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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

SCOTT A. CURRY,
Appellant,

DOCKET NUMBER
DE-0752-05-0294-I-1

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: December 14, 2005

Maxwell G. Battle, Jr., Esquire, Kalispell, Montana, for the appellant.

Jennifer T. Newbold, Esquire, Missoula, Montana, for the agency.

BEFORE

James A. Kasic
Administrative Judge

INITIAL DECISION

The appellant timely appealed from the agency action that removed him from his Civil Engineer position for the alleged misconduct of failing to cooperate in an official investigation. *See* 5 U.S.C. §§ 7511(a)(1)(A), 7512, 7513(d), and 7701(a) (the Board has jurisdiction over appeals from removal actions that involve non-probationary employees in the competitive service). At the parties' request, the hearing in this case was held by telephone on October 19, 2005, and the record closed with my receipt of the parties' rebuttal closing briefs on November 14, 2005. For the reasons discussed below, I AFFIRM the agency's removal action.

Background

As a Civil Engineer, the appellant worked in the Kootenai National Forest in Montana. The Forest Supervisor for the Kootenai National Forest was Manuel R. Castaneda and the appellant's direct supervisor was Forest Engineer Frank Votapka. Beginning in late July 2003 and through March 2004, one of the appellant's work assignments was to act as the Contract Officer Representative (COR) monitoring the work of a private company, Synergy, that was awarded a contract in the amount of \$766,792 to remodel and build an addition to offices at the Cabinet Ranger Station. As the COR on the Cabinet Ranger project, the appellant reported not only to Votapka but also to Jeannie Robertson, who was the Contract Officer (CO) for the project. Here, Castaneda explained that the CO had overall responsibility for the project and the COR had more day-to-day responsibilities for site inspections and interaction with the contractor. *See* Hearing Transcript (HT) at 7-8.

In late 2003 and early 2004, problems with Synergy's work on the project developed and increased. Ultimately, these problems, which included Synergy's inability to successfully resolve mold-related issues, led the agency to terminate Synergy's contract in mid-March 2004. Next, in mid-April 2004, the agency received a Congressional inquiry from U.S. Senator Conrad Burns to whom Synergy's president had complained. Synergy's allegations included the assertions that the appellant had: 1) violated various contract regulations through bad-faith contract administration; 2) engaged in improper business practices and personal conflicts of interest; 3) abused his power as the project's COR; and 4) otherwise failed to properly perform his COR duties. *See* Appeal File, Tab 15, Subtab 4mm.

In May 2004, the agency employed Gene Rouleau and Associates to conduct an administrative investigation into Synergy's allegations of employee misconduct. *See* Appeal File, Tab 15, Subtab 4ii. Subsequently, at a mid-May interview conducted by a Rouleau and Associates employee, the appellant

invoked his Fifth Amendment right to silence and the interview was terminated. *See* Appeal File, Tab 14, Subtab 4m.¹

Also, in May 2004, the agency's Office of Inspector General (OIG) received a complaint from Synergy's president that was essentially similar to the complaints Synergy made to Senator Burns. In response to the complaint, OIG directed the agency to investigate and prepare a report that included any actions necessary as a result of substantiated allegations. *See* Appeal File, Tab 15, Subtab 4kk. Accordingly, the OIG referral was consolidated with the investigation already undertaken in light of Synergy's complaint to Senator Burns.

In any event, in mid-August 2004, the appellant was directed to appear for another interview on September 8, 2004, so that a statement from him could be obtained. Attached to this direction was a blank form titled "Kalkines Warning." It stated:

For a compelled interview with existing or potential administrative consequences, you are informed of the following:

You are going to be asked a number of specific questions regarding the performance of your official duties.

You have a duty to reply to these questions, and agency disciplinary action resulting in your discharge may be initiated as a result of your answers. The information you provide and evidence discovered may be used in a disciplinary proceeding.

However, neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceeding. If you knowingly and willfully provide false information, you may be criminally prosecuted for that action.

You are subject to dismissal if you refuse to answer or fail to respond truthfully to any questions.

Do you understand the information listed above?

¹ For clarity, I note that this interview was rescheduled but never held. *See* Appeal File, Tab 15, Subtabs 4gg and 4ll.

