

ORIGINAL

No. 22-774

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ADAM DELGADO,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal government can breach a contract without justification and subsequently submit allegedly false documentation, evidence, and affidavits to conceal the malfeasance.
2. What time frame must be surpassed by the Federal government in its alleged failure to comply with the contents of a legally binding settlement agreement to constitute a breach of contract?
3. Whether the Federal government (1st party) can be held liable or sanctioned up to the amount of losses incurred and/or waived by the second party prior to the alleged breach by the Federal government.
4. Whether the Federal government can avoid investigating it's agents and/or employees who have allegedly violated the United States Code (U.S.C.) statutes pertaining to perjury, 18 U.S.C. § 1621 and 18 U.S.C. § 1001, Official False Statements.
5. Whether the Federal government is permitted to allegedly violate the Freedom of Information Act (FOIA) 5 U.S.C. § 552 in an attempt to conceal violations of Perjury, 18 U.S.C. § 1621, and 18 U.S.C. § 1001, False Official Statements or other misconduct by its employees.

PARTIES TO THE PETITION

Adam Delgado

United States Department of Justice

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Federal Circuit, 2022-1988, *Adam Delgado v. Department of Justice*, Decided November 17, 2022.

Merit System Protection Board HQ (BOARD) in No. NY-1221-09-0299-X-1, *Adam Delgado v. Department of Justice*, Decided May 26, 2022.

Merit System Protection Board-NY Office, No. NY-1221-09-0299-X-1, *Adam Delgado v. Department of Justice*, Not Decided.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delgado requests this court issue a writ of certiorari to reverse and remand the decisions below.



DECISIONS BELOW

The US Court of Appeals for the Federal Circuit’s Opinion, No. 2022-1988, is unpublished and appears at App. 1. The Merit System Protection Board’s Final Order, No. NY-1221-09-0299-X-1, is also unpublished and appears at App. 8.



STATEMENT OF JURISDICTION

On November 17, 2022, the US Court of Appeals for the Federal Circuit affirmed the ruling of the MSPB HQ (BOARD). The ruling stated that ATF was in full compliance with the 2011 Settlement Agreement with Mr. Delgado. The Court has jurisdiction under 28 U.S.C. § 1254(1).



PERTINENT STATUTORY PROVISIONS

Freedom of Information Act (FOIA)
5 U.S.C. § 552

- (a) Each *agency* shall make available to the public information as follows:

(1) Each *agency* shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) *rules* of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive *rules* of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the *agency*; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a *person* has actual and timely notice of the terms thereof, a *person* may not in any manner be required to resort

to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of *persons* affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each *agency*, in accordance with published *rules*, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as *orders*, made in the *adjudication* of cases;

(B) those statements of policy and interpretations which have been adopted by the *agency* and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format—

(i) that have been released to any *person* under paragraph (3); and

(ii)

(I) that because of the nature of their subject matter, the *agency* determines have become or

are likely to become the subject of subsequent requests for substantially the same records; or

(II)

that have been requested 3 or more times; and

(E)

a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each *agency* shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the *agency*, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an *agency* may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each *agency* shall also maintain and make available for public inspection

in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each *agency* shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by *order* published in the Federal Register that the publication would be unnecessary and impracticable, in which case the *agency* shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each *agency* shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final *order*, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an *agency* against a *party* other than an *agency* only if—

Whistleblower Protection Enhancement Act
of 2012, 5 U.S.C. § 2302(b)(8)

(a)

(1)

For the purpose of this title, “*prohibited personnel practice*” means any action described in subsection (b).

(2) For the purpose of this section—

(A) “*personnel action*” means—

- (i)**
an appointment;
- (ii)**
a promotion;
- (iii)**
an action under *chapter 75 of this title* or other disciplinary or corrective action;
- (iv)**
a detail, transfer, or reassignment;
- (v)**
a reinstatement;
- (vi)**
a restoration;
- (vii)**
a reemployment;
- (viii)**
a performance evaluation under *chapter 43 of this title* or under title 38;
- (ix)**
a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
- (x)**
a decision to order psychiatric testing or examination;

(xi)

the implementation or enforcement of any non-disclosure policy, form, or agreement; and

(xii)

any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a *covered position* in an *agency*, and in the case of an alleged *prohibited personnel practice* described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in *section 9101 of title 31*;

(B) “*covered position*” means, with respect to any *personnel action*, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the *personnel action*—

(i)

excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii)

excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) “*agency*” means an Executive *agency* and the Government Publishing Office, but does not include—

(i)
a Government corporation, except in the case of an alleged *prohibited personnel practice* described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii)

(I)

the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II)

as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a *personnel action*; or

(iii)

the Government Accountability Office; and

(D) “*disclosure*” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the *disclosure* reasonably believes that the *disclosure* evidences—

(i)

any violation of any law, rule, or regulation; or

(ii)

gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any *personnel action*, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A)

on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the *Civil Rights Act of 1964* (42 U.S.C. 2000e-16);

(B)

on the basis of age, as prohibited under sections 12 and 15 of the *Age Discrimination in Employment Act of 1967* (29 U.S.C. 631, 633a);

(C)

on the basis of sex, as prohibited under section 6(d) of the *Fair Labor Standards Act of 1938* (29 U.S.C. 206(d));

(D)

on the basis of handicapping condition, as prohibited under section 501 of the *Rehabilitation Act of 1973* (29 U.S.C. 791); or

(E)

on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to

any individual who requests or is under consideration for any *personnel action* unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A)

an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B)

an evaluation of the character, loyalty, or suitability of such individual;

(3)

coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4)

deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5)

influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6)

grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition

or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7)

appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in *section 3110(a)(3) of this title*) of such employee if such position is in the *agency* in which such employee is serving as a public official (as defined in *section 3110(a)(2) of this title*) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a *personnel action* with respect to any employee or applicant for employment because of—

(A) any *disclosure* of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i)

any violation of any law, rule, or regulation, or

(ii)

gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such *disclosure* is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any *disclosure* to the Special Counsel, or to the Inspector General of an *agency* or another employee designated by the head of the *agency* to receive such *disclosures*, of information which the employee or applicant reasonably believes evidences—

(i)
any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii)
gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

Perjury, 18 U.S.C. § 1621

Whoever—

(1)
having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2)
in any declaration, certificate, verification, or statement under penalty of perjury as permitted under *section 1746 of title 28*, United States Code, willfully subscribes as true any

material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

False Statements, 18 U.S.C. § 1001

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in *section 2331*), imprisoned not more than 8 years, or both. If the matter relates to

an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b)

Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1)

administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2)

any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.



