UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 52

Docket No. DA-0752-12-0112-I-1

Bruce D. Lange,

Appellant,

v.

Department of Justice,

Agency.

July 8, 2013

Joel J. Kirkpatrick, Esquire, Plymouth, Michigan, for the appellant.

Marcia N. Tiersky, Esquire, Springfield, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has filed a petition for review challenging the administrative judge's initial decision which reversed the appellant's removal based upon a due process violation. For the reasons that follow, we GRANT the agency's petition for review, VACATE the initial decision IN PART, and REMAND the proceeding to the administrative judge for further adjudication consistent with this Opinion and Order.[1]

[1] 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 agency removed the appellant, a Special Agent with the Drug Enforcement Agency (DEA), effective November 4, 2011, based upon two charges: (1) making a false statement and providing false documentation; and (2) having an improper association with a confidential informant (CI)/suspect. Initial Appeal File (IAF), Tab 5, Subtabs 4E, 4K. The appellant admitted to the deciding official that he provided false oral and written statements about his engaging in a sexual relationship with a CI and that he actually engaged in the relationship as alleged, and the administrative judge noted that she would only adjudicate the reasonableness of the agency's penalty determination. IAF, Tab 15 at 2; Tab 23, Initial Decision (ID) at 2.

¶3 Following an in-person hearing on March 29, 2012, the administrative judge reversed the appellant's removal based upon a *Ward*/*Stone* due process violation. ID at 2. The administrative judge held that the deciding official was "clearly involved in the investigation of the appellant's conduct which led to his removal, as well as investigating alleged misconduct that is not included in the agency's proposal notice." ID at 7. The administrative judge explained that the deciding official served in a supervisory role as the Associate Deputy Chief Inspector at the DEA's Office of Professional Responsibility (OPR) at the time OPR investigated the appellant's conduct, and that, based upon his prior involvement with that investigation, the deciding official was not an impartial decision maker. *Id*. at 5.

¶4 The administrative judge made three specific findings about the deciding official's role in OPR in support of her due process ruling: (1) the deciding official briefed a member of the Office of Inspector General on the investigation of the appellant on November 5, 2008, and he added the appellant's supervisor as

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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.

the subject of an investigation on February 10, 2009, for "Failure to Supervise, Poor Judgment, and Abuse of Authority"; (2) the deciding official was "assigned the initial screening into allegations that the appellant mishandled drug evidence" in May of 2009, which were not cited as grounds for removing the appellant; and (3) the deciding official received a memorandum dated April 1, 2009, concerning the final report into the agency's investigation of the appellant's misconduct. *Id*. at 6. Based upon these acts, the administrative judge concluded that the deciding official was "clearly involved" in the investigation into the appellant's conduct and was disqualified from serving as the deciding official on due process grounds. *Id*. at 7. The administrative judge noted, however, that the deciding official testified that he did not form an opinion about the appellant's case during OPR's investigation or personally conduct witness interviews as a part of that investigation. *Id*. at 5.

¶5 In additional support of her finding of a due process violation, the administrative judge determined that the agency should have disclosed the deciding official's involvement in the appellant's investigation prior to his rendering a final decision and that the agency should have turned over copies of information the deciding official was privy to during his time in OPR, which were not included in the notice of proposed removal. *Id*. at 7. The administrative judge also noted that the deciding official's *Douglas* factors worksheet contained a reference to the appellant's past discipline – a letter of reprimand for poor judgment in 2004 – which was not included in the agency's removal proposal, and she explained that although the deciding official testified that he did not rely upon the past discipline as an aggravating factor, his letter of decision stated both that all of the *Douglas* factors had been considered and that the agency had "lost trust and confidence in the appellant's 'integrity, <u>judgment</u>, and decision making skills.'" *Id*. at 8 (emphasis in original).

¶6 The agency has filed a petition for review of the administrative judge's due process ruling. Petition for Review (PFR) File, Tab 1. The agency argues, inter

alia, that the administrative judge erred in concluding that the deciding official's prior involvement in the appellant's investigation disqualified him from serving as the deciding official. *Id*. at 8-11. In opposition, the appellant asserts that the administrative judge found a due process violation based upon the agency's failure to give the appellant notice of the deciding official's prior involvement in the appellant's investigation, as opposed to the deciding official's service as the final decision maker, and that the initial decision should be affirmed. PFR File, Tab 3 at 10.

ANALYSIS

¶7 There are two separate *Ward*/*Stone* due process issues in this case: first, the deciding official's knowledge and involvement in the OPR investigation into the appellant's conduct prior to his becoming the deciding official; and second, the reference to the appellant's past disciplinary record in the deciding official's *Douglas* factors worksheet. As explained herein, the deciding official's knowledge and involvement in the appellant's pre-removal OPR investigation does not violate due process, and we reverse this portion of the initial decision. We conclude, however, that the extent to which the deciding official may have relied upon the appellant's past disciplinary record in violation of *Ward*/*Stone* remains unclear, and we remand the appeal to the administrative judge for further adjudication of this issue consistent with this Opinion and Order.

