UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 56

Docket No. DC-0752-10-0706-I-1

Tina M. Wilson,

Appellant,

v.

Department of Homeland Security,

Agency.

April 17, 2012

Robert E. Deso, Esquire, Washington, D.C., for the appellant.

Michelle I. Englar, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision affirming her removal. For the reasons discussed below, we VACATE the initial decision and REMAND the case to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 At the time of her removal, the appellant was a Senior Special Agent with the U.S. Immigration and Customs Enforcement (ICE). Initial Appeal File (IAF), Tab 1 at 2. The agency initiated an investigation of the appellant's conduct based upon information from her ex-husband that she had misused the Treasury

Enforcement Communication System (TECS) for personal financial gain. *Id.* at 9; IAF, Tab 16, Subtab 4h at 4-5. As a result of the investigation, the agency proposed and effected her removal based on 4 charges: (1) 15 specifications of the misuse of TECS; (2) 9 specifications of failure to declare income; (3) 5 specifications of lack of candor; and (4) 2 specifications of failure to cooperate. IAF, Tab 16, Subtabs 4b, 4g. She filed an initial appeal challenging her removal and making several assertions of harmful procedural error. IAF, Tabs 1, 24. She also argued that the deciding official relied upon uncharged and unsubstantiated misconduct in his decision to remove her. IAF, Tab 24 at 24, Tab 34 at 41-42.

¶3 After a hearing, the administrative judge sustained the agency's charges and affirmed the removal. IAF, Tab 38, Initial Decision (ID) at 1, 5-38. She found that the appellant failed to demonstrate that the agency committed harmful procedural error in effecting her removal. ID at 38-45. She further found that the agency established a sufficient nexus between the appellant's misconduct and the efficiency of the service, particularly because the appellant was a law enforcement officer and held to a higher standard of conduct. ID at 46-47. Finally, the administrative judge found that the appellant's removal was reasonable based on the sustained charges. ID at 47-49. The appellant filed a petition for review challenging the administrative judge's findings, and the agency responded in opposition. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

Remand is necessary to determine whether the agency committed a due process violation or harmful procedural error.

¶4 The appellant alleged below that the deciding official, John Torres, improperly relied upon uncharged and unsubstantiated misconduct as an aggravating factor upon which he based the removal action. IAF, Tab 24 at 24, Tab 34 at 41-42. Specifically, the appellant asserted that Mr. Torres improperly concluded that she had shared information that she obtained from TECS with

unauthorized individuals and improperly relied upon the uncharged and unsubstantiated misconduct in his analysis of the penalty. IAF, Tab 24 at 24, Tab 34 at 41-42. The administrative judge did not include an analysis of this argument in the initial decision, ID at 38-45, and the appellant raises it again on review, PFR File, Tab 1 at 16. An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and her legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). Thus, it is necessary to reopen the record to make findings on this issue. Further, although the appellant does not argue that Mr. Torres's consideration of such information was a violation of her due process right to notice and an opportunity to respond, it is also necessary to consider whether a due process violation occurred, especially in light of our reviewing court's decision in *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), and the Board's subsequent decisions applying *Ward*.[1] *See Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 8 (2011).

¶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

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[1] *Ward* was issued during the pendency of the initial appeal, and the Board's decisions implementing *Ward* were issued after the June 2, 2011 initial decision. *See Silberman v. Department of Labor*, 116 M.S.P.R. 501 (2011); *Lopes v. Department of the Navy*, 116 M.S.P.R. 470 (2011); *Gray v. Department of Defense*, 116 M.S.P.R. 461 (2011); *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453 (2011); *Pickett v. Department of Agriculture*, 116 M.S.P.R. 439, ¶ 12 (2011).

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*, 634 F.3d at 1279. 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.* In *Ward*, the court clarified that the due process analysis articulated in *Stone* applies whether the ex parte communication related to the charge itself or to the penalty. *Ward*, 634 F.3d at 1279-80. Further, the Board subsequently held that such a due process analysis is not only applicable to information obtained as a result of ex parte communication but also extends to information personally known and considered by the deciding official. *See Lopes*, 116 M.S.P.R. 470, ¶ 10.

¶6 In the notice of proposed removal, the agency charged the appellant with making TECS queries that were "not related in any way to [her] official duties." IAF, Tab 16, Subtab 4g at 1-2. As the appellant correctly asserts, the agency did not charge her with sharing TECS information with unauthorized individuals. There is no mention in the notice of proposed removal or the decision letter of any allegations that she shared TECS information with unauthorized individuals. Yet, the record reveals that the deciding official concluded that the appellant shared TECS information with unauthorized individuals and relied upon this conclusion in his penalty determination. Hearing Transcript, April 13, 2011 (HT) at 86 (testimony of Mr. Torres). In the "Douglas Factor Checklist," Mr. Torres

indicated that "[r]unning records checks for personal reasons *and sharing information with unauthorized individuals* seriously undermines th[e] public trust." IAF, Tab 16, Subtab 4c at 4 (emphasis added). Further, during his deposition, Mr. Torres testified that he concluded, based on the record as a whole, that the appellant shared the information that she obtained from her TECS searches with her ex-husband. IAF, Tab 24, Exhibit 14 at 74, 92, 94-95. At the hearing, Mr. Torres testified that, even though the allegation that she shared any information with unauthorized individuals was not substantiated, he concluded that she did share information with her ex-husband and considered it to be an aggravating factor. HT at 121-22.

