UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 229

Docket No. DE-0752-09-0072-I-1

Lonnie G. Robertson,

Appellant,

v.

Department of Transportation,

Agency.

December 15, 2009

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Amy Berks, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that affirmed his removal based on charges of abuse of authority and lack of candor. For the reasons set forth below, we GRANT the appellant's petition for review (PFR) under 5 C.F.R. § 1201.115(d), AFFIRM IN PART and VACATE IN PART the initial decision (ID), and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On August 29, 2008, the agency proposed the appellant's removal from his position as a Criminal Investigator based on charges of abuse of authority and lack of candor. Initial Appeal File (IAF), Tab 7, Subtab 4E. The abuse of authority charge contained two specifications, one involving an incident in June or July 2007 when the appellant allegedly presented his agency badge in connection with a personal matter and the other involving an incident on April 18, 2008, when the appellant allegedly harassed his neighbor, Soraya Formby, based on an outstanding warrant issued by the State of Colorado for her arrest. *Id.* at 2-3; *see id.*, Subtab 4C at 14-15. The lack of candor charge contained three specifications involving the appellant's alleged lack of candor in providing information to agency investigators concerning: (1) an incident that occurred outside the appellant's residence in June or July 2007; (2) the April 18, 2008 incident at Ms. Formby's residence; and (3) his whereabouts on May 16, 2008, when he was scheduled to attend firearms training. *Id.*, Subtab 4E at 3-4.

¶3 Following his receipt of the notice of proposed removal, the appellant submitted both a written and oral reply to Max Smith, the Region 6 Special Agent-In-Charge (SAC) and deciding official, asserting that (1) his actions on April 18, 2008, were appropriate because he was acting under state authority to assist a local police officer, (2) he provided relevant and material information to agency investigators on June 6, 2008, concerning his conduct on April 18, 2008, and (3) he was working in the agency office on May 16, 2008, but could not recall where he was in the building before arriving in his suite at 11:40 a.m. IAF, Tab 7, Subtab 4C at 12, 14-18, 24-29, 31; *id.*, Subtab 4B.

¶4 On October 6, 2008, SAC Smith had an *ex parte* telephone conversation with David Mozell, the local police officer who the appellant asserted he was assisting on April 18, 2008, to determine whether he intended to confer state authority on the appellant on that date. IAF, Tab 7, Subtab 4A at 3. Smith did not allow the appellant an opportunity to respond to Mozell's statement. He

sustained specification two of the abuse of authority charge and specifications two and three of the lack of candor charge and thus sustained both charges. *Id.* at 2, 4-8. The appellant was removed, effective November 7, 2008. *See id.* at 10.

¶5 The administrative judge found that the agency established specification two of the abuse of authority charge by preponderant evidence. IAF, Tab 26, Initial Decision (ID) at 12. She found credible the testimony of Officer Mozell that he did not command the appellant to assist him in arresting Ms. Formby on April 18, 2008, and thus she rejected the appellant's reliance on a Colorado statute providing that a person commanded to assist a peace office has the same authority to arrest as the officer who commanded assistance. *Id.* at 10-12. She also found credible the testimony of Amanda Craycraft and her sister Ashley Craycraft, who, along with a locksmith, were on Ms. Formby's property on April 18, 2008, and who testified that the appellant threatened to knock down Ms. Formby's door. *Id.* at 5, 12. The administrative judge found the appellant's testimony on the matter not credible given his previous history of abusing his authority and his admitted misrepresentation of a conversation he had with an agency attorney in 2006. *Id.* at 11-12. She also rejected the appellant's assertion that he used his agency badge for "identification purposes" only when he showed it to the locksmith and the Craycraft sisters. *Id.* at 12.

¶6 The administrative judge also found that the agency established specifications two and three of the lack of candor charge by preponderant evidence. *Id.* at 16. She found that the appellant failed to be forthcoming with investigators about his interactions with the locksmith and the Craycraft sisters at Ms. Formby's home on April 18, 2008, and that as an experienced investigator he was aware of the importance of ensuring that his statement was accurate and complete. *Id.* at 14. She also found that his statements to agency investigators concerning his whereabouts on May 16, 2008, were vague and incomplete and that his testimony that he could not recall his work activities on May 16, 2008,

was not credible given his otherwise detailed and fact specific testimony concerning the matters he was working on in May 2008. *Id.* at 16.

