

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
DALLAS REGIONAL OFFICE**

DAVID J. SIPE,  
Appellant,

DOCKET NUMBER  
DA-0752-07-0212-I-1

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: June 13, 2007

Paul R. Schwedler, Esquire, Chevy Chase, Maryland, and Patricia A. Nighswander, National Border Patrol Council, Washington, D.C., for the appellant.

Nara DaSilva, Esquire, Edinburg, Texas, for the agency.

**BEFORE**  
Anna M. Love  
Administrative Judge

**INITIAL DECISION**

On February 13, 2007, David J. Sipe filed an appeal of the action of the Department of Homeland Security (DHS), United States Customs and Border Protection (CBP), which removed him from his Border Patrol Agent position, effective April 21, 2001, pursuant to the mandatory removal provision of 5 U.S.C. § 7371.<sup>1</sup> The Board has jurisdiction over this appeal pursuant to

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<sup>1</sup> Prior to March 1, 2003, the functions performed by Border Patrol Agents were managed by the Department of Justice, Immigration & Naturalization Service (INS). See Homeland Security Act of 2002, PL 107-296, 116 Stat 2135.

5 U.S.C. §§ 7511-7513. Because the appellant withdrew his request for a hearing, this appeal is decided on the basis of the parties' written submissions.<sup>2</sup>

Based on the following analysis and findings, the agency's action is REVERSED.

### ANALYSIS AND FINDINGS

#### Background and undisputed facts.

The facts of this case are not in dispute. The appellant was employed by the INS as a Border Patrol Agent, GS-1896-09, in McAllen, Texas. Border Patrol Agents are law enforcement officers within the meaning given that term under 5 U.S.C. §§ 8331(20) or 8401(17). On December 19, 2000, the agency indefinitely suspended the appellant without pay based on an indictment charging criminal misconduct. AF, Tab 4(4I); *see also id.* AF, Tab 4(4J) at 1. On March 27, 2001, a jury in the United States District Court for the Southern District of Texas found the appellant guilty of a felony, Violation of Civil Rights Under Color of Law in violation of 18 U.S.C. § 242. *See* AF, Tab 4(4J) at 3. The appellant was convicted of using excessive force and causing bodily injury during the arrest of a Mexican national who was attempting to enter the United States illegally. *See* AF, Tab 4(4D) at 5.

On April 16, 2001, Deputy Chief Patrol Agent, J. Perry Cronin, proposed to remove the appellant from his Border Patrol Agent position in accordance with the provisions of 5 U.S.C. § 7371. AF, Tab 4(4G). Pursuant to 5 U.S.C. § 7371(b), any law enforcement officer who is convicted of a felony must be removed from employment on the last day of the first applicable pay period following the conviction notice date. On April 20, 2001, Chief Patrol Agent Jose E. Garza advised the appellant that he would be removed from his position,

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<sup>2</sup> During a conference call with the parties on May 3, 2007, the appellant withdrew his request for a hearing. Appeal File (AF), Tab 12. Although the parties were provided an opportunity to submit additional evidence and argument prior to the close of the record, neither party did so. *See* AF, Tabs 12 and 14.

effective April 21, 2001. AF, Tab 4(4F). The appellant was removed on April 21, 2001. AF, Tab 4(4E). He did not file a Board appeal at that time.

After his conviction, the appellant filed a motion for a new trial based on assertions that Federal prosecutors made misrepresentations and failed to disclose exculpatory evidence. *See* AF, Tab 4(4D). On or about April 18, 2003, the district court judge agreed with the appellant and granted his motion for a new trial. *Id.* The government appealed the judge's ruling to the United States Court of Appeals for the Fifth Circuit. *Id.* On October 15, 2004, the Fifth Circuit affirmed the trial judge's decision granting a new trial and remanded the matter. *Id.* On January 26, 2007, a jury found the appellant not guilty. AF, Tab 4(4C).

