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In the Matter of the Debt Collection Act Petition

SHARON M. HELMAN, Petitioner, v. U.S. DEPARTMENT OF VETERANS AFFAIRS, Respondent.	September 16, 2015 P.S. Docket No. VA 14-397

APPEARANCE FOR PETITIONER: Julia H. Perkins, Esq.
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FINAL DECISION UNDER THE DEBT COLLECTION ACT OF 1982

The Department of Veterans Affairs (VA) seeks to collect a debt from Sharon Helman.[1] The VA alleges that it released Ms. Helman's performance rating prematurely through an administrative error, resulting in the erroneous payment of a performance

[1] Jurisdiction for the Petition is based on a Memorandum of Understanding between the United States Postal Service (USPS) and the Department of Veterans Affairs. The memorandum is on file with the USPS Judicial Officer, 2101 Wilson Blvd., Suite 600, Arlington, Virginia 22201. It provides for the use of administrative judges and administrative law judges to decide cases arising under the Debt Collection Act of 1982, 5 U.S.C. § 5514. Procedural matters in this forum are governed by 39 C.F.R. Part 961. To the extent applicable, regulations issued by the VA under the Debt Collection Act of 1982, 38 C.F.R. §§ 1.980 – 1.995, are cited herein.

award and salary increase. The VA bears the burden to prove that it made an administrative error. Here, it has not met that burden, and thus it may not collect the assessed debt by administrative offset.

FINDINGS OF FACT

1. Ms. Helman became a member of the Senior Executive Service in 2007. In February 2012, she transferred from a VA facility in Illinois to become the Director of the Phoenix VA Health Care System. She remained in that position until she was placed on administrative leave in May 2014. She was eventually removed from federal service in November 2014. (Pet. Exh. S at 3–5, 7, 11).

2. Gina Farrisee has worked at the VA since September 2013 and became the Assistant Secretary for Human Resources and Administration in December 2013. Among her responsibilities, Ms. Farrisee oversees the Corporate Senior Executive Management Office (CSEMO). CSEMO oversees the performance rating system for the VA employees who are members of the Senior Executive Service, although the VA Secretary has ultimate authority to assign the agency's final performance rating. (Tr. 1 at 15–19, 21, 117).

Ms. Helman's Fiscal Year 2013 Performance Review

3. The VA had a general policy to defer a senior executive's performance rating if the employee was under investigation (Tr. 1 at 25, 33–34, 186). During her tenure with the VA, Ms. Farrisee discussed this policy with the Secretary. She did not, however, specifically discuss this policy with the Secretary in relation to the fiscal year 2013 performance ratings. (Tr. 1 at 203–04).

4. On September 6, 2013, the VA Secretary's Chief of Staff issued a policy memorandum regarding senior executive performance ratings for fiscal year 2013. In part, the memorandum stated that "[u]nder unusual circumstances (e.g., an executive may be involved in an ongoing investigation), the Secretary **may** defer an executive's rating." (Resp. Exh. D at 4)(emphasis added).

5. The Secretary thus had the discretion either to defer a rating or to issue a rating for a senior executive who was under investigation. If, however, in exercising his discretion, the Secretary decided to issue a final rating, the VA did not have the authority to later rescind that rating. (Pet. Exh. J at 9[2]; Resp. Exh. A at 1[3]).

6. The VA's internal schedule for issuing performance ratings for fiscal year 2013 included several levels of review, culminating in the Secretary's final rating by mid-February 2014. The VA then intended to notify the senior executives of their ratings and process any corresponding performance awards and raises by the end of February 2014.[4] (Resp. Exh. D at 9; Tr. 1 at 19–21).

7. In accordance with its internal schedule, the VA began reviewing Ms. Helman's performance. In October 2013, Ms. Helman's supervisor gave her an Initial Summary Rating of Level 4 (Exceeds Fully Successful). In January 2014, the VA's Performance Review Board also recommended that Ms. Helman receive a Level 4 rating. (Pet. Exh. N).

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[2] Testimony provided by Ms. Farrisee to Congress in June 2014.

