

(i). Appendix: Annex I
Federal Circuit determination, December 29, 2025

SOTO v. USPS 1

NOTE: This disposition is nonprecedential.

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

LUIS J. SOTO,
Petitioner

v.

UNITED STATES POSTAL SERVICE,
Respondent

2025-1275

Petition for review of the Merit Systems Protection Board in No. NY-0752-23-0059-I-1.

Decided: December 2, 2025

LUIS J. SOTO, Rio Grande, PR, pro se.
ELINOR JOUNG KIM, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by MICHAEL GRANSTON, TARA K. HOGAN, PATRICIA M. MCCARTHY, YAAKOV ROTH.

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Before TARANTO, BRYSON, and CUNNINGHAM, Circuit Judges.

PER CURIAM.

In 2023, the United States Postal Service (agency) terminated the employment of Louis J. Soto-Soto (petitioner). Petitioner then filed a grievance through his union, as per-mitted under the relevant collective bargaining agreement (CBA). While his union grievance was pending, petitioner also filed an appeal to the Merit Systems Protection Board (Board). The assigned Board administrative judge (AJ) is-sued an initial decision affirming petitioner's removal, and the Board affirmed. See *Soto v. United States Postal Service*, No. NY-0752-23-0059-I-1, 2023 WL 4051636 (M.S.P.B. June 13, 2023) (2023

Decision); *Soto v. United States Postal Service*, No. NY-0752-23-0059-I-1, 2024 WL 4457970 (M.S.P.B. Oct. 9, 2024) (2024 Decision).

Petitioner's primary argument to us is that the Board lacked jurisdiction to hear his case because he had filed the union grievance. He also argues that the agency violated his due process rights because the agency allegedly failed to provide him with notice of his union grievance rights and the agency employee who removed him had an alleged conflict of interest. We affirm the Board's determination.

I

Before the removal at issue, Petitioner worked as a lead sales-and-services associate in the Canovanas Post Office in Puerto Rico and as a shop steward for the American Postal Workers Union (Union), AFL-CIO Local 1070. 2023 Decision, at 2.1 On July 29, 2022, a supervisor from a different post office came to the Canovanas Post Office to

1 For the 2023 Decision, we use the AJ's own pagination (1–44), shown on the version in the Supplemental Appendix (S. Appx.) at 11–54.

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discuss union grievances with petitioner. S. Appx. 64. Petitioner physically attacked this supervisor, striking him with his shoulder and a binder. *Id.* The agency then placed petitioner on paid administrative leave and forbade him to enter the agency's facilities except as a customer—an order he defied repeatedly in 2022. 2023 Decision, at 4–5.

Petitioner's supervisor issued a Notice of Proposed Removal on January 3, 2023, charging him with "improper conduct and failure to follow instructions." S. Appx. 64. On February 9, 2023, the designated deciding official for the proposed removal, upon considering petitioner's written re-*ply* to the Notice, the seriousness of the conduct and relevant mitigating factors, concluded that petitioner had pre-conduct notice that his conduct violated agency policy. 2023 Decision, at 7, 26–28. The deciding official also determined that removal was a reasonable penalty. *Id.* at 7. Petitioner's removal took effect eight days later. *Id.* at 1.

Because petitioner was a preference-eligible employee, see 2024 Decision, at *2; 5 U.S.C. §§ 2108, 3330a (establishing certain employment rights for veterans), he was entitled to invoke two procedural mechanisms to challenge his removal: (1) arbitration, by filing a grievance through his Union pursuant

to the CBA, and (2) an appeal to the Board. See *Mays v. United States Postal Services*, 995 F.2d 1056, 1060 (Fed. Cir. 1993). Petitioner invoked both mechanisms. 2024 Decision, at *2. He filed a grievance on January 7, 2023, and he appealed to the Board on February 14, 2023. 2023 Decision, at 1; ECF No. 2 at 262 (Petitioner's uncorrected opening brief).

On June 13, 2023, the Board AJ affirmed the removal. 2023 Decision, at 1–44. The AJ determined that the agency had established by a preponderance of the evidence that petitioner engaged in misconduct. *Id.* at 7–18. Specifically, the AJ found that the testimony of the agency's witnesses showed that the 2022 physical altercation occurred, *id.* at 13–15, and that petitioner admitted his defiance of the

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agency order not to enter its property except as a customer, *id.* at 20. The AJ also determined that the agency established a nexus between the sustained charges and the efficiency of the service and that removal was reasonable because petitioner knew of the agency's strict policy against conduct of this type yet violated it without remorse. *Id.* at 24–29.

The AJ rejected petitioner's contentions that he had not been advised of his right to file a grievance under the CBA, finding that such advice was given to him in the January 2023 Notice of Proposed Removal and the Union had in fact filed a grievance on his behalf. *Id.* at 29, 34–36. The AJ also discussed the CBA, both giving an on-line source for the CBA itself and quoting the Union's manual interpreting the CBA. *Id.* at 36. According to the manual, CBA Article 16.9, addressing the situation when a preference-eligible employee files both a union grievance and an appeal to the Board, states that the Board appeal proceedings take precedence over the union grievance process: "Grievances of preference eligible employees who also have a live [Board] appeal on the same action will not be scheduled for arbitration until a final determination is reached on the [Board] appeal." *Id.* at 36 (quoting Union's manual). (We note that the on-line source bears this out.) Finally, the AJ rejected petitioner's contention that the deciding official for his removal lacked impartiality, finding that the evidence in the record did not support that contention. *Id.* at 36–37.

On July 12, 2023, petitioner sought full Board review, arguing for the first time that the Board lacked jurisdiction over his appeal. 2024 Decision, at *1; S. Appx. 60. The Board denied his petition for review and affirmed its initial decision on October 9, 2024. 2024 Decision, at *1. In particular, regarding the lack-of-jurisdiction argument, which rested on the assertions that (1) the

agency forced him to appeal to the Board and (2) he was not provided notice of his union arbitration rights, the Board rejected the

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premises, because petitioner conceded that he had been notified of his union grievance rights and actually had filed a union grievance. *Id.* at *1–2.

Petitioner seeks this court’s review. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

II

We may set aside the Board’s decision if it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures re-quired by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c). Whether the Board possessed jurisdiction to hear an appeal is a question of law that we review *de novo*. *Palmer v. Merit Systems Protection Board*, 550 F.3d 1380, 1382 (Fed. Cir. 2008). Factual findings, including those on which a jurisdictional determination is based, are reviewed for substantial-evidence support. *Bolton v. Merit Systems Protection Board*, 154 F.3d 1313, 1316 (Fed. Cir. 1998). Substantial evidence is “such relevant evidence as a rea-sonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229 (1938).

A

Petitioner argues that (1) his due process rights were violated because he received inadequate notice of his union arbitration rights and (2) the Board lacked jurisdiction over his appeal because he initiated a union grievance and the CBA prevents the Board from adjudicating his appeal. Petitioner Opening Br. at 2–3; Petitioner Reply Br. at 1–2. Neither argument has merit.

Petitioner provides no support for the proposition that he received inadequate notice of his right to file and pursue a grievance under the CBA. See Petitioner Reply Br. at 2. We discern no error in the Board’s findings that adequate notice was provided, as the record reflects that petitioner

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was aware of his rights under the CBA and actually did file a union grievance. 2024 Decision, at *1–2.

Petitioner also provides no support for the assertion that his exercise of his arbitration rights under the CBA precluded the Board from adjudicating his appeal. As a preference-eligible employee of the agency, petitioner was permitted by statute to seek review of the removal decision through an appeal to the Board and through arbitration under the CBA, and he chose to pursue relief under both mechanisms. *Bacashihua v. Merit Systems Protection Board*, 811 F.2d 1498, 1502 (Fed. Cir. 1987) (discussing the inapplicability of 5 U.S.C. § 7121 to the agency); see *Mays*, 995 F.2d at 1060. Nothing in the statute ousts the Board of jurisdiction to proceed in that circumstance. Nor does petitioner identify anything in the CBA that does so. Petitioner Opening Br. at 1–5; Petitioner Reply Br. at 1–5. To the contrary, according to the Union’s manual interpreting the CBA, both proceedings remain live and it is the grievance proceeding that stalls for the Board to proceed, not the reverse: “Grievances of preference eligible employees who also have a live [Board] appeal on the same action will not be scheduled for arbitration until a final determination is reached on the [Board] appeal.” 2023 Decision, at 36. The Board, therefore, did not err in adjudicating the Board ap-peal.

B

We understand petitioner to argue that his due process rights were also violated because the deciding official had an alleged conflict of interest because he served as a wit-ness against petitioner in a separate Union-related matter. Petitioner Opening Br. At 3; ECF No. 2 at 12–14 (Petitioner’s uncorrected opening brief). The Board did not err in rejecting this argument. The record is devoid of factual support for this assertion that could overcome the recognition that, in the employment setting, a deciding official is not generally disqualified by knowledge of the employee or

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the employee’s prior conduct. See *Norris v. Securities and Exchange Commission*, 675 F.3d 1349, 1354 (Fed. Cir. 2012); 5 C.F.R. § 752.404.

III

For the foregoing reasons, we affirm the Board’s decision that it possessed jurisdiction over petitioner’s appeal and its decision on the merits of petitioner’s appeal.

The parties shall bear their own costs.

AFFIRMED

(i). Appendix: Annex III
Determination on rehearing, January 9, 2026

Case: 25-1275 Document: 27 Page: 1 Filed: 01/09/2026

NOTE: This order is nonprecedential.
**United States Court of Appeals
for the Federal Circuit**

LUIS J. SOTO,
Petitioner
v.
UNITED STATES POSTAL SERVICE,
Respondent

2025-1275

Petition for review of the Merit Systems Protection
Board in No. NY-0752-23-0059-I-1.