On February 2, 2007, Paul A. Perez, President of the National Border Patrol Council (NBPC) Local 3307, notified Chief Patrol Agent Lynne M. Underdown in writing that, based on the appellant's January 26, 2007 acquittal, he believed the appellant should immediately be reinstated to his former position as a Border Patrol Agent. AF, Tab 4(4B). Perez pointed out that 5 U.S.C. § 7371(d) provides that, if the conviction is overturned on appeal, a removal taken under 5 U.S.C. § 7371 shall be set aside retroactively to the date on which the removal occurred. *Id.* In a letter dated February 12, 2007, Underdown advised Perez that she was unable to discuss the appellant's case with him because the right to union representation did not extend to individuals who were not currently employees of the agency. AF, Tab 4(4A). Underdown informed Perez that the appellant was "not precluded from obtaining personal representation and pursuing the matter through one of the other avenues of appeal outlined in the decision letter he received on April 20, 2001." *Id.*

The appellant filed the captioned appeal on February 13, 2007. AF, Tab 1. He asserted that his conviction had been overturned on appeal, and, therefore, according to 5 U.S.C. § 7371(d), his removal must be set aside retroactively to the date he was removed and that he must be paid back pay for the entire period of time, pursuant to the Back Pay Act, 5 U.S.C. § 5596.

The agency did not dispute that the appellant's conviction was overturned on appeal. *See* AF, Tab 4 and 8. The agency, however, moved that the appeal be dismissed as untimely filed. AF, Tabs 4 and 8. The agency argued that, to preserve his appeal rights, the appellant should have filed an appeal with the Board within 30 days of receipt of Garza's April 20, 2001 decision letter. *Id.* In the alternative, the agency contended that the appellant's conviction was overturned either on April 18, 2003, when the district court judge granted his motion for a new trial or on October 15, 2004, when the Fifth Circuit remanded his case for a new trial. *Id.* Accordingly, the agency stated that the appellant should have filed with the Board within 30 days of either April 18, 2003 or October 15, 2004. *Id.*

The agency further asserted that the Board should rely on the equitable doctrine of laches to bar the appellant's "unreasonable and inexcusable" delay in filing his appeal. *Id.* The agency argued that it has been prejudiced by the appellant's failure to file his appeal for nearly six years because it has hindered "its ability to resolve this matter, while at the same time inflating the potential damages it faces if it does not prevail." *Id.*

#### Burdens of Proof

The appellant has the burden of proof by preponderant evidence that his appeal was filed on time. 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. § 1201.56(c)(2) (2007). Nevertheless, if an appeal was not filed on time, the filing deadline may be waived if the appellant shows good cause for a delay in filing and that he acted reasonably under the particular circumstances of his case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

If the appellant establishes that his appeal was timely filed or that good cause exists to waive the filing deadline, the agency has the burden of proving by

preponderant evidence that the appellant engaged in the misconduct cited in its April 16, 2001 notice of proposed removal, *i.e.*, he was convicted of a felony and he was a law enforcement officer. 5 C.F.R. § 1201.56(a)(1) (2007). As to the penalty, the statute relied on by the agency in removing the appellant in April 2001, 5 U.S.C. § 7371(b), mandates removal of a law enforcement officer who is convicted of a felony.

Moreover, 5 U.S.C. § 7371(e)(2) indicates that specified procedures provided by 5 U.S.C. § 7513 shall apply to any removal taken under 5 U.S.C. § 7371, including the right to file an appeal to the Board. However, 5 U.S.C. § 7371(e)(2) indicates that, on appeal, the employee may only challenge the agency's action with respect to whether he is a law enforcement officer; he was convicted of a felony; or the conviction was overturned on appeal. Title 5 U.S.C. § 7371(d) further provides that, if the conviction is overturned on appeal, the removal shall be set aside retroactively to the date on which the removal occurred, with back pay under 5 U.S.C. § 5596 for the period during which the removal was in effect, unless the removal was properly effected other than under this section. Hence, the appellant has the burden of proving by preponderant evidence that his conviction has been overturned on appeal.

Although the appeal was untimely filed, good cause exists to waive the filing deadline.