INTRODUCTION

This is a case that could set multiple precedence for the Federal government, in its conduct and the conduct of some Federal employees. The ramifications, as they apply to both the Federal government and its employees will impact citizens and corporations that are or may be under future investigation by the Federal government. The ramifications will further impact whistleblowing Federal government employees, former and current, because the Federal government will be held to account for their abuses of the FOIA, *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963) as well as the others listed above.



STATEMENT OF THE CASE

This is another opportunity for the Court to set precedence by establishing what time frame must be surpassed in order to establish the Federal government has breached a contract. Although, Mr. Delgado is not an attorney, Mr. Delgado is a highly experienced and trained investigator of 38 years. Mr. Delgado understands the key components of a variety of types of cases. Mr. Delgado retired on September 30, 2022, with just over 20 years of service with ATF. Based on his extensive training and experience, Mr. Delgado is alleging that the Federal government has breached the contract, the Federal government has allegedly violated the FOIA 5 U.S.C. § 552, the Federal

government has allegedly violated 18 U.S.C. § 1621, Perjury and 18 U.S.C. § 1001, Official False Statements all in an attempt to coverup alleged Federal government misconduct.

The Merit Systems Protection Board (MSPB) New York office, Administrative Judge (AJ) granted Mr. Delgado's petition to enforce from 2016 concerning the lack of full compliance of a 2011 Settlement Agreement. In 2017, ATF submitted its documentation to claim full compliance with the Settlement Agreement. The AJ did not make a determination on compliance via an order in 2018 despite Mr. Delgado's repeated petitions for a Status Update and Summary Judgment such as the filing by Mr. Delgado on November 8, 2020 (App. 47). This status update request explained Mr. Delgado's need to get this case resolved because of his upcoming retirement and new pertinent facts for this case as learned from a separate Chicago MSPB case. It should be noted that the mention of the Chicago case was solely for the purpose of informing the New York AJ of the new pertinent case information brought about by discovery and rulings by the 7th Circuit from the Chicago cases. Once again, this petition has been part of the NY MSPB case since November 8, 2020 and the 7th Circuit cases have been resolved. ATF did not file a reply to the 2020 petition and did not object to its inclusion in this file. The AJ did not respond and the case was transferred to the MSPB HQ (BOARD) where it sat until May 26, 2022. The BOARD lacked a quorum until late 2021. The new BOARD members needed to be trained and then the BOARD had to clear a backlog

of thousands of cases. The BOARD hastily ruled ATF was in compliance. Mr. Delgado filed his appeal with the US Court of Appeals for the Federal Circuit in a timely manner and the Court affirmed the BOARD's ruling on November 17, 2022.

◆

REASONS FOR GRANTING THE WRIT

The Court should grant this Writ of Certiorari because, what should be rhetorical questions listed in this request, clearly are not. It should be clarified that the Federal government cannot lawfully breach a contract. Just as in the *USA v. Nebraska Beef, Ltd.*, No. 17-1344, US Court of Appeals for the Eighth Circuit, Filed: Aug. 27, 2018, the breaching party must be held accountable, so should the Federal government be equally held accountable.

“In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.” *Henriksen v. Gleason*, 643 N.W.2d 652, 658 (Neb. 2002) (citation omitted). “A breach is the nonperformance of a duty. . . .” *Weber v. N. Loup River Pub. Power & Irrigation Dist.*, 854 N.W.2d 263, 271 (Neb. 2014). A breach that is material excuses the nonbreaching party of its duty to perform its obligations under the contract. *Siouxland Ethanol, LLC v. Sebade Bros., LLC*, 859 N.W.2d 586, 592 (Neb. 2015).

Mr. Delgado has presented the promise by ATF in the form of the 2011 Settlement Agreement. Mr. Delgado has made multiple attempts to demonstrate ATF's breach of contract, despite the fact that various branches of the Federal government have obstructed his efforts by withholding documents responsive to his lawful FOIA requests. ATF cannot lawfully retaliate against an employee for whistleblowing. Mr. Delgado has and will once again layout the damages that Mr. Delgado has suffered as a result of the government misconduct and subsequent efforts to conceal the malfeasance.

Mr. Delgado fulfilled all of his obligations per the agreement, previously submitted and returned to work for ATF in the Chicago Field Division on July 18, 2011 without the following benefits: Thrift Savings Program matching contributions, the entirety of attorney's fees paid (\$39,581.51-\$20,000 Paid by ATF), court fees, court reporter fees (\$5,502.93); 1,104 hours of Annual Leave; 552 hours of Sick Leave; 120 days of Home Leave; 480 hours of Military Leave; Home Buy Back Benefits; Moving Expenses; Mortgage Payments and taxes for the Delgado Home in Puerto Rico from Sept 2005-October 2013 (\$210,866.76), Home Closing costs in Puerto Rico and Chicago and using the calculations provided by ATF, back pay as a GS-13-1 with subsequent step increases up to September 30, 2022, approximate value \$465,777.36, totaling approximately \$1 million, plus cumulative interest from 2006, he should have been entitled to had he not blown the whistle on ATF employee misconduct in Puerto Rico.

Whether the Federal government is permitted to allegedly violate the Freedom of Information Act (FOIA) 5 U.S.C. § 552 in an attempt to conceal violations of Perjury, 18 U.S.C. § 1621, and 18 U.S.C. § 1001, False Official Statements or other misconduct by its employees.

