UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 25

Docket No. NY-0752-11-0145-I-1

Alethia Canary,

Appellant,

v.

United States Postal Service,

Agency.

April 2, 2013

Doris G. Traub, Esquire, New York, New York, for the appellant.

David S. Friedman, Esquire, New York, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed her removal for unacceptable conduct and found that she failed to prove discrimination based on race. For the reasons set forth below, we REVERSE the initial decision in part and order the agency to CANCEL the appellant's removal.[*]

[*] 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

BACKGROUND

¶2 The appellant was a Supervisor of Distribution Operations at the agency's North Jersey Logistics and Distribution Center (L&DC) in Kearny, New Jersey. Initial Appeal File (IAF), Tab 14, Subtab 4DD at 17 of 44. At the time of the appellant's removal, Patty Edwards was the Manager of Distribution Operations (MDO) at the North Jersey L&DC and the appellant's immediate supervisor, and Carolyn Davis was the Plant Manager. IAF, Tab 11 at 29, 94 of 103. On June 7, 2010, the appellant was involved in a violent physical altercation with a subordinate employee. IAF, Tab 10, Subtab 4C at 112-15 of 204. The subordinate employee, a mail processing clerk, IAF, Tab 14, Subtab 4EE at 19 of 44, had a history of aggressive and abusive behavior, *see, e.g.*, IAF, Tab 23 at 84-89 of 104, that was well known to Ms. Edwards and Ms. Davis at the time of the altercation, Hearing Transcript (HT) at 340-42, 437-39.

¶3 Immediately following the altercation, Ms. Davis notified the U.S. Postal Inspection Service of its occurrence, and James Foley, Inspector, conducted an investigation into the matter. IAF, Tab 34, Exhibit F at 1-2. After reviewing the resulting Investigative Memorandum (IM) and meeting with the appellant to conduct a pre-disciplinary interview, Ms. Edwards determined that the appellant acted in self-defense and, therefore, should not receive discipline. HT at 352-54, 357. Although Ms. Davis agreed that the appellant acted in self-defense, she believed that a stronger message needed to be sent that anyone acting contrary to the agency's zero tolerance policy would be subject to discipline. HT at 452. As a result, Ms. Davis drafted a letter of warning in lieu of a 14-day suspension for issuance to the appellant. *Id.* at 442; IAF, Tab 34, Exhibit I.

¶4 On July 7, 2010, Ms. Davis, through her secretary, forwarded the letter to the Northern New Jersey District Labor Department for its review and editing

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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.

prior to issuance. IAF, Tab 34, Exhibit J at 23-24; HT at 447. On the following day, Frank Carney, Manager, Human Resources, and Fred Hrinuk, Manager, Labor Relations, raised concerns regarding the lack of severity of the proposed discipline. IAF, Tab 34, Exhibit J at 22-23; HT at 449-50. As a result, Ms. Davis indicated that, despite her reluctance to issue a proposed removal to the appellant considering the mitigating circumstances that were present, she would change the letter of warning to a proposed removal. IAF, Tab 34, Exhibit J at 1, 3; HT at 463. Ms. Davis subsequently amended the letter of warning and forwarded it to the Labor Department for its review. IAF, Tab 34, Exhibit I at 7-9; HT at 463-64. Ms. Davis testified, however, that, as the deciding official, she had already determined that she would have reduced the action to a letter of warning in lieu of a 14-day suspension. HT at 465.