The Board's regulations at 5 C.F.R. § 1201.22(b) require that an appeal be filed no later than 30 days after the effective date of the action being appealed or 30 days after the date of receipt of the agency's decision, whichever is later. Nonetheless, if an appeal was not filed on time, the filing deadline may be waived if the appellant shows good cause for a delay in filing and that he acted reasonably under the particular circumstances of his case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The factors the Board will look at to determine whether the appellant acted reasonably include, but are not limited to: (1) the length of the delay; (2) whether the appellant was notified of the time

limit or was otherwise aware of it; (3) the existence of circumstances beyond his control which affected his ability to comply with the time limit; (4) circumstances which show that any neglect on the part of the appellant is excusable; (5) whether there was unavoidable casualty or misfortune; (6) whether the appellant was pro se, and (7) whether not applying the time limit to the appellant would harm the agency. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

In response to a March 14, 2007 Order to Show Cause regarding the timeliness of the appeal, the appellant argued that his appeal was timely filed. AF, Tab 7. He stated that the timeliness of his appeal should be computed from the date the grounds to appeal have ripened, that is when his conviction was overturned. He asserted that he had no grounds to appeal until the jury acquitted him on January 26, 2007 and, therefore, his filing on February 13, 2007 was timely. The appellant pointed out that, in Underdown's February 12, 2007 letter, she told Perez that he had appeal rights.

The appellant also contended that the procedural language of 5 U.S.C. § 7371 is unclear. He noted that 5 U.S.C. § 7371(e)(3) specifically requires that the employee's removal must occur on the last day of the first applicable pay period following the date of the conviction regardless of whether the notice required by 5 USC 7371(e)(1)<sup>3</sup> and the allowable appeal procedures made applicable by 5 U.S.C. § 7371(e)(2) have been provided or completed. The appellant further related the following:

This clearly recognizes there is no necessary or direct link between the removal date and the expiration of the appeal procedures. A reasonable interpretation is that Congress considered and recognized the reality that it would be at a minimum extremely unusual or even impossible for a criminal conviction to be overturned in 30 days. It

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<sup>3</sup> Title 5 U.S.C. § 7371(e)(1) states that the agency shall deliver written notice to the employee as soon as practicable, and not later than five calendar days after the conviction date.

could not reasonably have intended that an appeal based on an overturned conviction, a drawn out process as evidenced convincingly by the facts here, had to be filed within 30 days of the removal.

AF, Tab 7.

Moreover, the appellant claimed that, if his appeal was untimely filed, good cause existed to waive the filing deadline. He reasserted his earlier argument about the ambiguous language of the statute. He also contended the following in relevant part:

Accomplished through prosecutorial misconduct, Sipe was convicted of a felony that carried a potential death penalty. . . . It is difficult if not impossible for anyone who has not been in that position to know how he must have felt. Surely he and the attorney retained for his criminal defense had more pressing things on their minds than attempting to sort out subtle distinctions between whether he had 30 days from the date of the removal letter or 30 days from [sic] the date of a potential reversal to file an appeal over loss of his job. It was loss of his life that was front and center. While the intent of the statute is clear, front and back end, its procedural language is certainly ambiguous and in early 2001 had been totally untested.

AF, Tab 7.

Here, Garza's April 20, 2001 decision letter advised the appellant that he would be removed effective April 21, 2001. AF, Tab 4(4F). Allowing five days for mailing, the receipt date would have been April 26, 2001. Thus, to be timely, the appeal should have been filed by no later than May 26, 2001. The date of filing by facsimile is the date of the facsimile. 5 C.F.R. § 1201.4(*l*) (2007). The appellant's original appeal was faxed to the Board on February 13, 2007, nearly six years after the filing deadline. AF, Tab 1. Accordingly, I find that the appellant's appeal of his removal was not filed within the regulatory time limit.