Mr. Delgado cites the case of Two Mexican nationals who were convicted for the murder of a federal officer, attempted murder of a federal officer, and related offenses in the killing of U.S. Immigration and Customs Enforcement's Homeland Security Investigations (ICE-HSI) Special Agent Jaime Zapata and the attempted murder of ICE HSI Special Agent Victor Avila on Feb. 15, 2011, in Mexico. Mr. Avila retired from ICE and has subsequently filed multiple FOIA requests to no avail. SA Zapata was killed by a firearm that was part of the infamous ATF Operation Fast and Furious. Multiple Federal agencies have received requests from Mr. Zapata or on his behalf. Judicial Watch has also filed a FOIA on this matter, *Judicial Watch v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 12-0921, to no avail. The Fast and Furious is known as a debacle on the part of ATF that allowed approximately 2,000 weapons to be bought in the US and transported to Mexico resulting in the death of numerous people in Mexico as well as US Border Patrol Agent Brian Terry.

I. ATF MISCONDUCT IN PUERTO RICO AND WHISTLEBLOWING

In September 2002, Mr. Delgado was a newly hired (GS-9) Special Agent (SA) with the Bureau of Alcohol, Tobacco, and Firearms (ATF) who was assigned to San Juan, Puerto Rico at his own expense. Mr. Delgado was a former Chicago Police Officer of nine years and at the time, an Air Force Office of Special Investigations (AFOSI) SA and Reserve Officer. As a result, Mr. Delgado had leadership training and experience. Mr. Delgado understood the concepts of and conducted himself with workplace professionalism. Mr. Delgado in his AFOSI capacity, had been the interim commander of multiple AFOSI units. Mr. Delgado was assigned to Supervisor Orlando Felix and attended the ATF training courses in 2003. Upon his return to San Juan, Mr. Delgado learned his first line supervisor was changed to a newly assigned Supervisor Jose Oquendo.

Shortly thereafter, supervisor Oquendo began a campaign of harassment of Mr. Delgado, in part because Mr. Delgado was a Hispanic who did not speak Spanish fluently which Mr. Delgado reported within the chain of command. As a result of reporting Oquendo to the Miami Field Division, additional retaliation occurred. In one incident, Mr. Delgado wanted to give a Confidential Informant (CI) funds for his help in a series of gun store burglary investigations. Oquendo refused the request for funds causing Delgado to request assistance from the second line supervisor. Supervisors Felix and Oquendo in San Juan called Delgado into an office and stated,

“The only thing you could have done worse than call Miami, is call IAD and if you did that, you would be dead.” Delgado reported the two supervisors, hence the second level supervisor flew to San Juan and interviewed the two supervisors. The supervisors confirmed the statement was said. Felix stated he was joking while Oquendo stated that Delgado’s career would be dead. In a separate incident, Mr. Delgado learned from another SA that supervisor Felix called a newly assigned gay female agent into his office and allegedly stated, “I hear we have something in common.” The female asked what’s that? Felix replied, “We both like pussy.” The female left the awkward situation and advised co-workers of the incident. Later, on September 23, 2009 during depositions, both supervisor Felix and the female denied the incident took place. During Mr. Delgado’s time in San Juan, there were a number of incidents that took place that were reported up the chain of command. Supervisor Felix also admitted to calling Mr. Delgado “maricon” which is Spanish slang for “Faggot.”

ATF policy assigned agents to San Juan for three years and then agents were allowed to put in for a paid transfer. Mr. Delgado submitted multiple requests to be transferred out of San Juan to Chicago, IL but ATF denied all requests to include Delgado’s offer for a self-paid move. ATF clearly demonstrated their animus for Mr. Delgado the whistleblower. Supervisor Oquendo told Delgado that he would be in San Juan for the rest of his career. In April 2006, Mr. Delgado submitted his resignation from ATF because of the hostile work

environment and constructive discharge conditions. To the best of Mr. Delgado's knowledge, no ATF employee was disciplined for their misconduct. These are some facts that the Court of Appeals for the Federal Circuit failed to address.

II. THE MSPB NY CASE

Puerto Rico falls under the authority of the New York City office of the MSPB. Mr. Delgado filed his Individual Right of Action (IRA), NY-1221-09-0299-W-1 in 2009 as well as a civil suit in Washington DC District Court, *Adam Delgado v. Alberto Gonzalez*, No. 07-00256 (CKK). Depositions were held and evidence was exchanged. On the Friday prior to the hearing being held in January 2011, ATF attorneys offered a Settlement Agreement that Mr. Delgado accepted, the less-than-ideal agreement, in good faith so that he could stop the hemorrhaging of money he had lost because of ATF's unprofessional conduct and whistleblower retaliation (App. 28). Since July 2011, after Mr. Delgado rejoined ATF in Chicago, IL, Mr. Delgado attempted to verify ATF's compliance with one portion of the settlement agreement and that is, did ATF pay the employer's portion of Mr. Delgado's FERS pension account. After exhausting all of his options, Mr. Delgado filed a petition to enforce with the AJ in March 2016. The AJ directed ATF to provide proof of payment. After a series of delays by ATF, ATF employee, Chris Kopeck, Deputy Chief, Payroll Processing and Operations Branch produced a "recreated" spreadsheet explaining the amounts of pay per pay period that Mr. Delgado

should have received to include his FERS pension account contributions from both Mr. Delgado's responsibility and ATF's responsibility. Mr. Delgado waived back pay and Thrift Savings Plan contributions as well as other benefits in the settlement agreement to the approximate figure currently at \$ 1,000,000.00. The National Finance Center (NFC) processes ATF's payroll using the Special Payroll Processing System (SPPS). In its response, ATF provided a screenshot of SPPS for one payment, \$6,059.14 which is appropriate and undisputed. However, ATF failed or refused to provide a SPPS screenshot of the employer's responsibility which according to ATF, totals \$122,581.06. This simple act would clearly prove ATF's compliance with a time date stamp which would state the pay period and year paid. ATF claimed both payments were made in 2012. The AJ's failure to make a decision caused this case to linger unnecessarily. Mr. Delgado has been more than patient. Please accept this Certiorari and reverse the Federal Circuit.