¶7 The administrative judge further found that the *ex parte* communication between SAC Smith and Officer Mozell did not introduce "new and material information" into the agency's decision making process and thus did not violate the appellant's right to due process. *Id.* at 17. She lastly found that the appellant's removal promoted the efficiency of the service, *id.* at 18, and that the penalty of removal was reasonable, *id.* at 21.

¶8 The appellant has filed a timely petition for review, Petition for Review File (PFRF), Tab 1, and the agency has filed a response in opposition, *id.*, Tab 3.

ANALYSIS

Charge 1: Abuse of Authority

¶9 We affirm the administrative judge's finding rejecting the appellant's defense under Colorado Revised Statute § 16-3-202 because Officer Mozell did not command or otherwise direct the appellant to assist him in arresting Ms. Formby on April 18, 2008. *See* ID at 10-11. We also affirm her finding that the appellant was not authorized to display his agency badge to the locksmith and the Craycraft sisters for "identification purposes" under agency guidelines or Colorado Revised Statute § 16-3-202. *See id.* at 12. Furthermore, we affirm her finding that the appellant's right to due process was not violated by the deciding official's *ex parte* communication with Officer Mozell because this contact did not rise to the level of introducing "new and material" information into the removal process. *See id.* at 16-17; IAF, Tab 7, Subtab 4F at 29-31. The appellant has not put forth any argument establishing error by the administrative judge on these issues. However, as discussed more fully below, we vacate the administrative judge's findings with respect to the specific actions of the appellant during his interaction with Ms. Formby on April 18, 2008, that were based on the testimony of the Craycraft sisters. *See id.* at 12.

¶10 The appellant asserts that the administrative judge erred in permitting two agency witnesses, Amanda Craycraft and Ashley Craycraft, to testify by telephone, rather than in person, over the appellant's objection. PFRF, Tab 1 at 2, 43. As noted by the appellant, the Craycraft sisters accompanied the locksmith to Ms. Formby's home on April 18, 2008, and thus witnessed the appellant's interactions with Ms. Formby on that date. *See id.* at 10. The appellant specifically asserts that only the Craycraft sisters testified that he told Ms. Formby he would knock her door down, while he maintains that he told her that if she did not open the door the police would knock it down. *Id.* He further asserts that the administrative judge erred in finding their testimony credible since they both testified that the garage door was closed when they arrived at Ms. Formby's residence, while the locksmith and the appellant testified that it was open. *Id.* at 42.

¶11 Under 5 U.S.C. § 7701(a)(1), an appellant has a right to a hearing at which the administrative judge may observe the testimony of witnesses. *See McCurdy v. Office of Personnel Management*, 96 M.S.P.R. 90, ¶ 5 (2004). In *Koehler v. Department of the Air Force*, 99 M.S.P.R. 82, ¶¶ 10-13 (2005), the Board held that an administrative judge could satisfy that right by holding a videoconference hearing, even when the appellant objected to such an arrangement. It also indicated, however, that, because that case involved a videoconference hearing, and not a telephonic hearing, it did not need to, nor would it, extend its holding to telephonic hearings. *Id.* ¶ 13 n.3.

¶12 In stating its holding in *Koehler*, the Board in effect relied on an administrative judge's opportunity, during a videoconference hearing, to visually observe witnesses as they testified. *See id.* ¶¶ 10-13 (reference to "advances [that] have succeeded in removing many of the limitations formerly associated with" videoconference hearings). This opportunity is critical to an administrative judge's ability to make the demeanor-based credibility determinations whose importance has been emphasized by our reviewing court. *See Haebe v.*

Department of Justice, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so). Moreover, the Board has held that a videoconference hearing in which technical or other difficulties might have interfered with the administrative judge's ability to observe the demeanor of some witnesses does not satisfy an appellant's right to a hearing. *See Vicente v. Department of the Army*, 87 M.S.P.R. 80, ¶¶ 6-9 (2000); *Perez v. Department of the Navy*, 86 M.S.P.R. 168, ¶¶ 5, 7-8 (2000).