¶7 We find that remand is necessary to address the potential due process violation. The parties have not had the opportunity to brief this issue, and the record is insufficient to determine whether the agency's actions rise to the level of a due process violation or constitute harmful procedural error. As the hearing official, the administrative judge is in the best position to resolve these questions. On remand, in accordance with the Federal Circuit's holding in *Ward*, the administrative judge must apply the *Stone* factors to determine whether the deciding official's reliance on his conclusion that the appellant shared TECS information with unauthorized individuals rises to the level of a due process violation. In conducting her analysis, the administrative judge should allow the parties to provide additional relevant evidence and argument regarding the *Stone* factors, including further hearing testimony if necessary. If a due process violation is found, the administrative judge must reverse the agency's action and order the agency to restore the appellant until she is afforded a "new constitutionally correct removal procedure." *Stone*, 179 F.3d at 1377; *see Ward*, 634 F.3d at 1280. If no due process violation is found, the administrative judge should then determine whether the agency committed harmful error within the meaning of 5 U.S.C. § 7701(c)(2)(A) and 5 C.F.R. § 1201.56(b)(1) & (c)(3). *See Ward*, 634 F.3d at 1281-82. If she finds that there was no harmful procedural

error, she may then reinstate her original findings with respect to the charges and the other affirmative defenses.

The appellant's other arguments on review do not provide a sufficient basis for disturbing the initial decision.

¶8 The appellant challenges the administrative judge's findings with respect to each specification of each charge and asserts harmful procedural error with respect to the deciding official's alleged failure to consider the documents she submitted to him during her oral reply. We have reviewed each of the appellant's arguments and find that they do not provide a sufficient basis for disturbing the initial decision. The appellant has not pointed to any material errors by the administrative judge, and we find that the administrative judge's findings and conclusions are supported by the record. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Further, to the extent that the appellant is challenging any of the credibility determinations, she has not presented sufficiently sound reasons for overturning them. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002).

¶9 With respect to the first charge, the appellant argues that there was no clear, definitive ICE policy that establishes parameters for making initial TECS inquiries. PFR File, Tab 1 at 17-23. The record clearly demonstrates, however, that individuals accessing TECS are prohibited from making inquiries for personal reasons. IAF, Tab 16, Exhibit 35. The appellant was charged with 15 specifications of misuse of TECS to make queries "not related in any way to [her] job duties." IAF, Tab 16, Subtab 4g at 1-2. The administrative judge found that the appellant improperly accessed TECS for personal reasons, not law enforcement purposes, and she found each of the appellant's explanations for accessing TECS to be lacking in credibility.[2] Although the appellant attempts to

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[2] The administrative judge sustained 12 of the 15 specifications and found that they were sufficient to sustain the charge without reaching the remaining 3 specifications. We agree with the administrative judge's conclusion that specifications 1-12 were

deflect attention from the administrative judge's well-reasoned findings and demeanor-based credibility determinations, she does not put forth a persuasive argument to challenge the administrative judge's findings regarding this charge. Further, we find that the administrative judge correctly decided that the agency proved the charge of failure to report income and appropriately afforded it little weight in her penalty analysis.

¶10 With respect to the lack of candor charge, we have considered the appellant's arguments regarding each of the 5 specifications, but we find that the administrative judge made well-reasoned findings on each of these specifications. The appellant challenges the administrative judge's findings regarding specifications 3-5 because the administrative judge relied upon her conclusion that the appellant's explanations of her misuse of TECS were not credible to conclude that the appellant exhibited a lack of candor when she provided the same explanations during the agency's investigation. We discern no error in the administrative judge's analysis regarding these specifications and, given the substantive evidence on the circumstances surrounding the appellant's misuse of TECS, we find it logical to conclude that the appellant lacked candor when she gave the same explanations, lacking in credibility, during the investigation in the first instance. *See Little v. Department of Transportation*, 112 M.S.P.R. 224, ¶ 20 (2009); *Boyd v. Department of Justice*, 14 M.S.P.R. 427, 428-30 (1983). Although the administrative judge did not explicitly address the appellant's argument that she did not remember some of the events at issue, she implicitly found this argument unpersuasive given the facts that the agency proved at the

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sufficient to sustain the charge, and any error by the administrative judge in failing to make findings of fact with respect to the last 3 specifications did not affect the appellant's substantive rights. *See Lavette v. U.S. Postal Service*, 96 M.S.P.R. 239, ¶ 9 n.1 (2004); *Cole v. Department of Veterans Affairs*, 77 M.S.P.R. 434, 439-440 (1998); *Hoag v. Department of the Navy*, 56 M.S.P.R. 449, 458 (1993).

hearing.[3] Finally, the appellant has not provided a sufficient basis to disturb the administrative judge's findings regarding the fourth charge or her remaining affirmative defenses.

ORDER

¶11 For the reasons described above, we vacate the initial decision and remand this case to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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

[3] The appellant argues that specifications 3-5 of the lack of candor charge should be barred by the doctrine of laches. The appellant has not argued or established that any delay in bringing the action was unreasonable and that she was materially prejudiced by the delay. *See Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 25 (2007).