final agency decision is attached and was received on May 12, 2010.

As a threshold matter, the Board does not have jurisdiction over this appeal. The final agency decision was erroneously issued. Appellant timely filed an EEOC complaint as a result of his termination. A Report of Investigation was prepared and sent. Upon receipt of the ROI, Appellant through counsel, timely filed a request for an EEOC hearing on March 8, 2010. A copy of the hearing request form is also attached. As the request to proceed at the EEOC was done first, an election was made that removes the matter from proceeding here.

In the alternative, Appellant was removed due to disability discrimination and requests reinstatement, back pay, and reasonable attorneys' fees as relief.

Sincerely

Stephen Scavuzzo

DEFENDANT'S
EXHIBIT
17

ANALYSIS OF THE CASE

Complainant: Jeffrey Walls

DON No. 09-61139-02126

Issue

Was Complainant discriminated against on the basis of physical disability (knee and back injuries) when on May 9, 2009, he was removed from the Federal service?

Background

At the time of the actions giving rise to this complaint, Complainant was employed as a Police Officer, GS-0083-06, with the Activity. Investigative File (IF) at 327, 421. During the period at issue, his first-line supervisor (S1) was a Police Officer, YN-0083-01, and his second-line supervisor (S2) was the Chief of Police, YN-0083-01. IF at 283, 284, 289, 290. The Security Installation Program Director was the proposing official (S3), and the Commanding officer was the deciding official (S4). Investigative File (IF) at 360-362, 405-412.

From November 10, 2008, to January 12, 2009, Complainant was on approved leave. On January 12, 2009, S1 informed Complainant that he needed to submit appropriate medical documentation to justify his continued absence. On February 3, 2009, Complainant submitted a document that had been signed by his doctor on January 12, but management determined that it was insufficient to support his continued absence. IF at 360, 519. On February 10, Complainant was issued a letter requesting additional medical documentation to justify his continued absence. IF at 345-347.

On March 30, S3 issued Complainant a Proposed Removal letter (PRL). IF at 360-362. On or about April 7 and 13, Complainant provided written and oral replies. IF at 391-397, 405, 406-411. On April 29, Complainant filed a grievance in response to the PRL. On April 30, management notified Complainant that the PRL was not a grievable matter. IF at 399. On May 5, S4 issued the subject removal decision, effective May 9. IF at 405-412. As a result, Complainant filed the subject complaint. IF at 2.

Analysis and Findings

Discrimination based on race, color, national origin, religion, sex, and reprisal is prohibited by Title VII of the Civil Rights Act of 1964, as amended. The Rehabilitation Act of 1973 (the Act) prohibits discrimination against qualified individuals with disabilities on the basis of their disabling conditions.

Traditionally, a systematic approach is used in the analysis of cases involving alleged employment discrimination. This systematic approach requires the Complainant to first establish

what is termed a prima facie case. If the Complainant is successful, a presumption arises that there was discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas v. Green, 411 U.S. 792 (1973). Management must then articulate a legitimate, nondiscriminatory reason for its actions, which, if believed, would support a finding that it was not motivated by unlawful discrimination. Burdine, 450 U.S. at 254-255 and n.8. At this point in the McDonnell Douglas framework, Complainant must prove, by a preponderance of the evidence, that the Agency intentionally discriminated against him based on his protected status. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

To establish a prima facie case of disability discrimination, the complainant must be a member of the class of persons protected by the Rehabilitation Act of 1973, as amended. Following this threshold requirement, the complainant must also prove by a preponderance of the evidence that he was either treated differently than individuals not within his protected group, or that the employer failed to make a needed reasonable accommodation, resulting in adverse treatment. Sisson v. Helms, 751 F.2d 991, 992-93 (9th Cir. 1985), cert. denied, 474 U.S. 846 (1985).

