UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 58

Docket No. AT-0752-09-0944-I-1

John Mark Pickett,

Appellant,

v.

Department of Agriculture,

Agency.

June 3, 2011

Joseph D. Ybarra, Esquire, San Antonio, Texas, and Larry Pate, Lexington, Mississippi, for the appellant.

Judith A. Herzog, 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 agency has filed a petition for review asking the Board to reconsider the administrative judge's decision in this case. For the reasons set forth below, we DENY the petition for review.

BACKGROUND

¶2 On May 26, 2009, the agency proposed to remove the appellant from his position as a Farm Loan Officer based upon the following reasons: (1) Inappropriate conduct resulting in coworkers fearing for their safety and

disruption to the workplace; (2) being intoxicated during duty hours; and (3) consuming alcohol during duty hours. Initial Appeal File (IAF), Tab 13, Subtab 4 at 1-2. In the specification underlying Reason 1, the agency stated:

> On February 5, 2009, while in your office, you made remarks while on the telephone in a very loud tone "Just kill them all" or "Just shoot them all". The remarks were overheard by two employees in the office who became concerned for their safety as they believed the statement(s) referred to employees in the Farm Service Agency (FSA) office.
>
> Your threatening statement frightened and made employees in the Coahoma County FSA Office uneasy. This resulted in all the FSA employees being sent home for the remainder of the day and the following day. It also resulted in the closure of the National Resources and Conservation Service office for the remainder of the day and the following day.

Id.

¶3 The appellant submitted a written reply on June 23, 2009, and made an oral reply on July 8, 2009. IAF, Tab 13, Subtabs 2-3. On August 13, 2009, R.M. Carnegie, the deciding official, sustained all three charges set forth in the proposal letter and removed the appellant from federal service effective August 15, 2009. *Id.*, Subtab 1.

¶4 The appellant filed an appeal with the Board and requested a hearing. *See* IAF, Tab 1 at 2. At the hearing, both employees who heard the appellant's statements on February 5, 2009, testified. *See* IAF, Hearing Transcript (HT) at 17, 23, 35, 38 (testimony of Emily Norris and Melissa Kay Hillhouse). In addition to her testimony about the events of February 5, 2009, Ms. Norris testified that she "had been told by Bonnie Butler sometime prior to that day that [the appellant's] wife had told her that [the appellant] had held a gun to [the appellant's wife's] head." HT at 24-25. Mr. Carnegie testified at the hearing that he considered the information in the case file as well as information relating to a

prior arrest of the appellant's that Judy Rocconi[1] told him about but that was not in the case file. *Id.* at 185-87. Mr. Carnegie further testified that in deciding to remove the appellant he considered "the rumors [he] had heard about [the appellant's] conduct outside the office" but that his consideration of the information in deciding to remove the appellant played "a minor role in that . . . it caused [the employees] to be more fearful . . . ." *Id.* at 192.

¶5 In its response file in the instant appeal, the agency included a December 19, 2006 newspaper notice indicating that the appellant had been arrested and was due in court for disturbing the peace. *See* IAF, Tab 13, Subtab 6 at 1. The agency stipulated during the hearing that the appellant was never provided with this information prior to the decision to remove him. *See* HT at 239-41. During the appellant's discovery deposition, the agency representative questioned the appellant regarding the December 19, 2006 newspaper notice. IAF, Tab 16 at 19-22. In response, the appellant stated that he was not aware of the newspaper notice, that he called the police in December 2006 after an argument with his wife, that he had a gun in his truck at the time, that he never threatened anyone with the gun, and that he was never charged with disturbing the peace. *Id.* He denied that he ever held his wife at gunpoint. *Id.* at 22.

¶6 Without addressing the merits of any of the charges, the administrative judge ordered the agency to cancel the appellant's removal and to retroactively restore the appellant effective August 15, 2009. IAF, Tab 25, Initial Decision at 8-9. Relying primarily on *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), and *Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001), the administrative judge found that the information regarding the appellant's arrest for disturbing the peace constituted new, rather

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[1] Ms. Judy Rocconi was originally designated to be the deciding official in this case. The appellant requested that she be recused as the deciding official, and Mr. Carnegie replaced her. HT at 180-81.

than merely cumulative, information because it was not disclosed to the appellant prior to the agency's removal decision and because there was no record in the witness statements that the appellant was previously arrested or held a gun to his wife's head. Initial Decision at 8. The administrative judge also found that the new information was material given Mr. Carnegie's testimony that the information supplied by Ms. Rocconi played at least a minor role in his decision and his testimony that the rumors of the appellant holding a gun to his wife's head played a role in his decision since it caused the employees to be more fearful. *Id.* The administrative judge further found that "the appellant's alleged arrest for disturbing the peace and holding a gun to his wife's head is so likely to cause prejudice that the appellant could not fairly be required to be subjected to a deprivation of property under such circumstances without being put on notice that it was being considered by the deciding official." *Id.* He thus found that the agency violated the appellant's procedural due process rights in failing to give him the opportunity to review and respond to Ms. Rocconi's comments regarding his alleged arrest for disturbing the peace and to the rumors that he held a gun to his wife's head, and that the agency's error was not harmless. *Id.*

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

ANALYSIS

¶8 In its petition for review, the agency asserts that the administrative judge erroneously applied precedent of the Board and the U.S. Court of Appeals for the Federal Circuit on ex parte communications because Mr. Carnegie's consideration of the newspaper material was limited to his penalty analysis. PFR File, Tab 1 at 8-9. Relying on *Westmoreland v. Department of Veterans Affairs*, 83 M.S.P.R. 625 (1999), *aff'd*, 19 F. App'x 868 (Fed. Cir. 2001), and *Biniak v. Social Security Administration*, 90 M.S.P.R. 682 (2002), the agency argues that *Stone* applies

"only to cases involving ex parte information that a deciding official receives in relation to the underlying charges of misconduct." PFR File, Tab 1 at 12.

¶9 In *Stone*, our reviewing court held that, when a deciding official receives new and material information by means of ex parte communications, "then a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure." *Stone,* 179 F.3d at 1377. In that case, the deciding official received ex parte memoranda recommending removal of the employee after the employee had received a notice of proposed removal. *Id*. at 1372. The court reasoned:

> The introduction of new and material information by means of ex parte communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond. When deciding officials receive such ex parte communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. Procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information.

Stone, 179 F.3d at 1376. However, the court also stated that, "not every ex parte communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the appellant to an entirely new administrative proceeding. Only ex parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice." *Id*. at 1376-77.

¶10 In *Stone*, the Federal Circuit relied upon certain factors in determining whether ex parte communications introduce new and material information: (1) Whether the information is merely cumulative, (2) whether the employee knew of and had an opportunity to respond to the information, and (3) whether the ex parte communications would likely result in undue pressure upon the deciding official to rule in a particular manner. *Id*. at 1377. The ultimate inquiry is whether the ex parte communication is "so substantial and so likely to cause

prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Id.*

¶11 Following the court's decision in *Stone*, the Board developed a line of precedent holding that, where an ex parte communication does not relate to the charge itself, but relates instead to the penalty, we would not consider such an error as a denial of due process of law to be analyzed under the factors set forth in *Stone*; rather we analyzed the error by applying the harmful error standard in our analysis of the penalty factors. *See Ward v. U.S. Postal Service*, 112 M.S.P.R. 239, ¶ 10 (2009); *Biniak*, 90 M.S.P.R. 682, ¶ 10; *Groeber v. U.S. Postal Service*, 84 M.S.P.R. 646, ¶¶ 9-11 (2000), *aff'd*, 13 F. App'x 973 (Fed. Cir. 2001); *Westmoreland*, 83 M.S.P.R. 625, ¶¶ 8-12. However, the Federal Circuit recently overruled *Ward* and has directed the Board to consider this type of error as a due process violation under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). *See Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011). The court further found that, even if the Board concludes that the ex parte communications did not rise to the level of a due process violation, the Board should consider the matter as harmful procedural error, and run a harmless error analysis to determine whether the procedural error required reversal, but not perform an independent analysis of the penalty. *Id.* at 1281-83. Given this decision from our reviewing court, we note that the precedent followed in *Ward, Biniak, Groeber, Westmoreland,* and similar decisions has been overruled. Therefore, the agency's argument on review is without merit.

¶12 Further, as discussed above, the record evidence here shows the administrative judge did not err in his analysis of the *Stone* factors. Mr. Carnegie testified that he considered information he received regarding the newspaper notice of the appellant's arrest for disturbing the peace in December 2006 and regarding the rumor that the appellant held his wife at gunpoint. *See* IAF, HT at 185-87, 192. The agency's response file contains a newspaper notice stating that

the appellant was arrested for disturbing the peace on December 19, 2006, and the agency stipulated at the hearing that the newspaper notice was not provided to the appellant before the agency's decision to remove him. *See* IAF, Tab 13, Subtab 6 at 1; HT at 239-241. Additionally, in response to the agency's question regarding "what role . . . any rumors [he] had heard about [the appellant's] conduct outside the office" played in his decision to remove the appellant, Mr. Carnegie testified that the rumor played "a minor role in that . . . it caused [the employees] to be more fearful . . . ." HT at 192. That the deciding official considered the new information and it influenced his decision weighs strongly in favor of finding that the new information was material. *See Ward*, 634 F.3d at 1280 n.2. Accordingly, we find that the administrative judge properly applied the *Stone* factors and determined that the ex parte information received by Mr. Carnegie constituted new and material information that was substantial and undermined the appellant's procedural due process rights.

ORDER

¶13 We ORDER the agency to CANCEL the appellant's removal and to restore the appellant effective August 15, 2009. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶15 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶16 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You

must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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, www.cafc.uscourts.gov. 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.

FOR THE BOARD:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.