UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

FRANKLIN D. FORRESTER, appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, agency.	DOCKET NUMBER DA07528410408
	Date: MAY 13 1985

Before

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant was removed from his Consumer Safety Officer position for (1) falsifying flexitime records, (2) taking extended lunch breaks, (3) involvement in unapproved outside activity, and (4) using government funds, equipment, and personnel to conduct outside activity. A presiding official of the Board's Dallas Regional Office found that the appellant's allegation of discrimination on the basis of national origin and sex was not substantiated. He found further, however, that only charges (3) and (4) were supported by a preponderance of the evidence; and he mitigated the penalty of removal to 30-day suspension. The appellant has petitioned for review. We hereby GRANT the petition in order to consider the appellant's allegation concerning procedural matters and concerning the merits of the charges sustained by the presiding official. See 5 U.S.C. § 7701(e)(1). For the reasons stated below, we find that the appellant's allegations concerning procedural matters are without merit, but that the agency has not shown a proper basis for taking adverse action against the appellant.

In his petition for review, the appellant alleges that the presiding official erred in declining to consider his allegation that the agency violated 5 C.F.R. § 752.404(b)(1) by failing to provide him with a "followup" investigative report, appellant's exhibit 2, on which he believes the agency relied in removing him. He notes that the reason given by the presiding official for his failure to consider the allegation was that the report at issue concerned only the charges which had not been sustained, initial decision at 7 n.2; and he alleges that the report in fact concerned the sustained charges as well. He contends further that, even if the report concerned only the unsustained charges, the agency's failure to provide it to him caused the action to be void in its entirety because (1) the deciding official's reliance on the report violated prohibitions on ex parte communications, and (2) a contrary determination would otherwise violate his due process rights and the regulations implementing the Civil Service Reform Act.

The record shows that an agency employee with whom the appellant worked, Mr. Richard Aleman, complained to agency officials that certain employees in his organization were engaging in improper actions. The agency's Policy Management Staff investigated the complaint, obtained information and affidavits from Mr. Aleman and the appellant, and provided the official who proposed the appellant's removal with at least two investigative reports. The first of these reports was issued before the appellant's removal was proposed, see agency file, tab 3; and the appellant apparently was given an opportunity to review the report before the decision to remove him was made. The second report, however, was not issued until six weeks before the agency issued its notice of decision to remove the appellant,[1/] and it was supplemented by material dated only 20 days before issuance of

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1/ The proposal notice was issued more than two months before the agency issued the notice of decision.

the notice. The agency official who decided to remove the appellant admitted at the hearing that he had reviewed the second report at the time he wrote the decision letter, and that he never provided the appellant with a copy of that report. Hearing transcript at 195. The appellant evidently first received a copy of the report either after the hearing started, see petition for review at 6, or the day before it began, see hearing transcript at 195 (statement by appellant's representative, on the first day of the hearing, that the report "was produced yesterday as a result of [a companion] case").

Section 752.404(b)(1) provides as follows:

> The notice of proposal [to take an adverse action] shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material which cannot be disclosed to the employee or his representative or designated physician . . . to support the reasons in the notice.

An agency's failure to comply with this section by not allowing an employee to review the material on which it relied would constitute a procedural error which, if harmful to the appellant, would provide a basis for reversal of the action. See Smith v. Department of the Interior, 6 MSPB 82, 86 (1981). The Board has held, however, that the appellant has the burden of proving harmful procedural error by a preponderance of the evidence, Parker v. Defense Logistics Agency, 1 MSPB 489, 482 (1980), and that an appellant is not entitled under 5 C.F.R. § 752.404 to material on which the agency did not rely, Klein v. Department of Labor, 6 MSPB 249, 251 (1981). In this case, the appellant has alleged that the agency's deciding official