See Appeal File, Tab 15, Subtab 4kk.

Next, according to the agency and prior to the September 8th meeting, the appellant's counsel requested that Castanedas or the U.S. Attorney sign the Kalkines Warning. When the appellant and his counsel reported to the interview and were presented with the warning as signed by Castanedas, his counsel indicated that the appellant would be unable to participate until the U.S. Attorney afforded the appellant a letter granting "use immunity." Thus, Hathaway was unable to obtain a statement from the appellant. *See* Appeal File, Tab 14, Subtab 4m. As a result, Castaneda issued the appellant a September 8, 2004 Letter of Reprimand. Specifically, as to the appellant's request for the U.S. Attorney to grant him use immunity, the reprimand stated:

You have been clearly put on notice that this is not a criminal investigation and that the information you provide in your statement cannot be used against you in a criminal proceeding pertaining to this matter. Because this is not a criminal matter, it is not necessary to involve the U.S. Attorney's office. In addition, you have been informed that if during the course of the interview the investigator determines there is a possibility of some criminal activity she will cease the interview and law enforcement will be contacted.

See Appeal File, Tab 15, Subtab 4ee. In response to the reprimand, the appellant's counsel again objected and claimed that the claimed administrative interview was "in fact investigating allegations of conduct that carry criminal penalties under Federal Law." *See* Appeal File, Tab 15, Subtab 4dd.

Next, on September 22, 2004, the appellant's wife contacted the Lincoln County Sheriff's Department to report that she had heard a disturbance at their residence and that the windshield on her pickup truck had been shot out. Both the sheriff's department and agency law-enforcement officials, including Special Agent Kim West, investigated the shooting incident, the latter because the appellant listed the defaulted Synergy contract as one possible reason for the shooting. Neither the agency's nor sheriff's investigations identified the

assailants, and the agency closed its investigation into the shooting on December 16, 2004. *See* Appellant's Exhibit S, at Appeal File, Tab 23.

Next, in late November 2004, Synergy filed a claim in the United States Court of Federal Claims seeking damages for the defaulted contract. Again, since Synergy claimed the agency interfered with its work performance and acted in bad faith in administering the contract, the appellant was directly implicated. *See* Appeal File, Tab 14, Subtab 4y.

It is unclear whether Synergy's filing in Federal court increased the agency's desire to interview the appellant. Nonetheless, in early December, Special Agent West arranged for Kris A. McLean, Assistant U.S. Attorney for the District of Montana, to issue a letter the appellant's counsel which stated:

Pursuant to the request of Forest Service Special Agent Kimberly West, I am providing use immunity for your client Mr. Curry. Please be advised that with respect to his interview with the Forest Service that the United States will not prosecute him based on information which may be revealed as a result of his interview.

He should, however, be cautioned that this grant of immunity does not extend to false statements or crimes of violence. He should be cautioned that if he does not tell the truth, anything that he says or reveals can be used against him.

If you have any further questions please contact me.

See Appeal File, Tab 14, Subtab 4w.

Further, in a December 9, 2004 letter to the appellant's counsel (who had previously requested that interview-related matters be directed to him), Castaneda directed the appellant to report to a 1:00 p.m. interview on December 16, 2004, at the Hanging Garden Room of the West Coast Hotel in Kalispell, Montana (the city where the appellant's counsel was located). *See* Appeal File, Tab 14, Subtab 4t. On December 16, 2004, however, the appellant's counsel declined the interview, indicating in a letter to Assistant U.S. Attorney Kris McLean:

As you know, I represent Scott A. Curry. I and Mr. Curry appreciate your letter dated December 2, 2004. However, based upon information received yesterday and today combined with prior

actions [and inactions] of Carol Kittson and Kim West, Mr. Curry declined to be interviewed by Ms. Kittson or Kim West today. The reasons include, but are not necessarily limited to the following:

- 1) Ms. West was allegedly assigned to investigate a shooting involving a silenced weapon at Mr. Curry's home;
- 2) It is reported that she did not interview key witnesses at the time of the shooting, did not obtain possession of the projectile recovered for testing, and failed to advise Mr. Curry of the status of the investigation as she said she would do; and
- 3) Yesterday, Jane Bain, HR Officer for the Kootenai National Forest advised that the shooting had been determined to be unrelated to the duties of Mr. Curry and was now a County matter; and
- 4) A rumor surfaced in the Kootenai National Forest Supervisor's Office that Mr. Curry was a target of the investigation, but Ms. West failed to respond to a direct request for that information or to advise which Assist. U.S. Attorney was handling the investigation; and
- 5) Since the foregoing rumor was circulated, the limited grant of use immunity you were kind enough to extend is insufficient, especially considering the unclear nature of Ms. West's involvement and what we have learned about an upcoming Civil Rights trial involving her in January, 2005; and
- 6) Mr. Curry was instructed to appear at a "Private Hotel Room" in Kalispell, MT to be interviewed; and
- 7) Once the shooting occurred it seems that the entire investigation should have been turned over to the Office of the Inspector General for the United States Department of Agriculture.

See Appeal File, Tab 14, Subtab 4s-7.

As the result of his failure to appear for questioning on December 16th, the agency placed the appellant on administrative leave. *See Appeal File, Tab 14, Subtab 4q.* Next, in mid-January 2005, Castaneda proposed the appellant's removal for failing to cooperate in an official investigation, despite receiving a grant of immunity from the U.S. Attorney's Office. *See Appeal File, Tab 14, Subtab 4l.* Then, after affording the appellant the opportunity for an oral and a written response, Castaneda sustained the failure-to-cooperate charge and decided

to remove the appellant. *See* Appeal File, Tab 13, Subtab 4c. The instant appeal timely followed.²

Applicable law

The agency has the burden of proving its misconduct charge by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(1)(ii). 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 true than untrue.” *See* 5 C.F.R. § 1201.56(c)(2). Further, if an agency proves its charge, it must show that discipline in some form is warranted to promote the efficiency of the service and that the penalty imposed (here, the removal action) is within the tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).³

Further, as applicable to the charge of failing to cooperate in an investigation, the United States Court of Appeals for the Federal Circuit (the Federal Circuit) stated in *Modrowski v. Department of Veterans Affairs*, 252 F.3d 1344, 1351 (Fed. Cir. 2001):

The Fifth Amendment privilege against self-incrimination may be asserted in an administrative investigation to protect against any disclosure an individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) In addition, the threat of removal from one’s position constitutes coercion, which renders any

² For clarity, I note that the appellant challenged his placement on administrative leave, the proposal to remove him, and the agency’s conduct in holding the oral response under the grievance/arbitration provisions of the applicable collective bargaining agreement. *See* Appeal File, Tab 13, Subtabs 4a and 4g. The filing of those grievances does not preclude the Board’s jurisdiction over this appeal, however, since he has not elected to challenge the removal action under those grievance/arbitration provisions. *See* 5 U.S.C. § 7121(e).

³ At the October 11, 2005 prehearing conference, the appellant’s counsel confirmed that the appellant was not raising any affirmative defenses. *See* Appeal File, Tab 30.

statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v. New Jersey*, 385 U.S. 493, 497, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (“The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.”). Nevertheless, because an employee receives “use immunity” through the so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v. Broderick*, 392 U.S. 273, 276, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). Invocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee’s duties is adequately accomplished when that employee is duly advised of his options to answer under any immunity actually granted or remain silent and face dismissal. *Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 948 (Fed. Cir. 1983).

Discussion

In the instant case, there is no dispute that the appellant failed to attend the December 16th interview as directed by Castaneda. Further, I find that the agency had a legitimate management interest in getting clarifying information from the appellant through the interview process. Here, it is undisputed that the appellant in his role as COR had extensive involvement in the failed Synergy contract. Additionally, the agency had received a Congressional inquiry, a hotline complaint, and a Federal lawsuit concerning Synergy. Finally, the extent of the information that the appellant gave to agency attorney Mark Lodine prior to the interview requests was never developed. Thus, I cannot find that the appellant was excused from having to answer further questions to aid the agency in the responding to the Congressional inquiry and hotline complaint and defending against the Federal lawsuit.