On January 12, 2023, Mr. Delgado filed, *Adam Delgado v. U.S. Department of Justice et al.*, 1:23-CV-89 (APM) in Washington DC, District Court in an attempt to finally obtain his FOIA request from ATF and the NFC from 2021. In his complaint, paragraph 5, Mr. Delgado claims that NFC gave ATF 191 pages responsive to Mr. Delgado's 2021 FOIA request which ATF has withheld. In paragraph 6, Mr. Delgado recounts a telephone call on December 14, 2020 with Terry Peoples of the USDA. During the conversation, Mr. Peoples stated, "It did not matter if ATF made the pension

contribution/payment.” Mr. Delgado followed up the conversation the next day with an e-mail documenting the conversation (App. 43).

III. MSPB HEADQUARTERS (BOARD) DECISION

Based on the inadequate evidence presented by ATF, Mr. Delgado requested a Summary Judgement from the AJ who ignored the request. The AJ further failed to issue an Order establishing full compliance by ATF based on the evidence submitted. Instead, the AJ passed the case off to the MSPB HQ (BOARD) which lacked a quorum until late 2021 and then in 2022, the BOARD, finally started to perform triage on their backlog of thousands of cases. The BOARD, in their order dated May 26, 2022, in paragraph 3, incorrectly interpreted Mr. Delgado’s decision to not “file a petition for review of the compliance initial decision if they disagreed with the findings therein. CID at 8-9.” (App. 10) Mr. Delgado did not file a petition because, if what the BOARD claims was a clear determination of noncompliance, Mr. Delgado would have technically won his argument hence there would be no need for Mr. Delgado to request a review.

Mr. Delgado had consulted with multiple private attorneys about this case prior to 2021 because the AJ’s actions were vague. Even the private attorneys were unsure if the case could be taken to an appeals court prior to the BOARD deciding. Mr. Delgado was attempting to resolve this case prior to his retirement

on September 30, 2022, so that he could avoid being in this position upon his retirement. The ATF has done everything in its power to delay this case and avoid sanctions for committing an alleged fraud on the Courts. Mr. Delgado believes the BOARD did not give proper consideration to the Breach of Contract portion of Mr. Delgado's case and it appears the BOARD took a view of this case as, "You got paid so ATF is in compliance. End of case." Mr. Delgado is not certain that the payment was made. Mr. Delgado alleges that ATF committed a breach of contract, specifically positive malperformance, by their defective or incomplete obligation to pay into Delgado's Federal Employees Retirement Systems (FERS) plan as stated in the settlement agreement when ATF claimed to have made the payment in 2012. As a Cold War warrior, Mr. Delgado is asking the Court to follow President Reagan's advice of, "Trust but verify." Had the AJ made a clear determination and issued an order, Mr. Delgado would not have had to file his petition on November 8, 2020. Included in the petition was a Seventh Circuit ruling for two cases that started after this case and have since been resolved. The BOARD had the November 8, 2020 Petition in their files but apparently did not take it into consideration.

IV. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECISION

The Court of Appeals and the BOARD incorrectly claimed that Mr. Delgado stated that ATF made the \$122,581.06 payment. In two places in the petition to

the Court of Appeals, Mr. Delgado stated concerning ATF's alleged payment to his FERS account, "Simple deduction leads Delgado to believe ATF did not."

Mr. Delgado stated, "Delgado believes that ATF may have made the \$122,581.06 payment post the filing of the of the Petition to Enforce to avoid sanctions and because ATF's payment figures will be verified by OPM in the two weeks preceding Delgado's retirement on 30 September 22." Mr. Delgado would like to correct the record on one issue. The NFC receives the retirement record two weeks prior to retirement and in turn NFC forwards the retirement record to OPM. Once again, ATF never claimed an administrative oversight for the lack of payment. Mr. Kopeck of ATF declared under penalty of perjury that the payments were made in 2012. The fatal flaw in ATF's claim is this, ATF claimed that in Pay Period 5 of 2012, ATF paid \$22,581.06 and in Pay Period 8 of 2012. ATF paid \$100,000.00 to meet the Settlement Agreement. The SPPS screenshot provided by ATF and Mr. Delgado's pay statement clearly show ATF paid \$6,059.14 in Pay Period 4 of 2012. If ATF can provide an accurate screenshot of the \$6,059.14 payment, then why has ATF refused to provide the same type of SPPS screenshot for their alleged payments in Pay Periods 5 and 8 of 2012? In their documentation to the AJ, ATF claimed the total payment, employee and employer contributions were \$122,581.06.

ATF's failure to pay in 2012 may be due to a number of reasons such as, a natural disaster or a change in the law. To the best of Mr. Delgado's knowledge,

there was no natural disaster or change in the law in 2011-2012 that inhibited the government's performance, the receiving party may raise breach or rescission. There was no rescission clause in the 2011 settlement agreement.

Furthermore, the Court of Appeals for the Federal Circuit, in their response, provided a mischaracterization of Mr. Delgado in that the Court's order depicted Mr. Delgado as merely a whiner who did not speak Spanish and Mr. Delgado wanted out of Puerto Rico in a short amount of time. Mr. Delgado was assigned to Puerto Rico for three years because it was a hardship assignment as designated by ATF Order. Delgado was an ATF whistleblower who reported multiple violations of the law and departmental policy.

It is unfortunate but the reality is, Judges and AJ's make mistakes of facts in their justifications for their rulings, hence, the need for Appeals Courts and the Supreme Court.

Whether the Federal government can avoid investigating its agents and/or employees who have allegedly violated the United States Code (USC) statutes pertaining to Perjury, 18 U.S.C. § 1621 and 18 U.S.C. § 1001, False Statements.