ON PETITION FOR PANEL REHEARING

Before TARANTO, BRYSON, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

O R D E R

On December 16, 2025, Luis J. Soto filed a request for reconsideration which the court construed as a petition for panel rehearing [ECF No. 26].

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

January 9, 2026

Date

FOR THE COURT

Jarrett B. Perlow

Clerk of Court

(i). Appendix: Annex X
AJ MSPB Determination

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

LUIS J. SOTO,
Appellant,

DOCKET NUMBER
NY-0752-23-0059-1-1

V.

UNITED STATES POSTAL SERVICE,
Agency

DATE: June 13, 2023

Cindy M. Cruz-Rivera, Carolina, Puerto Rico, for the appellant.

Krista M. Irons and Managing Counsel, Esquires, St. Louis, Missouri, for the agency.

BEFORE
Maria M. Dominguez
Administrative Judge

INITIAL DECISION

INTRODUCTION

On February 14, 2023, the appellant filed an appeal with the Merit Systems Protection Board (Board), challenging the decision of the U.S. Postal Service (USPS or agency), to remove him from his position as a Lead Sales and Services Associate (LSSA) at the Canovanas Post Office, effective February 17, 2023. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this matter under S U.S.C. §§ 7511-13 and 7701(a) and, 39 U.S.C. § 1005(a)(4)(A). The hearing the appellant requested was held via Zoom for Government on April 25 and 26, 2023. Hearing Recording 1 (HRI) and Hearing Recording 2 (HR2).¹ For the reasons set forth below, the agency's removal action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The following facts can be gleaned from the record and/or were established at the hearing. At all times relevant to this appeal, the appellant held the position of LSSA at the Canovanas Post Office. HRI, appellant's testimony; see also IAF, Tab 8 at 22,² Postal Service Form 50 (PS Form 50). The appellant was also a shop steward for the American Postal Workers Union (APWU), AFL-CIO Local 1070, in charge of the Canovanas Postal Office and also an Eastern Regional Vice President for Puerto Rico. HRI, appellant's testimony; see also IAF, Tab 7, appellant's response to affirmative defenses order.

On July 29, 2022, the appellant was scheduled to meet with Jonathan Martinez, Supervisor, Customer Services, of the Arecibo Post Office, in regards to some union grievances. HRI, appellant's and Mr. Martinez's testimony. This meeting was scheduled to take place in the morning, at around 10:00 a.m., at the Canovanas Post Office, which means Mr. Martinez had to drive about 1 and ½ hours to get there, since Canovanas Post Office is located approximately 50 miles from the Arecibo Post Office. See id.

At the beginning of the meeting, Mr. Martinez asked the appellant whether he had his shop steward's certification from the APWU authorizing him to address grievances from the Arecibo Post Office. See id. In response, the

1 HRI refers to the first day of hearing (April 25, 2023), whereas HR2 refers to the second day (April 26, 2023). These recordings are located in the Initial Appeal File (IAF) at Tabs 35 and 37, respectively.

2 References to page numbers herein are made to the electronic filing page numbers rather than to any other page numbers listed on the documents. The electronic filing page numbers are located on the bottom, right-hand side of the documents referenced.

appellant started insulting Mr. Martinez. HRI, Mr. Martinez's testimony. The appellant admittedly repeatedly asked Mr. Martinez whether he knew how to read and was inept,³ after which Mr. Martinez terminated the meeting. HRI, appellant's and Mr. Martinez's testimony.

When Mr. Martinez announced that the meeting was over, the appellant called for Raymond Acevedo, Supervisor, Customer Service, of the Canovanas Post

Office, and asked him remove the appellant from the office. See *id.* Mr. Acevedo subsequently described this exchange in a statement he provided to the Initial Management Inquiry Process (IMIP) on September 1, 2022 as follows:

Approximately at 10:30-10:33 am, was the first time I heard Mr. Soto Screaming my name. Before that, I did not hear anyone screaming, shouting or calling me. After I heard him calling me, he told me "come here, so you can escort this imbecile out of here. After I heard him speaking in that manner, I told Mr. Soto to stop it, that this type of conduct is not tolerated at the Postal Service and I stayed in the doorway that leads to the supply room.

IAF, Tab 8 at 80 (grammar, punctuation and capitalization as in original).

While Mr. Acevedo was in the process of escorting Mr. Martinez out of the Canovanas Post Office, the appellant and Mr. Martinez made physical contact with each other, but there is a dispute as to who initiated it and what the contact consisted of, as will be discussed more fully below. See generally HRI, appellant's and Mr. Martinez's testimony. In addition, the appellant appears to have raised his voice and repeatedly said demeaning things to Mr. Martinez, although this is in dispute as well. See *id.* Mr. Acevedo's statement indicates: "Soto kept telling me to escort this imbecile, and Mr. Martinez said to Soto 'keep talking, you are giving me more information,' while he was slowly preparing to leave." IAF, Tab 8 at 80.

³ During cross-examination, the appellant denied having asked Mr. Martinez if he was "incompetent." HR2.

Shortly thereafter, Mr. Martinez telephoned the USPS Inspection Service, Postal Police (USPSIS), and filed an Incident Report. IAF, Tab 8 at 69-70; HRI, Mr. Martinez's testimony. That same day, he also went to the local police station in an effort to obtain a protective order against the appellant, but was unsuccessful in doing so. HRI, appellant's and Mr. Martinez's testimony. That same day, the appellant was placed on emergency placement, without pay, until further notice. See IAF, Tab 8 at 50, letter referencing the emergency placement letter of July 29, 2022.

On August 8, 2022, the agency conducted a telephonic Pre-Disciplinary Interview (PDI) of the appellant pertaining to the July 29, 2022 incident, during which the appellant was accompanied by Angieliz Colondres, his union representative. HRI, appellant's testimony; see also IAF, Tab 24.

By letter dated August 26, 2022, the appellant's emergency placement was rescinded and he was notified that he would be fully reimbursed for the entire period of time he was in an unpaid, emergency placement; instead, he would be in a paid administrative leave until further notice. There is no dispute that said letter also instructed him not to enter any USPS facility unless he was doing so as a customer. IAF, Tab 8 at 50; HRI, appellant's testimony.

Also on August 26, 2022, the agency initiated an IMPI pertaining to the July 29, 2022 incident, which resulted in 2 interviews of the appellant being conducted -on September 16, 2022 and on October 5, 2022, the latter of which was the same day the IMIP was completed. IAF, Tab 8 at 55-142. Although the appellant reported to his interview on September 16, 2022, it had to be stopped and rescheduled due to the fact the appellant was uncooperative. See *id.* at 120- 21. At his October 5, 2022 interview, the appellant largely disputed the allegations against him. See *id.* at 109-11.

Despite having received express instructions by the USPS not to enter any postal facility other than as a customer, on October 12, 2022, the appellant entered the Hato Rey Station to serve as a union representative for Yilmarié Dones. HRI, appellant's testimony; see also IAF, Tab 18, stipulation # 5; *id.*, Tabs 12 and 13, statements from Hector Rivera and Ana Victoria (also known as Ana Guzman), indicating that the appellant was at the Hato Rey Station that day.

As a result of the above, a notice of another PDI was sent to the appellant's address of record on October 28, 2022, wherein he was notified to report for a PDI on November 1, 2022. *Id.*, Tab 8 at 52. The appellant appeared for the scheduled PDI along with his union representative Javier Rivera, during which he admitted to receiving and signing for the letter that informed him he was on administrative leave and instructed him not to enter any USPS facility except as a customer. See *id.* at 46-48. He also admitted to disregarding the instructions and entering the Hato Rey Station as Ms. Dones' shop steward on October 12, 2022. See *id.* Finally, at this PDI, the appellant was once again instructed not to enter any postal facility except as a customer through the front door.

On November 3, 2022, the appellant admittedly entered the Carolina Main Post Office (Carolina MPO) as a union representative while campaigning for the APWU position as a Vice President. *Id.* at 40-45, Credible Threat/Assault/Harassment Report with accompanying documentation in support thereof. Upon becoming aware of the fact the appellant was on

administrative leave without authorization to enter a USPS facility, Debbie Diaz, Postmaster of the Carolina MPO (Postmaster Diaz), instructed him to leave, at which point he allegedly became aggressive with her, as evidenced by the fact she filed a Credible Threat/Assault/Harassment Report alleging he was "aggressive while charging towards [her]," invaded her personal space, verbally attacked her, called her "vieja loca" (crazy old lady) and "puta" (whore), and pointed a finger at her face. Id. at 44; HR1, Postmaster Diaz's testimony; appellant's testimony.

Postmaster Diaz reported the incident to the USPSIS, after which the USPSIS's Postal Inspector Jorge Rios Amador responded and investigated the allegations. Id. On November 4, 2022, an Assault and Threat Specialty Report was issued by Inspector Rios Amador, wherein he indicated that the appellant had verbally assaulted Postmaster Diaz and, had used offensive language to the point that Postmaster Diaz felt intimidated and believed the appellant was going to physically assault her. IAF, Tab 8 at 39-45.

On November 29, 2022, the appellant was mailed another PDI notice, id. at 38, which directed him to report for another PDI on December 2, 2022, to which the appellant did not report. Consequently, he was sent another notice on December 19, 2022 which rescheduled the PDI for December 23, 2022, via Zoom or telephone. Once again, the appellant refused to report for it.

In light of the above, on January 3, 2023, Mr. Acevedo, with the concurrence of Milton M. Borja, Postmaster of the Canovanas Post Office (Postmaster Borja), issued a Notice of Proposed Removal (NOPR), to the appellant, charging him with improper conduct and failure to follow instructions. Id. at 33-37.