The undisputed evidence of record further reflects that, on February 2, 2007, within one week of his acquittal, the appellant, through the NBPC, informed the agency that he had been acquitted and sought reinstatement pursuant to the provisions of 5 U.S.C. § 7371(d). AF, Tab 4(4B). On February 12, 2007,

Chief Patrol Agent Underdown declined to communicate with the NBPC regarding the appellant because he had not been an employee since 2001. AF, Tab 4(4A). Underdown further suggested that the appellant pursue the matter through one of the other avenues of appeal outlined in the April 20, 2001 decision letter, which included filing a Board appeal. *Id.* The appellant filed the instant appeal one day later, on February 13, 2007.

This case appears to involve a matter of first impression for the Board. However, the Board's treatment of indefinite suspensions may be applied here by analogy. The Board has long recognized that indefinite suspensions that are valid when imposed may nonetheless become invalid in light of later developments. Specifically, the Board has ruled that an indefinite suspension must terminate upon the occurrence of an ascertainable condition subsequent. *Peyton v. Department of Justice*, 62 M.S.P.R. 113, 115 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995) (Table); *White v. U.S. Postal Service*, 58 M.S.P.R. 22, 24 (1993). In this connection, the Board has held that where an agency has relied solely on an indictment to establish its original indefinite suspension, and the only condition subsequent is the resolution of the criminal charges, it is unreasonable to continue the suspension after the date the indictment is dismissed and the appellant is entitled to back pay for such a period. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 111 (1990). The Board has further found that an Order sustaining an indefinite suspension explicitly or implicitly mandates that the agency move expeditiously in terminating the suspension upon the occurrence of the condition subsequent, and that the agency's failure to do so may be brought before the Board by filing a petition for enforcement. *Peyton*, 62 M.S.P.R. at 116; *White*, 58 M.S.P.R. at 24.

However, when there is no order to enforce because the appellant did not appeal the imposition of the suspension action, the Board has found that the appellant should not be foreclosed from challenging the continuing nature of the suspension at the time he contends it has become improper because he recognized

that an earlier challenge would waste his, the agency's, and the Board's time and resources. *Id.* Under those circumstances, when the appellant has acted promptly upon determining that the agency was delaying in canceling the indefinite suspension, the Board has found that, to the extent the appellant's appeal was untimely, good cause was shown to waive the Board's regulatory time limit. *Id.*

In assessing whether to waive the filing deadline, the United States Court of Appeals for the Federal Circuit has emphasized that the Board must consider the length of delay in every good cause determination. *Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1582 (Fed. Cir. 1994). In the instant case, I find that the appellant's nearly six-year delay in filing is significant and normally would not provide a basis for waiving the filing deadline. *See, e.g., Schensted v. Department of Commerce*, 96 M.S.P.R. 143, ¶ 7 (2004) (a ten-month delay in filing a petition for appeal is significant); *Tynes v. Department of the Air Force*, 79 M.S.P.R. 357, ¶ 9 (1998) (a six-month delay in filing an appeal is significant), *aff'd*, 194 F.3d 1332 (Fed. Cir. 1999) (Table).

Nevertheless, I find that the appellant has demonstrated that good cause existed for his delay. Applying the Board's long standing case law regarding indefinite suspensions by analogy to the facts here, I find that, the sole basis for the appellant's removal under 5 U.S.C. § 7371 was a felony conviction and since that conviction has been overturned on appeal, it is unreasonable for the agency to refuse to reinstate the appellant in light of the mandatory language of 5 U.S.C. § 7371(d). Moreover, I find that, if, in 2001, the appellant had challenged his removal, which the agency properly took under 5 U.S.C. § 7371, he would have had no legitimate reason to do so. An appeal in 2001 would have wasted his, the agency's, and the Board's time and resources.

Furthermore, the appellant sought reinstatement from the agency within one week of his January 26, 2007 acquittal and promptly filed this appeal within one day of the agency's refusal to discuss the matter with a representative from his former union and its suggestion that he file an appeal. Hence, I find that it

would be unconscionable, under the circumstance of this case, to foreclose the appellant from challenging his removal at this time.