There is public interest for a precedence to be set in this case because current and former good government employees have been retaliated against and bullied by supervisory Federal government employees concerned with being discovered. Future government

employees will be continually bullied and retaliated against for keeping faith to their oaths, the constitution, the laws, and the department policies. The Federal government must be held to a higher standard to enforce its policies, the law and the constitution. This includes investigating allegations of misconduct so that those employees who are found to have violated policies, the law and the constitution can be removed from government service. Without this precedence being established, the government will continue to turn a blind eye to some government employees alleged misconduct and eventually it will be discovered by defense attorneys for citizens under investigation.

Some government employees may feel that they can operate with the impunity. Subsequently, some citizens may be shot at, searched, or arrested without proper authorization. Some government employees may be sexually harassed by a government coworker who operates with impunity because the DOJ civil division is more concerned about protecting their reputation and their desire to avoid cases being appealed because of *Giglio* issues with the government's witnesses and employees' credibility. *Giglio v. United States*, 405 U.S. 150 (1972).

Brady v. Maryland set a precedent on the requirement to give the defense exculpatory evidence and yet ATF has frequently refused to comply in civil and criminal cases.

What time frame must be surpassed by the Federal government in its failure to comply with the contents of a legally binding settlement agreement to constitute a breach of contract?

Is a breach of contract defined as taking place after a positive malperformance violation is discovered after one month, one year, four years or more? When will DOJ civil division stop defending bad employees and making false allegations against honest employees to justify their actions in court? In the DOJ response for this case at the Federal Circuit, the DOJ attorney stated Mr. Delgado and Mrs. Delgado were “on the rolls at the Chicago Police Department” while they were in Puerto Rico. What the attorney didn’t say, is that the Delgado’s were in a Leave of Absence status without pay. That attorney has left government service but the unfounded allegations clearly demonstrate that the DOJ is willing to say anything to win a case. The Department of Justice has given Mr. Delgado awards, letters, and certificates which are nice but ATF has cheated Mr. Delgado out of approximately \$1,000,000.00 in benefits for telling the truth. Mr. Delgado is not the first whistleblower and will certainly not be the last whistleblower appealing to this court as long as the DOJ is not held accountable. There is a willful blindness taking place at the DOJ.



CONCLUSION

The Court should grant Certiorari to address the failures of the US Court of Appeals for the Federal Circuit and the BOARD to address the issues raised before them. The alleged breach of contract by the US Federal Government and their subsequent acts to withhold lawful FOIA requests are serious matters that must be addressed. No Federal government employee should be expected to absorb financial losses in the area of \$1,000,000 for telling the truth and whistleblowing. When a federal employee signs a settlement agreement in good faith it should be promptly and fully honored.

Respectfully submitted,

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February 14, 2023

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Note: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

ADAM DELGADO,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2022-1988

Petition for review of the Merit Systems Protection Board in No. NY-1221-09-0299-X-1.

Decided: November 17, 2022

ADAM DELGADO, Ft. Meade, MD, pro se.

CATHARINE PARNELL, Civil Division, Commercial Litigation Branch, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, DEBORAH ANN BYNUM, PATRICIA M. MCCARTHY.

Before NEWMAN, REYNA, and STOLL, *Circuit Judges*.

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PER CURIAM.

Adam Delgado appeals a decision from the U.S. Merits System Protection Board affirming that the Bureau of Alcohol, Tobacco, Firearms, and Explosives complied with a settlement agreement between Mr. Delgado and the agency. We affirm.

BACKGROUND

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (the “agency”) posted Mr. Delgado in Puerto Rico as a Special Agent. SAppx 3-5¹. Between 2005 and 2006, Mr. Delgado repeatedly requested the agency change his post to Chicago. SAppx 4-5. After multiple denials of his request for transfer, Mr. Delgado filed an Equal Employment Opportunity complaint. SAppx 4. Mr. Delgado also filed a discrimination claim against the agency in the U.S. District Court for the District of Columbia. SAppx 4, 76. Mr. Delgado continued to request and be denied transfer until he resigned in 2006. SAppx 4-5.

In 2009, Mr. Delgado filed an appeal before the Merit Systems Protection Board (the “Board”), alleging that he had been constructively removed from his position when the agency refused to transfer him. SAppx 23, 75. The Board later dismissed the appeal without prejudice so that Mr. Delgado’s newly obtained counsel could refile an appeal after completing his review of

¹ “SAppx” refers to the appendix submitted with the Department of Justice’s Response Brief.

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the record. SAppx 76. Mr. Delgado refiled an appeal in January 2010, alleging that his supervisor discriminated against him for not speaking Spanish and threatened his career. SAppx 82.

In January 2011, Mr. Delgado and the agency entered into a Settlement Agreement (the "Settlement") to resolve the district court litigation and the appeal to the Board. SAppx 22-23, 75-76, 82, 89-92. Under the Settlement, the agency would cancel Mr. Delgado's resignation, the agency would then reinstate and post him in Chicago, and the agency would pay both "the employer's and employee's share of Federal Employee Retirement System contributions from the date of resignation until the effective date of cancellation of the resignation." SAppx 91. The Settlement also required the agency to pay \$20,000 for Mr. Delgado's attorney fees and costs accrued in district court and in appeal to the Board. *Id.* In signing the Settlement, Mr. Delgado "waive[d] any claims of back pay or any other damages of any kind whatsoever." *Id.* Mr. Delgado's appeal to the Board was dismissed as a result. SAppx 96. The agency cancelled Mr. Delgado's resignation and then reinstated and posted him in Chicago. SAppx 117.

Following the Settlement, at Mr. Delgado's request, the agency informed Mr. Delgado that it had made \$122,581.06 in retirement contributions on behalf of the employer as of March 2012. SAppx 101, 103, 112. Chief of Payroll Processing & Operations Branch Chris Kopeck also suggested in his correspondence that the agency had overpaid the contribution by

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\$1,351.48, and that the correct contribution should have been \$121,229.58. SAppx 103.