An individual with a disability is one who: (1) has a physical or mental impairment, which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment. 29 C.F.R. § 1614.203 (a) (1) (i) - (iii). Major life activities are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203(a)(1). The Commission has also held that major life activities include thinking, concentrating, and interacting with others. See Fidurski v. Department of Health and Human Services, EEOC Request No. 05960027 (February 19, 1997).

More so, a "qualified individual with a disability" is a person, "who has the requisite skill, experience, education, and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

Complainant stated that in July 2008, he injured his left knee on the job, and he experienced "some difficulties" in walking, bending, lifting, and stooping. He also had some problems with his lower back and with sleeping. He was advised that if these issues were not resolved within six to eight weeks, he needed to consider a medical procedure. He resolved his difficulties by using knee braces. IF at 250, 252. He also filed for worker's compensation. IF at 270, 277, 284, 290, 373. In late September 2008, he experienced pain in his left knee, and

subsequently twisted it again while on duty, and again filed for worker's compensation. IF at 374.

A medical record dated November 19, 2008, indicated that Complainant appeared to have a tear of the anterior horn of the lateral meniscus. He was informed that a tear did not necessarily require surgery, and was advised to contact his doctor if he decided to have surgery. IF at 517. At some point he experienced intermittent swelling and occasional locking of the knee. IF at 518. A doctor's note dated January 1, 2009, indicated that Complainant would be "disabled" from January 1 to April 5, 2009, and would be able to resume light duty at that time. IF at 520. On January 12, he experienced pain in his left knee. IF at 519. A doctor's note dated March 14, indicated that Complainant was awaiting conditions to return to work on a light duty status, with stipulations from his Veteran Administration (VA) doctors. He was scheduled for a follow up appointment on or around April 14, 2009. IF at 375, 521.

Medical documentation of record did not show that Complainant's condition was permanent, or that he was substantially limited in the major life activity. He was not regarded as having an impairment. In that regard, Complainant's April 7th response to the NPR stated since late December 2008, his knee had improved and felt stronger. Furthermore, he was optimistic about his return to work. He was mainly concerned with providing an explanation regarding his failure to submit the requested medical records. IF at 395-397. As such, Complainant has not shown that he is a person with a disability under the Act, and failed to establish a case of prima facie disability discrimination.

Assuming arguendo that Complainant established a prima facie case of disability discrimination, he failed to show that he was denied reasonable accommodation or subjected to disparate treatment. In that regard, Complainant stated and/or alleged the following.

Complainant acknowledged receipt of the February 10 request for more medical documentation from S2, and he contacted S2 about his medical condition several times. In February 2009, his leave requests were disapproved by S1 and S2. He claimed he was waiting for a medical procedure on his knee that was to be conducted sometime in April 2009. He felt that he could obtain all of his medical records from the VA, if given more time. However, his doctors at the VA were unable to comply within the subject timeframe because of their patient backlog. Even so, S2 informed him that he would be removed in five days, if he failed to provide the documentation. He claimed he made every attempt to comply with management's request, including returning to work against his doctor's orders. IF at 255-256, 375-376. On April 18, he said that he could obtain the records by May 5. IF at 377.

In an effort to show that his medical condition was a discriminatory factor in his removal, Complainant stated and/or alleged the following. When he injured his knee in July 2008, he had S2 and other management officials under investigation for misconduct. After the matter was litigated in January 2009, S1 and S2 decided to retaliate against him by terminating his employment. The removal action was consistent with their history of abusing their authority. In that regard, he noted that another GS-06 Police Officer, who had presented medical documentation to S2, was also issued a termination notice, but he decided to retire. IF at 259.

Complainant alleged that he was denied reasonable accommodation. In that regard, he said that management refused to allow him to use a sport utility vehicle, rather than a regular patrol car to compensate for his knee problems. IF at 252-253. He also alleged disparate treatment because at least one co-worker was permitted to be out on worker's compensation for two years with no requirement to contact his supervisors. IF at 261. Complainant admitted that during the period at issue, he had family-related personal issues that did not permit him to bring the desired focus to these matters, and the personal issues may have clouded his recollections. IF at 261-262, 375-376.