[3] Letter from Deputy Secretary Sloan Gibson to Congressman Jeff Miller in August 2014.

[4] Depending on their rating, senior executives were eligible to receive both a one-time cash performance award and a permanent salary raise (Tr. 1 at 58–59).

8. In January or February 2014, then-VA Secretary Eric Shinseki met with his Chief of Staff and Ms. Farrisee to assign the final performance ratings for each senior executive for fiscal year 2013. The Secretary had a hard copy of each proposed performance rating available for his review, if necessary. (Tr. 1 at 174, 177–80).

9. At the meeting, the Secretary also had a list of thirteen senior executives, including Ms. Helman, who were under investigation by the Office of Inspector General, Equal Employment Opportunity Office, or Office of the General Counsel. The list is titled "FY 2013 SES Performance Rating / Awards Name Checks Open Cases." The list is marked as "Attachment One," but it does not identify its author or the employee who compiled the information on it. (Resp. Exh. D at 8; Tr. 1 at 22, 143–44, 177–81, 212–13).[5]

10. As he assigned the final ratings, the Secretary used a separate document listing the name and recommended rating for each senior executive. On that document, the Secretary handwrote his final performance rating for each senior executive by either: (1) confirming the recommended rating by placing a checkmark next to it, (2) changing the recommended rating by crossing it out and writing in his final rating, or (3) noting his decision to defer the rating (Tr. 1 at 174–80). The Secretary's annotations on this list thus showed his intended final performance ratings for each employee, including Ms. Helman (Tr. 1 at 210). The VA did not produce the annotated list used by the

[5] All the names on the list, except for Ms. Helman's, have been redacted in the copy of the list included in the record.

Secretary to record his final performance ratings. At the hearing, Ms. Farrisee could not say whether the VA still has the annotated list (Tr. 1 at 181).[6]

11. After the Secretary annotated the list with the final ratings, the list was sent to CSEMO for further processing. There, an unidentified CSEMO employee entered the performance ratings into the VA's computer system. Once the information was entered, the senior executives and the VA could access and print the final performance ratings, which now included the Secretary's electronic signature. (Tr. 1 at 178–81, 185–86, 189; Pet. Exh. N).

12. The VA issued Ms. Helman's fiscal year 2013 performance rating in February 2014. As issued, the VA gave Ms. Helman a Level 4 rating (Exceeds Fully Successful). Secretary Shinseki's electronic signature appears on Ms. Helman's performance rating. (Pet. Exh. N).

13. As a result of her performance rating, Ms. Helman received a one-time performance award of $8,495 and a 2% raise. Ms. Helman received the performance award payment in February 2014 and the 2% raise for six pay periods from March through May 2014. In total, Ms. Helman received $9,080.60 based on her performance rating. (Pet. Exh. A at 3; Tr. 1 at 58–59).

The VA's Decision to "Pull Back" the Performance Rating

14. In April 2014, Ms. Farrisee saw a news report stating that Ms. Helman had received a performance award for fiscal year 2013. Ms. Farrisee believed that Ms. Helman's performance rating had been deferred because she was under investigation. After reviewing the VA's records, however, Ms. Farrisee learned that the VA had in fact

[6] The VA was required to keep the annotated list for five years from the date it issued Ms. Helman's performance rating. 5 C.F.R. § 430.311.

issued Ms. Helman a performance rating and that she had received a cash award and a raise based on that rating.[7] Ms. Farrisee thus believed that Ms. Helman's performance rating had been released in error. (Tr. 1 at 31–34; Resp. Exh. J).

15. Thereafter, Ms. Farrisee's Principal Deputy initiated an informal inquiry to determine if the VA had been negligent in releasing the rating (Tr. 1 at 32). The VA finished a draft report of the inquiry on May 16, 2014. A final version was finished at a later, unidentified date. (Tr. 1 at 32–33, 64, 68). The VA did not produce either the draft or final report, although, Ms. Farrisee believes the VA still has both documents (Tr. 1 at 76).

