

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

_____)	DOCKET NUMBER
HENRY S. ANDERSEN)	DC04328310838
)	
v.)	
)	
DEPARTMENT OF STATE)	DATE: <u>APR 24 1985</u>
_____)	

OPINION AND ORDER

Appellant filed a timely petition for appeal from the action of the Department of State removing him from the position of Oceanographer, GS-1360-13, effective June 24, 1983, under the procedures of 5 U.S.C. Ch. 43. The removal action was based on appellant's alleged unacceptable performance in four critical elements of his position. After affording appellant a hearing, the presiding official issued an initial decision. The presiding official found: 1) that the critical elements and performance standards for appellant's position were properly established and were directly related to the duties and responsibilities of his position; 2) that the specifications pertaining to two of the four critical elements were supported by substantial evidence; 3) that appellant did not prove his affirmative defense that the removal action was motivated by the personal animus of agency officials and was taken in reprisal for his having filed grievances and complaints concerning various agency personnel practices; and 4) that the remedy of removal was both reasonable and appropriate. Thus, the removal action was sustained.

Appellant filed a timely petition for review, to which the agency responded. Appellant contends, in relevant part, that the presiding official erred in his evaluation of the evidence and by refusing to permit him to present "key elements of a chronology" from which reprisal by the agency could be inferred, and that the presiding official erred by not permitting him to cross examine adequately the proposing and deciding officials in order to prove his affirmative defense of reprisal. Appellant contends further that the agency engaged in prohibited ex parte communications in that: (1) the proposing official, after hearing appellant's oral reply, submitted a memorandum to the deciding official which generally discussed appellant's responses to the charges, withdrew certain specifications, listed several alternative disciplinary actions and recommended a best alternative; (2) the proposing official, after hearing the oral reply, requested assistance from appellant's bureau chief in formulating his recommendation; and (3) the decision letter was prepared by the proposing official and was issued by the deciding official without exercising his independent judgment.

The petition for review is hereby GRANTED pursuant to 5 U.S.C. § 7701(e)(1).

Despite the contentions raised by appellant, our review of the record shows that the presiding official permitted full examination of the proposing and deciding officials concerning appellant's allegations of reprisal, and that appellant was permitted to submit his "chronology of reprisal" in his written closing statement. The Board concurs with the finding of the presiding official, initial decision at 4, that appellant failed to carry his burden of showing by preponderant evidence that the removal action was effected in reprisal for his filing grievances and complaints concerning various agency personnel practices. See Gerlach v. Federal Trade Commission, 8 MSPB 599 (1981).

The Board gives due deference to the findings of fact and credibility determinations of the presiding official who was present to hear and observe the demeanor of the witnesses. Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980), aff'd, 669 F.2d 613 (9th Cir. 1981). Appellant has not demonstrated that the presiding official's findings of fact are based on an erroneous application of the statutory requirements governing the weight of the evidence or other cause warranting a complete review of the record in this regard. Id.^{1/}

The Board finds, in regard to the claims of prohibited ex parte communications, that there is no statutory or regulatory prohibition of ex parte communications between the proposing and deciding officials or any other officials or persons during the agency's decision making process. The Board finds that ex parte communications between the proposing and deciding officials or any other agency officials or persons during the agency's decision making process are proper absent a showing by the appellant that they are prohibited by statute, Office of Personnel Management regulation, or agency internal regulation. Depte v. United States, 715 F.2d 1481, 1484 (Fed. Cir. 1983). See Welcker v. United States, No. 84-1392, slip op. at 11-12 (Fed. Cir. January 22, 1985). The Board will not place nonstatutory or nonregulatory encumbrances upon the agency decision making process involving the furnishing of advisory information which is of an investigative, nonadversarial nature. See Hairston

^{1/} In reaching this conclusion, we find that the agency has met its burden of showing under Chapter 43 that its performance appraisal plan was approved by the Office of Personnel Management and that it afforded appellant a reasonable opportunity to improve his performance. See Griffin v. Department of the Army, 23 M.S.P.R. 657(1984); Sandland v. General Services Administration, 23 M.S.P.R. 583(1984). The Board, further, has no authority to review or modify the agency's choice of a removal or demotion action taken under 5 U.S.C. Section 4303. Lisiecki v. Federal Home Loan Bank Board, 23 M.S.P.R. 633(1984).

v. Department of the Treasury, MSPB Docket No. DC07528110806 at 4 (August 24, 1983).

An employee's procedural rights in a Chapter 43 proceeding are set forth in 5 U.S.C. § 4303 and 5 C.F.R. § 432.101. See Sandland v. General Services Administration, 23 M.S.P.R. 583, 590 (1984). Under 5 U.S.C. § 4303(b)(1)(A) and 5 C.F.R. § 432.101(b), an employee against whom a reduction in grade or removal based on unacceptable performance is proposed is entitled to advance written notice of the proposed action. The notice must identify specific instances of unacceptable performance by the employee on which the proposed action is based, and the critical elements of the employee's position involved in each instance of unacceptable performance. The employee also is entitled to a reasonable time to answer orally and in writing. 5 U.S.C. § 4303(b)(1)(C); 5 C.F.R. § 432.101(b). Further, the employee is entitled to a written decision which specifies the instances of unacceptable performance by the employee on which the action is based, and unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action. 5 U.S.C. § 4303(b)(1)(D); 5 C.F.R. § 432.101(b). There is, however, no statutory or regulatory prohibition on the proposing and deciding officials or other agency officials or persons conferring about the proposed Chapter 43 action prior to the decision. See, e.g., Peterson v. Department of Health and Human Services, 25 M.S.P.R. 572 (1985); Beatty v. Department of Housing and Urban Development, MSPB Docket No. DC04328210433 and DC531D8210491 at 2 (May 4, 1984). See also Sibert v. Department of Health, Education, and Welfare, 4 MSPB 132 (1980), in which the Board held that no violation of the procedural rights found in 5 C.F.R. Part 752 results from ex parte communications between the proposing and deciding officials in a case where the agency has adopted a two-stage decision making process not required by statute or regulation.