The deciding official's knowledge and involvement in the appellant's OPR investigation, alone, does not violate due process.

¶8 Pursuant to the Federal Circuit's decisions in *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999), a deciding official violates an employee's due process rights when he relies upon new and material ex parte information as a basis for his decisions on the merits of a proposed charge or the penalty to be imposed. *See Norris v. Securities & Exchange*

Commission, 675 F.3d 1349, 1354 (Fed. Cir. 2012); *Gray v. Department of Defense*, 116 M.S.P.R. 461, ¶ 6 (2011). The Board has held that an employee's due process right to notice extends to both ex parte information provided to a deciding official and information known personally to the deciding official. *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 7 (2012). *Ward/Stone* and its progeny recognize, however, that not all ex parte communications rise to the level of due process violations; rather, only ex parte communications which introduce new and material information to the deciding official are constitutionally infirm. *Id.*, ¶ 8. In *Stone*, the Federal Circuit identified the following factors to be used to determine whether ex parte information is new and material: (1) whether the ex parte communication introduces cumulative, as opposed to new, information; (2) whether the employee knew of the information and had an opportunity to respond; and (3) whether the communication was of the type likely to result in undue pressure on the deciding official to rule in a particular manner. 179 F.3d at 1377.

¶9 An employee also has a due process right to have an unbiased decision maker adjudicate his case. *Martinez v. Department of Veterans Affairs*, 119 M.S.P.R. 37, ¶ 6 (2012) (citing *Svejda v. Department of the Interior*, 7 M.S.P.R. 108 (1981)). In *Martinez*, the Board reaffirmed that an employee must assert "specific allegations indicating that the agency's choice of the deciding official made the risk of unfairness to the appellant 'intolerably high'" in order to establish a due process violation based upon the identity of a deciding official. 119 M.S.P.R. 37, ¶ 7. As explained in *Martinez*, a deciding official's awareness of background information concerning the appellant, his concurrence in the desirably to take an adverse action, or his predisposition to impose a severe penalty does not disqualify him from serving as a deciding official on due process grounds. *Id.*, ¶¶ 7-8. In *Norris*, moreover, our reviewing court recently held that a deciding official's mere knowledge of an employee's background does not rise to the level of a due process violation unless "that knowledge is a basis for the

deciding official's determination on either the merits of the underlying charge or the penalty to be imposed." 675 F.3d at 1354; *see also id*. ("Nothing in the regulations . . . requires that the deciding official be unfamiliar with the individual, the facts of the case, or the employee's prior conduct.").

¶10 Under *Norris* and *Martinez*, the deciding official's knowledge and involvement in the appellant's pre-removal OPR investigation did not violate the appellant's due process rights. In support of her finding of a due process violation, the administrative judge relied upon three specific facets of the deciding official's knowledge and involvement in the OPR investigation: that he briefed a member of the agency's inspector general's office about the investigation in November of 2008 and added the appellant's supervisor as a subject of an OPR investigation; that he was assigned the initial responsibility to screen additional allegations of the appellant's misconduct not included in the proposed adverse action; and that he received a memorandum regarding OPR's final report into the appellant's conduct. ID at 6. None of these instances of involvement, however, were relied upon by the deciding official in considering the appellant's case, *see* ID at 5, and together, they fail to illustrate an "intolerably high" risk of unfairness to the appellant. *See Martinez*, 119 M.S.P.R. 37, ¶ 7 (rejecting that a deciding official's prior "consideration of and concurrence in the findings" of an OIG report violated the appellant's right to due process). Rather, a deciding official only violates due process when he relies upon his personal knowledge of an employee's background, without notice to the employee, as "a basis for [his] determinations on either the merits of the underlying charge or the penalty to be imposed." *Norris*, 675 F.3d at 1354; *see also Martinez*, 119 M.S.P.R. 37, ¶ 11 (a deciding official's "familiarity with the facts of the case and expressed predisposition contrary to the appellant's interests does not constitute a due process violation or harmful error").

¶11 In opposition to the agency's petition for review, the appellant advances that the administrative judge found a due process violation "due to the failure of

the agency to inform or notice" the appellant about the deciding official's prior involvement in the appellant's OPR investigation. PFR File, Tab 3 at 15. This argument does not change our analysis. Under the *Ward*/*Stone* line of authority, an agency need only inform an employee of a deciding official's knowledge or awareness of new and material information "personally known *and considered* by the deciding official" in reaching his decision. *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 10 (2011) (emphasis added). In this case, where there is no evidence that the deciding official relied upon his past involvement in or knowledge of the appellant's OPR investigation when considering the appellant's proposed removal, there is no due process need to publish the deciding official's prior supervisory role over OPR to the appellant. *Cf. id.*, ¶¶ 10-11. Similarly, because the deciding official did not consider or rely upon documentation in his role as the deciding official to which he was only privy while overseeing OPR, there is no due process violation based upon the agency's failure to provide notice or produce such documentation to the appellant. *See Norris*, 675 F.3d at 1353-54 ("[A] deciding official's mere knowledge of prior misconduct by the employee obtained before the commencement of disciplinary proceedings does not constitute an improper ex parte communication.").