¶13 An administrative judge's opportunity to observe the demeanor of witnesses while they are testifying over the telephone would appear to be far more limited than it would be if those witnesses testified before properly functioning videoconference equipment. In fact, the opportunity of the administrative judge in the present appeal to observe the Craycraft sisters' demeanor while testifying over the telephone would appear to have been even more limited than in cases, cited above, where the Board remanded the appeals based on difficulties arising during videoconference proceedings. *See Vicente*, 87 M.S.P.R. 80, ¶¶ 8-9 (appeal remanded based on the appellant's assertion that technical difficulties had interrupted the proceedings); *Perez*, 86 M.S.P.R. 168, ¶¶ 7, 9 (appeal remanded based on evidence that the administrative judge did not have a full view of witnesses' faces).

¶14 Accordingly, we find that the administrative judge erred in ordering a partial telephonic hearing. Where an administrative judge improperly holds a telephonic hearing, the Board will undertake a careful review of the record to determine whether the error had a potential adverse effect on the appellant's substantive rights. *See Lowe v. Department of Defense*, 67 M.S.P.R. 97, 99-101 (1995); *McGrath v. Department of Defense*, 64 M.S.P.R. 112, 116 (1994).

¶15 Our review of the record demonstrates that the Craycraft sisters testified regarding disputed factual matters. Most notably, they testified that the appellant told Ms. Formby he was going to knock her door down if she did not come out of her home.[*] *See* HCD, Day 1. The appellant testified that he told Ms. Formby that the police would knock her door down if she did not open it. *See* HCD, Day 2. The administrative judge explicitly found credible the testimony that the appellant threatened to knock down Ms. Formby's door. ID at 12. Although she had no opportunity to view the witnesses' demeanor, she found the Craycraft sisters credible simply because "they directly observed the appellant's interactions with [Ms.] Formby" and because they lacked bias concerning the events of April 18, 2008. *See id.* The administrative judge then relied on their testimony to sustain specification two of the abuse of authority charge, *see id.*, part of which specifically alleged that the appellant "threatened to knock [Ms. Formby's] door down if she did not come out," *see* IAF, Tab 7, Subtab 4E at 2-3. Therefore, the administrative judge's error in accepting testimony regarding disputed factual matters over the telephone had a potential adverse effect on the appellant's substantive rights. *See Lowe*, 67 M.S.P.R. at 99-101. Accordingly, we must vacate the administrative judge's findings that were based on the testimony of the Craycraft sisters and remand this appeal to the regional office with instructions to schedule a hearing in which the administrative judge can observe the demeanor of the witnesses. *See McGrath*, 64 M.S.P.R. at 117-18.

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[*] We note that while the administrative judge found that the "Craycraft sisters[]" testified that the appellant threatened to knock down Ms. Formby's door, *see* ID at 12, and while the appellant apparently concedes in his petition for review that both Craycraft sisters so testified, PFRF, Tab 1 at 10, 41-42, our review of the hearing testimony suggests that only Amanda Craycraft specifically testified that the appellant threatened to "kick [Ms. Formby's] door down," *see* HCD, Day 1.

Charge 2: Lack of Candor

¶16 The appellant asserts that the administrative judge also erred in sustaining specifications two and three of the lack of candor charge. PFRF, Tab 1 at 1-2. With regard to specification two, he asserts that he did not reveal information regarding his interaction with the locksmith and the Craycraft sisters at Ms. Formby's residence to agency investigators in his June 6, 2008 interview because the "narrow focus of the interview . . . was whether [the appellant] attempted to arrest Ms. Formby." *Id.* at 25. He further asserts that the agency failed to demonstrate, as required under *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284-85 (Fed. Cir. 2002), that the questions asked of him during the June 6, 2008 interview should have elicited information about the locksmith and the Craycraft sisters. *Id.* at 28.