The NOPR provided the appellant with an opportunity to respond to the proposed action within 10 calendar days from his receipt thereof. Id. On January 12, 2023, the appellant provided a written reply, indicating that the NOPR omitted the fact he is a shop steward for the APWU charged with the Canovanas Post Office and, was appointed as the Eastern Region Vice President for Puerto Rico. Id. at 23-32. Additionally, he alleged that the failure to follow instructions charge did not apply to him because those instructions applied only while in his capacity as a USPS employee, but not while he was acting as a shop steward under the collective bargaining agreement (CBA) with the APWU. See id.

Moreover, he asserted that Herminio Rivera, Manager, Post Office Operations for the East Area of Puerto Rico (MPOO Rivera), was a prosecution witness

against him in a case presented before a state court in Puerto Rico against him by Postmaster Yashira Quiles of the Luquillo Post Office (Postmaster Quiles) and, that he had reservations about MPOO Rivera's impartiality while acting as a deciding official here. See *id.* He also argued that the accusations brought against him by management were nothing more than a "union busting strategy"

coordinated by management at the Puerto Rico District. IAF, Tab 8 at 30. Finally, he averred that even if deference ought to be given to the alleged incidents, the proising official, along with Postmaster Borja, never considered any alternative disciplinary actions. See *id.*

On February 9, 2023, after considering the appellant's written reply, *id.* at 23-32, and the relevant Douglas factors, MPOO Rivera issued a Letter of Decision (decision letter) sustaining the charges and finding the penalty of removal to be reasonable. *Id.* at 17-21. This appeal followed. *Id.*, Tab 1.

Burdens of proof

In an appeal in which a federal agency takes an adverse action against a tenured employee, the Board will sustain the action if the charge is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1)(ii).⁴ In addition, the agency must show that its action promotes the efficiency of the service and that the imposed penalty is reasonable. *Vaughn v. U.S. Postal Service*, 109 M.S.P.R. 469, ¶ 13 (2008). With respect to any affirmative defenses, the appellant bears the burden of proof by preponderant evidence. 5 U.S.C. § 7701(c)(2); 5 C.F.R. § 1201.56(b)(2)(i)(C).

The agency proved its charge of improper conduct by preponderant evidence.

"A charge of 'improper conduct' has no specific elements of proof; it is established by proving that the appellant committed the acts alleged in support of the 'improper conduct' label." *Parbs v. U.S. Postal Service*, 107 M.S.P.R. 559, ¶ 8 (2007) (citing *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 22 (2006)). Moreover, an agency is required to prove only the essence of its charge of improper conduct and need not prove each factual specification supporting the charge or prove each specification in its entirety. See *Hicks v. Department of the*

⁴ A preponderance of the evidence is that "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. § 1201.4(q).

Treasury, 62 M.S.P.R. 71, 74 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table); *Diaz v. Department of the Army*, 56 M.S.P.R. 415, 419-420 (1993) (unlike the charge label and its elements, specifications need not be proven in their entirety).

In support of its improper conduct charge, the NOPR indicated, in relevant part, as follows:

On August 26, 2022, an Initial Management Inquiry Process ("IMIP") began in regard to an allegation of workplace harassment involving you, Luis Soto, toward Jonathan Martinez, that occurred on or about July 29, 2022. The investigation, which included a series of interviews of the witnesses present during the events of July 29, 2022, revealed that on or about July 29, 2022, Jonathan Martinez arrived at the Canovanas Post Office to review union grievances with you. During this meeting, you became upset and aggressive, and began making remarks such as stating that Mr Martinez was inept, incompetent, and asked him if he knew how to read. It was at this point that Mr. Martinez informed you that he would not continue the meeting if you could not show respect.

You then became boisterous and called for a supervisor to come and remove Mr. Martinez from the meeting. Supervisor Acevedo opened the door to the room in which the meeting was being held and as you were raising your voice towards Mr. Martinez. You then proceeded to hit Mr. Martinez's hand with a binder you were holding while Mr. Martinez was gathering his belonging to leave the meeting. As Mr. Martinez moved to exit the room, you physically hit him on his right bicep with your shoulder as Mr. Martinez attempted to exit the meeting room. At this point, you attempted to charge at Mr. Martinez and lunge at him with both arms outstretched reaching for his face while screaming at him to the point where a supervisor had to intervene to stop you. Mr. Martinez proceeded to place his hands in the air and walk out of the meeting room while you yelled the following at him: "Saca a este cabron de aqui, antes de que lo coja. Es mas, you te cojo afuera cabron." This roughly translates to: "Get this "carbon" out of here before I get a hold of him. As a matter of fact, I will get you outside "cabron." Mr. Martinez proceeded to call the postal police because of your actions.

As part of this investigation, you were scheduled for an IMIP interview on September 13, 2022, at the District Office, which was then rescheduled for September 16, 2022, because you alleged that you did not receive the letter notification. On September 16, 2022, you reported for your interview. During your interview, you were disruptive and uncooperative which caused the investigators to have to stop the interview process. A second Interview was then scheduled for you on October 5, 2022.

On Monday, August 8, 2022, a Pre-Disciplinary Interview was held with you and your representative, Angieliz Colondres, who was present via telephone. During your POI, you denied ever raising your voice during the grievance meeting on July 29, 2022. You also denied ever cursing at Mr. Martinez or calling him a "cabron." You further denied hitting Mr. Martinez on the hand with your binder and hitting Mr. Martinez with your shoulder. IAF, Tab 8 at 33-34 (grammar, punctuation and capitalization as in original).

In support of this charge, Mr. Martinez testified that he had asked the appellant to meet with him telephonically to discuss grievances, noting that due to some negative experiences he had had with the appellant in the past, he preferred not to meet with him in person. However, the appellant had refused, telling Mr. Martinez that he would only be available by telephone between 9:00 and 11:00 p.m. on Sundays. Consequently, Mr. Martinez reluctantly agreed to meet with him on July 29, 2022 at the Canovanas Post Office, but requested that Mr. Acevedo stay close by in the event there were any problems. HRI.

According to Mr. Martinez, when the appellant arrived for the meeting on 'July 29, 2022, they started discussing the basic elements of a particular grievance, but because the computer was slow, they moved onto another grievance, at which time Mr. Martinez asked the appellant if he had his shop steward's certification since Article 17.2.D5 of the CBA states that if a union

5 Article 17.2.D reads as follows:

At the option of the Union, representatives not on the Employer's payroll shall be entitled to perform the functions of a steward or chief steward, provided such representatives are certified in writing to the Employer at the Area Level and providing such representatives act in lieu of stewards designated under the provisions of 2.A or 2.B above.

<https://apwu.org/contracts/2021-2024-apwuusps-collective-bargaining-agreement>. representative is not from that employer' s office, he has to be

certified by the APWU to oversee grievances from that specific duty station. Here, since the appellant was not from the office related to the grievance they were discussing, he had to have a certification. HRI, Mr. Martinez's testimony.

Mr. Martinez testified that in response, the appellant started to insult him, telling him he was inept and incompetent, and asking him if he knew how to read, to which Mr. Martinez responded by skin the appellant to refrain from this behavior and warning him that if this continued, he would terminate the meeting. The appellant, however, allegedly disregarded the request. Instead, he continued to insult him, saying things like: "go back and cry to your boss," "you're stupid," "you're inept," after which Mr. Martinez ultimately decided to end the meeting. HRI.

Mr. Martinez testified that once the meeting was terminated, the appellant called for Mr. Acevedo, shouting: "Remove this idiot from the office." Immediately thereafter, a clerk with whom Mr. Martinez was not familiar, stood at the entrance of the office and proceeded to laugh and smile, which Mr. Martinez took to mean that the appellant had planned this. He testified that the appellants barrage began even before they had started to discuss the details of the grievance, and Mr. Acevedo came into the area while the appellant was referring to Mr. Martinez as "stupid" and an "idiot." HRI.

A review of Mr. Acevedo's statement, provided during his IMIP interview on September 1, 2022, corroborates the improper comments the appellant made. He indicated, in relevant part, as follows:

Approximately at 10:30-10:33 am, was the first time I heard Mr. Soto Screaming my name. Before that, I did not hear anyone screaming, shouting or calling me. After I heard him calling me, he told me "come here, so you can escort this imbecile out of here. After I heard him speaking in that manner, I told Mr. Soto to stop it, that this type of conduct is not tolerated at the Postal Service and I stayed in the doorway that leads to the supply room. Mr. Martinez was standing besides the Postmaster's desk, while Mr. Soto was standing at the door, holding it. This door is the same door I was standing at the doorway. Also. clerk Robin Feliciano was holding another door that leads to the lobby/window and looking inside the office. Soto kept telling me to escort this imbecile, and Mr. Martinez said to Soto "keep talking, you are giving me more information," while he was slowly preparing to leave. Both of them were acting like little kids.

Before this, Mr. Soto tends to higher his voice and to shout to other people. This has not happened with me, but I have seen him do it to Postmaster Borja and other employees. Usually the other people from Management....

Mr. Soto's actions and lack of respect and his violation of the Zero Tolerance Policy are not going to be tolerated.

In all the time I was present, Mr. Martinez did not say anything to disrespect Mr. Soto, as Mr. Soto was doing, they basically kept saying the same, Mr. Soto telling me to escort this imbecile, and Martinez responding, keep talking, more information for me.

IAF, Tab 8 at 80-81 (grammar, punctuation and capitalization as in original).