The means by which the deciding official learned of additional allegations or information against the employee during the decision making process, which the employee did not have the benefit of reviewing and responding to, is not the focus of the Board's concern in reviewing an employee's allegation that his or her statutory or regulatory procedural rights were violated in a Chapter 43 action. The Board's concern, rather, is directed specifically to whether the deciding official predicated his or her ultimate decision on the information contained in the advance written notice, and not on additional allegations or information, and whether the employee had an opportunity to address the specific instances of unacceptable performance on which the proposed action is based.

The Board finds that an allegation by the appellant that new allegations or information were erroneously considered during the agency's decision making process which he or she did not have the benefit of reviewing and responding to and which impaired his or her ability to defend against the agency's action is subject to the harmful error analysis set forth in Baracco v. Department of Transportation, 15 M.S.P.R. 112 (1983), aff'd, 735 F.2d 488 (Fed. Cir. 1984); and Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). In order to support an allegation that the introduction of new allegations or information during the agency's decision making process constituted harmful error, the appellant must show: 1) that new allegations or information were introduced which the appellant has not had the benefit of reviewing and responding to; 2) that the deciding official was influenced by the new allegations or information in his or her decision making process; and 3) that the procedural error of considering the new allegations or information likely had a harmful effect upon the outcome before the agency.^{2/} See Baracco, 15 M.S.P.R. at 121-23; Parker, 1 MSPB

^{2/} The appellant, further, may show that additional allegations or information which improperly influenced the agency's decision making process were motivated by animus, reprisal or some other improper motive, and thus also establish that the agency's action was based
[FOOTNOTE CONTINUED ON NEXT PAGE]

at 121-23; Parker, 1 MSPB at 492-93. See also Sandland, 23 M.S.P.R. at 590 n.11.3/

The Board finds that appellant failed to show any error in the ex parte discussions of the proposing and deciding officials with subordinate managerial officials concerning their recommendations and appellant's arguments raised in his oral and written replies. The court in Sullivan v. Department of the Navy, 720 F.2d 1266, 1272 (Fed. Cir. 1983), distinguished its holding from those cases in which communications to a decision maker during the decision making process merely involved the furnishing of internal information and documents of an advisory nature. The court, further, in Depte, 715 F.2d at 1484-85, held that an ex parte discussion by a deciding official with an impartial agency witness to the misconduct charged against an employee is not improper or a prohibited personnel practice under 5 U.S.C. § 2302(b)(2). The record in the instant case

[FOOTNOTE CONTINUED]

on a prohibited personnel practice against the appellant under 5 U.S.C. § 2302(b). See Sullivan v. Department of the Navy, 720 F.2d 1266, 1274-76 (Fed. Cir. 1983), where the court found that the improper influence of an agency official in the decision making process of the removal action, motivated by animus against the employee for filing a grievance against the official, rendered the action a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(8).

In the instant case, the presiding official found, and the Board concurs, that appellant failed to show that his removal was effected in reprisal for his conduct.

3/—In Farris v. Department of the Air Force, MSPB Docket No. BN07528410079 at 5 (January 31, 1985), the Board stated that no law or regulation prohibits the proposing and deciding officials from "meeting, discussing and/or consulting on a case if no new evidence, subject matter or material is introduced, which the appellant has not had the
[FOOTNOTE CONTINUED ON NEXT PAGE]

discloses that no new allegations or information were introduced at these discussions and that the discussions merely involved the furnishing of advisory information by impartial management officials and were of an investigative, nonadversarial nature. See Hairston, supra, at 4.

The Board finds further that the proposed decision letter submitted to the deciding official by the proposing official cannot be interpreted as precluding the deciding official from reaching his own considered judgment on the merits of the action. While 5 U.S.C. § 4303(b)(1)(D)(ii) and 5 C.F.R. § 432.101(b) require an employee who is in a higher position than the proposing employee to concur in a demotion or removal action, it is that independence of judgment on the merits, which the deciding official testified without contradiction that he exercised in evaluating the removal action and adopting the proposed decision letter, that is required by statute, regulation, and judicial precedent. The Board perceives no error in this regard in the instant case. See Anderson v. Department of Transportation, 15 M.S.P.R. 157, 166-68 (1983), aff'd, 735 F.2d 537 (Fed. Cir. 1984). See also Sullivan, 720 F.2d at 1272.

Accordingly, the initial decision sustaining the removal action is hereby AFFIRMED as MODIFIED by this opinion.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court

[FOOTNOTE CONTINUED]

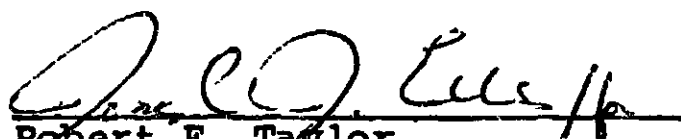
benefit of responding to or viewing...." The Board hereby clarifies its statement in Farris by holding that the introduction of additional allegations or information during the agency's decision making process which the employee has not had the benefit of reviewing and responding to does not constitute harmful error unless the appellant shows that such error occurred under the analysis set forth at 5, supra.

has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District not later than thirty (3) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f)-(k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.