¶17 In *Ludlum*, the Federal Circuit explained that a lack of candor charge may be proven by showing that the respondent failed "to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete." 278 F.3d at 1284. While the court did not explicitly hold that "in order to determine whether a 'given statement' is 'accurate and complete' . . . it is necessary for the Agency to demonstrate by preponderant evidence what questions were actually asked," as the appellant asserts, *see* PFRF, Tab 1 at 28, it did find that lack of candor was established under the relevant facts by showing that the appellant, an FBI agent, did not "respond fully and truthfully" to the questions he was asked, *Ludlum*, 278 F.3d at 1284. Here, the agency summary of the appellant's June 6, 2008 investigative interview does not include the questions asked of the appellant. *See* IAF, Tab 8, Subtab 4F at 22-26. Therefore, the questions asked of the appellant and consequently what he should or should not have been expected to disclose in response are not readily apparent from the documentary evidence. The testimony of the agency investigator who interviewed the appellant on June 6, 2008, however, indicates that, while the appellant first mentioned the presence of the

locksmith on Ms. Formby's property on April 18, 2008, he did not specifically ask the appellant about any interactions he had with the locksmith, although he generally informed the appellant that the scope of the interview included allegations that he misrepresented his position. *See* HCD, Day 1. The administrative judge failed in the ID to address this testimony or the issue of whether the appellant was specifically asked questions that should have elicited information about the locksmith and the Craycraft sisters. Accordingly, we must vacate the AJ's findings on specification two of the lack of candor charge and remand the issue for further adjudication.

¶18 With regard to specification three of the lack of candor charge, the appellant asserts that the charge is more appropriately classified as a falsification charge, which requires an intent to supply wrong information. PFRF, Tab 1 at 34-35. He further asserts that the agency failed to demonstrate that his "lack of recollection of where he was in the building on May 16th was somehow deceptive as opposed to a sincere good faith lack of recollection." *Id.* at 36.

¶19 Specification three of the lack of candor charge essentially alleges that the appellant maintained that he arrived at the office at 8:30 a.m. on May 16, 2008, when other evidence suggested that he did not. *See* IAF, Tab 7, Subtab 4E at 4. In support of the allegation, the agency stated in the specification that the appellant's supervisor could not reach him at 10:00 a.m., that one colleague did not see the appellant in the office even after searching for him at the direction of his supervisor, that the same colleague did not note the appellant's arrival until 11:40 a.m., that another colleague did not see the appellant in the office from 7:00 a.m. to 9:30 a.m., and that the appellant did not log on to the computer system until 11:55 a.m. *See id.* In sustaining the specification, the decision letter noted that the appellant stated in his response to the notice of proposed removal that he could not recall his location in the office on the morning of May 16, 2008, or the particular subject matter of his work. *See* IAF, Tab 7, Subtab 4A at 7. However, specification three did not charge the appellant with providing

incomplete, vague, or misleading responses to the agency investigators regarding his whereabouts on the morning of May 16, 2008. *See id.*, Subtab 4E at 4. Rather, the specification, in effect, alleges that the appellant stated that he arrived at work at 8:30 a.m. on May 16, 2008, but that other evidence suggested that he did not. *See id.*

¶20 Thus, the administrative judge's finding that the appellant's statements concerning his whereabouts were "vague and incomplete" was in error in light of the wording of the specification, which charges that the appellant was untruthful when he told agency investigators that he arrived at the office at 8:30 a.m. *See* ID at 16. The administrative judge further erred in relying on the fact that the appellant was able to provide detailed testimony regarding his work surrounding the date of May 16, 2008, but could not recall his activities on May 16, 2008, or his location in the office building to sustain the specification. *See id.* Rather, she should have determined whether the appellant arrived at work at 8:30 a.m. on May 16, 2008, as he claimed in his June 6, 2008 interview. *See* IAF, Tab 8, Subtab 4F at 26. Accordingly, we must vacate the administrative judge's findings on specification three of the lack of candor charge and remand the issue for further adjudication.

ORDER

¶21 For the above reasons, we AFFIRM IN PART and VACATE IN PART the initial decision. We REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order. Because the administrative judge who had originally heard this appeal is no longer with the Board, a new administrative judge will be assigned to the case. For this reason and because there is conflicting evidence on material issues, the resolution of which will require that credibility determinations be made, the administrative judge must provide the parties with another opportunity to present testimony on material

facts that remain in dispute. *See Callery v. Department of Justice*, 35 M.S.P.R. 233, 235 (1987).

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.