16. In May 2014, Ms. Farrisee sent Secretary Shinseki a "decision package" recommending that he retroactively rescind the performance rating issued in February. Ms. Farrisee based her recommendation on, among other things, the VA's general policy to defer ratings, the May 16, 2014 draft report, and her presumed understanding of the Secretary's original intent. She did not, however, review the annotated list used by the Secretary to record the final performance ratings. The decision package included a draft letter signed by Ms. Farrisee notifying Ms. Helman of the VA's decision to pull back her performance rating. The Secretary approved Ms. Farrisee's recommendation on May 23, 2014, by signing the decision package. (Resp. Exh. J; Tr. 1 at 34–37, 64, 88, 107, 181).

17. After the Secretary approved the decision package, Ms. Farrisee sent the letter to Ms. Helman notifying her that her performance rating would be pulled back and

[7] Ms. Farrisee also learned that another senior executive had received a performance rating while under investigation (Tr. 1 at 32). That senior executive's performance rating is not before me and its release does not affect my decision.

that the VA would initiate a payroll action to recover the performance award and salary adjustment (Resp. Exh. N).

18. On June 14, 2014, the Defense Finance and Accounting Service (DFAS), acting as the VA's payroll agent, notified Ms. Helman that the VA intended to collect a $9,080.60 debt based on a salary overpayment. DFAS also advised Ms. Helman that she could: (1) challenge the debt by asking for a hearing, and (2) request documents related to the debt. (Resp. Exh. B; *see also* 5 U.S.C. § 5514(a)(2)).

19. In response to the DFAS letter, Ms. Helman, by letter dated June 25, 2014, asked for documents related to the debt and also notified both the VA and DFAS that she intended to request a hearing (Resp. Exh. C).

20. After further exchanges between the parties, on October 14, 2014, Ms. Helman again asked the VA for a hearing to contest the debt (Pet. Exh. Q). The VA referred Ms. Helman's Petition to the United States Postal Service Judicial Officer Department in December 2014.

21. In November 2014, the VA removed Ms. Helman from her position as Director of the Phoenix VA Health Care System and from federal service. In December 2014, the Merit Systems Protection Board upheld the VA's removal action. (Pet. Exh. S).

Document Production Issues

22. In her June 25, 2014 response to the DFAS letter assessing the debt, Ms. Helman asked the VA for, among other things, "[a]ny other policy, procedure, and/or other material on which the VA and DFAS rely as legal or evidentiary basis on which to

rescind my bonus and salary increase (which constitute the total value of my alleged debt)" (Resp. Exh. C).

23. Having not received a response to her document request, Ms. Helman renewed her request in a letter to the Phoenix Health Care System payroll office on August 7, 2014 (Pet. Exh. D).

24. The VA responded on August 28, 2014, by providing Ms. Helman with: (1) the Chief of Staff's memorandum dated September 6, 2013, (2) the list titled "FY 2013 SES Performance Rating / Awards Name Checks Open Cases," and (3) two documents describing the VA's Senior Executive Service Performance Management System (Resp. Exh. D).

25. On September 17, 2014, the VA Office of the General Counsel provided another response to Ms. Helman's document request. The Office of the General Counsel said it did not have any responsive documents, but that it would forward Ms. Helman's request to the Veterans Health Administration Central Office. (Pet. Exh. F). The record does not include a response from the Central Office.

26. After the hearing request was docketed by the Postal Service in December 2014, the VA filed its Answer on January 30, 2015. The VA attached several documents to its Answer, but those documents included only one new document: an August 19, 2014 letter from the VA to Congress regarding Ms. Helman's performance rating.[8]

27. I convened a telephone conference with the parties on February 9, 2015. During the conference, Ms. Helman's attorney asked the VA to produce additional documents related to the dispute. I ordered Ms. Helman's attorney to file a document

[8] See Footnote 3.

request with the VA by February 13, 2015, to ensure that the VA understood the extent of the documents being requested. I then ordered the VA to respond to the document request by February 27, 2015. In a later telephone conference, I extended the VA's deadline for producing documents to March 11, 2015.

28. As ordered, Ms. Helman sent the VA a document request. Among other things, Ms. Helman asked for all documents and communications created between February 1 and June 14, 2014, relating to the VA's discovery and conclusion that the release of Ms. Helman's performance rating was an administrative error (Request No. 3). (Pet. Mot. for Sanctions, Exh. 3 at 5).

