UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TAB 1a
September 24, 2013

THE DEPARTMENT OF NAVY MASTER NARRATIVE REGARDING THE MAY 2013 FURLOUGH OF CIVILIAN EMPLOYEES

This master narrative represents the position of the Department of the Navy regarding the overarching issues raised by appellants in challenges to the furlough directed by the Secretary of Defense on May 14, 2013. It is applicable to all furlough appeals filed by Department of the Navy civilian employees. This master narrative will not be filed separately for each consolidated appeal. Supplemental information, as reflected in supplemental statements of fact, supplemental narratives, and supplemental documents, will be filed for each consolidated Acknowledgment Order issued by the Merit Systems Protection Board in order to address matters raised in the individual employee appeals that were consolidated. The supplemental information will be filed with the MSPB in accordance with the Acknowledgment Order issued by the assigned Administrative Judge.

I. INTRODUCTION

In May 2013, the Department of Defense (DoD or the Department) faced a daunting challenge: accommodate a dramatic reduction in available resources with less than six months remaining in the fiscal year. In response, on May 14, 2013, the Secretary of Defense (the Secretary) directed DoD managers to prepare to furlough most of the Department's civilian employees for up to 11 discontinuous workdays prior to the end of the fiscal year. The furlough encompassed virtually all DoD member agencies as well as all DoD military departments including the Department of the Navy (which includes the United States Marine Corps) (DON), the Department of the Army (DA), and the Department of the Air Force (DAF), and impacted more than 650,000 out of approximately 800,000 total civilian employees, including almost 160,000 out of approximately 250,000 DON civilian employees. In response to the Secretary's directive, the DON began to furlough civilian employees on July 8, 2013. Subsequently, after changes in the fiscal picture due to Congressional actions and internal budget management

efforts, the Secretary reduced the furlough period to six discontinuous workdays effective August 6, 2013.

Although the scale of the furlough at issue is unprecedented, the well-established standard for determining the legitimacy of a furlough is the same regardless of the number of employees adversely impacted. Specifically, the Merit Systems Protection Board (MSPB or the Board) has jurisdiction to review furloughs of 30 days or less to determine if the action was taken "only for such cause as will promote the efficiency of the service." Whether the Board finds a particular furlough action promoted the efficiency of the service hinges on the Agency demonstrating, by a preponderance of the evidence, that: (1) the furlough was *bona fide – i.e.*, the Secretary's decision to institute a furlough was *a* good faith, reasonable management solution to DoD's financial predicament regardless of whether it was the *only* solution or the *best* solution; and (2) management's structural determinations were applied in a non-disparate manner – *i.e.*, the Secretary's decision to include nearly all DoD agencies, all military departments, and employees at entities funded through defense Working Capital Funds (WCFs), and to exempt only a very limited number of positions was applied to similarly situated employees in a uniform and consistent manner.

As discussed briefly below and in more detail in subsequent sections, the Agency has clearly met its burden. Additionally, the DON's careful attention to providing affected civilians with adequate notice of the furlough, an explanation of the basis for the furlough, and a meaningful opportunity to respond ensured compliance with all applicable due process requirements.

II. SUMMARY OF ARGUMENT

The Secretary's Decision to Furlough Was *Bona Fide*

Without exception, the Board has determined that a furlough is a reasonable solution for addressing actual or even *perceived* sequestration-induced budgetary shortfalls. Here, the Secretary's furlough decision falls squarely within such Board precedent. Specifically, the decision to furlough resulted from a combination of negative budgetary events including the severe budgetary cuts imposed by the sequestration provision in the Budget Control Act (BCA) of 2011, which became effective in March 2013. At that time, it was clear that DoD had insufficient Operations and Maintenance (O&M) funds, from which the majority of civilian employees are paid, to meet its obligations. Not only was the O&M fund slashed by $20 billion as a result of sequestration, it was also being drained by the higher-than-expected spending on overseas military operations, and could not be replenished from other sources within DoD due to the restrictions imposed by the Continuing Appropriations Resolution, 2013. These and other factors led to an overall shortfall in the O&M accounts of more than $30 billion.

Additional facts support the conclusion the decision to furlough was *bona fide*. For example, the Agency took other significant actions to reduce costs, such as hiring freezes, layoffs of temporary and term employees, sharp cutbacks in facilities maintenance, travel and training, and delay of contracting actions. Also, the furlough implementation process demonstrated the Secretary's determination to avoid or lessen it if possible. For example, after the initial announcement of a possible furlough of 22 days, he reduced it to 14 potential days and then 11. Eventually, the number of days was reduced to six on August 6, 2013.

DoD's Structural Determination to Include All Military Departments, Civilian Employees of WCFs and to Designate Certain Positions as Categorically Exempt Was Applied in a Non-Disparate Manner

The Board has made clear that it will not interfere with management determinations respecting how to structure a *bona fide* furlough. Rather, the Board's review concerns only

whether an agency applied the designated furlough framework in a "fair and even manner." In *Chandler v. Dep't of the Treasury*, 2013 M.S.P.B. 74 (Sept. 18, 2013), the Board explained that "fair and even" means "uniformly and consistently" but "does not mean that the agency is required to apply the furlough in such a way as to satisfy the Board's sense of equity. Rather, it means that the agency is required to treat similar employees similarly and to justify any deviations with legitimate management reasons."

Here, pursuant to his statutory authority to control budgetary decisions with respect to all entities that fall under the DoD umbrella, the Secretary determined that the furlough would encompass most DoD agencies, all of the military departments, and civilian employees of entities funded through the Department's WCFs. He also determined that there would be only limited categorical exceptions.

Thus, challenges by appellants to the inclusion of the DON based on statements by DON management that it was more fiscally sound than other military departments must fail for two reasons. First, such inclusion was within the Secretary's management prerogative. Second, the inclusion of *all* the military departments (which, with respect to this particular challenge by appellants, are the similarly situated entities for purposes of the Board's review) is inherently non-disparate. In short, the Secretary could have determined that only one or two of the three military departments would be included in the furlough, but by including *all* such departments, he acted uniformly and consistently.

Similarly, challenges by appellants to the inclusion of civilian employees at entities funded through WCFs also must fail because (1) the Board has explicitly recognized that it is within management's discretion to include employees, even if the sequestration does not directly affect the funds used to pay for work that is to be performed; and (2) the across-the-board

application of the furlough to *all* WCF employees at the DON (and in the other military departments) is again inherently non-disparate.

Moreover, although the Board has explicitly recognized that it has no authority to review the management considerations that underlie an agency's decisions with respect to how to structure a furlough, even if the Secretary's decisions were subject to such scrutiny, they would withstand it. The Secretary's inclusive approach was, in fact, sound because it: (1) promoted DoD's desire for across-the-board consistency; (2) enabled some cross-leveling of funds between services that were more fiscally sound (such as the DON), in order to assist others less fiscally sound (such as the DA); and (3) put all non-exempt civilians on an equal footing without exceeding the 22-day maximum for furloughs or resorting to a reduction-in-force (RIF), which was a more severe and less viable option at the FY's mid-point.

Finally, within each of the DoD agencies and military departments, the majority of positions were subject to the furlough; the few positions categorically recognized as exempt underwent a thorough review process and were based on position-based, mission-specific factors. Because such determination was within the Secretary's decision-making authority, any challenge based on the particular exception itself must fail. Rather, the sole review is limited to application of the exception. Here, there is no evidence of any disparate application.