Moreover, I find unpersuasive the agency's argument that the appellant should have refiled his appeal either when the trial court granted his motion for a new trial in April 2003 or when the Fifth Circuit remanded the matter in October 2004. *See* AF, Tabs 4 and 8. Neither the agency nor the appellant has provided me with any legal authority, and I have not found any, that defines what is meant by the language, "conviction was overturned on appeal," in 5 U.S.C. § 7371(e)(2)(C). I find that it was reasonable for the appellant to conclude that, because his case was remanded for a new trial, his felony conviction was not "overturned on appeal" until after the jury found him not guilty.

I also find the agency's laches argument to be without merit. *See* AF, Tabs 4 and 8. I do not find that the appellant unreasonably and inexcusably delayed in filing his appeal. Nor do I find, under the facts of this case, that the agency has been unfairly prejudiced. As the agency concedes in its submission, "back pay alone may not be sufficient to show prejudice to the government." AF, Tab 4. Rather, I find that the agency has not demonstrated, nor has it asserted facts to show, that it is prejudiced at all in defending itself in this matter. It merely is worried about the amount of back pay for which it may be liable.

Accordingly, after considering the entire record, I find that the appellant has established good cause for waiving the Board's regulatory time limit.<sup>4</sup>

The agency has proven that the appellant is a law enforcement officer and that he was convicted of a felony.

Title 5 U.S.C. § 7371(b) mandates the removal from employment of any law enforcement officer who is convicted of a felony. In light of the undisputed

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<sup>4</sup> The appellant also argued that his appeal was timely filed under the theory that the agency's failure to reinstate him resulted in a constructive removal. *See* AF, Tab 7. Because I have found good cause was shown to waive the filing deadline, I have made no findings on whether the agency constructively removed the appellant.

facts in this case, I find that the appellant was a law enforcement officer within the meaning of 5 U.S.C. § 7371(a)(2) and that he was convicted of a felony when the original jury found him guilty on March 27, 2001. Accordingly, I find that the agency has met its burden of proving the merits of its charge. Therefore, in April 2001, the statute relied on by the agency in removing the appellant, 5 U.S.C. § 7371(b), mandated his removal.

The appellant has proven that his conviction has been overturned on appeal.

After considering the record evidence, I find that it is undisputed that the appellant's felony conviction has been overturned on appeal. It is also unquestioned that the agency effected his removal based solely on the mandatory removal provisions of 5 U.S.C. § 7371. Hence, the statute requires that the appellant's removal be set aside retroactively to the date on which the removal occurred, April 21, 2001, and that he be awarded back pay for the period during which the removal was in effect.

### **DECISION**

The agency's action is REVERSED.

### **ORDER**

I **ORDER** the agency to cancel the removal and to retroactively restore the appellant effective **April 21, 2001**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

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

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

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

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.


### **INTERIM RELIEF**

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

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the

agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

  
\_\_\_\_\_  
Anna M. Love  
Administrative Judge

#### **NOTICE TO PARTIES CONCERNING SETTLEMENT**

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

#### **NOTICE TO APPELLANT**

This initial decision will become final on **July 18, 2007**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## BOARD REVIEW

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

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

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

## JUDICIAL REVIEW

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

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

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

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

## ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

## ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office,

describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

#### **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.

## CERTIFICATE OF SERVICE

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

Appellant

U.S. Mail                      David J. Sipe  
   4106 N. 23rd Street  
   McAllen, TX 78504

Appellant Representative

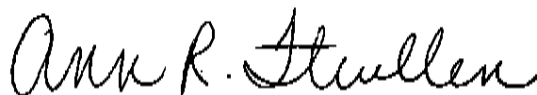
U.S. Mail                      Paul R. Schwedler  
   6719 Fairfax Road  
   Chevy Chase, MD 20815

Agency Representative

U.S. Mail                      Nara DaSilva, Esq.  
   Department of Homeland Security  
   U.S. Customs and Border Protection  
   Rio Grande Valley Sector Headquarters  
   Office of the Asst. Chief Counsel  
   4400 South Expressway 281  
   Edinburg, TX 78539

June 13, 2007

(Date)



Ann R. Fluellen  
Paralegal Specialist