29. The VA responded to the document request on March 11, 2015. In response to Request No. 3, the VA replied that, "[r]esponsive documents are attached." The only two documents responsive to Request No. 3 were: (1) Ms. Farrisee's May 22, 2014 letter to Ms. Helman, and (2) DFAS's June 14, 2014 letter to Ms. Helman—both of which Ms. Helman already had. (Pet. Mot. for Sanctions, Exh. 4).

30. Upon receipt of the VA's response, Ms. Helman's attorney sent an e-mail to the VA on March 13, 2015, expressing his belief that the VA had not adequately responded to the document request. The e-mail asked the VA to clarify some of its responses. The VA did not respond. (Pet. Mot. for Sanctions, Exh. 5).

31. Ms. Helman's attorney sent another e-mail to the VA on March 18, 2015, asking if the VA intended to respond to his previous e-mail (Pet. Mot. for Sanctions, Exh. 5). By March 21, 2015, the VA still had not responded to the e-mails seeking clarification.

32. Ms. Helman filed a Motion for Sanctions on March 21, 2015, alleging, among other things, that the VA had violated my prior orders to produce documents.[9] As a remedy, Ms. Helman asked for a decision invalidating the debt. (Pet. Mot. for Sanctions).

33. In response, the VA asked me to deny the motion, asserting that it had provided "all relevant and available information" to Ms. Helman. The VA also argued that some of the requested documents were neither relevant nor necessary for Ms. Helman to present her case under the Debt Collection Act. (VA Response to Mot. for Sanctions).

34. I convened a telephone conference on March 31, 2015, to discuss Ms. Helman's motion and the VA's response. As to Request No. 3, the VA again asserted that it had produced all the responsive documents in its possession. The VA could not, however, adequately explain how it concluded that there were no additional documents. The VA also could not provide adequate assurances that it had conducted a reasonably diligent and thorough search for responsive documents. I expressed my specific concerns about the VA's cursory response to Ms. Helman's document requests and its failure to describe the efforts it had taken to search for documents. I therefore ordered the VA to supplement its response to Ms. Helman's document request. In addition to any documents produced, I ordered the VA to describe its document search. (Order and Memorandum of Telephone Conference, April 2, 2015; Pet. Amend. Mot. for Sanctions, Exh. 8 at 25–26, 42–43).

35. As ordered, the VA supplemented its response to Ms. Helman's document request on April 10, 2015. The VA claimed to have searched its e-mail system and

[9] Discussion of the other issues raised in the motion is not necessary to my decision.

contacted the "respective Agency offices and employees" in an effort to respond to Ms. Helman's document request. The VA briefly described its e-mail system in an attempt to explain its inability to provide more than two e-mail chains. The VA did not, however, explain its search for additional documents. (VA Supp. Response).

36. As to Request No. 3, the VA provided briefing slides dated June 2, 2014. Three other documents, marked as being responsive to Request No. 4, were also responsive to Request No. 3: Ms. Farrisee's May 22, 2014 memorandum to Secretary Shinseki, and two e-mail chains dated May 21–22, 2014, which discussed the VA's response to a congressional inquiry regarding Ms. Helman. (VA Supp. Response).[10]

37. Ms. Helman amended her Motion for Sanctions on April 20, 2015, asserting that the VA had not adequately explained its document search[11] (Pet. Amend. Mot. for Sanctions at 4–5).

38. Ms. Helman renewed her Motion for Sanctions during the hearing and specifically asked that I draw an adverse inference based on the VA's failure to produce documents that Ms. Farrisee referenced during her testimony (Tr. 1 at 84–85; Tr. 2 at 4–5).

DECISION

The VA, relying on the Debt Collection Act, seeks to collect $9,080.60 from Ms. Helman based on the allegedly mistaken release of her performance rating in February 2014. To collect a salary overpayment under the Debt Collection Act, the VA must prove that Ms. Helman received a salary overpayment, the amount of the overpayment, and that she was not entitled to the payment. *Kathryn L. Schrack*, DCA 11-52, 11-53,

[10] These documents are now marked as Resp. Exhs. I, K, and L.