In March 2016, Mr. Delgado filed a petition for enforcement with the Merits System Protection Board Field Office, arguing that the agency lacked proof of paying the Federal Employee Retirement System contributions as required by the Settlement and that the correct employer contribution amounted to \$156,777.94. SAppx 101. The Administrative Judge found the agency's discrepant calculations for the employer contribution – \$122,581.06 versus \$121,229.58 – required further attention and clarity. SAppx 120-21. The Administrative Judge granted Mr. Delgado's petition and found that, to comply with the Settlement, the agency must explain its \$122,581.06 contribution computations between April 4, 2006, and July 16, 2011. SAppx 121.

STANDARD OF REVIEW

Our review of Board decisions is statutorily limited. We must set aside a Board decision when it is “[1] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [2] obtained without procedures required by law, rule or regulation having been followed; or [3] unsupported by substantial evidence.” *Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984) (citing 5 U.S.C. § 7703(c)). “Substantial evidence is defined simply as ‘more than a mere scintilla’ and ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”

DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.,
695 F.3d 1247, 1252 (Fed. Cir. 2012) (citation omitted).

DISCUSSION

We affirm the Board's determination that the agency complied with the Settlement. SAppx 315-20. Mr. Delgado argues that the Board did not have sufficient evidence to find that the agency paid "the \$122,[581.06] employer portion payment" to his federal employee retirement account as required by the Settlement. Appellant Op. Br. 2. Mr. Delgado also seeks "back pay, seniority, benefits, moving costs, attorneys fees, court reporter fees, court costs, annual leave, sick leave, military leave, home leave, home buy back program and other entitlements." *Id.*

We conclude that substantial evidence supports the Board's determination that the agency complied with the Settlement. The agency provided sworn declarations and evidentiary support showing that the agency paid an adjusted contribution of \$139,341.22 as of April 12, 2018. SAppx 146-47, 271-73, 299-301. Mr. Delgado's demand for additional evidence for a portion of this payment is unnecessary where, as here, there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuoProSS Meditech Corp.*, 695 F.3d at 1252. Requiring additional evidence is also improper because Mr. Delgado appears to concede that payment has been made. Appellant Reply Br. at 6 ("Mr. Delgado believes that [the agency]

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may have made the \$122,581.06 payment post the filing of the Petition to Enforce to avoid sanctions. . . .”).

We also affirm the Board’s rejection of Mr. Delgado’s requests for wages, fees, costs, and benefits outside the scope of the Settlement. Mr. Delgado claims that he is entitled to these remedies for an alleged breach of the Settlement. Appellant Reply Br. 7. Most of Mr. Delgado’s requested relief is monetary. “The [Board] does not possess authority to award monetary damages for the breach of a settlement agreement.” *Cunningham v. United States*, 748 F.3d 1172, 1180 (Fed. Cir. 2014). Even for non-monetary relief, the Board is statutorily limited to enforcing compliance with a settlement agreement. *See id.*; *see also* 5 U.S.C. § 1204(a)(2). Thus, the Board correctly rejected each monetary and non-monetary request outside the scope of the Settlement.

CONCLUSION

We affirm the Board’s determination that the agency complied with the Settlement. We also affirm the Board’s rejection of Mr. Delgado’s requests for wages, costs, fees, and benefits outside the scope of the Settlement.

AFFIRMED

COSTS

No costs.

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**United States Court of Appeals
for the Federal Circuit**

ADAM DELGADO,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2022-1988

Petition for review of the Merit Systems Protec-
tion Board in No. NY-1221-09-0299-X-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

November 17, 2022

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court

Tobacco, Firearms, and Explosives (agency) entered into in resolution of his whistleblower individual right of action appeal. *Delgado v. Department of Justice*, MSPB Docket No. NY-1221-09-0299-C-1, Compliance File (CF), Tab 1. In a compliance initial decision issued February 13, 2017, the administrative judge found the agency partially noncompliant with the settlement agreement. CF, Tab 10, Compliance Initial Decision (CID). For the reasons discussed below, we find the agency in compliance and DISMISS the petition for enforcement.

DISCUSSION OF ARGUMENTS AND EVIDENCE ON COMPLIANCE

In the compliance initial decision, the administrative judge found that the agency had complied with the settlement agreement's requirements to reinstate the appellant, cancel his resignation, and return him to duty in the Chicago field office. CID at 3. However, the administrative judge found that the agency had not established that it had complied with the settlement agreement's requirement that it pay the employer and employee portions of the appellant's retirement contributions for the period from April 4, 2006, through July 16, 2011. *Id.* at 7. Therefore, the administrative judge ordered the agency to have the National Finance Center (NFC) explain its computations regarding the appellant's share and the agency's share of the Federal Employee Retirement System (FERS) retirement contributions for the period from April 4, 2006, through July 16, 2011; have NFC make the necessary adjustments,

if any; and submit a clear explanation of NFC's computations. *Id.* at 7.

The administrative judge informed the agency that, if it decided to take the actions ordered in the compliance initial decision, it must submit to the Clerk of the Board a narrative statement and evidence establishing compliance. CID at 7-8. In addition, she informed both parties that they could file a petition for review of the compliance initial decision if they disagreed with the findings therein. CID at 8-9. Neither party filed any submission with the Clerk of the Board within the time limit set forth in 5 C.F.R. § 1201.114. As such, pursuant to 5 C.F.R. § 1201.183(b)-(c), the administrative judge's findings of noncompliance became final, and the appellant's petition for enforcement was referred to the Board for a final decision on issues of compliance. *Delgado v. Department of Justice*, MSPB Docket No. NY-1221-09-0299-X-1, Compliance Referral File (CRF), Tab 2.