Mr. Martinez's testimony corroborates the fact he did not respond in kind. In fact, he denied having insulted the appellant or responding to anything he said. Rather, he began to pack his belongings, while Mr. Acevedo was standing outside the office. Mr. Martinez testified that although Ms. Acevedo could not see him from where he was standing, Mr. Martinez knew Mr. Acevedo was right outside since he heard his voice. According to Mr. Martinez, since the appellant was holding the door open and the office where they met was small, the appellant was within an arm's reach from the desk Mr. Martinez was sitting at. HRL.

Mr. Martinez then bent over to disconnect his laptop and grab his backpack, which is "when [he] felt a tap on [his] hand." He testified that the appellant had a small binder, which is what Mr. Martinez believes the appellant "hit him with." He testified that after the appellant made contact with his hand with this binder, the appellant looked at one of the clerks and they both started laughing, which reinforced Mr. Martinez's belief that the appellant was trying to provoke him, to which Mr. Martinez did not respond. He testified that without acknowledging that the appellant had just hit his hand with the binder, he merely continued to pack his belongings, then stood next to the exit door where one of the clerks was standing. Because he feared that the appellant may strike him from behind if he exited the door closest to the clerk, he proceeded to exit through the door he believed was the safest, since doing so would result in his facing the appellant, who was holding the door open, and which was where Mr. Acevedo stood, on the other side of the doorway. HRL.

Mr. Martinez testified that after strapping his backpack over his right shoulder, he proceeded to walk "almost from the side" through the door the appellant was holding open because he believed the appellant was going to "do something." As he proceeded to leave, the appellant "tried to shoulder-check" him, but because Mr. Martinez was walking at an angle, the appellant's

"forearm just hit [his] bicep." Mr. Martinez described a "shoulder-check" as "someone ... bump[ing] his shoulder with my shoulder with a hostile intent to hit me." While demonstrating the movement at the hearing, Mr. Martinez testified that the appellant "moved his shoulder forward, in a quick motion, hitting [him] on [his] shoulder." HRI. According to Mr. Martinez, the appellant then immediately spun around on off-side, at this point out of the office, pointed to the other clerk, and said, "see, he hit me." Mr. Martinez then raised his hands in the air as if surrendering and, stated that he never touched the appellant., which is when the appellant became "really angry" and said, "no, you hit me, ... , remove this guy before I get him, better yet, I'm going to get this - right now." Mr. Martinez testified that at this point, the appellant lunged at him, which is when Mr. Martinez stepped back and Mr. Acevedo proceeded to stand between them. He testified that at the same time, the appellant was trying to grab him and was lunging at his face with his hands, insulting him verbally, and saying that he was going to get Mr. Martinez outside. Moreover, he testified that had Mr. Acevedo not been there, this incident would have turned into a "physical altercation." Mr. Martinez described the appellant's tone of voice during the incident as "very violent," "very hectic," and "very aggressive." Finally, he testified that he immediately telephoned the USPS police and exited the building as quickly as he could, after which he also went to the local police. HR1.

On the other hand, during his testimony, the appellant denied having: referred to Mr. Martinez as "incompetent"; made contact with him with a binder; or shoulder-checked him on Mr. Martinez's way out of the office. Rather, he testified that: the conduct he engaged in was acceptable union activity in the course of union business; his tone of voice was not inappropriate as he normally speaks loudly; and, it was Mr. Martinez who was the aggressor when he attacked the appellant with his backpack. HR! and HR2. On cross-examination, however, the appellant admitted to asking Mr. Martinez if he knew how to read and if he was inept. HR2.

Where, as here, the parties present conflicting testimony and evidence, I must make credibility determinations to resolve the issue. *Vicente v. Department of the Army*, 87 M.S.P.R. 80, , 7 (2000) (where it is impossible to believe the conflicting testimony of witnesses on opposing sides, resolution of the appeal depends on an assessment of witness credibility). 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: (I) 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).

In support of the agency's version of events, I note that Mr. Martinez's testimony at the hearing was consistent with the statement he gave during his IMIP interview on September 1, 2022, wherein he asserted as follows:

It is then that I ask if he had the steward certification to discuss the grievances from Rio Grande. The certification is required as per article 17.2 D of the APWU Agreement. After I requested the steward certification, his demeanor changed, he became upset. His attitude turning aggressive after only 2 or 3 questions over the certification. He starts making remarks of me being an inept and incompetent and asking where did it said that he needed a steward certification, and if I knew how to read. I proceed to look up the agreement in the computer and read out loud the article 17.2 D. After this, outburst from Soto, I also told him that I was going to discuss the grievances but there had to be mutual respect, that if a second outburst happened, I was going to leave, that violence and disrespect will not be tolerated. This is not the first time he disrespects me. On April 2022 we had a telephone conversation, and he had told me I had no authority to view grievances, that I was and inept and ignorant. On July 8, again on a telephone call he addressed me as inept and ignorant. I wrote him back by email, stating that there needed to be mutual respect. I copied in my emails Mr. Kendrick Comulada, Carolina Bello, and Jose Muniz so they were aware of the situation. Luis Soto got riled and starts calling for the supervisor to come to the office and to take away this stupid incompetent. I don't react at his comments or say anything. I told him that unfortunately due to his conduct I was not able to continue the meeting. But Luis Soto continues with his insults to the point of raising his voice. At the moment, a clerk opened one of the postmaster office doors and stands there, but doesn't do anything, does not tried to calm Luis Soto, just stares at the scene smiling. The scene looked like it was planned, the clerk appeared to quickly, and looked expectant, as if waiting for something to happen. I started to write down the comments he (Luis Soto) was making but I stopped not wanting to take my eyes away from him. When Sup. Acevedo enters the office, he hears what Soto is saying, about me being incompetent and stupid.

Raymond tells him that there needed to be mutual respect, Soto tells him that I was an idiot and I needed to be escorted outside of the facility. I then speak up and say that the more he said to me, the more I will have to write. Raymond then steps outside the office near the door while I finish gathering my belongings. As I get down to one of the cables of my laptop, I felt something hit my hand, then I look up, I see Soto with a binder on his hand and smiling at the clerk that had remained standing at one of the office doors. I look at him, and finish picking my stuff and say nothing. We were approximately 3 to 5 feet apart while in the office. Soto moved right next to the door Acevedo had gone out, holding it back. All the while the clerk was there watching what was going on, still standing on the door entrance. I put my backpack on my right side as I'm going out of the office, Soto "shoulder checks me" hitting my right bicep with his forearm and it is when he asks the clerk "you saw that he hit me"? I turned clockwise with my hands in the air. Soto tries to charge at me, Sup. Raymond steps in and blocks him. I take a step back with my hands in the air and speak and say I didn't hit you as I'm holding my backpack. While the Supervisor is blocking Soto, he continues to tell the supervisor to take me away and I quote "Saca a este cabron de aqui, antes de que lo coja. Es mas, yo te cojo afuera cabron". I instantly called the postal police and informed the situation; the time of the call was 10:35am. The call lasted 4 minutes and 35 seconds. The officer that took the call was able to hear Soto insulting me. The clerks were watching and smiling at the scene. Raymond is blocking and holding Soto at the door. I continue to exit the facilities while speaking to Postal Police. As I recall my actions, I never insulted or did anything to call for this outbreak from Soto. IAF, Tab 8 at 74-75 (grammar, punctuation and capitalization as in original).

Although Mr. Acevedo's statement makes clear he did not see who made physical contact with whom, he testified that he heard a scuffle when he turned to leave with Mr. Martinez after the appellant had requested that he escort Mr. Martinez out. He indicated in his statement as follows:

This all happened in about 3-4 minutes. After Martinez was ready to leave, I told him to come out of the office, and automatically I rotate my body to keep walking and I see clerk Javier Rivera, the other steward, standing at the end of the supply room. As I see him and I turned my back. I heard a "forcejeo"⁶ between them and both seemed like closing to each other, and I immediately stood in the middle of them, not permitting anything else to happen. As this was happening, Soto said "you hit me" and Martinez said "no, you hit me." Mr Soto called Mr Martinez a "cabron"⁷ multiple times. As this was

6 On translate.google.com, "forcejeo" translates to "struggle" or "tussle."

7 On translate.google.com, "cabron" translates to "bastard."

happening, neither of the clerks (Robin Feliciano and Javier Rivera) was saying something. When they started shouting, Robin Rivera⁸ said he saw Martinez hitting Mr. Soto.

Mr. Martinez and Mr. Soto were both continuously talking to each other. After this, I told Martinez, who was on the phone calling Postal Police, to come with me and escorted him outside the office for his own security and the security of everybody else as I was also calling the Postal Police. After this immediately called Postmaster Borja to let him know what has happened. At this office, the Zero Tolerance Policy has been reminded multiple times to all employees.

IAF, Tab 8. at 81 (grammar, punctuation and capitalization as in original).