The Furlough Decision Was Implemented in Accordance with Due Process Requirements

The DON has satisfied all due process requirements by according each furloughed employee prior notice of the planned furlough, an explanation of the Agency's evidence, and a meaningful opportunity to respond. Any challenges based on statutory/regulatory due process requirements set forth in 5 U.S.C. § 7513 and 5 C.F.R. § 752.404 fail because there has been no showing of any such violation and/or harmful error. Any challenges premised on a violation of constitutionally-protected due process rights whether under the reasoning of *McGriff v.*

Department of the Navy, 118 M.S.P.R. 89, 101 (2012), or any other basis, must fail as a matter of law in light of a substantial and long-standing line of federal court decisions finding no protected property interest in this context.

III. JURISDICTION

A furlough is "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons." *See* 5 U.S.C. § 7511(a)(5); *Chandler*, 2013 M.S.P.B. 74, at ¶ 5; *Mendenhall v. USPS*, 74 M.S.P.R. 430, 436 (1997). The Board has jurisdiction to hear an otherwise covered federal employee's appeal of a furlough of less than 30 days under the adverse action procedures set forth in 5 U.S.C. §§ 7512(5), 7513(d) and 7701. *See Chandler, supra*, at ¶ 5; *Marks v. United States Postal Service*, 78 MSPR 451, 454 (1998) ("The Board has jurisdiction to determine whether an agency's placement of an employee in a nonpay, nonduty status is in accordance with Federal regulations and with any applicable collective bargaining agreement."). To the extent that *covered employees* have *timely* challenged the consolidated issues addressed herein and are not subject to any previously-filed grievance, the Agency does not contest the Board's jurisdiction.[1]

IV. STATEMENT OF FACTS

Overview of DoD and the Secretary of Defense's Authority

1. DoD is composed primarily of: (a) the Office of the Secretary of Defense, (b) the Joint Chiefs of Staff, (c) the Joint Staff, (d) the Defense Agencies, (e) the DoD Field Activities, (f) the military departments (*i.e.*, the DON, DA and DAF), and (g) the unified and specified combatant commands. The DON consists of two uniformed Services: the United States Navy and the United States Marine Corps. *See* 10 U.S.C. §§ 111, 5011, and 5041.

[1] If review of any individual appeal within a consolidated appeal identifies a jurisdictional issue, the Agency will address such issue separately from this master narrative.

2. As the head of DoD, the Secretary of Defense has authority, direction and control over the Department, including all of the above entities, subject only to the direction of the President, certain provisions of Title 10 of the United States Code, and section 2 of the National Security Act of 1947. Although separately organized under the Secretary of the Navy, the DON operates under the authority, direction and control of the Secretary of Defense. *See* 10 U.S.C. §§ 113 and 5011. The Secretary also has authority to establish and oversee defense working-capital funds. *See* 10 U.S.C. § 2208.

Overview of Sequestration and Its Impact on DOD

3. The BCA of 2011, which was enacted in August 2011, provided for a projected $1.2 trillion in automatic spending cuts (*i.e.*, "sequestration") if Congress failed to enact deficit reduction legislation adopting the recommendation of the Joint Select Committee on Deficit Reduction by January 15, 2012. The cuts were to be evenly divided: (1) over a nine-year period beginning in January 2013 and ending in 2021, and (2) between defense spending and discretionary domestic spending. When no such compromise was reached, however, the mandatory budget cuts (including $109 billion in total cuts for 2013) were scheduled to go into effect on January 2, 2013. Passage of the American Taxpayer Relief Act on January 3, 2013, temporarily halted the mandatory budget cuts (including $109 billion in total cuts for 2013) until March 1, 2013. *See* Tab 1, Declaration of Robert Hale at ¶ 6;[2] Tab 34, American Taxpayer Relief Act of 2012; and Tab 37, Budget Control Act of 2011.

4. As of February 2013, DoD anticipated, absent another postponement or compromise, that by the end of the following month, its share of the sequester for 2013 would result in an approximate $46 billion reduction in the Department's total discretionary budgetary top line (later recalculated by the Office of Management and Budget at $37 billion) with virtually every

[2] Mr. Hale is the Under Secretary of Defense (Comptroller)/Chief Financial Officer in the DoD. *See id.* at ¶ 1.

budget account in the Department's budget – including wartime funding but excluding military personnel – cut by as much as nine percent. *See* Tab 1, Hale Decl. at ¶ 7.

5. In addition to sequestration, DoD anticipated further budgetary constraints if the funding levels for the remainder of FY 2013 were to stay in effect at the then-current funding levels allowed by the continuing resolution (CR). Typically, a CR proportionally allocates budget authority into accounts based on amounts appropriated in the prior year's appropriations acts. Thus, the lack of a regular DoD appropriations act for FY 2013 created, among other things, the additional constraint of having money in the wrong appropriation accounts. Specifically, under the then-existing CR, the Department had too many dollars in the investment accounts and too few dollars in the operation and maintenance (O&M) accounts. *See* Tab 1, Hale Decl at ¶ 8.

6. Finally, by February 2013, DoD faced costs of wartime operations in excess of those that were estimated two years earlier when budgets were prepared. At that point, DoD estimated that it could be short as much as $10 billion in wartime operating costs. *See* Tab 1, Hale Decl at ¶ 9.

7. These various factors – sequestration, misallocation of funds under the CR, unexpectedly high wartime costs – all affected the DoD budget, especially the O&M portion of the budget, which funds the costs for many of DoD's civilian employees. Taken together, these factors left DoD facing shortfalls of $40 billion or roughly 20 percent of O&M funding for active forces. *See* Tab 1, Hale Decl. at ¶ 10.

Initial Considerations Regarding the Potential Furlough of DoD Civilian Employees

8. In response to sequestration and other shortfalls, DoD determined that if it had to operate under reduced funding levels for an extended period of time, it would have to consider furloughs and other actions to ensure it could execute its core mission and to bring its expenditures down to appropriate levels. As an initial overriding objective, the Department had to protect the

warfighter. This objective meant, however, that there would be larger and more disproportionate cuts in the military departments' O&M accounts supporting the base budget for the active forces and from which most civilian positions are funded. The need to protect warfighter funds added to the Department's O&M problem. *See* Tab 1, Hale Decl at ¶ 11; Tab 33, DEPSECDEF Memorandum for Secretaries of the Military Departments Subj: Handling Budgetary Uncertainty in Fiscal Year 2013.

9. As of late February 2013, the Department had already begun taking many near-term actions in an attempt to slow spending and avoid more draconian cuts at a later time. Such actions included severe cutbacks in travel and training conferences; civilian hiring freezes; layoffs of more than 7,500 temporary and term employees; sharp cutbacks in facilities maintenance (by as much as 90% in the remainder of the year); cutbacks in base operations; reduction of the number of aircraft carriers, embarked air wings, and accompanying defensive and support ships deployed to the Persian Gulf; reductions in the scope of and period of performance of contracts; and delay of contracting actions until the next fiscal year. However, the Department recognized at that time that if sequestration and the CR were to last throughout FY 2013, many more far-reaching changes would be required, including cutbacks and delays in virtually every investment program in the Department (some 2500 of them) and the furlough of civilian personnel. *See* Tab 1, Hale Decl at ¶ 12. An administrative furlough was a management tool that would result in a predictable, recurring amount of money being available for use by the Department to contribute to addressing the negative fiscal impacts of sequestration, operating for a full-year under a continuing resolution, and increasing war requirements. *See* Tab 1, Hale Decl at ¶ 5; Tab 29, Commandant of the Marine Corps Letter Subj: Sequestration Impacts; Possible Furloughs; Tab 30, Fiscal Director of the Marine Corps Memorandum Subj: Guidance for

Sequestration and Continuing Resolution Planning; Tab 32, Budget Guidance Memorandum 12-3A Subj: Implementation of Annual Continuing Resolution and Sequestration on the FY 2013 DON Budget.