Having found that the agency had a valid reason to schedule the December 16th interview, the question becomes whether the appellant was justified in invoking his right to silence under the Fifth Amendment and failing to attend. Here, the appellant argues alternatively that: 1) applicable agency regulations/rules excused him from having to answer questions and/or provide a

statement because of the criminal nature of the shooting incident and the allegations made by Synergy; and 2) even if he was required to answer questions, such a requirement was premised upon his receipt of adequate immunity, which he alleges he never received. Contrary to the appellant's contentions, I find that the agency has shown that it properly required the appellant to answer questions after affording him adequate use immunity.

As to the appellant's first contention, I find that the agency rules and regulations that he cites merely restate the rules discussed above in the applicable law section of this decision; namely that: 1) an appellant cannot be disciplined from invoking his Fifth Amendment right to silence in a criminal proceeding; 2) an appellant can assert his Fifth Amendment right to silence in an administrative investigation to protect against any disclosure that he reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used; but 3) where an appellant receives use immunity, he may be removed for failure to cooperate with an agency investigation. *See, e.g.,* Appellant's Exhibit A, at Appeal File, Tab 23. Moreover, Castaneda clearly advised the appellant of these same requirements in: 1) his September 8, 2004 letter of reprimand to the appellant for failing to attend the scheduled September 8th meeting; and 2) his December 9, 2004, letter that set the December 16th interview. *See* Appeal File, Tabs 14 and 15, Subtabs 4t and 4ee.

Next, I reject the appellant's contention that the December 16th meeting was a criminal interview, thus enabling him to invoke his Fifth Amendment right to silence, irrespective of any grant of immunity. To the contrary, the December 16th interview was clearly administrative as to questioning about the Synergy contract as it was being conducted by the agency, not the U.S. Attorney (who would bring criminal charges), and the pending matters of concern to the agency were the Congressional inquiry, the hotline complaint, and Synergy's civil suit. Further, given the appellant's failure to appear, I find that I am not faced with the potentially harder problem of whether he could have validly invoked his Fifth

Amendment right to silence with respect to a given question or line of questioning because that questioning involved certain of Synergy's claims of wrongdoing that could be criminal in nature.

Similarly, I reject the appellant's claim that the December 16th meeting was a criminal interview (or properly viewed by him as such) because Special Agent West was in attendance. West and other agency law enforcement officials had only investigated the shooting incident because of the appellant's concern that Synergy officials might be involved because of the failed contract. Therefore, noting that he had requested immunity before relating the details as to why he suspected Synergy involvement in the shooting incident,⁴ he should have known that she was only attending the December 16th meeting to hear any information he offered as to such involvement now that the requested immunity had been granted.

Having found that the agency has shown that the appellant was not excused from having to answer questions because of the criminal nature of shooting incident and the allegations made by Synergy, the question becomes whether the use-immunity letter issued by Assistant U.S. Attorney McLean was sufficient to compel the appellant to attend the December 16th interview. Here, the appellant contends that it was inadequate for two reasons. First, he asserts that the immunity letter was not specific as to date or subject matter. I find, however, that since it was included with Castaneda's December 9th letter that set the December 16th interview (which was the only interview that the agency had scheduled), it is clear that the grant of immunity applied to the December 16th interview. Similarly, I find it clear that the appellant knew that the subject matter of the December 16th interview would be the failed Synergy contract. This is so because: 1) he knew that for seven months (*i.e.*, since May 2004), the agency had been requesting that he answer questions related to the failed Synergy contract; 2)

⁴ See Appellant's Exhibit S, at Appeal File, Tab 23.

in the December 9th letter directing him to attend the December 16th interview, Castaneda told the appellant to bring any documents related to the Synergy contract that were not already in the official contract file; and 3) in declining to have the appellant appear, his attorney referenced an understanding that questions about the failed contract would be asked. *See* Appeal File, Tabs 14 and 15, Subtabs 4m, 4t, 4ee, 4kk, and 4s (at p. 4).

Secondly, the appellant asserts that the grant of use immunity was insufficient because it excepted (*i.e.*, was not applicable in the case of) false statement or acts of violence. I find, however, that an exception to immunity for any false statements made by the appellant does not render the grant of immunity insufficient. Rather, as the agency notes: 1) the U.S. Attorney grants use immunity under the statutory authority codified at 18 U.S.C. § 6002; and 2) section 6002 contains the false-statement exception. Thus, the appellant received the grant of immunity that the U.S. Attorney was authorized to give.