[11] Here again, it is not necessary to discuss other issues raised in this filing.

11-54 (August 26, 2011). Here, neither the receipt nor the amount of the alleged overpayment is in dispute. The only issue before me is Ms. Helman's entitlement to keep the payments she received based on her performance rating, which the VA alleges was released through an administrative error.

Here, the VA has conceded that it did not have the authority to rescind a properly issued final performance rating given to a senior executive—even if the senior executive was under investigation (Finding 5). Acknowledging that lack of authority, the VA instead contends that an administrative error led to the inadvertent release of Ms. Helman's performance rating in February 2014. Specifically, the VA contends that the Secretary exercised his discretion to defer Ms. Helman's rating because she was under investigation (Findings 8–11).[12] The VA believes that the Secretary then annotated the list with his intention to defer Ms. Helman's rating, but an unnamed CSEMO employee later mistakenly entered a Level 4 rating for Ms. Helman. The VA thus contends that the performance rating it issued in February was not final. Because the rating was not final, the VA believes it had the authority to rescind the rating.

This theory suffers from several weaknesses. As noted, the VA bears the burden to prove that it made an administrative error when it issued Ms. Helman's performance rating in February 2014. Here, however, the record includes a signed performance rating issued by Secretary Shinseki that was released to Ms. Helman (Finding 12). The release of Ms. Helman's rating—even if she were under investigation—was within the Secretary's discretion under the policy memorandum issued by his authority in

[12] During closing arguments, Ms. Helman argued that the VA was precluded from withholding the rating because the VA did not begin the investigation during fiscal year 2013. The VA did not contest this assertion, but instead it pointed to evidence supporting its belief that it had begun the investigation before the end of the fiscal year. (Tr. 2 at 33–41). Because the case is decided on other grounds, I need not address this issue.

September 2013 (Finding 4). In light of that signed performance review, and the Secretary's discretion to release it, the VA must come forward with evidence to prove that: (1) Secretary Shinseki affirmatively exercised his discretion to defer the performance rating in February 2014; and (2) his original intent was negated by an administrative error when a CSEMO employee incorrectly input the final performance rating into the VA's computer system.

The VA did not try to prove these elements through the testimony of either Secretary Shinseki or a CSEMO employee. It also did not introduce contemporaneous documents, such as Secretary Shinseki's annotations, to meet its burden. Instead, as discussed below, it tried to meet this burden through Ms. Farrisee's testimony and the decision package.

I. Ms. Farrisee's testimony does not prove that the Secretary affirmatively exercised his discretion to defer Ms. Helman's rating or that his original intent was negated by an administrative error.

Ms. Farrisee testified that she and Secretary Shinseki met in January or February 2014 to discuss and assign the performance ratings for fiscal year 2013. She recalled that during that meeting Secretary Shinseki annotated his final rating for each senior executive, including Ms. Helman, on a list of names. She could not, however, provide specific testimony regarding the Secretary's intent to defer the ratings for senior executives under investigation, or what he wrote next to Ms. Helman's name. Instead, her testimony regarding the Secretary's intent to defer the performance rating was based primarily on her belief that he followed the same process used in previous years. (Tr. 1 at 25, 184–86, 202, 204).

Ms. Farrisee's testimony also included hearsay testimony regarding Secretary Shinseki's intent to defer the ratings for all senior executives under investigation (Tr. 1 at 203). Nothing in the record, however, supports this hearsay testimony. Rather, the only document in the record directly bearing on the VA's deferral policy is the September 6, 2013 memorandum from the Chief of Staff. As that document makes clear, the Secretary had the discretion to defer performance ratings, but he was not required to do so. Given that discretion, Ms. Farrisee's unsupported, hearsay conclusions regarding how the Secretary exercised that discretion are not persuasive.

Thus, Ms. Farrisee's testimony, taken as a whole, is not sufficient to prove that Secretary Shinseki affirmatively exercised his discretion to defer Ms. Helman's rating, or that his original intent was negated by an administrative error.