Although I have also considered the testimony of Javier Rivera (the other clerk who testified on the appellant's behalf and who was also present during the incident), I did not find him to be as credible as Mr. Martinez. First, I note that he

was reading from a statement during his testimony, although arguably, he could have recalled the incident if he was present for it. Second, Mr. Rivera was a biased witness as he acted as the appellant's union representative on November 1, 2022, during the appellant's PD1. Id. at 52. Third, Mr. Rivera's version of events is inconsistent with Mr. Feliciano's, as will be explained in more detail below. Fourth, it is unlikely that Mr. Rivera had the ability to observe the incident as it unfolded since, as was evident during his cross-examination, he was behind Mr. Acevedo, and would have had to see through Mr. Acevedo's body in order to observe what occurred.. If Mr. Acevedo was in front of him, and Mr. Acevedo could not see the incident from where he was standing, see id. at 80-81 (Mr. Acevedo's statement), ML Rivera could not have seen it either since he was behind Mr. Acevedo, and outside the door of the room where the meeting took place. HRL, Mr. Rivera's testimony. In fact, when asked how he was able to see

⁸ This appears to be a typographical error since Robin's last name is Feliciano. However, during his testimony, Mr. Feliciano did not state that he witnessed Mr. Martinez hit the appellant. Rather, he testified that Mr. Martinez's

backpack was so "huge" that he could not get through the door without bumping the appellant with it. HRI.

the incident unfold despite Mr. Acevedo being in his line of vision between him and Mr. Martinez, Mr. Rivera testified, that Mr. Acevedo "isn't that big." Next, when asked, "So, if Mr. Soto's body was blocking the doorway as Mr. Martinez was attempting to exit the room while also trying to walk around Mr. Acevedo to exit the room, how could you see him?," Mr. Rivera testified, "No, he was holding the door open but he wasn't in the way, actually." HRI. Fifth, it is improbable that Mr. Rivera provided a statement to the union of his own volition, as testified to during cross-examination, when asked. In this regard, Mr. Rivera testified that he provided a statement to the union about the incident in question but was not asked to do. When asked why he did so then, he testified "It's a regular procedure, every time you see something, that's your statement." However, he then testified that the statement he provided to the union was dated September 9, 2022, which was a month and ½ after the event as issue. Clearly, Mr. Rivera could not keep his story straight since the September 9, 2022 statement at issue was what he provided to the IMIP, although Mr. Rivera testified that this same statement was what he gave the union. Compare HRI, Mr. Rivera's testimony with IAF, Tab 8 at 103.

Finally, I note that the appellant's own witness, Robin Feliciano (the other clerk who was present during the incident on July 29, 2022), discredited the appellant's version of events by testifying that the backpack Mr. Martinez was carrying was so "huge" that he simply could not fit through the doorway with said backpack on his shoulder without grazing the appellant. According to Mr. Feliciano, as Mr. Martinez was attempting to fit through the doorway to exit the conference room door, because the appellant was standing in front of it, and partially blocking the door with his body, the appellant came into contact him while trying to exit the area with his backpack hanging from one shoulder. HRI.

Consequently, after carefully considering all the evidence and testimony of record, I find that the appellant's version of events was discredited by the testimony of his own witnesses and, that of Mr. Martinez. His story that he was attacked by Mr. Martinez and that he was not the aggressor despite his verbal attack on Mr. Martinez, as evidenced in the record, is simply not worthy of belief. On the contrary, I find that it is more likely than not that the incident occurred as explained by Mr. Martinez during his testimony. Being that Mr. Acevedo's written statement also indicates that he had to stand in between Mr. Martinez and the appellant in order to avoid an altercation, I find that there

is sufficient evidence to establish that the appellant engaged in the charged improper conduct with respect to the verbal and physical altercation he initiated against Mr. Martinez.

Even if the appellant's tone, as described, was a consequence of his union activities, I find his questioning of Mr. Martinez, as well as his yelling to a supervisor to "Hget [Mr. Martinez] out of here," was improper and unprofessional. The appellant could have simply provided Mr. Martinez with the certification he was seeking and, refrained from making demeaning statements to him, or yelling out to have a supervisor "get him out of here." Instead, he proceeded with the commentary and yelling, causing others to come around to see what was happening. Having reviewed the documentary and testimonial evidence, I credit Mr. Martinez's testimony. See Hillen, 35 M.S.P.R. 453, 458. I observed that he testified in a clear, straightforward, and detailed manner, which was confident and assured. I find no reason to question his credibility. As noted above, I also find that his testimony was consistent with what he previously provided. Accordingly, I find that the agency proved, by preponderant evidence, that the appellant engaged in the conduct as described in the conduct charged and, that it was improper. The improper conduct charge is SUSTAINED.

The agency proved its charge of failure to follow instructions by preponderant evidence.

To prove a "failure to follow instructions" charge, the agency must show that (1) proper instructions were given, and (2) the appellant failed to follow the instructions. The agency does not need to show that the failure to follow instructions was intentional. *Powell v. U.S. Postal Service*, 122 M.S.P.R. 60, 15 (2014) (citing *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555-56 (1996)).

In support of its failure to follow instructions charge, the agency asserted, in relevant part, as follows:

On August 26, 2022, you were sent a letter via Express Mail ... placing you on Administrative Leave and instructing you to remain outside any Postal Facilities other than as a customer. In the letter you were provided specific instructions that you cannot enter any Postal Facility except through the front door as a customer until further express notific_ation. On October 12, 2022, you entered the Hato Rey Station and served as a union representative for Ms. Yilmarié Dones. You disregarded the instructions given to you and entered the Hato Rey

Station after being expressly instructed not to enter any postal facility except as a customer.

On October 28, 2022, a Notice of Pre-Disciplinary Interview ("POI") was mailed to your address of record. This letter notified you to report for a PDI on November 1, 2022, at 10:30 AM. On November 1, 2022, you attended your scheduled PDI at the Canovanas Post Office with your representative, Javier Rivera, present. During your POI, you admitted that you received and signed for express mail piece E1350828597US, which was the Administrative Leave notification letter sent to you by postal management instructing you not to enter any postal facilities other than as a customer. You then admitted that you disregarded the instructions in this letter when you entered the Hato Rey Station, which is a postal facility, to represent Yilmari Dones as her shop steward.

On November 3, 2022, at approximately 8:25AM, you yet again entered a post office in your capacity as a union representative after being issued a letter instructing you not to enter a post office except for as a customer, and after being previously notified during a Pre-Disciplinary Interview on November 1, 2022. On November 3, 2022, you entered the Carolina Main Post Office and proceeded to address the clerks on the workroom floor. When Postmaster Debbie Diaz became aware that you were not permitted on the workroom floor, she asked you to leave. You refused to leave and proceeded to yell at her in an aggressive manner by charging towards her, invading her personal space, and called her a "vieja loca" (crazy old lady), "puta" (bitch), and pointing your finger in her face.

Postmaster Diaz reported this incident to the United States Postal Service Inspection Service ("USPSIS"), and USPSIS Postal Inspector Jorge Rios Amador responded and investigated. In his Assault and Threat Specialty Report, Dated November 4, 2022, which details his findings, Postal Inspector Rios Amador reported that Postmaster Diaz stated that she was verbally assaulted by you, Luis Soto, and that she asked you to leave the post office because you were on notice that you were not permitted on the workroom floor. Postmaster Diaz further stated that you refused to leave the post office and used offensive language to the point where she felt intimidated and believed you were going to physically assault her.

On November 29, 2022, you were mailed a Notice of Pre-Disciplinary Interview ("PDI") with tracking number E1360312383US. This letter

instructed you to report for a PDI on December 2, 2022, at 11:00 AM at the District Office. You refused to report for this PDI as scheduled due to the location of the PDI. On December 19, 2022, you were again sent a Notice of PDI letter notifying you that you were scheduled for a PDI on December 23, 2022, via ZOOM/phone. You again refused to report for the PDI as instructed.

IAF, Tab 8 at 34-35 (grammar, punctuation and capitalization as in original).

The evidence in support of this charge is the appellant's own admission, during the hearing, that he received the August 26, 2022 letter from Postmaster Borja placing him on paid administrative leave and instructing him not to enter any postal facility except as a customer, until further notice. HR!. He also admitted that despite this instruction, he entered the Hato Rey Station on October 12, 2022 in order to serve as a union representative for Ms. Dones. HRl.

Moreover, at the hearing, the appellant admitted that during his PDI on November 1, 2022, he was reminded of the instruction not to enter any postal facility except as a customer until further notice. During direct examination, he also admitted that he entered USPS premises on November 3, 2022 once again, without authorization, when he entered the Carolina MPO in order to campaign for the union. HR l .

Additionally, the appellant admitted that he failed to report for the scheduled PDI on December 2, 2022, which then had to be rescheduled to December 23, 2022, via Zoom, the latter of which he also failed to appear for. Thus, I find that by the appellants own admissions, the agency has proved the charge.

I am unpersuaded by the appellant,s claim that he was somehow immune from having to abide by the August 26, 2022 letter placing him on administrative leave by virtue of the fact said letter did not carve out an exception for him to 'enter postal premises in order to conduct union activities. HRl. The fact of the matter is that said letter properly placed the appellant on administrative leave pending an investigation into his improper conduct on July 29, 202i and, consequently, constituted a proper instruction by the agency. If I was to believe the appellant's claim in this regard, anyone can enter USPS premises, regardless of whether he has ill intent, under the guise that he is there to conduct "union business." Here, the letter placing the appellant on administrative leave and prohibiting him from entering a postal installation, except as a customer, took no position either way on whether the appellant could enter postal premises to conduct union activities.

The appellant, by his own testimony, and through that of his witness, Angieliz Colondres, Vice President or Acting President of the APWU at that time, discredited the appellant's argument that he had authorization to be there. In effect, despite the requirement to provide advance notice to management that he intended to visit postal premises, nobody advised the agency that the appellant intended to be there, only Ms. Colondres did, as to her own presence there. HRI & HR2, Ms. Colondres' and appellant's testimony.

Specifically, on cross-examination, the appellant admitted that as a shop steward, he is familiar with the CBA between the APWU and the USPS. He also testified that he is familiar with Article 23 of the CBA, which governs the rights of union officials to enter postal premises. He acknowledged that Article 23 specifically requires "reasonable advance notice to the Employer" by a union representative who wishes to be permitted to enter postal installations to conduct union activities. HR2.

Here, there is no dispute that the appellant did not provide "reasonable advance notice" of his anticipated visit to the Hato Rey Station to conduct union activities on October 12, 2022, nor requested permission to do so, either to Ana Victoria, Postmaster of Mayaguez, or Hector Rivera, Manager of Catano Annex, nor to any other management official. for that matter, prior to entering said location. HRI and HR2; see also IAF, Tab 12, Hector Rivera's email to Carolina Bello; id., Tab 13, Ana Victoria's email to Carolina Bello.