10. As a result, on February 20, 2013, Secretary of Defense Panetta notified DoD civilian employees and the Congress about the potential for such furloughs for up to 22 days (176 hours). As Under Secretary of Defense Robert Hale noted that same day in a DoD Press Briefing on "Civilian Furlough Planning Efforts," although the Department would strongly prefer not to impose furloughs, the Department believed that it had no choice but to do so absent further action by Congress, given the severe budget constraints outlined above. As he then stated,

> We're more than 20 percent short in O&M, with seven months to go, much higher in some of the services, particularly the Army. Civilian personnel make up a substantial part of DoD O&M funding. We can't do reductions in force, especially at this point in the year. They'd cost us money in this year because of unused leave and severance pay, so furloughs are really the only way we have to quickly cut civilian personnel funding.

See Tab 1, Hale Decl at ¶ 13. He also noted that, in terms of procedures, DoD would be asking the various components to: (1) identify by March 1, 2013, specific exceptions to the furlough, which the Department would review for consistency, and (2) begin notifications and "impact and implementation" bargaining with local unions. *See* Tab 26, USD (Comptroller) Robert Hale Press Briefing on Civilian Furlough Planning Efforts from the Pentagon (2/20/2013).

11. During the planning for possible furloughs, the Secretary determined that, as a matter of policy, there would be only limited exceptions to any furloughs that were imposed. Exceptions would include civilians directly involved in support of wartime operations, those needed for protection of life and property, and those involved in a few programs of particularly high priority (especially programs directly and significantly affecting military readiness). Remaining furloughs would be structured in a fair and even manner across the breadth of the

Department (including the military departments). DoD estimated that furloughs of 22 days would reduce DoD expenditures by $4 to $5 billion. *See* Tab 1, Hale Decl at ¶ 14; Tab 24, DoD Memorandum Subj: Total Force Management and Budgetary Uncertainty; Tab 25, Under Secretary of the Navy Memorandum Subj: Planning Guidance for Potential Civilian Furloughs.

The Impact of the March 21, 2013 Appropriations Act on the Furlough Decision

12. On March 21, 2013, Congress passed H.R. 933, the "Consolidated and Further Continuing Appropriations Act, 2013," (the Act), which, in part, provided FY 2013 full-year appropriations through September 30, 2013, for various Federal agencies, including DoD, and which modified some aspects of sequestration. Although it retained the overall sequestration spending cuts and their across-the-board nature, and did not provide sufficient funding to cover the Overseas Contingency Operations (OCO) shortfalls, it aligned funding closer to the FY 2013 budget request for DoD and provided limited transfer authority to the Department, which is an authority to move money from one account (*e.g.*, Procurement) to another (*e.g.*, O&M) in order to provide some flexibility during budget execution. In anticipation of the President's signing Public Law No. 113-6, on March 21, 2013, the Department delayed issuance of furlough notices to allow the Department to analyze carefully the impact of the Act on the Department's resources. After March 26, 2013, when President Obama signed H.R. 933 into law as Public Law No. 113-6, the Department no longer operated under the CR terms and conditions. This corrected approximately $11 billion of the shortfall in the military departments' base O&M accounts that resulted from operating under the CR at the FY 2012 funding levels and authorized a total of $7.5 billion in general and special transfer authority under sections 8005 and 9002, respectively. *See* Tab 1, Hale Decl at ¶ 15.

13. However, even after enactment of this appropriations legislation, the Department still faced an O&M shortfall in excess of $30 billion. In efforts to minimize the adverse effects of sequestration, and of the overall O&M shortfall, the Department pursued various courses of action. In addition to the short-term actions mentioned above, the Department imposed far-reaching cutbacks in training and maintenance. In April 2013, the Air Force began shutting down all flying at 12 combat-coded fighter and bomber squadrons and curtailed exercises, acts that seriously reduced military readiness. By April, the Army had already cancelled seven combat training center rotations – culminating training events that are necessary to ready units for deployment – and five brigade-level exercises. The DON also cut back steaming days and flying hours across the Navy and Marine Corps. The military services also cut back funding for weapons maintenance. In addition, the DON delayed deployment of the USS TRUMAN carrier strike group to the Persian Gulf, curtailed the sailing of the USNS COMFORT to the United States Southern command area of responsibility, and cancelled four other ship deployments. *See* Tab 1, Hale Decl at ¶ 16; Tab 15, Transcript DoD Town Hall on Sequestration in the Pentagon (USD (Comptroller) Robert Hale).

Subsequent Developments-The Furlough Decision

14. By late April, these various actions had reduced the estimated O&M shortfall to about $11 billion, mostly in DoD's wartime budget and mostly in the Army. Faced with a limited number of options to close this gap, and with uncertainty about the Department's ability to identify and gain Congressional acceptance of further budget cuts, on May 14, 2013, Secretary Hagel announced his intention to impose furloughs on civilian personnel rather than making even larger cuts in training and maintenance that would have further eroded military readiness. Rather than the 22 days estimated earlier, the Secretary reviewed budget projections and decided

that furloughs could be limited to a maximum of 11 days (88 hours). DoD estimated that furloughs of 11 days would save the Department about $2 billion, avoiding substantial further cuts in training and maintenance. *See* Tab 1, Hale Decl at ¶ 17.

The Impact of DoD Reprogramming Efforts

15. Thereafter, the Department undertook extensive efforts to identify budget changes that would close the remaining gap and, if possible, reduce cutbacks in training and impose fewer furlough days. In mid-May, the Department prepared and submitted two Omnibus reprogramming requests that sought permission from the congressional defense committees to move funds totaling $9.6 billion from lower priority budget lines to higher priority budget lines. When the congressional committees did not approve all of the Omnibus reprogramming requests, the Department submitted two additional reprogramming actions on July 22, 2013, that included about $1 billion of replacement sources for those sources that one or more of the committees had denied or deferred. These reprogramming actions moved furlough savings and funds for lower-priority activities to areas of highest budgetary need. The law limits the amount of funds that can be transferred annually under reprogramming, and these two reprogramming actions used almost all of DoD's transfer authority for FY 2013. Second, pursuant to existing authorities, the Department transferred responsibilities for some specific programs and missions from one DoD component to another and used other available means to reallocate the financial burden for supporting the warfighter. For example, on July 15, 2013, pursuant to section 165(c) of title 10 of the United States Code, the Deputy Secretary of Defense assigned to the Secretary of the Navy the responsibility for providing up to $450 million for support to U.S. Forces in Afghanistan that previously had been the responsibility of the Army under the Logistics Civil Augmentation Program (LOGCAP). DON ultimately provided $310 million for the support to

to U.S. Forces in Afghanistan using the Army's LOGCAP contract. On July 15, 2013, pursuant to section 2571(b) of title 10 of the United States Code, the Deputy Secretary also directed the Director for Defense Logistics Agency to reduce the standard prices for jet and ground fuel procured under the authority of section 2208 of title 10 of the United States Code and provided to DoD customers in connection with military operations conducted in Afghanistan, retroactive to March 1, 2013 (to coincide with the President's sequestration order). This effectively tapped funds available to the Defense Logistics Agency to support the warfighting costs that would otherwise have been borne by the military departments. *See* Tab 1, Hale Decl at ¶ 20; Tab 10, DoD Reprogramming Request.