¶5 In the meantime, Alice Newman, Manager, Human Resources for the Northeast Area, received an equal employment opportunity pre-complaint counseling request from the subordinate employee regarding the altercation. HT at 289. As a result, Ms. Newman contacted Mr. Carney and Mr. Hrinuk to ask them about what happened and request a copy of the IM. *Id.* at 289-90. After consulting with Mr. Carney, Ms. Newman determined that Ms. Davis could not be objective as a decision maker in the case. IAF, Tab 34, Exhibit J at 3. Ms. Newman additionally determined that the IM was insufficient and ordered that a fact finding be conducted to supplement the record. HT at 291-93; *see* IAF, Tabs 11-14 at 69 of 103. After reviewing the fact finding report, Ms. Newman determined that the agency would "probably be better served" by having individuals outside of the North Jersey L&DC serve as the proposing and deciding officials. HT at 295. She selected Jocelyn Flagg, an MDO and Acting Plant Manager at another agency facility, and Ricardo Quental, Manager, In-Plant Support, Northeast Area, to serve as the proposing official and deciding official, respectively. *Id.* at 296-97. Ms. Newman testified that she based those selections on, among other things, the honesty of Ms. Flagg and Mr. Quental. *Id.* She also

testified that she specifically instructed Ms. Flagg to exercise her own judgment in determining what type of discipline to propose. *Id.* at 297-98.

¶6 On November 2, 2010, Ms. Flagg issued the appellant a notice of proposed removal based on the sole charge of unacceptable conduct for her involvement in the June 7, 2010 incident. IAF, Tab 10, Subtab 4C at 112-19 of 204. On February 3, 2011, following consideration of the appellant's oral reply to the proposed removal, Mr. Quental issued a decision sustaining the charge and removing the appellant, effective February 7, 2011. IAF, Tab 10, Subtab 4A at 33-38 of 204.

¶7 The appellant filed a timely appeal challenging the removal decision. IAF, Tab 1. Specifically, the appellant denied engaging in the charged behavior and asserted that the penalty of removal was not warranted. *Id.* at 3. She raised the affirmative defense of harmful procedural error, claiming that the agency did not follow its internal procedures requiring that disciplinary decisions be made by an employee's direct supervisor. *Id.* at 6. She additionally claimed that the agency engaged in discrimination based on race (African-American) and color (black) when it removed her. *Id.* at 7. After holding the requested hearing, the administrative judge issued an initial decision sustaining the charge, finding a nexus between the sustained charge and the efficiency of the service and finding the removal penalty within the bounds of reasonableness. IAF, Tab 49, Initial Decision. The administrative judge also rejected the appellant's affirmative defenses of harmful procedural error and discrimination based on race. *Id.* at 15-18.

¶8 On review, the appellant argues, among other things, that the administrative judge erred when she determined that the appellant failed to establish her affirmative defense of harmful procedural error. Petition for Review (PFR) File, Tab 1 at 23-27, 35-36. Specifically, the appellant reasserts her argument that the agency committed harmful procedural error when it replaced the proposing and deciding officials in violation of the agency's

Employee and Labor Relations Manual (ELM). *Id.* The agency has filed a response in opposition to the appellant's petition for review. PFR File, Tab 5.

ANALYSIS

¶9 The appellant's removal may not be sustained if she shows harmful error in the application of the agency's procedures in arriving at its decision to remove her. 5 U.S.C. § 7701(c)(2)(A); *see Helms v. Department of the Army*, 114 M.S.P.R. 447, ¶ 6 (2010). An appellant bears the burden of proof to show harmful error by the agency in effecting an adverse action. *Helms*, 114 M.S.P.R. 447, ¶ 6.

¶10 The appellant argues on review that the agency violated ELM § 651.75 when it replaced Ms. Davis as the deciding official. PFR File, Tab 1 at 24. Section 651.75 of the ELM provides that the deciding official "must be higher in authority than the proposing official" and that, in field installations, such as the North Jersey L&DC, the "installation head or designee usually makes the decision." IAF, Tab 34, Exhibit H at 5. We find no violation of the ELM here. Although Ms. Davis, as the installation head, would usually serve as the deciding official on a proposed adverse action, the ELM does not require it. The only requirement for the designation of a deciding official contained in the ELM is that the deciding official is higher in authority than the proposing official, *id.*, and Mr. Quental, as Manager, In-Plant Support, Northeast Area, was higher in authority than both Ms. Edwards and Ms. Flagg at the time. HT at 169-70. We also find that the agency did not otherwise commit procedural error when it replaced Ms. Davis with Mr. Quental because the agency had not yet issued proposed disciplinary action to the appellant at the time of the replacement. *See Helms*, 114 M.S.P.R. 447, ¶ 7 (quoting *Shiflett v. Department of Justice*, 98 M.S.P.R. 289, ¶ 9 (2005)) ("An agency commits procedural error when it replaces a properly authorized deciding official who has already considered an employee's reply to a proposed adverse action and arrived at a decision.").