The appellant also failed to provide reasonable notice or, to request permission to access the Carolina MPO on November 3, 2022. HRI, Ms. Colondres' and appellant's testimony. In fact, Ms. Colondres testified that in regards to this November 3, 2022 campaign meeting at the Carolina MPO, she had advised Carlos Del Toro, Post Office Operations Manager (POOM Del Toro), that she intended to be there that day. He, in turn, communicated this to Postmaster Diaz, which was in accordance with Article 23 of the CBA. HRI.

The record is devoid of any proof that Ms. Colondres also requested that the appellant be permitted access on that date as well. In fact, Ms. Colandres' testimony suggests otherwise. She testified that at some point, an order of protection was brought up by POOM Del Toro, at which time "he mentioned the order of protection and I told him that there was no active order of protection so we were not violating any rights," by being there. HRI. However, as indicated above, the appellant never requested access for himself.

Finally, I note that during cross-examination, the appellant acknowledged that at no point on October 12, 2022 or, on November 3, 2022, do his time and attendance records reflect that he was on official union time. Had the appellant given notice to the installation head that he intended to enter postal premises on October 12, 2022 or November 3, 2022, as required by Article 23 of the CBA (thereby being present on postal premises with express authority), the USPS would have taken him off of paid administrative leave and placed him on union shop steward time for pay purposes. Instead, the appellant's own testimony revealed that he: failed to follow the CBA; failed to give reasonable advance notice to be permitted on postal premises; entered postal premises without permission; continued to be paid administrative leave rather than union shop steward pay; and, lastly, failed to follow the instructions given to him in the August 26, 2022 administrative leave letter. IAF, Tab 8 at 133. For all the above reasons, I find that the appellant's claim that entering USPS premises for the purpose of conducting union business absolved him of his failure to follow instructions was discredited through his own testimony and that of his witness, Ms. Colondres.

I also find that Postmaster Diaz's testimony further supports the agency's failure to follow instructions charge since, according to her, upon learning that the appellant did not have permission to be on postal premises, she approached him while he was on the workroom floor and, simply asked him to finish conducting his union business in the customer lobby where he was permitted, rather than on the workroom floor. HRI. Postmaster Diaz denied having attempted to thwart the appellant's union activities; rather, she testified that she merely requested that he exit the area he was not permitted to be in and, continue his activities where he was authorized to be. She also testified that by the time she realized he was not authorized to be there, the union meeting had ended. However, upon her asking him to move to another location, the appellant became irate, charged towards her in an aggressive manner, entered her personal space, and began calling her "crazy old lady" and "bitch." HRI.

Finally, MPOO Rivera, the deciding official, testified that he considered the statements of Ana Guzman, Hector Rivera, Postmaster Diaz, the USPSIS Assault and Threat Specialty Report and, the appellant's response to the NOPR in making his decision to sustain this charge. He further testified that he found Postmaster Diaz's statement to be credible and determined that the August 26, 2022 administrative leave letter, as well as the subsequent PDI on November 1, 2022, placed the appellant on direct notice that he was not permitted to enter postal premises except as a customer. I agree.

I find that despite the instruction given in the August 26, 2022 letter, the appellant entered the Hato Rey Station on October 12, 2022, without authorization. After being reminded of this instruction once again during the November 1, 2022 PDI, the appellant blatantly disregarded this instruction 2 days later, on November 3, 2022, when he entered the Carolina MPO. As such, I find that the agency met its burden of proof with respect to its failure to follow instructions charge. This charge is, consequently, also SUSTAINED.

The agency established the required nexus by preponderant evidence.

In addition to the requirement that the agency prove its charges, it also must prove that there is a nexus, i.e., a clear and direct relationship between the articulated grounds for an adverse action and either the appellant's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 8 (2010); see also *Scheffler v. Department of the Army*, 117 M.S.P.R. 499, ¶ 9 (2012), *aff'd*, 522 F. App'x 913 (Fed.Cir.2013) (holding that the nexus requirement, for purposes of determining whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest); see also *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir.1987) (finding there is a clear and direct inverse relationship between the legitimate government interests of providing a safe environment for the agency's employees and an employee's inappropriate conduct of engaging in physical altercations with a co-worker on agency premises); *Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535, ¶ 13 (2006) (a nexus exists between the sustained charge of violating the agency's Zero Tolerance Policy on violence in the workplace and the agency's mission of providing a safe environment for its employees and providing service to its customers).

Here, there is an obvious relationship between the sustained charges and the efficiency of the service. Deciding official MPOO Rivera testified that he found that the appellant's removal promotes the efficiency of the service because the USPS has an interest in maintaining a safe work environment for all employees. MPOO Rivera also found that the appellant's blatant disregard of the instructions he was given negatively impacted the efficiency of the service and caused a disruption in the workplace, particularly at the Carolina MPO, since his improper conduct and failure to follow instructions both occurred on postal premises and, caused a disruption to the operation when two other clerks and a supervisor had to stop their work and became witnesses to the incident and halt the physical altercation that the appellant initiated with Mr.

Martinez on July 29, 2022. See *Blevins v. Department of the Army*, 26 M.S.P.R. 101, 104 (1985), *aff'd*, 790 F.2d 95 (Fed. Cir. 1986) ("There is a causal connection between an employee's refusal to comply with what the agency believes are properly promulgated instructions and the efficiency of the service. Failure to follow instructions or abide by requirements affects the agency's ability to carry out its mission."); see also *Howarth v. U.S. Postal Service*, 77 M.S.P.R. 1, 7 (1997) (finding that there was nexus between the appellant's refusal to comply with the agency's legitimate instruction because failure to follow instructions inherently affects the agency's ability to carry out its mission). As a result, I find that the agency proved, by preponderant evidence, that a nexus exists between the efficiency of the service and the charged misconduct.

The penalty of removal was within the bounds of reasonableness considering the seriousness of the appellant's misconduct.

Finally, the agency must establish by preponderant evidence that its choice of penalty was within the tolerable bounds of reasonableness. *Hall v. Department of Defense*, 117 M.S.P.R. 687, ¶ 6 (2012). When an agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272 (2001) and *Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, 12, *rev. dismissed*, 135 F.3d 773 (Fed. Cir. 1997) (Table)); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280,306 (1981).⁹

⁹ Those Douglas factors are: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Douglas*, 5 M.S.P.R. at 305-06. And not every factor is relevant in every case. *Chavez v. Small Business Administration*, 121 M.S.P.R. 168, ¶ 9 (2014) (finding that a deciding official does not have to consider each of the *Douglas* factors in making his penalty determination); *Hooper v. Department of the Interior*, 120 M.S.P.R. 658, ¶ 10 (2014).

In determining whether the penalty is reasonable, the Board gives deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that management judgment has been properly exercised. *Howard v. U.S. Postal Service*, 72 M.S.P.R. 422, 425 (1996). Thus, where the agency's charges have been sustained, the Board will modify a penalty only when it finds the agency failed to weigh specific *Douglas* factors or that the selected penalty clearly exceeded the bounds of reasonableness. See *Parker v. U.S. Postal Service*, 111 M.S.P.R. 510, ¶ 9 (2009).

Here, MPOO Rivera credibly testified that he thoroughly reviewed the evidence file. He testified that he considered the evidence of record, including the appellant's response to the NOPR and all the relevant *Douglas* factors when making the decision to remove the appellant. During his testimony, he also established that he exercised reasonable management discretion in connection with the decision to remove the appellant from his position with the USPS. MPOO Rivera testified that the appellant had engaged in serious, improper conduct when he initiated a physical and verbal altercation against Mr. Martinez. But for the appellant's actions, no altercation would have ensued. HRI.

Moreover, MPOO Rivera testified that the appellant had blatantly disregarded direct instructions he was given. He also testified that he properly weighed the relevant *Douglas* factors. Specifically, MPOO Rivera testified that he considered the appellant's 7 years of government service, his work history, and lack of prior discipline as mitigating factors that weighed in his favor. HRI.

However, the deciding official found that these mitigating factors did not outweigh the seriousness of the appellant's improper conduct and failure to

follow instructions. He testified that as a LSSA, the appellant was tasked with providing instructions to other Sales and Services Associates at the Canovanas Post Office and as such, he was held to a higher standard as he holds a position that requires trust and authority. Moreover, he testified that the appellant's improper conduct was egregious because he created an unsafe working environment. He also found that all of the charged conduct occurred on postal property and that several other employees stopped their assigned duties to either watch or, to assist in stopping the appellant's improper behavior. HRI.

MPOO Rivera found that through his actions, the appellant violated the USPS's Zero Tolerance Policy and, in light of his role as a shop steward, he was on notice of what type of conduct violated this policy. See IAF, Tab 8 at 19. In his decision letter, the deciding official asserted that the appellant's improper conduct and failure to follow instructions showed a blatant disregard for his responsibilities as a postal employee. He testified that ultimately, in light of how the appellant had conducted himself and because of his blatant disregard for instructions given to him, MPOO Rivera had lost confidence in his ability to perform his duties as a LSSA. HRI.

Additionally, the deciding official testified that the appellant had not taken responsibility for his actions, had denied any wrongdoing, and, had shown no remorse for his actions. Finally, MPOO Rivera testified that although he considered alternative sanctions, he found that the appellant had no potential for rehabilitation as he has not taken accountability for his improper conduct or failure to follow instructions, and, instead, had tried to justify his wrongdoing by incorrectly asserting that he is permitted to engage in such conduct during union activities. As such, he determined that the appellant's removal was appropriate and, that no lesser penalty would suffice. HRI. I agree.