Exceptions to the Furlough

16. As set forth in the Secretary's May 14, 2013, memorandum announcing the DoD-wide furlough of civilian employees, a decision was made to except several categories of employees, primarily for mission-specific reasons, including the following eight categories applicable to DON personnel: (a) employees deployed to a combat zone; (b), employees necessary to protect safety of life and property (but only to the extent necessary to protect life and property), including selected medical personnel; (c) all employees in Navy shipyards; (d) Foreign Military Sales (FMS) employees funded entirely from FMS administrative and case funds; (e) all employees excluded by application of law (*i.e.*, individuals appointed by the President, with Senate confirmation, who are not covered by the leave system in 5 U.S.C., chapter 63, or an equivalent formal leave system); (f) all employees funded by non-appropriated funds; (g) all Outside Contiguous United States foreign national employees; and (h) all employees who are not paid directly by accounts included in the DoD-Military (subfunction 051) budget (*e.g.*, certain positions at the Naval Postgraduate School.) *See* Tab 2, Declaration of

Robert T. Cali at ¶ 5;[3] Tab 12, May 14, 2013 SECDEF Memorandum; Tab 8, DON Memorandum Subj: Department of the Navy Supplemental Guidance on the Scheduling of Furloughs.

17. The exception for "employees necessary to protect safety of life and property" was intended to be limited in application. Specifically, Budget Submitting Offices (BSOs) were instructed to identify positions where 80% manning would create unacceptable risk. This focused on 24/7 shifts and emergency response requirements. *See* Tab 2, Cali Decl at ¶ 6; Tab 12, May 14, 2013 SECDEF Memorandum.

18. The exception for "employees in Navy shipyards" (which covered: (1) Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility (IMF), (2) Portsmouth Naval Shipyard, (3) Norfolk Naval Shipyard, (4) Puget Sound Naval Shipyard and IMF, and (5) the Naval Submarine Base Kings Bay) was included due to the particular difficulty in making up delays in maintenance work on nuclear vessels critical to mission success. In implementing this exception, DON leadership determined that it would apply only to those individuals who worked directly for the above facilities. (Thus, not all positions geographically located at a shipyard were necessarily covered by the exception.) Rather, this determination was made based on Unit ID Codes unique to each of the above facilities. *See* Tab 2, Cali Decl at ¶ 7.

19. With respect to civilian intelligence positions, a distinction was made based on the source of and authority over the funding. Thus, as noted in the Secretary's May 14, 2013, memorandum, the Secretary determined that civilian intelligence positions funded through Military Intelligence Program (MIP) funds (controlled by the Secretary) would be included in the furlough. The memorandum also noted that the Director of National Intelligence (DNI) (whose authority derives from the Intelligence Reform and Terrorism Prevention Act of 2004, and who

[3] Mr. Cali is the Principal Deputy Assistant Secretary of the Navy (Manpower & Reserve Affairs). *See id.* at ¶ 1.

has authority over National Intelligence Program (NIP) funds), would determine whether NIP-funded positions would be subject to furlough. Following issuance of the Secretary's May 14, 2013, memorandum, DNI James Clapper determined that civilian intelligence positions funded through NIP would not be furloughed. *See* Tab *2,* Cali Decl at ¶ 8; Tab 12, May 14, 2013 SECDEF Memorandum, and Tab 11, May 15, 2013, Office of the Director of National Intelligence (DNI), Furlough Decision Announcement.

Congressional Inquiry Regarding Non-Excepted Status of Working Capital Fund Employees

20. On June 21, 2013, a bipartisan group of 31 Members of Congress sent a letter to the Secretary of Defense expressing "concern about the determination that civilian workers at entities funded through Defense Working Capital funds are subject to furlough." Specifically, the members inquired as to the legality of furloughing civilians in these funds in light of section 129 of title 10 of the United States Code. *See* Tab 5, Letter from USD (Comptroller) Robert Hale to Congress re: Furlough of Capital Working Fund Employees & June 21 2013, Congressional Letter; Tab 1, Hale Decl at ¶ 18.

21. On July 5, 2013, acting based on the advice of the DoD Office of General Counsel, Under Secretary of Defense Hale, responded on behalf of Secretary Hagel. In his letter, he noted that the short-term furlough directed by DoD does not contradict any of the various prohibitions which are set forth in section 129. As he further explained, to the contrary,

> Section 129 directs the Department to manage our civilian workforce based on workload and on the "funds made available to the department for such fiscal year." The $37 billion reduction levied on the Department by sequestration is a major cause of these furloughs, and therefore our actions satisfy the requirements of section 129. Indeed, section 129 directs the Department to manage our civilian workforce based on workload and funding.
>
> As for your cost concerns, furloughs of all DoD civilians will save about $2 billion in FY 2013, including more than $500 million associated with reduced personnel costs in working capital fund activities. These working capital fund

> personnel savings provide us the flexibility to adjust maintenance funding downward to meet higher-priority needs. The Air Force, for example, currently expects to reduce funded orders in their working capital funds by about $700 million to meet higher-priority needs while the Army expects to reduce orders by $500 million.

See Tab 5, Letter from USD (Comptroller) Robert Hale to Congress re: Furlough of Working Capital Fund Employees; Tab 1, Hale Decl at ¶ 19.

Implementation of the Furlough

22. In accordance with the Secretary's May 14, 2013, memorandum, implementation of the furlough generally proceeded pursuant to the following schedule for DON employees. First, between May 28 and June 5, the DON issued a DoD-mandated standardized Notice of Proposed Furlough to employees who were subject to furlough and who, based on their employment status, were entitled to such notice. This notice informed employees of: (1) the basis for the furlough; (2) the procedures and conditions to be applied with respect to the furlough; (3) various rights associated with responding to the proposed furlough (*e.g.*, specifics as to the rights to respond orally or in writing, to review supporting material, and to be represented by counsel); and (4) the identity of the individual designated to hear oral replies, and if different, the identity of the deciding official (DO). *See* Tab 2, Cali Decl at ¶ 11.

23. Prior to issuance of the above notice, the DON had designated approximately 750 DOs across its commands to consider any replies received and issue a final decision. (Some commands, especially those with numerous employees, also designated a separate official to hear oral replies and provide a summary to the relevant DO.) The DON instructed its DOs that they had the authority to: (1) modify the furlough if they determined that an individual held a position subject to one of the previously established exceptions; (2) recommend modification of the furlough if they concluded that the position at issue should be subject to an exception not

previously recognized; and (3) adjust furlough schedules. *See* Tab 2, Cali Decl at ¶ 12; Tab 6, Department of the Navy Administrative Furlough Guidance for Proposing and Deciding Officials.

24. Second, following completion of the seven-day period designated for replying to the proposed furlough (which typically occurred between June 4 and June 12, 2013), the DON's designated DOs issued the Notices of Decision to Furlough, or, where applicable, Notices of Decision to Modify the Proposed Furlough between June 5 and July 5, 2013. Across the DON, in approximately 270 instances, DOs granted relief from the Proposed Furlough based on their conclusion that the position at issue was covered by an established exemption. *See* Tab 2, Cali Decl at ¶ 13.

25. The Notices of Decision to Furlough informed employees that the reasons for the proposed furlough remained valid, reiterated the procedures and conditions previously outlined including information regarding scheduling, and set forth applicable appeal rights. Third, following issuance of the notices, the furlough period began for DON employees on July 8, 2013. *See* Tab *2,* Cali Decl at ¶ 14.

The Conclusion of the Furlough

26. Since Congress approved most of the Department's large reprogramming requests that were submitted in mid-May and late-July, giving the Department flexibility to move funds across accounts, together with the facts that the military departments were aggressive in identifying ways to hold down costs, and that DoD was able to transfer some responsibilities for funding specific programs and missions using existing authorities, DoD was successful in shifting savings (including furlough savings) to meet its highest priority needs. As a result, the Department was able to close the remaining budgetary gap and abide by legally binding spending

caps. DoD was also able to accomplish two high-priority goals: a reduction in furlough days, and modest improvements in training and readiness. *See* Tab 1, Hale Decl at ¶ 21.

