

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

LILLIE LAVAN,
Appellant,

DOCKET NUMBER
DA-0752-11-0629-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: August 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Clifton J. Spears, Jr., Alexandria,, Louisiana, for the appellant.

Brandi M. Powell, New Orleans, Louisiana, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant asserts for the first time on review that: (1) the deciding official violated her due process rights by considering *ex parte* communications in her penalty determination; and (2) the deciding official violated agency procedures by failing to include all the evidence she considered in reaching her decision in the letter of proposed indefinite suspension. Petition for Review (PFR) File, Tab 1 at 5-7. She may not raise such claims for the first time on review. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

Even if the appellant had timely raised her due process claims below, we believe that there is not a violation of due process under *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011), or based on agency procedures. In *Ward*, the court explained that, if an employee has not been given “notice of any aggravating factors supporting an enhanced penalty,” an *ex parte* communication with the deciding official regarding such factors may constitute a constitutional due process violation because it potentially deprives the employee of notice of all the evidence being used against her and the opportunity to respond to it. *Ward*, 634 F.3d at 1280. “However, 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 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.” *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d](#)

[1368](#), 1376-77 (Fed. Cir. 1999). In *Stone*, the court specifically identified three useful factors in making this determination: “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.” *Id.* 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.*

Here, the appellant claims that during the hearing, the deciding official, Gracie M. Specks, stated that she considered *ex parte* telephone conversations before issuing her decision. PFR File, Tab 1 at 5. The appellant further contends that Ms. Specks failed to reference these conversations in the notice of proposed indefinite suspension. *Id.* After listening to the Hearing CD in its entirety, we find the appellant’s claims are baseless.

During the hearing, Ms. Specks testified that, in making her penalty determination, she relied on the appellant’s federal court indictment, which is clearly referenced in the notice of proposed indefinite suspension. Initial Appeal File (IAF), Tab 4, Subtab 4d at 1, Tab 11, Hearing CD. Ms. Specks also mentioned that, upon reading the appellant’s name in the news, she talked to the appellant’s supervisor about the appellant’s indictment. IAF, Tab 11, Hearing CD. Ms. Specks further stated that she consulted with her Chief of Police regarding the same matter. *Id.* Ms. Specks did not testify that she engaged in any conversations regarding other acts of alleged misconduct by the appellant, but rather she discussed the appellant’s indictment.

Because the indictment was the basis of the agency action, the information contained in these conversations was not new. The appellant had an opportunity to make an informed reply to that allegation, which Ms. Specks considered in

making her decision to indefinitely suspend the appellant. IAF, Tab 4, Subtabs 4b, 4c, 4d, 4e. Accordingly, the appellant has failed to establish that the agency violated her due process rights.

Further, the appellant's argument that the deciding official's actions violated agency procedures similarly lacks merit. An agency's consideration of misconduct, without referencing such misconduct in the notice of proposed removal, is still a procedural error even if an *ex parte* communication does not rise to the level of a due process violation. *See Ward*, 634 F.3d at 1281. When there is an error in the application of the agency's procedures, the Board is required to conduct a harmful error analysis to determine whether the procedural error requires reversal. *See id.* Here, to the extent Ms. Specks did engage in *ex parte* communications with others regarding the appellant's federal indictment, any such communications were not harmful because they did not cause the agency to reach a different conclusion regarding the appellant's indefinite suspension. *See* 5 C.F.R. § 1201.56(c)(3).

In her petition for review, the appellant does not challenge the administrative judge's findings regarding the agency's charges, nexus, the appellant's disparate treatment claim, and the existence of a condition subsequent which would bring the appellant's indefinite suspension to an end. Because the administrative judge reviewed the entire record, applied the applicable law, and made explained and reasoned findings, we discern no reason to disturb these findings. *See Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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:

William D. Spencer
Clerk of the Board

Washington, D.C.