Upon review of the entirety of the record, I find that MPOO Rivera reasonably exercised his discretion and appropriately weighed the relevant Douglas factors in concluding that the appellant's conduct warranted a removal. The Board has previously upheld a removal in similar appeals. See *Deutsch v. U.S. Postal Service*, 39 MSPR 386, 390 (1989) (physical assault without provocation "is sufficient, standing alone to warrant his removal."). Having considered the relevant Douglas factors and the evidence, I find that the agency-imposed penalty does not exceed the bounds of reasonableness and, that the agency has shown that the action taken promotes the efficiency of the federal service. 5 U.S.C. § 7513(a); Wiley, 102 M.S.P.R. 535 (sustaining the appellant's removal

based on the single sustained charge of improper conduct/violation of Zero Tolerance Policy).

Affirmative defenses

Even in a case in which the agency produces sufficient evidence to meet its burden of proof, the Board cannot sustain the agency's decision if the appellant meets his burden of proving an affirmative defense. 5 U.S.C. § 7701(c)(2); 5 C.F.R. § 1201.56(a)(2)(iii), (b). In this case, the appellant asserted that the agency committed harmful procedural error and, denied him his due process rights. See IAF, Tab 7.

The appellant failed to prove, by preponderant evidence, that the agency engaged in harmful procedural error.

The appellant has the burden of proving his affirmative defenses by a preponderance of the evidence. See 5 C.F.R. § 1201.56(b)(2)(i). In this regard, the appellant argued that the agency engaged in harmful procedural error by virtue of the fact it charged him for conduct that occurred while he was acting purely in his capacity as a union official and, that its disciplinary action is no more than "union busting" activities in violation of Articles 1, 16, 17, and 23 of the CBA between the USPS and the APWU. In effect, he argued that his removal is void because it is an attempt to discipline him for conduct he engaged in while conducting his union activity. See IAF, Tab 7. For the reasons that follow, I find that his claim lacks any merit.

The Board treats the provisions of a CBA to which an agency is a party in the same manner that it treats provisions of agency regulations, and it will enforce employee rights derived from such agreements. See *Randle v. Department of the Navy*, 50 M.S.P.R. 574, 581 (1991). To prevail on his claim that the agency failed to follow the provisions the CBA to which it agreed, the appellant must establish harmful error, i.e., the appellant must establish that the agency committed a procedural error and that the 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. See 5 C.F.R. § 1201.4(r); *Hall v. Department of the Navy*, 73 M.S.P.R. 251, 255 (1997); see also *Borden v. Department of Justice*, 59 M.S.P.R. 353, 356 (1993) (a violation of the parties' CBA may constitute harmful procedural error warranting reversal of the agency's action).

Harmful procedural error cannot be presumed; an agency error is harmful only where the record shows that the 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. *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, 1 13 (2003). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, i.e., that it caused substantial prejudice to his rights. *Turner v. U.S. Postal Service*, 85 M.S.P.R. 565, 1 5 (2000).

July 29, 2022 "union activity"

Article I of the CBA lists those crafts employees recognized as covered under the CBA 10; Article 16 lists discipline procedures for those covered

10 It states, in relevant part: The Employer recognizes the Union designated below as the exclusive bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the National Level:

American Postal Workers Union, AFL-CIO - Maintenance Employees

American Postal Workers Union, AFL-CIO - Motor Vehicle Employees

employees, ranging from a letter of warning to a removal, and provides for indefinite suspensions for suspected criminal conduct and emergency placement in off-duty status; Article 17 details representation by stewards of those listed employees; and Article 23 details the right of union officials to enter postal installations upon reasonable notice.

Article 23 states, in pertinent part, as follows:

Upon reasonable notice to the Employer, duly authorized representatives of the Union shall be permitted to enter postal installations for the purpose of performing and engaging in official union duties and business related to the Collective Bargaining Agreement. There shall be no interruption of the work of employees due to such visits and representatives shall adhere to the established security regulations.

<https://apwu.org/contracts/2021-2024-apwuusps-collective-bargaining-agreement>.

As for the appellant's claim that the charged conduct which occurred on July 29, 2022 is "normal" in union discussions with management, I find that the testimony revealed that the conduct with which he was charged took place after the union activity had ceased. The fact of the matter is that when the appellant met with Mr. Martinez on July 29, 2022 to discuss grievances, the appellant's request to Mr. Acevedo to "escort this imbecile out of here," as well

as the aggression he showed to the appellant, coupled with the physical contact he made

American Postal Workers Union, AFL-CIO - Postal Clerks

- The Special Delivery Messengers were merged into the Clerk Craft by Memorandum of Understanding dated November 20, 1997.

American Postal Workers Union, AFL-CIO - Mail Equipment Shops Employees

American Postal Workers Union, AFL-CIO - Material Distribution Centers Employees

American Postal Workers Union, AFL-CIO - Operating Services and Facilities Services Employees.

<https://apwu.org/contracts/2021-2024-apwuusps-collective-bargaining-agreement>.

with Mr. Martinez, occurred after Mr. Martinez had already concluded the grievance meeting. Both Mr. Martinez and the appellant testified that Mr. Martinez decided to end the meeting, and in fact did so, when the appellant continued to carry on with the comments he was making. In fact, there is no dispute that both Mr. Martinez and the appellant had gotten up from table to exit the office when the appellant initiated the physical contact and proceeded to scream for Mr. Acevedo's attention. See g♦n(?rally HRJ.

The agency, in its closing argument, notes that the National Labor Relations Board (NLRB) has been repeatedly asked to determine whether employers have unlawfully discharged or otherwise disciplined employees who had engaged in abusive conduct in connection with activity protected by Section 7 of the National Labor Relations Act (Act). The NLRB now holds that abusive conduct is not protected by the Act and should be differentiated from conduct that is protected by the Act. It is the employer's burden to show that it would have issued the same discipline for. See IAF, Tab 39.

Even if the appellant was still actively engaged in grievance discussions when he lunged at Mr. Martinez's face and shoulder-checked him, his removal for improper conduct was not related to his engagement in union activities; instead, he was removed for initiating a verbal and physical altercation with Mr. Martinez while on postal premises, which constitutes improper conduct, whether while in the course of his union activities or, otherwise. Such conduct is not protected as union activity.

In General Motors LLC, 14-CA-197985 369 NLRB No. 127 (2020), the NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of activity otherwise protected under the Act, including profane, racist, and sexually unacceptable remarks. Thus, the type of behavior the appellant engaged in on July 29, 2022 was specifically deemed to be no longer acceptable or protected during union activity. Under this new standard, the appellant must first prove that his union activity was the motivating factor for the discipline. If _ that burden is met, the employer must then prove it would have taken the same action even in the absence of the protected activity.

Here, the appellant has not presented any evidence to carry his burden of proof since he was removed for improper conduct and failure to follow instructions - not for his engagement in union activities. Although the appellant was a union shop steward, he not only made demeaning statements when speaking to Mr. Martinez, he "shoulder-checked, which could have caused physical harm. Although an employee may generally not be removed for rude or impertinent conduct in the course of presenting grievances, it is well-settled that where threats of physical harm are present, an employee can be removed. Special Counsel v. Nielson, 71 M.S.P.R. 161,176 (1996). In light of the above, I find that the appellant has failed to prove, by preponderant evidence, his affirmative defense of harmful procedural error with regard to his conduct on July 29, 2022.

State court's denial of protective order:

Although I have also considered the appellant's claim that a state court already determined that the alleged assault by the appellant on Mr. Martinez did not occur, and that the removal action, consequently, constitutes "double jeopardy see IAF, Tab 7 at 6, I also find that said claim lacks any merit. Here, the appellant argues that by virtue of the fact Mr. Martinez's request for a protective order against him was denied on August 25, 2022, the alleged assault simply did not occur. See id. at 6 and 27, order denying motion for protective order. However, the state's decision not to grant a protective order on the ground that Mr. Martinez did not establish the necessary elements required for it, are not the same underlying elements pertaining to this adverse action.

In other words, Mr. Martinez's request for a protective order is not a complaint of assault against the appellant. I find that his argument that "by not

appealing the judge's decision, it turned into a final and binding determination

that Luis J. Soto-Soto did not assault Jonathan Martinez," IAF, Tab 7 at 6, lacks any basis in law. Since that judge's determination as to whether a protective order was warranted requires a different analysis altogether, his denial of it has no bearing on the instant matter. Consequently, I disagree with the appellant's claim that having disciplined him for improper conduct "constitutes a constitutionally prohibited double jeopardy" or, harmful procedural error based on the fact Mr. Martinez was denied a protective order. pertaining to the appellant. In light of the above, I further find that the appellant has failed to prove his affirmative defense of harmful procedural error with regard to his claim of the denial of Mr. Martinez's request for a protective order.

The appellant failed to prove, by preponderant evidence, that his due process rights were violated.

Finally, the appellant alleged that his due process rights were violated when: (1) he was issued a letter on August 26, 2022' which placed him on emergency placement without providing him proper notice; (2) the notice of decision to remove him allegedly failed to advise him of his right to file a grievance in regards thereto; and (3) deciding official MPOO Rivera was allegedly a prosecution witness pertaining to a matter raised by Postmaster Quiles and his impartiality is in question. See IAF, Tab 7.

Only the second and third claims are before me since the first one was dismissed in light of the fact the appellant was retroactively reimbursed for said leave, and the appellant, through his representative, acknowledged, at the beginning of the hearing, that this was not an issue the appellant wished to proceed with. See HRI.