The agency submitted a statement of compliance on July 19, 2017. CRF, Tab 10. The agency stated that, in the process of gathering the information needed by NFC to determine the correct amounts of retirement contributions, the agency discovered that the salary rates for Puerto Rico originally had been used for the period between 2006 to 2011, rather than the higher rates for Chicago, which should have been used pursuant to the settlement agreement. *Id.* at 12, 39. Therefore, the agency included the Chicago salary rates in the information it sent to NFC following the issuance of the CID. *Id.* at 12.

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NFC provided a spreadsheet setting out the figures it used for its calculations, which were based on the Chicago pay rates. *Id.* at 13; *see* CRF, Tab 11 at 15-18. The total adjusted employee contribution, which NFC computed by adding together the yearly amounts, was calculated at \$7,326.35. CRF, Tab 10 at 13, n.15. NFC calculated the total agency contribution by adding the “GOV FERS Retirement Shares” contribution for each pay period for each of the years (2006 to 2011) to derive the yearly total. CRF, Tab 10 at 14. *See* CRF, Tab 11 at 9, 15-18. These calculations resulted in a total adjusted Agency contribution of \$139,341.22 (\$16,760.16 more than the agency’s original payment of \$122,581.06). CRF, Tab 10 at 14, n.18. The agency submitted screen captures indicating adjustments made in pay periods 7, 8, and 9 in 2017. CRF, Tab 11 at 22-24.

The agency reported that it had requested that NFC make necessary adjustments required by the change in the appellant’s duty station from Puerto Rico to Chicago, and that, while most of the adjustments were made, there was an outstanding adjustment in the amount of \$6,040.18, which the agency was in the process of reconciling with NFC. CRF, Tab 10 at 15. This adjustment was due to the difference in the locality pay rates between Puerto Rico and Chicago. *Id.* at 15-16.

The appellant responded to the agency’s proof of compliance on September 4, 2017, arguing that the agency had not complied with its obligation to work with NFC to make the necessary retirement contributions

until recently. CRF, Tab 14 at 4. Because of this delay, the appellant argued that the agency should be held liable for back wages, other benefits, legal fees, and various other relocation and transportation costs. *Id.* at 4-5. The appellant further argued that the agency could not provide proof that the contributions were made; therefore, he assumed they had not been made. *Id.* at 6. The appellant also attached copies of earnings statements from his time in Puerto Rico, and disputed the agency's conclusion that the settlement agreement required payment under the Chicago locality pay rate. *Id.* at 7; *see id.* at 16-58. Finally, the appellant requested that the agency be directed to appoint him to a GS-14 position at its headquarters in Washington, D.C., because his wife had accepted a new job in Maryland. *Id.* at 9-10.

The appellant submitted an additional statement on February 17, 2018, which included a draft global settlement proposal. CRF, Tab 15.

The agency submitted additional evidence of compliance on April 12, 2018. CRF, Tab 16. The agency stated that the previously-outstanding adjustment of \$6,040.18 to the agency's share of retirement contributions was made, resulting in a total paid agency share of \$139,341.22. *Id.* at 7, 9-10. The appellant did not respond to the agency's submission.

The Board issued an order on July 19, 2018, directing the appellant to respond to the agency's submissions within 20 calendar days. CRF, Tab 17. In response, the appellant submitted a statement on

July 21, 2018, which argued that the agency had not provided adequate proof that the adjustments to the employer's retirement contributions had actually been made. CRF, Tab 18. The appellant argued that the agency should have provided "independent" confirmation that the payments were made, preferably from the Office of Personnel Management (OPM). *Id.* at 6. He further requested that original and certified copies of NFC's documents be mailed to him, the agency, and the MSPB to establish that the payments had been made. *Id.* at 6-7. The appellant also continued to argue, without support—and to his detriment—that the pay rates should have been calculated using the lower Puerto Rico locality rate, rather than Chicago. *Id.* at 5.

On November 8, 2020, the appellant submitted a motion for a status update and summary judgment. CRF, Tab 19. In that motion, he argued that the agency had not provided "definitive proof" that it made the required retirement contributions. *Id.* at 4. He also argued that he did not receive the full amount of attorney fees that he paid, and stated that he had recently prevailed in two other whistleblowing appeals in the Court of Appeals for the Seventh Circuit. *Id.*

The agency has submitted evidence that it has made retirement contributions in the amounts of \$139,341.22 for the agency share, and \$7,326.35 for the employee share. The appellant has not provided any specific objection to the amounts of the contributions. Rather, he has argued that the agency needs to provide additional proof that it has made the contributions.

We reject the appellant's assertion that independent corroboration from OPM is necessary to establish compliance in this matter. Rather, we find that the affidavits, screen captures, and spreadsheets submitted by the agency constitute sufficient proof that it has complied with the administrative judge's order directing it to have the NFC explain its computations regarding the FERS contributions for the period from April 4, 2006, through July 16, 2011, and have NFC make the necessary adjustments.

We further reject the appellant's contentions that the agency should be required to pay him back wages, benefits, legal fees, and relocation and transportation costs, and to appoint him to a GS-14 position at its Washington, D.C. headquarters. None of these requirements are found in the settlement agreement. Accordingly, they are outside the scope of this enforcement action, which is limited to enforcing the terms of the settlement agreement.

For the reasons above, we find the agency in compliance and DISMISS the petition for enforcement. This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(c)(1) (5 C.F.R. § 1201.183(c)(1)).

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees and costs **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your motion for attorney fees and costs with the office that issued the initial decision on your appeal.

NOTICE OF APPEAL RIGHTS²

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of

² Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) **Judicial review in general**. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after you receive** this decision. 5 U.S.C. § 7703(b)(2); see *Perry v. Merit Systems Protection Board*, 582 U.S. ___, 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days after your representative receives** this decision. If the action involves a claim of discrimination based on race, color, religion,

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sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/Court_Websites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

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If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW 12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.³ The court of appeals

³ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

January 12, 2023

Adam Delgado, Pro Se
PO Box 145
Ft. Meade, MD
773-992-7632
[Adam.delgado@
ii-services.net](mailto:Adam.delgado@ii-services.net)

Case: 1:23-cv-00089
Assigned To : Mehta, Amit P.
Assign. Date : 1/12/2023
Description: FOIA/Privacy
Act (I-DECK)

Plaintiff,

Vs.