27. Specifically, on August 6, 2013, Secretary Hagel announced that, "due to a combination of Congressional approvals and Departmental budget management efforts, I am directing that furloughs for most DoD civilians be reduced from 11 days (88 hours) to six days (48 hours)." *See* Tab 3, August 6, 2013 SECDEF Memorandum; Tab 1, Hale Decl at ¶ 21, and Tab 2, Cali Decl at ¶ 15. By August 17, 2013, the vast majority of DON employees had achieved the required six days of furlough. *See* Tab 2, Cali Decl at ¶ 15; Tab 3, DoD SECDEF Memorandum Subj: Reducing Furlough Days.

28. Overall, the furloughs impacted approximately 650,000 (or about 85%) of the Department's approximately 767,000 civilian employees paid directly by DoD funds. *See* Tab 1, Hale Decl at ¶ 17. With respect to the DON, the furloughs impacted approximately 160,000 out of approximately 250,000 DON civilian employees. *See* Tab 2, Cali Decl at ¶ 16.

V. ARGUMENT: DOD'S DECISION TO FURLOUGH CIVILIAN EMPLOYEES WAS *BONA FIDE,* APPLIED IN A NON-DISPARATE MANNER AND IMPLEMENTED IN ACCORDANCE WITH DUE PROCESS REQUIREMENTS

The proper standard of review for an adverse action is whether the decision was taken for "such cause as will promote the efficiency of the service." *See* 5 U.S.C. § 7513(a). As the Board noted in *Chandler*, an agency is not required to show that its action *best* promoted the efficiency of the service. *See* 2013 M.S.P.B. 74, at ¶ 28 (emphasis in original). Rather, in the context of a furlough, an agency satisfies this standard, in general, "by showing that the furlough was *a* [rather than the only] reasonable management solution to the financial restrictions placed on it and that the agency applied its determination as to which employees to furlough in a 'fair and even manner.'" *See id. at* ¶8 (*quoting Clark v. Office of Pers. Mgmt.*, 24 M.S.P.R. 224, 224-25

(1984)). In *Chandler*, the Board further explained that, "fair and even manner" equated with "uniformly and consistently," and,

> does not mean that the agency is required to apply the furlough in such a way as to satisfy the Board's sense of equity. Rather, it means that the agency is required to treat similar employees similarly and to justify any deviations with legitimate management reasons.

Id. at ¶ 8.

The Board concludes that good cause exists when the management decision to furlough results from Congressional budget cuts. *See Dep't of Labor v. Avery*, 2013 M.S.P.B. 75, at ¶¶ 2, 13 (Sept. 18, 2013); *Clark, supra,* at 224-25. Moreover, "absent any showing of disparate treatment among similarly situated detailed employees," the Board will not second-guess an agency's "management determination respecting how to structure the furlough." *See Clark, supra, at* 225-26; *see also Chandler*, *supra*, at ¶ 36 (same); *Avery, supra, at* ¶ 10 (same). As demonstrated below, the DON has met its burden.

A. The Secretary's Decision to Furlough Civilian Employees was a Reasonable Response to Congressionally-Imposed Severe Fiscal Constraints

Without exception, the Board has upheld as *bona fide* the decision by federal agencies to furlough civilian employees in response to Congressionally-imposed fiscal constraints such as sequestration.[4] *See, e.g., Avery, supra, at* ¶¶ 2, 13 (finding agency had "sound business reasons" to furlough administrative law judges based on a "funding shortfall engendered by President Obama's March 1, 2013, Sequestration Order."); *NLRB v. Boyce*, 51 M.S.P.R. 295, 302 (1991) (concluding that the NLRB's proposed furlough action was "clearly reasonable" and "substantially justified," in light of potentially severe cuts due to a sequester order); *FDA v.*

[4] A *bona fide* or good-faith determination is one that is "real, actual, genuine, and not feigned." *See Perry v. Dep't of the Army*, 992 F.2d 1575, 1579 (Fed. Cir. 1993) (*quoting* Black's Law Dictionary 160 (5th ed. 1979)).

Davidson, 46 M.S.P.R. 223, 224-25 (1990) (upholding furlough triggered by a 31.9 percent sequester of funds); *Dep't of Educ. v. Cook*, 46 M.S.P.R. 162, 163 (1990) (finding "good cause exist[ed] for the proposed furlough because 'it [was] directly related to a management plight caused by financial restrictions.'"); *Clark*, 24 M.S.P.R. at 224-25 (upholding furlough resulting from a 16 percent budget cut imposed by Congress); *Hinckley v. OPM*, 24 M.S.P.R. 243, 244 (1984) (upholding furlough implemented due to 16 percent forced reduction in salaries and expenses).[5] Appellants offer no sound basis for deviating from such well-established precedent.

As in each of the above cases, it is clear that DoD faced serious financial constraints principally due to the severe budgetary cuts imposed by the BCA's sequestration provision. As Secretary Hagel noted in his May 14, 2013, memorandum announcing the furlough:

> Major budgetary shortfalls drove the basic furlough decision. On March 1, sequestration went into effect across the federal government. DoD's budget for FY2013 was reduced by $37 billion, including $20 billion in the operation and maintenance (O&M) accounts that pay many of our civilian workers. In addition, because our wartime budget is also subject to sequestration, we must utilize funds originally budgeted for other purposes in order to provide our troops at war with every resource they need. To compound our problems, when we estimated future wartime operating costs more than a year ago, we planned on fuel costs below what we are currently experiencing. Taken together, all these factors lead to a shortfall in our O&M accounts of more than $30 billion – a level that exceeds 15 percent of our budget request, with fewer than six months left in the fiscal year in which to accommodate this dramatic reduction in available resources.

See Tab 12, May 14, 2013, SECDEF Memorandum. In addition, the O&M fund initially could not be replenished from other sources within DoD due to restrictions imposed by a continuing resolution. At its essence, the furlough, which would result in a predictable, recurring amount of

[5] *Accord Cook v. Dep't of the Interior*, 74 M.S.P.R. 454, 458-59 (1997) (upholding RIF based on anticipated loss of funds, where uncontroverted facts at time of RIF decision reflected that Congressionally-approved appropriation was more than $20 million less than the President's budget request, and would have resulted in a significant reduction of activities.)

money for use by DoD, was a reasonable means of addressing the budgetary shortfall without diminishing military readiness to an unacceptable level.

Although these facts standing alone are sufficient to demonstrate the *bona fides* of a non-disciplinary, position directed furlough, several other factors also support such a finding, including evidence of an agency's willingness to alter the furlough decision based on changed budgetary circumstances and to engage in other cost-cutting measures. *See, e.g., NLRB v. Boyce*, 51 M.S.P.R. at 302 (agency withdrawal of complaint seeking permission to furlough within three days of Congress's passage of a new budget agreement demonstrated "that the budget situation was the sole motivating factor in the agency's initial furlough proposal"); *Hartman v. City of Providence,* 636 F.Supp. 1395, 1399-1400, 1406 (D.R.I. 1986) (agency's exploration of methods other than personnel cuts to effect savings (*e.g.*, reviewing its insurance program, scrutinizing purchasing procedures, and curtailing non-business use of department motor vehicles) supported finding that budget-cutting was *bona fide*.)

Similarly here, while unable to completely avoid a furlough, DoD was able to delay implementation, and reduce the total number of anticipated furlough days three times in response to changing budgetary circumstances. As Secretary Hagel noted in the May 14, 2013, memorandum announcing the initial furlough decision,

> Furloughs of up to 11 days represent about half of the 22 days that can legally be imposed in a year and also about half the number we had originally planned. This halving of previous furlough plans reflects vigorous efforts to meet our budgetary shortfalls through actions other than furloughs as well as Congressional passage of an appropriations bill in late March that reduced the shortfalls in our operating budget and expectations of Congressional action on our reprogramming request.