An agency's failure to provide an employee with prior notice and an opportunity to present a response to an appealable agency action constitutes a due process violation. See *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 546 (1985)). An action in which due process is not provided must be reversed. *Id.* Thus, for example, if an agency intends to rely on aggravating factors, such as prior discipline, in determining a penalty, those factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official. *Vena v. Department of Labor*, 111 M.S.P.R. 165, 11 9 (2009).

The Board has held that an employee's due process right to notice extends to both ex parte information provided to a deciding official and information known personally to the deciding official, if the information was considered in reaching the decision and not previously disclosed to the appellant. *Solis v. Department of Justice*, 117 M.S.P.R. 458, 17 (2012).

A deciding official violates an employee's due process rights if they rely on new and material information received ex parte as a basis for their decision on the merits of a proposed charge or the penalty to be imposed. *Gray v. Department of Defense*, 116 M.S.P.R. 461, r 6 (2011) (citing *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011) and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999)). Thus, the appellant bears the burden of showing both that the deciding official relied on the information, and that such reliance rises to the level of a due process violation. *Bennett v. Department of Justice*, 119 M.S.P.R. 685, r 12 (2013) (citing *Stone*, 179 F.3d at 1377 and *Ward*, 634 F.3d at 1280).

Failure to notify the appellant of his right to file a grievance

I have carefully considered the evidence on the due process issue. As to his first claim (that the notice of decision failed to advise him of his right to file a grievance in regards thereto), the NOPR specifically provided him with his right to file a grievance. See IAF, Tab 8 at 37. During cross-examination, the appellant was asked to read his right to file a grievance into the record and did so. HR2. Moreover, the APWU did file a grievance pertaining to the appellant's removal, to which appellant testified during his cross-examination. Consequently, there is no dispute that the appellant pursued his grievance-arbitration rights up until the date of his Board hearing in this appeal as he had to elect which forum he wanted to proceed to hearing in. As noted by the agency, this procedure is governed by the CBA between the agency and the APWU.

Specifically, Article 16.9 of the CBA governs this contract issue, and the Joint Contract Interpretation Manual states the following in Article 16.9:

Grievances of preference eligible employees who also have a live MSPB appeal on the same action will not be scheduled for arbitration until a final determination is reached on the MSPB appeal. Article 16.9.B waives Postal Service liability for the period from the date the case would have been scheduled for arbitration and the date it is actually scheduled for arbitration.

For the purpose of a grievance appeal over a notice of proposed removal, the time limits run from the proposed removal notice, not from the decision letter on the proposed removal notice. Once a grievance on a notice of proposed removal is filed, it is not necessary to also file a grievance on the decision letter. Receipt of a notice of proposed removal starts the thirty-day advance notice period Article 16.5.

<https://apwu.org/contracts/2021-2024-apwuusps-collective-bargaining-agreement>;
<https://apwu.org/contracts/jcim-2022-joint-contract-interpretation-manual>.

For this reason, I find that not only was the appellant correctly apprised of his grievance rights, he elected to pursue such rights until the date of his hearing before the Board. As such, the appellant's claim that he was denied his due process rights must also fail. I find that he has failed to establish, by preponderant evidence, that he was denied his due process rights.

MPOO Rivera's alleged lack of impartiality

Finally, as to the appellant's claim that deciding official MPOO Rivera lacked impartiality simply because he was a prosecution witness against him in a matter brought by Postmaster Quiles, I find that the record is devoid of any information which would lead me to find that this claim is valid. In effect, the appellant presented absolutely no evidence that establishes that MPOO Rivera was not impartial. Consequently, I find that the appellant failed to prove this claim as well.

Conclusion

Having determined that the agency carried its burden of proof with respect to establishing the basis for the appellant's removal and the reasonableness of the penalty, and having determined that the appellant failed to establish his affirmative defenses, I conclude that the agency's action must be affirmed.

DECISION

The agency's removal action is **AFFIRMED**.

FOR THE BOARD:

ISi
Maria M. Dominguez
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 18, 2023, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.114, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.1 14(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (see 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. See 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. See 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 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 how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, 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 this decision becomes final. 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 this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); see *Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If the action involves a claim of discrimination based on race, color, religion, 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 this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

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

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 5SW12G 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 with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 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.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.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below: <http://www.uscourts.gov/CourtLocator/CourtWebsites.aspx>.

(i). Appendix: Annex XIII
Determination of the Board of MSPB

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LUIS J. SOTO,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER NY-0752-23-0059-I-1

DATE: October 9, 2024

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Cindy M. Cruz-Rivera, Carolina, Puerto Rico, for the appellant. Krista M. Irons, Esquire, St. Louis, Missouri, for the agency.

BEFORE:

Cathy A. Harris, Chairman
Raymond A. Limon, Vice Chairman
Henry J. Kerner, Member

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which affirmed the appellant's removal. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to

1 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any

future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c) the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

DISCUSSION OF ARGUMENTS ON REVIEW

The administrative judge correctly found that the Board has jurisdiction over this appeal.

For the first time on review, the appellant primarily argues that the Board lacks jurisdiction over his appeal. Petition for Review (PFR) File, Tab 1. The Board will generally not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence; however, because the appellant's argument implicates the Board's jurisdiction, we will address his claim. *Clay v. Department of the Army*, 123 M.S.P.R. 245, ¶ 6 (2016); *Poole v. Department of the Army*, 117 M.S.P.R. 516, ¶ 9 (2012).

A Postal Service employee may file a Board appeal challenging an adverse action taken under 5 U.S.C. chapter 75 only if: (1) he is a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity; and (2) he has completed 1 year of continuous service in the same or similar positions. See *Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996). Here, the administrative judge found that the Board had jurisdiction over the appellant's removal. Initial Appeal File

(IAF), Tab 40, Initial Decision (ID) at 1. On review, the appellant argues that the administrative judge erred in assuming jurisdiction over his appeal. PFR File, Tab 1 at 8-14.

In arguing that the Board lacks jurisdiction over the appeal he filed, the appellant appears to assert that the underlying matter in his appeal is an unfair labor practice (ULP) complaint, which is within the jurisdiction of the Federal Labor Relations Authority (FLRA). PFR File, Tab 1 at 8-17. Specifically, he appears to argue that the agency committed a ULP when it improperly removed him in violation of the collective bargaining agreement (CBA) and failed to advise him of his right to "continue his previous arbitration process or present a new one on the removal," thereby forcing him to appeal to the Board. *Id.* Therefore, he argues that the administrative judge should have dismissed his appeal before holding a hearing on the merits. *Id.*; IAF, Tab 15 at 4-9. We find his arguments unavailing.

The Board has previously explained that the Civil Service Reform Act (CSRA) replaced the prior patchwork system of laws and gave the FLRA authority over some matters but precluded the FLRA from adjudicating others, including removal actions that fall under the Board's authority. *Marshall v. Department of Veterans Affairs*, 106 M.S.P.R. 478, ¶¶ 11-14 (2007). Specifically, it explained that under 5 U.S.C. § 7116(d), "[i]ssues which can properly be raised under an appeals procedure may not be raised [before the FLRA] as unfair labor practices." *Marshall*, 106 M.S.P.R. 478, ¶ 13. As in *Marshall*, the "appeals procedure" relevant to the instant case is provided by the Board, which, under the CSRA, must adjudicate employee appeals from removals. *Id.*; see also 5 U.S.C. §§ 7512, 7513(d). Therefore, the propriety of the appellant's removal is properly raised in an appeal filed with the Board and may not be raised as a ULP before the FLRA. *Marshall*, 106 M.S.P.R. 478, ¶ 14; see *Dept. of Commerce v. Federal Labor Relations Authority*, 976 F.2d 882, 888 (4th Cir. 1992).

To the extent that the appellant argues that the agency forced him to proceed in this forum because it failed to advise him of his right to continue his pending grievance or allow him to file a new grievance on his removal in its decision letter, his argument is without merit. PFR File, Tab 1 at 8-14. Generally, an individual affected by a personnel action, such as a removal, that is both appealable to the Board and covered by a negotiated grievance procedure may contest the action before the Board or in a grievance, but not both. 5 U.S.C.

§ 7121(e)(1); *Anderson v. U.S. Postal Service*, 109 M.S.P.R. 558, ¶ 5 (2008). However, this binding election of remedies does not apply to Postal Service employees with appeal rights, who are entitled to pursue both a grievance and a Board appeal simultaneously. See *Mays v. U.S. Postal Service*, 995 F.2d 1056, 1058 (Fed. Cir. 1993); *Anderson*, 109 M.S.P.R. 558, ¶ 5.

First, the appellant conceded below that the agency advised him of his right to file a grievance in its notice of proposed removal and testified that he did so. ID at 35-36; Hearing Audio, Tab 35-15 (testimony of the appellant); IAF, Tab 8 at 37. The appellant also acknowledges in his petition for review that "he was warned of his right to file a grievance" in the notice of proposed removal, and he filed a grievance. PFR File, Tab 1 at 12. According to the record, the appellant is a preference eligible and had completed more than 1 year of continuous service in his position before his removal. IAF, Tab 8 at 22. Therefore, to the extent that he filed a grievance on his proposed removal, he was not prohibited from filing a Board appeal. Thus, we agree with the administrative judge that the Board has jurisdiction over his appeal.

Accordingly, we deny the petition for review and affirm the initial decision, which sustained the agency's removal decision based on charges of improper conduct and failure to follow instructions.

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 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:

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.

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. 420 (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, 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/CourtWebsites.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

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 5SW12G 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 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.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.

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.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below: http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Gina K. Grippando Clerk of the Board
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant Electronic Service Luis Soto
Served on email address registered with MSPB

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Served on email address registered with MSPB

10/09/2024
(Date) John Hayes

**Additional material
from this filing is
available in the
Clerk's Office.**