¶11 The appellant also argues on review that the agency violated ELM § 651.73 when it replaced Ms. Edwards as the proposing official. PFR File, Tab 1 at 23-24. Section 651.73 of the ELM provides that, "[u]nless the circumstances of a particular case make it impractical, the employee's immediate supervisor issues a written notice of proposed adverse action." IAF, Tab 34, Exhibit H at 5. The administrative judge found that it would not have been practical for Ms. Edwards to serve as the proposing official because she found that Ms. Edwards could not be objective given her prior experiences with the subordinate employee. Initial Decision at 16. We find, however, that the record is devoid of any reason that would make it "impractical" for Ms. Edwards to serve as the proposing official, including her alleged lack of objectivity. Indeed, first line supervisors will almost always have prior experiences with employees, but that fact does not make it impractical for them to act as proposing officials. In any event, the record here reflects that the agency replaced Ms. Edwards because it did not agree with the chosen course of disciplinary action against the appellant, not because it was not practical for her to serve as the proposing official. IAF, Tab 34, Exhibit J at 3-4. An agency is required to follow its own rules, including the ELM, regardless of whether those rules go beyond the requirements of government-wide statutes and regulations. *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 26 (2012). Therefore, while the agency may have otherwise had the discretion to replace Ms. Edwards as the proposing official, the ELM restricts such action here. Accordingly, we find that the agency committed procedural error when it replaced Ms. Edwards as the proposing official.

¶12 Harmful error cannot be presumed; an agency error is harmful only where the record shows 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. *Bair v. Department of Defense*, 117 M.S.P.R. 374, ¶ 8 (2012). Here, Ms. Edwards testified that she would not have issued the appellant any discipline based upon her belief that the appellant acted in self-defense. HT at

353-54, 357. The agency's violation of the ELM, therefore, caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. Accordingly, we find that the agency's substitution of proposing officials constitutes harmful procedural error. Under these circumstances, pursuant to 5 U.S.C. § 7701(c)(2)(A), we must reverse the agency's action. *See, e.g., Turner v. U.S. Postal Service*, 85 M.S.P.R. 565, ¶ 9 (2000).

¶13 The appellant does not dispute, and we find no reason to disturb, the administrative judge's finding that the appellant failed to prove her affirmative defense of race discrimination. *See* Initial Decision at 17-18. Applying the administrative judge's analysis of the evidence and testimony with respect to the race discrimination claim, we also find that the appellant failed to prove her affirmative defense of color discrimination. *Id.* Based on our disposition, we need not address the appellant's other arguments on review.

ORDER

¶14 We ORDER the agency to CANCEL the appellant's removal and to restore the appellant effective February 7, 2011. *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.

¶15 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, 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.

¶16 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).

¶17 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).

¶18 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.

¶19 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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:

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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 MEMBER MARK A. ROBBINS

in

Alethia Canary v. United States Postal Service

MSPB Docket No. NY-0752-11-0145-I-1

¶1 For the reasons given below, I do not agree with my colleagues that the agency committed harmful procedural error. I would address arguments that the appellant raises in her petition for review that are not reached by the majority.

¶2 The agency's regulations provide in relevant part that "[n]ormally, the employee's immediate supervisor issues a proposed letter of warning in lieu of time-off suspension," and that a decision is rendered by a management official "at a higher level of authority" than the proposing official. Initial Appeal File (IAF), Tab 34, Exhibit (Ex.) H at 4. The regulations further provide that, where a removal or a suspension of more than 14 days (among other possible actions) is contemplated, "the employee's immediate supervisor" serves as the proposing official "[u]nless the circumstances of a particular case make it impractical," and that the deciding official "must be higher in authority" than the proposing official. *Id*. at 5.