¶12 Based upon *Norris* and *Martinez*, which were both decided after the administrative judge issued her initial decision in this case, the initial decision's due process finding must be reversed.[2]

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[2] In *Ward*, the Federal Circuit held that if a deciding official's consideration of ex parte information does not violate due process, the Board should then analyze whether his consideration of such information constitutes harmful procedural error. 634 F.3d at 1281 (citing 5 C.F.R. § 752.404(f)). On remand, the administrative judge does not have to adjudicate a harmful procedural error defense because the appellant has not shown that the deciding official relied upon his personal knowledge of the appellant's OPR investigation in rendering his decision. The administrative judge, moreover, foreclosed the consideration of a harmful procedural error affirmative defense based upon the selection of the deciding official because the appellant was unable to specify "any agency rule, regulation, or collective bargaining agreement that was violated." IAF,

The extent to which the deciding official relied upon the appellant's past discipline needs to be developed further on remand.

¶13 The administrative judge found that the inclusion of the appellant's past discipline on the deciding official's *Douglas* factors worksheet provided additional support for her reversal of the appellant's removal. We believe that this potential due process violation is underdeveloped, and should be explored further on remand.

¶14 In her initial decision, the administrative judge noted that the appellant's prior discipline was included on the *Douglas* factors worksheet but was not included in the agency's removal proposal or letter of decision. ID at 7-8; IAF, Tab 5, Subtab 4G. The administrative judge explained that although the deciding official testified that "he did not find the fact that the appellant had this prior discipline to be an aggravating factor," he also "acknowledged that he considered the factors listed in his written *Douglas* factor analysis" before rendering his penalty determination. ID at 8; *see also* IAF, Tab 5, Subtab 4E (agency letter of decision stating, "I have also taken into consideration all pertinent Douglas Factors[,] including your claims of mitigating circumstances."). The initial decision does not make credibility findings under *Hillen* reconciling the differences between the deciding official's oral statements and his letter of decision. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

¶15 Based on the current record, we believe there remains an unresolved issue of fact as to whether the deciding official actually relied upon the appellant's past discipline in rendering his penalty analysis. As noted above, pursuant to *Norris*, a deciding official's mere knowledge of information not included in a proposal notice is not enough to trigger a due process violation. *Norris*, 675 F.3d at 1354. Rather, such information must be a "basis for the deciding official's

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Tab 21. The appellant has not challenged this ruling through a cross-petition for review.

determinations on either the merits of the underlying charge or the penalty to be imposed" before due process is violated. *Id*. (citing *Ward*, 634 F.3d at 1280). Many of the Board's post-*Ward* decisions finding due process violations note that the ex parte information considered by the deciding officials also served as the grounds for their decisions. *See, e.g.*, *Solis*, 117 M.S.P.R. 458, ¶ 9 (noting that the *Douglas* factors referred to ex parte information, which "contributed in part to [the deciding official's] finding that the appellant had no potential for rehabilitation"); *Silberman v. Department of Labor*, 116 M.S.P.R. 501, ¶ 12 (2011) (referencing that the deciding official included ex parte information concerning prior discipline as factors in her decision letter); *Lopes*, 116 M.S.P.R. 470, ¶ 12 (explaining that the deciding official's hearing testimony confirmed his consideration of ex parte information about prior misconduct found on the *Douglas* factors worksheet); *Pickett v. Department of Agriculture*, 116 M.S.P.R. 439, ¶ 12 (2011) (highlighting that the deciding official "testified that he considered information he received" outside the proposal notice).

¶16 In similar cases, where there has been a factual question as to whether the deciding official relied upon ex parte information in rendering his ultimate decision, we have remanded that issue to the administrative judge for further factual development of the record. *See, e.g.*, *Wilson v. Department of Homeland Security*, 118 M.S.P.R. 62, ¶¶ 6-7 (2012); *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 12 (2011). On remand, the administrative judge should explore whether the deciding official relied upon the appellant's past discipline when conducting his penalty analysis. The administrative judge, as the hearing officer, is in the best position to make factual findings and detailed credibility assessments. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002); *Hillen*, 35 M.S.P.R. at 458.

¶17 On remand, should the administrative judge conclude that the deciding official did not impermissibly consider the appellant's past discipline in violation of due process, the administrative judge should then assess whether the inclusion

of the appellant's past discipline on the *Douglas* factors worksheet amounted to harmful procedural error, *Ward*, 634 F.3d at 1281-82, and if not, then adjudicate the reasonableness of the appellant's removal under *Douglas*.

ORDER

¶18 For the above-stated reasons, this appeal is remanded to the Dallas 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.