See Tab 12, May 14, 2013 SECDEF Memorandum. Subsequently, in his August 6, 2013, memorandum explaining the further reduction in the number of furlough days from 11 to six, Secretary Hagel wrote,

> In early May, we faced a residual shortfall in our operating budget of $11 billion. Furloughs of 11 days, which would have saved $2 billion, were one of the limited number of options we identified to close this gap. Since then, Congress has approved most of a large reprogramming request that we submitted in mid-May, giving us flexibility to move funds across accounts. The military services have been aggressive in identifying ways to hold down costs, and we have been successful in shifting savings (including furlough savings) to meet our highest priority needs.

See Tab 3, August 6, 2013 SECDEF Memorandum. The demonstrated link between such reductions in the number of furlough days and changing circumstances in the budgetary arena unequivocally support a finding that the decision to furlough was based on budgetary constraints.

Additionally, DoD took numerous other actions in an attempt to reduce costs including, for example, severe cutbacks in travel and training conferences; civilian hiring freezes; layoffs of more than 7,500 temporary and term employees; sharp cutbacks in facilities maintenance (by as much as 90% in the remainder of the year); cutbacks in base operations; reduction of the number of aircraft carriers, embarked air wings, and accompanying defensive and support ships deployed to the Persian Gulf; reductions in the scope of and period of performance of contracts; and delay of contracting actions until the next fiscal year. *See* Tab 1, Hale Decl at ¶¶ 12, 16. Simply put, the decision to furlough was not made in isolation, but was one of many significant cost-cutting measures taken in response to sequestration.

The DON anticipates that most challenges to the *bona fides* of the Secretary's furlough determination will involve allegations of "unfairness" and personal hardship. Such challenges, however, must fail because the legitimacy of a non-disciplinary, position-directed adverse action does not depend on its impact on the individual. If that were the standard, no furlough could withstand scrutiny since, by its very nature, a furlough detrimentally impacts each furloughed individual. Similarly, any challenges based on unsubstantiated allegations that the furlough was politically-driven or based on any other improper reason also must fail in light of the above

overwhelming evidence that the furlough was, in fact, *a* reasonable management solution to the financial restrictions imposed by sequestration. *See generally* Tabs 1-37.

B. The Determination as to How to Structure the Furlough Was Applied in a Non-Disparate Manner

1. The Board's Authority to Review Structural Decisions is Limited

Upon a finding that the furlough is *bona fide*, the sole issue left for Board review is whether determinations as to how to structure the furlough were applied in a "uniform and consistent" manner among similarly situated employees. *See Chandler*, *supra*, at ¶¶ 8, 36 ("There are many ways in which agency management could have structured the furlough, and it is not the Board's place to select from among them."); *Avery, supra, at* ¶ 10 ("The Board will not scrutinize an agency's decision to determine whether the agency has structured a furlough in a manner that second-guesses the agency's assessment of its mission requirements and priorities."); *Clark,* 24 M.S.P.R. at 225-26 ("[A]bsent any showing of disparate treatment" among similarly situated employees, the Board will not interfere with "management's determination respecting how to structure the furlough."); *FDA v. Davidson*, 46 M.S.P.R. at 226 (same); *accord Gandola v. Federal Trade Comm'n*, 773 F.2d 308, 311 (Fed. Cir. 1985) (The "decision on the composition and structure of the work force reflects the kind of managerial judgment that is the essence of agency discretion, and is not meet for judicial reevaluation.")[6]

[6] In upholding the furlough in *Clark*, the MSPB cited to *Griffin v. Dep't of Agric.*, 2 M.S.P.R. 168, 170-72 (1980), a case involving a RIF, for the proposition that the Board has no authority to second-guess management's determination on certain issues:

> once the determination has been made that the agency had a legitimate reason for invoking RIF regulations *the Board has no authority* to review the management considerations which underlie that agency determination by considering whether a particular position should be eliminated.

24 M.S.P.R. at 225 (emphasis added).

The logic of such deference is clear - neither the Board nor any individual appellant is in any position to substitute their judgment for that of the Agency about how to structure the furlough. In this case, the Secretary's decision was the result of a thoughtful deliberative process preceding the Secretary's decision:

> Before making a decision, I sought advice and inputs from senior leaders in the military departments and agencies as well as advice from my senior civilian and military staff. I asked them to keep in mind our fundamental criterion to minimize adverse mission effects and, subject to that criterion, to ensure reasonable consistency and fairness across the Department for any furlough that we impose.
>
> Based on all these inputs, I have decided to direct furloughs of up to 11 days for most of the Department's civilian personnel. . . . Furloughs will be imposed in every military department as well as almost every agency and in our working capital funds. . . [T]here will only be limited exceptions driven by law and by the need to minimize harm to mission execution.

See Tab 12, May 14, 2013, SECDEF Memorandum.

As set forth above, in structuring the furlough, the Secretary determined that: (1) it would be applied DoD-wide to include virtually all of the defense agencies, all of the military departments, and the WCFs; and (2) exceptions would be limited. In light of *Clark* and its progeny (including the Board's recent decisions in *Chandler* and *Avery*), the Secretary's determination as to how to structure the *bona fide* DoD furlough must be upheld as long as the Agency treated similar employees similarly and can justify any deviations with legitimate management reasons. *See Chandler*, *supra*, at ¶ 8.

2. The Secretary of Defense Applied the Furlough in a Non-Disparate Manner

The DON anticipates challenges to the Secretary's determination with respect to (1) the inclusion of the DON civilian workforce in light of preliminary statements by DON leadership that the DON was fiscally sound; (2) the inclusion of individuals holding positions paid from WCFs in light of the indirect impact of sequestration on such funds; and (3) the manner in which

exceptions were selected. However, as discussed below, such challenges must fail because they go to the issue of how to structure the furlough, which is not subject to second-guessing by appellants or the Board. Moreover, such determination was applied in a non-disparate manner.

a. Inclusion of the DON in the Furlough

Prior to the Secretary's furlough determination on May 14, 2013, Navy leadership advocated against any furlough for Navy civilian personnel based on the relatively sound fiscal situation within that particular component of DoD. However, those circumstances were rendered irrelevant by the Secretary's decision to include DON civilians in a DoD-wide furlough. Thus, any challenge on the basis of comments by DON leadership must fail because the Secretary had clear authority to structure the furlough as he saw fit, which in this case, included the DON. *See* 10 U.S.C. §§ 5011 and 113 (The Secretary of Defense has authority, direction, and control over the DoD; the DON is a component of the DoD).

Additionally, any claim of disparate treatment is patently and fatally flawed because in analyzing "disparate treatment" at this level, the relevant "similarly situated" entities are the other military departments and the decision to include *all* of the military departments regardless of any one department's particular financial standing, is *inherently* non-disparate.