United States Department of Justice (DOJ),
Bureau of Alcohol, Tobacco, Firearms and Explosives
(ATF)
National Finance Center (NFC),
United States Department of Agriculture (USDA)
Defendants,

**COMPLAINT PURSUANT TO
FREEDOM OF INFORMATION ACT**

Plaintiff, Adam Delgado, Pro Se, brings this action against Defendants, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), a sub-component of the United States Department of Justice (DOJ). In addition, Defendants, the National Finance Center (NFC) and the US Department of Agriculture (USDA), for the failure to timely and appropriately respond to

the Freedom of Information Act (FOIA) request served by Mr. Delgado pursuant 5 U.S.C. 552. As explained below, Mr. Delgado has exhausted his remedies under 5 U.S.C. 552(a)(6)(C)(i).

THE PARTIES

1. Mr. Delgado is a retired ATF Special Agent and Whistleblower who resides on Ft. Meade, MD. The DOJ, ATF and the USDA all have their Headquarters in Washington, D.C.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this case, and venue is proper in this District, pursuant to 5 U.S.C. 552(a)(4)(B)(C).

BACKGROUND

3. In January 2011, DOJ and ATF entered into a settlement agreement with Adam Delgado on MSPB case number, NY-1221-09-0299-W-2 and Adam Delgado v. Albert Gonzales District of Columbia, Civil Action No. 07-00256 (CKK) (a copy of which is attached hereto as Exhibit 1). In the agreement, ATF agreed to make pension contributions to Mr. Delgado's Federal Employee Retirement System (FERS) account. One contribution was normally the employee's responsibility, but ATF agreed to pay it in the amount of \$6,059.14.
4. The other amount is approximately \$122,581.06, depending on which government agency was calculating the figures, which was supposed to be

paid by ATF. Starting in 2011, Mr. Delgado attempted to obtain proof of the \$122,581.06 payment from ATF without success so that he could avoid being in this position upon his retirement.

5. On July 9, 2017, out of frustration with ATF's failure to provide timely compliance with the FOIA Request, Mr. Delgado filed a separate FOIA request with the National Finance Center (NFC) which is a component of the US Department of Agriculture (USDA) (a copy of which is attached hereto as Exhibit 2). The NFC responded that they did not have documentation responsive to Mr. Delgado's request. After a series of communications, ATF, responded on May 10, 2021, that they had 191 pages from the NFC that were responsive to Mr. Delgado's request, but ATF was deferring the release of the documents. (a copy of which is attached hereto as Exhibit 3).
6. Mr. Delgado subsequently sent an e-mail to terry.peoples@usda.gov on December 15, 2020 to document his telephone conversation on December 14, 2020 with Terry Peoples about Mr. Peoples comments that "it did not matter if ATF made the pension contribution/payment (a copy of which is attached hereto as Exhibit 4).
7. On May 10, 2021, ATF acknowledged in writing the 2021-NFC-0036-FP (USDA) FOIA Request number and ATF FOIA Request number 2021-0501 (a copy of which is attached hereto as Exhibit 5). ATF provided a spreadsheet of figures with the date of 12/18/04 without a legend to explain the numbers so it is unresponsive to the requests.

8. The NFC uses a computer system known as Special Payroll Processing System (SPPS) and this entire matter could have been resolved years ago had the NFC OR ATF produced one screenshot of the SPPS screen documenting the payment of the \$122,581.06 payment allegedly made in 2012 as ATF has submitted under penalty of perjury, to Merit Systems Protection Board (MSPB) and the US Court of Appeals for the Federal Circuit Case number 22-1998.
9. ATF did provide a screenshot from SPPS of the \$6,059.14 payment to Mr. Delgado's FERS account but ATF and the NFC have both refused to make a screenshot of the alleged 2012 payment of \$122,581.06. Mr. Delgado filed a petition to enforce in 2016 with the MSPB Administrative Judge (AJ) and that AJ ordered ATF to demonstrate compliance. ATF instead produced a spreadsheet of the amounts of payments that **should** have been made to Mr. Delgado's FERS account and some e-mails between ATF and the NFC concerning the payment calculations but no screenshot of the 2012 transaction. The AJ did not make a final ruling of compliance. Instead, the determination was passed on to the MSPB Headquarters in 2018 which did not have a quorum until late 2021. The Board was backlogged with thousands of cases and had newly trained board members reviewing cases. In 2022, the Board ruled ATF was in compliance and then Mr. Delgado petitioned to the Federal Circuit who agreed with the Boards ruling.
10. Still after 11 years of trying to obtain a simple screenshot from SPPS of the \$122,581.06 payment

and the date(s) of the payment(s), both the NFC and ATF have refused to provide this one document. Mr. Delgado alleges that, IF, the \$122,581.06 payment(s) was/were ever made by ATF, the payment may have been paid in or around 2017. This is the proverbial, ATF being caught with it's hand in the cookie jar. Although Mr. Delgado has not attended law school, if the allegations are proven true with this court's order to produce the SPSS screenshot of the alleged 2012 payment to the Delgado FERS Account, ATF would have breached the 2011 agreement and then provided perjured documentation to cover up the breach.

11. With all due respect, FOIA demands more of government agencies. Mr. Delgado has been more than patient, and the DOJ, ATF, NFC and the USDA have not fulfilled their statutory obligations: even now years after the Request was served.

COUNT I

(Violation of 5 U.S.C. 552)

12. Mr. Delgado reallege and incorporate by reference Paragraphs 1-11 hereof.
13. DOJ, ATF, the NFC and the USDA has violated and is in violation of 5 U.S.C. 552.

RELIEF REQUESTED

Accordingly, Mr. Delgado respectfully requests that the Court enter judgement in Mr. Delgado's favor and: