UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 36

Docket No. SF-0752-11-0288-I-1

Cody N. Seeler,

Appellant,

v.

Department of the Interior,

Agency.

March 16, 2012

Cody N. Seeler, Honaunau, Hawaii, pro se.

Karen D. Glasgow, Esquire, Oakland, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his removal for refusal to attend mandatory training. For the reasons set forth below, we REVERSE the initial decision and DO NOT SUSTAIN the agency's removal action.

BACKGROUND

¶2 The appellant was appointed to a GL-09 Park Ranger position with the National Park Service in September 2008. Initial Appeal File (IAF), Tab 1 at 47. Effective January 1, 2011, he was removed for "Refusal to attend mandatory

Federal Law Enforcement Training (FLETC) which ma[de] [him] no longer qualified for [his] position." *Id.* at 1-2, 47, 54, 60. He appealed the removal and asserted that he was not aware of the training requirements at the time of his appointment. *Id.* at 5. He also alleged harmful error, asserting that the agency erred in effecting his removal because the FLETC training was not mentioned in the vacancy announcement for the position, nor was it mentioned in his position description or performance appraisal. *Id.* at 3-6. He did not request a hearing. *Id.* at 2.

¶3 The appellant also objected to the deciding official's reliance on information that was not mentioned in the notice of proposed removal. *Id.* at 3, 5. The decision letter referenced a comment that the appellant allegedly made to Cynthia Galieto, the Acting Chief Ranger at the time of the appellant's appointment. According to the decision, the appellant told Ms. Galieto that she should have lied to the agency about their conversation regarding the FLETC requirements so that the agency would not have known that she had informed him of the FLETC requirements at the time of his appointment. IAF, Tab 3, Subtab 4b at 2, 6, Subtab 4d. The deciding official, Kathy Billings, referred to the comment twice in the decision letter even though it was not in the notice of proposed removal. IAF, Tab 3, Subtab 4b at 2, 6, Subtab 4g. The administrative judge issued an order instructing the parties to brief the issue of whether the agency engaged in ex parte communication that violated the appellant's due process rights. IAF, Tab 4. The appellant argued that the statement he allegedly made to Ms. Galieto was "unfounded" and "slanderous," IAF, Tab 1 at 5, was "false as presented," and was new and substantial information that Ms. Billings relied upon in her decision to remove him, IAF, Tab 6 at 2. The agency argued that this statement was merely cumulative of information already in the record regarding the timing of the appellant's knowledge. IAF, Tab 5 at 1-2. Ms. Billings submitted a declaration stating that the record as a whole supported her

decision to sustain the removal action and that, because he was no longer qualified for his position, the only appropriate penalty was removal. *Id.* at 4-5.

¶4 In her initial decision, the administrative judge affirmed the agency's removal action based on the written record. IAF, Tab 9, Initial Decision (ID) at 1. She found that it was undisputed that the agency offered the appellant the opportunity to attend the FLETC training and that he declined to do so. ID at 5. She found that the appellant was clearly on notice of the requirement to attend the training and that his argument that he was not informed of the requirement at the time of his appointment was unavailing. ID at 5-7. With respect to the comment attributed to the appellant in the decision letter, the administrative judge found that the ex parte communication did not rise to the level of a due process violation because it related to information already contained in the proposal notice and was obtained through ex parte communications that only confirmed or clarified what was already in the record. ID at 11-12. She further concluded that the agency's procedural error was not harmful because it was not likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. ID at 12.

ANALYSIS

¶5 Our reviewing court has 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 v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). "[N]ot 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 claimant to an entirely new administrative proceeding"; rather, "[o]nly *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; *see*

Ward v. U.S. Postal Service, 634 F.3d 1274, 1279 (Fed. Cir. 2011) (citing *Stone*, 179 F.3d at 1376-77). In *Stone*, the court specifically identified three factors "[a]mong the factors" that the Board should consider: "whether the *ex parte* communication merely introduces 'cumulative' information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." *Stone*, 179 F.3d at 1377. The court determined that "[u]ltimately, the inquiry of the Board 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*. The *Stone* analysis applies whether the ex parte communication relates to the charge itself or to the penalty. *See Ward*, 634 F.3d at 1279-80.

¶6 The record reflects that, in his response to the notice of proposed removal, the appellant disputed the statements made by his former supervisors, Ms. Galieto and Les Inafuku, with respect to the degree and clarity of the discussions concerning the FLETC requirement. IAF, Tab 3, Subtab 4e at 1. After the appellant submitted his reply, Ms. Billings contacted both Ms. Galieto and Mr. Inafuku by e-mails with the subject line "Verification of Statement" to confirm the statements attributed to them in the notice of proposed removal. IAF, Tab 3, Subtab 4c at 1-2, Subtab 4d at 1. In a response e-mail, Ms. Galieto confirmed that her recollection of her conversation with the appellant was consistent with the information in the notice of proposed removal. IAF, Tab 3, Subtab 4d. Additionally, she stated that, when the appellant was in the office retrieving his belongings, she remarked to the appellant, "[Y]ou know we talked about it and you knew you had to go," to which the appellant responded, "[Y]ou should have lied, they wouldn't have known." *Id.*

¶7 Ms. Billings referred to the appellant's statement to Ms. Galieto twice in her decision letter. IAF, Tab 3, Subtab 4b at 2, 6. The first time was in response

to the appellant's assertion that he disputed the clarity of the instructions from Ms. Galieto and Mr. Inafuku. *Id*. at 2. Ms. Billings stated:

> Furthermore, Ms. Galieto reports that you told her she should have lied when she was asked whether she had apprised you of the FLETC requirement. According to Ms. Galieto, you told her that had she lied to us, no one would have known about the conversation. Accordingly, I find you knew prior to accepting the Park Ranger (Protection) position at PUHO [Pu'uhonua o Honaunau National Historical Park] of the requirement to attend FLETC in order to retain the position.

Id. Ms. Billings again discussed this statement in her analysis of the reasonableness of the penalty:

> From a review of the record, I find your assertion that you were confused about FLETC attendance patently false. Given your admonishment to Ms. Galiteo that she should have lied about her conversation with you, I am convinced that you knew upon accepting the position in 2008 that FLETC attendance was mandatory. Accordingly, I find you deliberately chose to forego FLETC despite knowing it was a requirement of your position . . . . Therefore, I find that there are no mitigat[ing] circumstances surrounding the issue of your refusal to attend FLETC.
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> . . . .
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> Additionally, I find that no penalty less than removal would be adequate to deter you and others from accepting a position, particularly a [law enforcement] position, knowing you are not willing to fulfill the requirements of said position. I find your lack of integrity militates against your being placed in another position as all park positions require the incumbent be trusted to fulfill the requirements of the position, even those which conflict with his personal life.

Id. at 6-7.

¶8 As the administrative judge correctly noted, the deciding official initiated ex parte communications to confirm information that was already in the notice of proposed removal. *See Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001) ("Investigatory interviews and communications that do no more than confirm or clarify pending charges do not introduce new and material

information."). Nevertheless, we find that the information gleaned from the ex parte communication was "new and material" such that it deprived the appellant of the due process guarantee of notice, particularly because the deciding official relied on it in her conclusion that removal was the appropriate penalty.[1] *See Ward*, 634 F.3d at 1279-80. Although the agency argues that this statement merely provided an additional reason supporting the conclusion that the appellant knew he was required to attend the training, we find that the statement relied upon by Ms. Billings went beyond a mere confirmation of what Ms. Galieto informed the appellant at the time of his appointment.

¶9 The decision letter makes clear that the appellant's statement to Ms. Galieto was material to Ms. Billings's conclusion that he knew of the FLETC requirement upon his appointment. Ms. Billings specifically considered this statement in finding that his assertions regarding his knowledge of the FLETC requirements at the time of his appointment were false. IAF, Tab 3, Subtab 4b at 6. The decision letter also indicates that this statement appears to have influenced Ms. Billings to conclude that the appellant lacked integrity and could not be trusted to perform any other position. *Id.* at 7. In both her decision letter and her declaration, Ms. Billings distinguished the appellant's removal from other situations in which employees remained employed after failing to obtain the mandatory law enforcement commission. IAF, Tab 3, Subtab 4b at 3, Tab 5 at 5. Ms. Billings stated that the distinguishing factor was that the other employees had attempted to complete the mandatory training and failed, whereas the appellant refused to attend training despite knowing that it was mandatory "upon accepting the position in 2008." IAF, Tab 3, Subtab 4b at 3, 6-7, Tab 5 at 5. Thus, Ms. Billings considered the issue of whether the appellant knew about the requirement

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[1] The administrative judge did not have the benefit of the Board's post-*Ward* decisions because they were issued after the initial decision. *See, e.g.*, *Pickett v. Department of Agriculture*, 116 M.S.P.R. 439 (2011).

upon accepting the position to be relevant and important to her decision to sustain the charge and conclude that removal was a reasonable penalty under the circumstances. Ex parte communication is plainly material when the deciding official has admitted that the information influenced her penalty determination. *See Ward*, 634 F.3d at 1280 n.2; *Silberman v. Department of Labor*, 116 M.S.P.R. 501, ¶ 12 (2011).

¶10 As the administrative judge found, there is no record evidence that the appellant knew of and had an opportunity to respond to the "should have lied" comment prior to his removal. ID at 11. In addition, the allegation that the appellant told a supervisor that she should have lied in order to conceal information from the agency is in itself "possibly inflammatory," as the agency conceded below, IAF, Tab 5 at 1, and Ms. Billings clearly relied on this statement to conclude that the appellant knew of the training requirement upon his appointment and to conclude that removal was the appropriate penalty. We find that the deciding official's consideration of this aggravating factor without the appellant's knowledge was "so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under the circumstances." *Stone*, 179 F.3d at 1377. Consequently, because the agency violated the appellant's due process guarantee to notice and a meaningful opportunity to respond, the agency's error cannot be excused as harmless, and the appellant's removal must be canceled. *See Ward*, 634 F.3d at 1279. The agency may not remove the appellant unless and until he is afforded an "entirely new" and "constitutionally correct" removal proceeding.[2] *Id.*

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[2] In reversing the appellant's removal, we make no findings with respect to the merits of the agency's charge.

¶11 Accordingly, we REVERSE the initial decision and DO NOT SUSTAIN the removal action.[3] This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

ORDER

¶12 We ORDER the agency to rescind the removal. *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.

¶13 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.

¶14 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).

¶15 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

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[3] Based on our disposition, we need not address the appellant's other assertions raised on petition for review.

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).

¶16 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.

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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.

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.

DISSENTING OPINION OF MARY M. ROSE

in

Cody N. Seeler v. Department of the Interior

MSPB Docket No. SF-0752-11-0288-I-1

¶1 The agency in this case proved that the appellant knew he was required to attend training at FLETC. The appellant disputed that he knew and he objected below to the deciding official's consideration of a statement attributed to the appellant in which he allegedly acknowledged that he knew he was required to attend training. The Board finds that the appellant's alleged acknowledgement of the training requirement constitutes new and material information the consideration of which violated the appellant's right to due process and warrants reversal of the removal action. I disagree.

¶2 First, the administrative judge found that there was no due process violation. The appellant does not challenge this finding on review. I believe that, aside from threshold questions of jurisdiction, it is inappropriate to raise issues sua sponte. In my view, the appellant has abandoned his due process argument and the Board should not consider it.

¶3 Second, even if the Board were to consider it, however, I would find no due process violation. Not every introduction of new information rises to the level of a due process violation. *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011) (citing *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999)). In deciding whether the new information constitutes a due process violation, the ultimate inquiry is whether consideration of the information 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. *Stone*, 179 F.3d at 1377. Factors to be considered include whether the information was merely cumulative and whether it

was of the type likely to result in undue pressure on the deciding official to rule in a particular manner.

¶4 As I see it, the appellant's supposed acknowledgement of the training requirement is a classic example of merely cumulative information that does not rise to the level of a due process violation under *Stone*. The agency already had sufficient proof that the appellant knew he was supposed to attend training. That he allegedly told his supervisor that he knew of the training requirement is nothing more than additional evidence in support of facts that were already thoroughly supported. In finding that the new information in this case is *not* cumulative under *Stone*, the Board makes it difficult to imagine any new information that the Board *would* find to be cumulative under *Stone*.

¶5 For these reasons, I respectfully dissent.

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Mary M. Rose
Member