In contrast, management officials stated that Complainant was removed for excessive absences for periods of time when he was not on worker's compensation. IF at 273, 280. In support thereof, they stated the following. When Complainant was removed on May 5, he had been in an absent without leave (AWOL) status since January 13. Moreover, his unauthorized absences totaled 77 days, and 648 hours. Despite numerous requests for the documentation, clear notice of his AWOL status, and the potential for disciplinary action, Complainant still had not complied with management's request by the time he was removed. Even though he was provided with a generous opportunity to supply the documentation, he failed to do so. IF at 361, 406, 411.

Complainant's failure to justify his absences created serious concerns about his ability and willingness to be a police officer. His excessive unauthorized leave had a negative impact on organizational efficiency and warranted his removal from Federal service. Complainant's previous 30-day suspension for Inappropriate Conduct and Negligent Behavior was an aggravating factor. Even so, his length of service was considered a mitigating factor. The subject reasons for Complainant's removal, as identified in the NPR, were sustained by a preponderance of the evidence. Complainant's removal was not based on discrimination. It was taken to promote the efficiency of the service. IF at 273, 281, 361, 405-406.

Complainant provided no documentation to show that his disciplinary issues were related to his alleged disability. Assuming, arguendo, that his disciplinary issues were the result of a disability, courts have consistently held that an employer

may uniformly impose discipline and hold all employees to the same performance and conduct standards. "The Rehabilitation Act is designed to put individuals with disabilities on equal footing with non-disabled people in regards to the hiring, promotion, and discharge decisions of the Federal government and its grantees. It is not designed to insulate them from disciplinary actions that would be taken against any employee regardless of his status." Wilber v. Brady, 780 F. Supp. 837, 840 (D. D. C. 1992).

Complainant was not similarly situated to the co-worker, who he alleged was on workers compensation for two years and did not have to provide medical documentation or contact management. Complainant provided no evidence that the co-worker did not provide proper medical documentation. The record shows that Complainant was only asked for additional medical documentation after his workers' compensation leave had ended.

Complainant's allegation, that management retaliated against him because he brought management officials under investigation for misconduct, is not protected activity under Title VII or the Rehabilitation Act. However, there is no evidence that management terminated him due to retaliatory reasons.

In sum, Complainant failed to show that management's actions were based on discriminatory animus. Nor did he provide any evidence that he was treated less favorably than others not of his protected group under similar circumstances. Therefore, he did not substantiate this claim.

Conclusion

Complainant has failed to prove, by the preponderance of the evidence that he was discriminated against in the matters alleged.

Certificate of Service

I hereby certify that the final action in the discrimination case of JEFFREY WALLS v. RAY MAYBOS, SECRETARY OF THE NAVY, DON No. 09-61139-02126, was sent on the date cited below via certified mail, return receipt requested to:

COMPLAINANT: CERTIFIED MAIL #:
Mr. Jeffrey Walls 7101 4579 9290 0231 6783
6901 Malichite Place
Capital Heights, MD 20743

ATTORNEY:
Stephen Scavuzzo, Esq. 7101 4579 9290 0231 6790
8200 Greensboro Drive
McLean, VA 22102

This final action was also forwarded by regular mail to:

Department of the Navy
Human Resources Office-Washington
c/o EEO Office
1411 Parsons Avenue, SE, Suite 300
Washington Navy Yard, DC 20374-5033

For timeliness purposes, it will be presumed that this notice was received within five (5) calendar days after it was mailed:

Date: 5-11-2010 pl. J. Ellenson

Donna J. Ellenson
Naval Office of EEO Complaints
Management & Adjudication
614 Sicard Street SE, Suite 100
Washington Navy Yard, DC 20374-5072

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