Similarly, I find that the exception for acts of violence did not render the immunity grant insufficient. My review of the record does not reveal that the appellant had ever been accused of engaging in any act of violence. Rather, in light of the shooting incident, he and his family were the victims of an act of violence. Moreover, since he did not attend the December 16th interview, I am not faced with the more difficult question of whether the agency could have disciplined him for failing to answer a specific question or series of questions related to a matter that he felt involved an allegation that he had committed an act of violence.

Lastly, although not highlighted in the appellant's closing argument, he objects to having to attend the December 16th interview because it was to be held in a meeting room at a private hotel, as opposed to a Federal facility. The reason for this location was not explored at the hearing, but (as noted above) Kalispell appears to have been selected because it was where the appellant's counsel was located. Moreover, there is no evidence showing that the location for the

interview was unsafe or improper. Accordingly, I find that the fact that the interview was to take place at a hotel conference room does not excuse the appellant's non-attendance.

Thus, in sum, I find that the agency has presented preponderant proof supporting its charge that the appellant failed to cooperate in an official investigation, despite receiving a grant of immunity.

The Federal Circuit has held that an employee may be disciplined for refusing to cooperate in an internal agency investigation. *Weston v. U.S. Department of Housing & Urban Development*, 724 F.2d 943, 949 (Fed. Cir. 1983). Accordingly, it is clear that the agency was warranted in imposing discipline for the appellant's failure to cooperate in the present case. The remaining issue is whether the removal penalty imposed by the agency was within the tolerable limits of reasonable penalties for the sustained misconduct.

In assessing the appropriateness of the removal penalty, I (like Castaneda) find that the most important factor is the severity of the misconduct. *See Luciano v. Department of the Treasury*, 88 M.S.P.R. 335, 343 (2001) (in assessing whether the agency-imposed penalty is within the tolerable limits of reasonableness, the Board considers first and foremost the nature and seriousness of the misconduct and its relation to the appellant's duties, position, and responsibilities), *aff'd*, 30 Fed. Appx. 973 (Fed. Cir. 2002). Simply put, the appellant's failure to cooperate was serious because: 1) he knew that the agency had been seeking information from him for over seven months (*i.e.*, since May 2004); 2) the information sought was related to his oversight duties involving a failed \$750,000 construction project, which by December 2004 was the subject of Federal litigation; 3) the agency had provided him with adequate immunity; and 4) he failed to even appear for the December 16th interview, thus, his lack of cooperation was total.

Balanced against the seriousness of the misconduct, I recognize that the appellant had over 15 years of prior exemplary service. Further, I note the

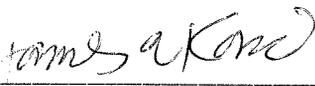
appellant's objection to Castaneda considering this a second offense. This objection is based on the assertion that the *Kalkines* notice that Castenda provided before the appellant failed to attend the scheduled September meeting was inadequate for various reasons. *See* Appeal File, Tab 32; *see also Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981) (the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline). While I find no basis to set the September reprimand aside as clearly erroneous, I note that even if I did not consider it as prior/similar misconduct, the September incident would still be important as it vested the appellant with notice that the agency expected him to answer questions when given appropriate immunity. Thus, understanding the agency's expectation, the appellant acted intentionally and with full knowledge that he could be removed when he failed to attend the December 16th interview.

In sum, after considering the aggravating and mitigating factors, I find that the agency appropriately exercised its disciplinary discretion in deciding to remove the appellant for the sustained charge of failing to cooperate in an official investigation, despite receiving appropriate immunity. *See Douglas*, 5 M.S.P.R. at 306 (the Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:



James A. Kasic
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 18, 2006**, 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 this initial decision is received by you 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. 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. 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.

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 Scott A. Curry
 10 Whitetail Way
 Troy, MT 59935

Appellant Representative

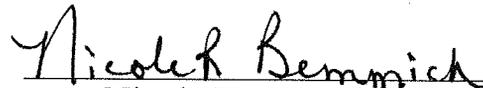
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December 14, 2005

(Date)



Nicole R. Remmich
Paralegal Specialist