Also, even though the Secretary has no legal obligation under Board precedent to explain the underlying rationale for his decision to include all military departments, it was, in fact, reasonable. It was the Secretary's view that, just as wars are fought by the services as a whole, no single DoD entity should bear the burden of the furlough alone. Rather, as noted above, the Secretary strived to "minimize adverse mission effects and, subject to that criterion, to ensure reasonable consistency and fairness across the Department for any furlough that we impose." *See* Tab 12, May 14, 2013, SECDEF Memorandum. DoD recognized that the desire for consistency across the military departments and other defense agencies would require some

cross-leveling of funds between departments that were more fiscally robust (such as the DON), in order to assist those services (particularly the Army), which was approximately 80% short of its O&M for the last seven months of FY13.[7] Absent such cross-funding, it was perceived that certain services would exceed the statutory maximum of 22 furlough days, which would have resulted in a permanent RIF for at least some civilians – an option that was more severe and less viable at the fiscal year's midpoint. *See* Tab 1, Hale Decl at ¶¶ 13-14.

b. Application of the Furlough to Civilian Employees of WCFs

Similarly, challenges to the structural determination to include civilian employees at entities funded through Defense WCFs, which are indirectly linked to appropriations impacted by sequestration, also must fail. The Board has explicitly recognized that, "even if the sequestration does not affect the funds used to pay for work that is to be performed," an agency can still institute a furlough action against such employees based on the agency's budgetary deficit, and the only relevant inquiry is whether such inclusion was applied in an even-handed manner to similarly situated groups of employees. *See FDA v. Davidson*, 46 M.S.P.R. at 226 (*citing Waksman v. Dep't of Commerce*, 37 M.S.P.R. 640 (1988) (agency could terminate employees in a RIF due to a funding shortage even though that shortage resulted from a decrease in funds other than those used to pay for work being performed by those employees.)) Here, the Secretary's decision to include all WCF employees (who, with respect to the DON, comprise

[7] This greater flexibility, in fact, came into play on July 15, 2013, when the Deputy Secretary of Defense assigned to the Secretary of the Navy the responsibility for providing up to $450 million for support to U.S. Forces in Afghanistan that previously had been the responsibility of the Army under LOGCAP. DON ultimately provided $310 million for the support to U.S. Forces in Afghanistan using the Army's LOGCAP contract. *See* Hale Decl at ¶ 20.

over 40% of the workforce) is inherently non-disparate in light of its across-the-board application.[8]

c. Appellants Fail to Demonstrate Disparate Treatment in Application of Exceptions to the Furlough

As noted in the Secretary's May 14, 2013, memorandum, few positions were categorically recognized as exempt. *See* Tab 12, May 14, 2013 SECEF Memorandum; Tab 2, Cali Decl. at ¶ 5. Although each categorical and service-specific exception underwent a thorough review process to ensure the reasonableness of excluding those positions from the furlough, as noted above, the validity of such structural determinations are not subject to Board review. *See, e.g., Chandler, supra*, at ¶ 8. Rather, the sole question is whether the exceptions were applied in a non-disparate manner to "similarly situated" employees. Specific challenges as to whether exceptions were disparately applied to any particular appellant will be addressed on an individualized basis in response to the consolidated appeals.

C. The Furlough Was Implemented in Accordance with Due Process Requirements

In addition to the above "efficiency of the service" merits review, the Board also reviews an agency's compliance with procedural due process in determining the legitimacy of an adverse action. *Depending on the nature of the adverse action*, procedural due process may require compliance with the Due Process Clause of the Fifth Amendment in addition to statutory/regulatory due process requirements set forth at 5 U.S.C. § 7513(b)(2) and 5 C.F.R. § 752.404(c)(1)-(2).[9]

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[8] As set forth in the Hale declaration, any challenge to inclusion of WCF employees based on an alleged statutory violation also is without merit.

[9] *See* U.S. Const. Amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.")

At their core both statutory/regulatory due process and constitutionally-protected due process share the common elements of notice, an explanation of the basis for the action, and an opportunity to be heard. However, the type of due process at issue is critical because an agency bears the burden of proving compliance with constitutionally-protected due process which, if breached, results in reversal of the underlying action regardless of the merits. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). In contrast, an appellant bears the burden of alleging, as an affirmative defense, an error in application of statutory/ regulatory due process requirements and reversal will occur only if the employee is able to "show harmful error in the application of the agency's procedures in arriving at such decision." *See* 5 U.S.C. § 7701(c)(2)(A).

Here, the DON's standardized approach in providing every employee covered by Chapter 75 with proper written notice, an explanation (including access to supporting documents) of the basis for the proposed furlough, and an opportunity to respond prior to issuance of the final decision, complied with all due process requirements. *See* Tab 2, Cali Decl at ¶¶ 11-14. Any assertion that the agency failed to follow the procedures in 5 U.S.C. § 7513 and 5 C.F.R., part 752 must fail because there has been no demonstration of "harmful error" with respect to any such non-compliance. Additionally, as discussed below, any contention to the contrary based on an assertion of constitutionally-protected due process must fail because there is no constitutionally-protected property interest in adverse actions involving a bona fide furlough.

1. *There is No Entitlement to Constitutionally-Protected Due Process in an Adverse Action Involving a Bona Fide Furlough*

    a. *The Bona Fide DoD-Wide Furlough Did Not Impact Any Constitutionally-Protected Property Interest*

As a general rule, if a Chapter 75 adverse action impacts a constitutionally-protected property interest, an agency must accord a covered employee some form of procedural due process under the Fifth Amendment. Thus, in addressing whether a due process violation has occurred, the Board *must first determine whether a constitutionally-protected property interest exists*. If such an interest exists, the Board will then, under the specific facts presented, address what process is due. *See Loudermill*, 470 U.S. at 538, 541. Here, the Board need not address what process is due, as a constitutional matter, because a *bona fide* furlough does not implicate a constitutionally-protected property interest.

Except for terminations subject to a "just cause" standard, the Supreme Court has not explicitly recognized a constitutionally-protected property interest with respect to public employment. *See id.* at 532, 547 (finding in that specific context a protected property interest that requires, with rare exception, minimal due process rights in the form of *prior* notice of the charges, an explanation of the agency's evidence, and a meaningful opportunity to respond.);[10] *see also Stephen v. Dep't of the Air Force*, 47 M.S.P.R. 672, 681 (1991) (same). The Supreme Court and the Board also have assumed, *where the defendant/agency did not challenge the existence of a property interest*, that an employee suspension subject to a just cause standard also infringes a constitutionally- protected property interest. *See Gilbert v. Homar*, 520 U.S. 924, 929 (1997); *McGriff v. Dep't of the Navy*, 118 M.S.P.R. 89, 101 (2012).

However, none of these cases support a finding of a constitutionally-protected property interest in the instant appeals because each of those cases involved a disciplinary person-directed

[10] "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state [or federal] law.'" *See Loudermill*, 470 U.S. at 538. With respect to public employment, the Supreme Court has recognized that such an interest exists only when state (or federal) laws, rules or understandings create a "legitimate claim of entitlement" to continued employment rather than a mere unilateral expectation of continued employment. *See Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 576 (1972); *see also Hill v. Borough of Kutztown*, 455 F.3d at 234.

adverse action. In contrast, a short-term *bona fide* furlough is a non-disciplinary position-directed adverse action with "only a temporary effect on an individual's employment status," *see Chandler, supra*, at ¶ 7, and neither the Supreme Court nor the Board has ever held that a public employee has a constitutionally-protected property interest within that context. Moreover, a substantial and long-standing line of federal court decisions have explicitly held that an employee adversely impacted due to *bona fide* reorganization or other cost-cutting measures such as a furlough has no entitlement to constitutionally-protected due process rights. *See, e.g.*, *Rodriguez-Sanchez v. Municipality of Santa Isabel*, 658 F.3d 125, 130 (1st Cir. 2011); *Misek v. City of Chicago*, 783 F.2d 98, 100-101 (7th Cir. 1986); *Whalen v. Mass. Trial Court*, 397 F.3d 19, 24 (1st Cir. 2005); *Godin v. Machiasport Sch. Dep't Bd. of Dir.*, 844 F. Supp.2d 163, 170 n.4 (D. Maine 2012); *Hartman v. City of Providence,* 636 F.Supp. at 1410 (citing numerous cases in various jurisdictions which have recognized that non-disciplinary position-directed adverse actions arising from legitimate budgetary needs do not implicate constitutionally-protected due process rights either because there is no constitutionally-protected property interest or such actions fall within a "reorganization exception" to constitutional protections that otherwise might be due).