II. The May 22, 2014 decision package's evidentiary value is outweighed by the VA's failure to produce better evidence.

The VA also introduced the decision package Ms. Farrisee sent to Secretary Shinseki in May 2014 to support its position. On its face, the decision package includes Secretary Shinseki's signature indicating his agreement that he originally intended to defer Ms. Helman's performance rating and that the performance rating was released through an administrative error. That document's evidentiary value, however, is undermined by contemporaneous evidence that the VA did not produce—evidence that could have better proved the Secretary's intent three months earlier.

A. The VA failed to produce documents.

For reasons unexplained, the VA did not produce Secretary Shinseki's handwritten annotations. The VA did not produce the draft or the final report of its internal investigation. The VA did not produce Secretary Shinseki's testimony. And the

VA did not produce testimony from the CSEMO employee who recorded the Secretary's original intent. All this evidence could have provided a clear picture of the Secretary's original intent, and its total absence from the record is striking.

Moreover, in a Debt Collection Act case such as this one, the VA must provide an employee with "an opportunity to inspect and copy Government records relating to the debt." 5 U.S.C. § 5514(a)(2)(B); 38 C.F.R. § 1.983(b)(6). The VA, however, did not comply with that requirement. Despite repeated requests from Ms. Helman, the VA failed to produce at least three documents that were responsive to that request, directly related to the debt, and central to its assertion that it made an administrative error. The failure also directly violated my Order dated April 2, 2015. These documents included: (1) the annotated list used by Secretary Shinseki to record his final performance ratings, (2) the draft report dated May 16, 2014, addressing the circumstances of the alleged administrative error that led to the release of Ms. Helman's performance rating, and (3) the final version of that report. (Findings 10, 15).

Although the VA was required to produce all three documents, its failure to produce the list that included Secretary Shinseki's annotations of the final performance ratings is the most damning. The Secretary's annotations on that list presumably recorded his actual intent regarding Ms. Helman's performance rating—which is the central issue now before me. Its absence from the record is glaring. Ms. Farrisee freely discussed the list during her testimony, which suggests that the VA was not deliberately hiding it. Nonetheless, the fact remains that the VA did not produce the list showing the final performance ratings despite the VA's assurances it had produced all responsive documents. And it is not clear that anyone ever even looked for it.

B. Ms. Helman has asked for an adverse inference based on the VA's failure to produce documents.

Ms. Helman has moved for an adverse inference based on the VA's failure to produce the annotated list that showed Secretary Shinseki's originally intended rating for Ms. Helman. The District of Columbia Circuit Court of Appeals described the circumstances under which a trier of fact may draw an adverse inference:

> Simply stated, the rule provides that when a party has relevant evidence within its control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. As Professor Wigmore has said:
>
> > * * * The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted.

UAW v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972)(footnotes omitted).

More recently, the Second Circuit Court of Appeals—drawing many analogies from cases discussing the destruction of evidence—discussed the circumstances under which a trier of fact may draw an adverse inference when documents are not produced. The Court held that the party seeking an adverse inference based on the failure to produce documents must show that: (1) the party having control over the evidence had an obligation to produce it; (2) the party that failed to produce the evidence had a culpable state of mind; and (3) the missing evidence must be relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that

claim or defense. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007)(applying the same test in the Federal Circuit).

i. The VA had an obligation to produce the annotated list Secretary Shinseki used to record the final performance ratings.

The annotated list Secretary Shinseki used to record the final performance ratings is critical evidence directly related to the debt and, therefore, the VA had an obligation to produce it under 5 U.S.C. § 5514(a)(2)(B) and 38 C.F.R. § 1.983(b)(6). The annotated list was also responsive to Ms. Helman's document request and covered by my April 2, 2015 Order. The VA has not claimed that the annotated list does not exist or that it was unable to produce it for some other reason. Thus, Ms. Helman has met the first part of the test.

ii. The VA had a culpable state of mind.

