

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

VALERIE D. CHAMBERS,
Appellant,

DOCKET NUMBER
AT-0752-12-0212-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: January 24, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John Mechanic, II, Gulfport, Mississippi, for the appellant.

Johnston B. Walker, Jackson, Mississippi, 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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

On review, the appellant alleges that the administrative judge misapplied *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#) (Fed. Cir. 1999), and failed to apply a harmful error analysis in assessing the impact of the ex parte communications that the deciding official had with two subordinates. Petition for Review (PFR) File, Tab 1 at 5. The ex parte communications concerned three issues: (1) Which of the agency's numerous government-owned vehicles (GOV) the appellant was driving when she committed her misconduct; (2) the nature of the appellant's duties; and (3) the fact that the appellant had completed an agency rehabilitation program as a client before becoming an agency employee. Hearing Compact Disc (HCD), Track 2, Testimony of Wisnieski. We find that the

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

administrative judge correctly found that the agency did not violate the appellant's due process rights.

In *Ward v. U.S. Postal Service*, [634 F.3d 1274](#), 1280 (Fed. Cir. 2011), our reviewing court held 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 due process violation. See *Gray v. Department of Defense*, [116 M.S.P.R. 461](#), ¶ 5 (2011). Only ex parte communications that introduce new and material information will violate the due process guarantee of notice. *Ward*, [634 F.3d at 1279](#); *Stone*, 179 F.3d at 1376–77; *Gray*, [116 M.S.P.R. 461](#), ¶ 6. The Board will consider the following factors, among others, to determine whether an ex parte contact is constitutionally impermissible: (1) whether the ex parte communication merely introduces cumulative information or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) 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. *Ward*, 634 F.3d at 1280; *Stone*, 179 F.3d at 1377; *Gray*, [116 M.S.P.R. 461](#), ¶ 7. Ultimately, the 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. *Ward*, 634 F.3d at 1279; *Stone*, 179 F.3d at 1377; *Gray*, [116 M.S.P.R. 461](#), ¶ 7.

The appellant here has failed to show that any of the ex parte communications contained new and material information that was so likely to prejudice the appellant's rights as to render the removal action unfair under the circumstances. The fact that the appellant committed her admitted misconduct in one particular government-owned vehicle as opposed to one of a number of others in the agency's fleet is in no way material in this case and therefore does not meet the materiality requirement of *Stone*, 179 F.3d at 1377. Similarly, the nature of the appellant's job duties is not new and material information but rather, more in

the nature of background information already known to the appellant and was not the type of information that likely resulted in any undue pressure on the deciding official. *See id.* Moreover, the information about the appellant's prior participation in an agency rehabilitation program is not new information because the appellant raised it as an issue in her reply to the notice of proposed removal. Initial Appeal File, Tab 4, Exhibit 4d at 2. Because she explicitly put the issue before the deciding official, she cannot claim that she did not know that the deciding official might consider it. Therefore, this information is not new and material under *Stone* and the agency did not violate the appellant's right to due process.

Additionally, we agree with the administrative judge that the appellant failed to show that the deciding official's consideration of these ex parte communications constituted harmful error. *See Ward*, 634 F.3d at 1282-83. To show harmful error, the appellant must prove that the procedural error was 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. *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991). The appellant made no such showing here or made even an allegation that the outcome of her case might have been different had she been given an additional opportunity to respond.

As to the merits of the case, we agree with the administrative judge that the appellant's stipulation to the facts underlying the charge of misuse of a GOV satisfies the agency's burden of proving that the conduct underlying that charge occurred. *See* [5 C.F.R. § 1201.63](#). Therefore, we see no error in the administrative judge's decision to sustain the first charge. Moreover, because we find, as explained more fully below, that the first charge alone warrants the penalty of removal, we do not address the second and third charges. *See Doe v. Department of Justice*, [118 M.S.P.R. 434](#), ¶ 16 (2012); *Luciano v. Department of the Treasury*, [88 M.S.P.R. 335](#), ¶ 10 (2001), *aff'd*, 30 F. App'x 973 (Fed. Cir. 2002).

The appellant argues on review that the penalty of removal is excessive because she has no prior disciplinary record. PFR File, Tab 1 at 6. She also asserts that the administrative judge failed to consider two cases in which agency employees committed similar conduct and were not removed, and she cites two Board cases that she claims warrant mitigation. *Id.* at 6-7.

The appellant introduced no evidence in support of her apparent claim of disparate penalty except the deciding official's rather vague testimony about two other instances of misuse of a GOV. The deciding official testified that one case was distinguishable because it did not involve a moving violation. HCD, Track 1, Testimony of Wisnieski. He asserted that the second case was resolved by a settlement agreement and did not involve willfulness as did the appellant's case. *Id.*, Track 2. The appellant introduced no further evidence concerning these two cases and there is no basis for the Board to conclude that they are comparable or involve similar misconduct. Thus, the appellant's apparent disparate penalty claim is without merit.

Similarly, the cases to which the appellant cites are distinguishable from her case. *Humphrey v. Department of the Army*, [76 M.S.P.R. 519](#) (1997) was a case in which the Board found that the agency failed to follow its own internal rules concerning misconduct charges related to underlying alcoholism. There is no assertion here that there are any special rules that the agency should have followed in the appellant's case. In *Stronko v. Department of the Treasury*, [14 M.S.P.R. 596](#) (1983), the Board found that the administrative judge erred when he mitigated the appellant's 30-day suspension for misuse of a GOV to a 30-day period of leave without pay. *Stronko* does not support the appellant's apparent argument that a removal is per se inappropriate for a first offense of misuse of a GOV.

Finally, we agree with the administrative judge that the deciding official considered the *Douglas* factors most relevant to this case and that the agency reasonably exercised its management discretion. *See Gray v. U.S. Postal Service*,

[97 M.S.P.R. 617](#), ¶ 11 (2004), *aff'd*, No. 05-3074 (Fed. Cir. June 9, 2005) (NP). Specifically, the deciding official testified that he considered the seriousness of the appellant's misconduct, including the fact that she put the public at risk and could have caused a serious accident. HCD, Track 1, Testimony of Wisnieski. He also considered the potential impact of the appellant's misconduct on the agency's reputation with the taxpayers if the appellant's actions had become known. *Id.* He considered that the appellant had only been an agency employee for approximately three years and that her job required public contact and the use of a GOV. *Id.* He considered that she had no prior disciplinary record. *Id.*, Track 2. Under the circumstances, we find no basis to disturb the agency's exercise of management discretion in deciding on the penalty of removal.

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 the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff.

Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.