As explained by the court in *Hartman, supra*, the distinction between the rights due in person-directed versus *bona fide* position-directed adverse actions "preserves to government the right flexibility to address systemic needs while preserving to the employee meaningful protection against job actions directed specifically against him or her." *See* 636 F. Supp. at 1410; *see also Graham v. Haner*, 432 F. Supp. 1083, 1089 (W.D. Va. 1976) ("It would be a most remarkable development in the law if a duly elected city governing body, acting on the advice of its chief administrator, could not effect [*bona fide*] changes in its city administrative structure

without running afoul of [constitutional] due process limitations."); *Kusza v. Maximonis*, 363 Pa. 479, 483, 70 A.2d 329, 331 (1950) (same).

In light of the above precedent, any asserted constitutionally-protected due process violation in the context of DoD's *bona fide* furlough must fail because there is no constitutionally-protected property interest on which to base such a claim. To paraphrase the *Graham* decision, *supra*, it would be a most remarkable development in the law if the Secretary, in compliance with legislation enacted by Congress and signed into law by the President, and acting on the advice of his most-senior budgetary officials, could not effect a short-term furlough of civilian employees in order to avert a negative impact on national defense priorities (including military forces actively engaged in war), without running afoul of constitutional due process limitations.

b. Alternatively, Even if There is a Constitutionally-Protected Property Interest, the Board's Decision in McGriff v. Department of the Navy Provides No Basis for Finding a Constitutionally-Protected Due Process Violation

Alternatively, even if the Board were to find a constitutionally-protected property interest with respect to a short-term furlough, there is no basis for finding a constitutionally-protected due process violation based on the Board's decision in *McGriff, supra,* as various appellants have alleged. In *McGriff,* the MSPB addressed what due process procedures are required when an agency indefinitely suspends an employee based upon the suspension of access to classified information, or pending its investigation regarding that access, where the access is a condition of employment. After *assuming* a constitutionally-protected property interest existed in not being suspended without just cause, the Board in *McGriff* balanced the following three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also Homar*, 520 U.S. at 931-32 (adopting above standard and noting that account also must be taken of "the length" and "finality of the deprivation.") After finding substantial private and governmental interests, the Board concluded with respect to the second factor, that if a deciding official *lacks the authority* to influence or alter the outcome of the indefinite suspension (*e.g.*, by reinstatement of the clearance or reassignment to a position not requiring access to classified information), then the indefinite suspension must be reversed because the absence of such authority constitutes a violation of a constitutionally protected due process right to a meaningful opportunity to respond. *See McGriff*, 118 M.S.P.R. at 103-104. [11]

Any attempt to bootstrap the holding in *McGriff* – by asserting that the designated deciding officials here also had no real authority to influence or alter the furlough decision – is fatally flawed (independent of the absence of a constitutionally-protected property interest) for the following reasons. First, any alleged property interest at stake in a furlough action is far less substantial than an indefinite suspension action whereas in both types of adverse actions the governmental interest is important. Second, the Board's central concern in the security clearance context (*i.e.*, an agency's seemingly unfettered authority to indefinitely suspend an employee based on an underlying suspension of access to classified material *not subject to review by the Board* or other third party) is entirely absent in the short-term furlough context.[12] Here, the

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[11] The United States Court of Appeals for the Federal Circuit recently cast doubt on the continued viability of the reasoning in *McGriff*. *See Gargiulo v. Dept. of Homeland Sec.*, __ Fed. 3d __, 2013 WL 4258098 (Fed. Cir. Aug. 16, 2013); *Salinas-Nix v. Dep't of the Army*, __ Fed. App.__, 2013 WL 3491426 (Fed. Cir. July 15, 2013).

[12] In *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that the Board has no authority to review the *merits* of the agency's initial decision to suspend an employee's access to classified material. *Id.* at 527-32.

Board has authority to review whether the furlough was *bona fide* and whether the Secretary's determination as to how to structure the furlough was applied non-disparately. Thus, in determining what process is due, *McGriff* is simply inapplicable because different interests are at stake. *See Gilbert v. Homar*, 520 U.S. at 930 ("It is by now well established that 'due process is flexible and calls for such procedural protections as the particular situation demands,'") (*quoting Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In addition, even if the Board were to find that the same level of due process was due in both the security and short-term furlough contexts, the reply opportunity here was not an "empty formality." Rather, the Agency's designated deciding officials had sufficient authority within the parameters set by the Secretary to satisfy an employee's constitutionally-protected due process rights. Specifically, the deciding officials had the authority to reverse the proposed action for any individual mistakenly excluded from an established exception, as well as to recommend reversal in the event a unique circumstance supported a new exception for the particular position at issue. DON deciding officials, in fact, exercised that authority to reverse the furlough decision in more than 270 instances.[13] See Tab 2, Cali Decl at ¶ 13. That level of review is more than sufficient to satisfy the purpose of a pre-decision hearing recognized by the Supreme Court in *Loudermill*.[14]

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[13] *Accord Anderson v. Dep't of Transp.*, 15 M.S.P.R. 157, (1983) (Appellants removed from air traffic controller positions due to participation in illegal nationwide strike alleged that impact of Presidential statements and agency-issued instructions subjected deciding officials to a "command influence" that rendered statutory/regulatory oral reply requirement meaningless and futile; in rejecting argument, Board held, "The law does not require that the deciding official operate without guidelines or standards, but only that he hear the employee's explanation, assess its credibility, and determine whether the charges should be sustained;" and there was no evidence that official statements or guidance either improperly affected the agency reply process or in any way adversely affected the appellants' rights, as demonstrated, in part, by the fact that some air traffic controllers were reinstated as a result of their reply presentations.)

[14] Specifically, as the Court noted, a pre-decisional hearing is not intended to necessarily resolve the propriety of any adverse action; rather, it is "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *See Loudermill*, 470 U.S. at 533. In the furlough context, since the *bona fides* and non-disparate

2. *Appellants Must Demonstrate Harmful Error in Any Alleged Non-Compliance with Statutory/Regulatory Due Process Requirements*

If an error occurs in application of a statutory/regulatory due process requirement, then reversal of the agency's decision will occur only if the employee has pled and is able to "show harmful error in the application of the agency's procedures in arriving at such decision."[15] *See* 5 U.S.C. § 7701(c)(2)(A).[16] The DON will address in its individual pleadings any allegations regarding a statutory/regulatory due process violation.

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implementation are open to Board review, a DO's examination of the established exceptions and authority to recommend a new exception satisfies the purpose behind any constitutionally-required, pre-furlough hearing.

[15] Pursuant to 5 U.S.C. § 7513(b)(2), an employee against whom an adverse action is proposed is entitled to "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." *See* 5 U.S.C. § 7513(b)(2). The implementing regulations similarly provide that:

> (1) An employee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.
>
> (2) The agency will designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7513(c), the agency may, in its regulations, provide a hearing in place of or in addition to the opportunity for written and oral answer.

5 C.F.R. § 752.404(c)(1)-(2).

[16] In *Cornelius v. Nutt*, 472 U.S. 648 (1985), the Supreme Court adopted the following definition of "harmful error" promulgated by the Merit Systems Protection Board (hereafter "MSPB" or "the Board") in 5 C.F.R. § 1201.56(c)(3):

> "Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, *i.e.*, caused substantial harm or prejudice to his/her rights."

472 U.S. at 657-58 (*quoting* 5 C.F.R. § 1201.56(c)(3) (1985)). In *Anderson v. Dep't of Transp.*, 15 M.S.P.R. 157, 172 (1983), the MSPB noted that an appellant has the burden of proving the affirmative defense of harmful error by a preponderance of the evidence.

VI. CONCLUSION

For the reasons set forth above, the DON respectfully requests that the Board find that: (1) DoD's decision to furlough civilian employees was *bona fide*; (2) the decision was applied in a non-disparate manner; and (3) the DON implemented the furlough in accordance with all due process requirements.

Respectfully submitted,

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