¶3 The majority finds that the agency committed procedural error under these regulations when it replaced Patty Edwards, Manager of Distribution Operations and the appellant's supervisor, with Jocelyn Flagg, a manager at another facility, as the proposing official. Specifically, the majority states that "the record is devoid of any reason that would make it 'impractical' for Ms. Edwards to serve as the proposing official, including her alleged lack of objectivity." The majority goes on to find that, in any event, "the agency replaced Ms. Edwards because it did not agree with the chosen course of disciplinary action against the appellant, not because it was not practical for her to serve as the proposing official." I disagree on both counts.

¶4 Months before the June 7, 2010 altercation between the appellant and Gulseren Gillum, Ms. Edwards had come to believe that Ms. Gillum was "uncontrollable" and posed a danger to employees at her postal facility. Ms. Edwards' belief was so strong that she sought the assistance of an agency Threat Assessment Team. As a result of a March 6, 2010 incident in which Ms. Gillum had allegedly acted aggressively in the workplace, Ms. Edwards tried to have Ms. Gillum barred from agency premises, but officials in "labor relations" instructed Ms. Edwards to allow Ms. Gillum to return. Ms. Edwards believed that Ms. Gillum should have been removed. Transcript 347-54.

¶5 Given this history, agency officials could reasonably conclude that Ms. Edwards would not be objective in determining what discipline, if any, to impose on the appellant. Agency management needed to determine whether the appellant was culpable or had acted in self-defense during her June 7, 2010 encounter with Ms. Gillum, yet prior to that date Ms. Edwards had already formed an opinion that Ms. Gillum presented a threat to other employees and had tried unsuccessfully to have her barred from agency premises. It is entirely understandable for agency officials to have doubted that Ms. Edwards or anyone else at the appellant's postal facility was in a good position to judge whether the appellant's actions toward Ms. Gillum on June 7, 2010 were justified. Indeed, an agency official at the Northeast Area level decided to take the appellant's case completely out of the hands of local officials, i.e., Ms. Edwards and Plant Manager Carolyn Davis, because she believed that Ms. Davis was not "objective." IAF, Tab 34, Ex. J at 3. This amounts to a determination that it was "impractical" for Edwards to serve as the proposing official. Such a determination, which the Board is in no position to second-guess, was within the agency's discretion under agency regulations. I would therefore conclude that the agency did not commit procedural error under its regulations when it replaced Ms. Edwards with Ms. Flagg.

¶6 I would further find that the agency's decision to replace Ms. Edwards with Ms. Flagg was timely made. When an agency rule provides that an employee's first-line supervisor will normally propose an adverse action, the agency commits procedural error if it designates a different proposing official after the first-line supervisor "had made up his mind what the proposed discipline should be." *Boddie v. Department of the Navy*, 827 F.2d 1578, 1580 (Fed. Cir. 1987). Here, e-mail records show that an agency official at the Area level decided to replace Ms. Edwards at 6:49 a.m. on July 8, 2010. IAF, Tab 34, Ex. J at 3. Ms. Edwards interviewed the appellant that same day, and testified that she had not made up her mind about what action to take before the interview. Transcript 375; IAF, Tab 11 at 260. Since the appellant, who bears the burden of proving her claim of harmful procedural error by preponderant evidence, 5 C.F.R. § 1201.56(a)(2)(iii) & (b)(i), has not shown or even alleged that Ms. Edwards met with the appellant and made up her mind about what discipline should be proposed very early in the morning of July 8, 2010, i.e., before 6:49 a.m., the agency's decision to replace Ms. Edwards was made in a timely fashion.

¶7 In sum, I do not agree that the appellant's removal should be reversed on the basis of harmful procedural error. Still, the appellant argues in great detail in her petition for review that the administrative judge erred in finding that she did not make out her claim of self-defense. I would address those arguments.

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Mark A. Robbins
Member