In determining whether a party that did not produce documents acted with a culpable state of mind, courts have looked at a variety of reasons for the non-production, ranging along a continuum from innocence to negligence to gross negligence and ultimately to bad faith. In *Residential Funding*, the Second Circuit Court of Appeals held that an adverse inference may be appropriate in a case involving negligence, noting that each party should bear the risk of its own negligence. 306 F.3d at 108; *cf. Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1328–29 (Fed. Cir. 2011)(holding that bad faith and prejudice must be shown before imposing the more severe dispositive sanction of dismissal).

Here, the record supports at least a finding of negligence. Despite my April 2, 2015 Order, the VA never adequately explained the extent of its document searches. At

the hearing, Ms. Farrisee freely referenced the annotated list and testified that it recorded Ms. Helman's final performance rating. Yet the VA could not explain its continued failure to produce that vital document. The VA also could not explain why it had not looked for the annotated list, nor could it even say if it still exists. Simply put, the VA made no real effort to find or produce the annotated list that directly bears on the issues before me in this case.

Accordingly, I find that the VA acted negligently when it failed to produce the annotated list recording Ms. Helman's final performance rating. Ms. Helman has thus met the second part of the adverse inference test.

iii. The annotated list is relevant to Ms. Helman's defenses under the Debt Collection Act.

The party seeking an adverse inference must show that the missing documents are relevant, which in this context means something more than meeting the requirements of the Federal Rules of Evidence. Instead, under this analysis, the party seeking an adverse inference must show the relevance of a missing document by putting forward sufficient evidence from which a reasonable trier of fact could infer that the missing document would have been adverse to the party that did not produce it. *Residential Funding*, 306 F.3d at 108–09. Nonetheless, I must not impose too strict a standard of proof on Ms. Helman regarding the relevance of the annotated list. Specifically, she does not need to prove the exact contents of that document. Requiring her to do so would allow the VA to profit from its failure to produce the document. *Id.* at 109.

The relevance of a document in this context may be shown by relying on other evidence in the record. *Id.* at 109–10. Here, the record does include other evidence—

the final performance rating signed by Secretary Shinseki in February 2014—that could lead to an inference that the annotated list is adverse to the VA's position. On its face, the performance rating signed by Secretary Shinseki suggests that he exercised his discretion to release Ms. Helman's performance rating. A reasonable trier of fact could infer that the performance rating on the annotated list, which was not produced, corresponds to, and forms the basis of, the rating shown on the performance rating released at the same time. In this context, the actual performance rating establishes the relevance of the missing annotated list in relation to proving the Secretary's original intent. Put simply, a reasonable trier of fact could conclude that the annotated list showed that Secretary Shinseki intended to release the rating rather than defer it. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939)("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

C. The adverse inference against the VA outweighs the evidence it introduced supporting its contention of an administrative error.

Because Ms. Helman has met the requirements for an adverse inference, I conclude that the annotated list is adverse to the VA's assertion that it made an administrative error. This adverse inference outweighs any probative value attached to Secretary Shinseki's after-the-fact signature on the May 2014 document purporting to express his original intent three months earlier.

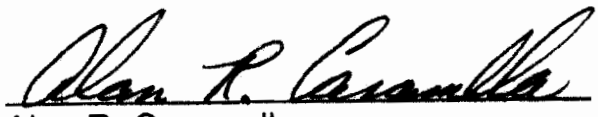
Thus, weighing the entire record before me, including the documents not produced, I conclude that the decision package does not suffice to meet the VA's burden to prove that it made an administrative error. Because the VA has not proved that it made an administrative error, it has not proved that the performance rating it

issued in February 2014 was not a final rating. And as the VA concedes, unless it can prove that the February 2014 rating was not final, it did not have the authority to rescind the rating.

ORDER

Neither Ms. Farrisee's testimony nor the decision package proves that the VA made an administrative error when it released Ms. Helman's performance rating in February 2014. In the absence of proof of such an error, Ms. Helman is entitled to keep the payments she received based on her performance rating for fiscal year 2013.

Accordingly, the Petition is granted. The VA may not collect the performance award and salary increase related to Ms. Helman's fiscal year 2013 performance rating by administrative offset.



Alan R. Caramella
Administrative Judge