"testified that he had relied upon [the second] investigative file." Petition for review at 2-3.[2/] However, the portion of the hearing transcript which the appellant cites in support of this allegation indicates that the deciding official testified that he did not "specifically recall" whether the report at issue was part of the basis for the decision. Hearing transcript at 194. In addition, the deciding official did not refer to the second investigative report in his notice of decision to remove the appellant, and the appellant has cited no other evidence which would establish that the agency relied on the report, see Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980) (petition that does not show factual error of presiding official by citing specific portions of the record is not sufficient basis for review by the Board). Furthermore, the fact that certain portions of the file were related to the charge sustained by the presiding official does not establish, absent a showing that the agency relied on this evidence in removing the appellant, that the appellant was entitled under 5 C.F.R. § 752.404(b)(1) to review the file. See Bize v. Department of the Treasury, 3 MSPB 261, 264-66 (1980) (relevant material to which an appellant is entitled under post-termination discovery proceedings may include material not covered under 5 C.F.R. § 752.404). We find, therefore, that the appellant has not established that the agency violated 5 C.F.R. § 752.404(b)(1).

The appellant has also alleged that the deciding official's reliance on the report violated prohibitions on ex parte communications. In support of this allegation,

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2/ The second investigative report evidently differs from the first in that it includes more recent information concerning the charges which were brought against the appellant and other employees; it does not, however, appear to concern charges different from those at issue in the first report. See appellant's exhibit 2.

the appellant has cited Camero v. United States, 375 F.2d 277 (1967), Ryder v. United States, 585 F.2d 482 (1978), and Sullivan v. Department of the Navy, 720 F.2d 1266 (1983), each of which involved improper ex parte communications between an adversary of the plaintiff and an official who either had decision-making authority or advised an official with that authority; and he has identified Mr. Aleman as the "adversary" whose statements allegedly were improperly communicated to the deciding official. However, the appellant has not identified any statements by Mr. Aleman which were brought to the deciding official's attention for the first time in the second investigative report, and our review of that document has not disclosed any such statements.

Furthermore, although the second investigative report evidently constituted an ex parte communication to the deciding official, the Board has held that ex parte communications during the agency's decision-making process are proper absent a showing that they are prohibited either by statute or by a regulation of the agency or the Office of Personnel Management (OPM), Andersen v. Department of State, MSPB Docket No. DC04328310838 at 3 (April 24, 1985). In addition, the Board has held that when an appellant alleges that his ability to defend himself against the agency's action was impaired by the ex parte introduction of evidence, he may not prevail unless he shows, inter alia, that the deciding official was influenced by the new information in his decision-making process, and that consideration of the new information is likely to have had a harmful effect on the outcome before the agency.[3/] As we indicated above, the appellant has not established that the ex parte communication at issue violated

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3/ Andersen v. Department of State, MSPB Docket No. DC04328310838 at 5 (April 24, 1985).

5 C.F.R. § 752.404(b)(1). He also has failed to show that it violated any other OPM or agency regulation, or that it violated any statutory provision; and, even if he had established any such violation, there is no showing that the communication influenced the deciding official or is likely to have had a harmful effect on the outcome before the agency. We therefore find that the appellant has failed to show that the ex parte communication at issue here constitutes a proper basis for reversal of his removal.[4/]

The appellant appears to be objecting, in this regard, not only to the agency's failure to provide the report prior to the decision to remove him, but also to its failure to provide the report promptly in response to his discovery request. Specifically, he alleges that this failure prevented him from reviewing the report until after the hearing ended; and that, when he did review it, he was able to obtain new evidence showing that the agency's third charge should not have been sustained. This "new evidence" is attached to the petition for review. The appellant does not indicate, however, that he asked for a postponement of the hearing proceedings in order to review the report; and our review of portions of the transcript,[5/] and of the

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4/ The appellant also cites Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983), and McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977), in support of his allegation that the agency's failure violated his right to due process. Because both Miller and McGhee concern an employee's right to be given certain kinds of information before a post-termination hearing, rather than before the termination itself, and because the court did not hold in either case that failure to meet these requirements would constitute a basis for reversal of the action, neither decision supports a conclusion, in the case now before the Board, that the agency's failure to provide the appellant with the report at issue at an earlier time causes the action itself to be void.

5/ We have reviewed pages five through twelve of the transcript, in which the parties addressed the appellant's motion for sanctions against the agency on the basis of its alleged failure to respond properly to other parts of its discovery request, and pages 194 and 195, in which the appellant introduced the report at issue into evidence and stated that the agency had not produced it in a timely fashion.

appellant's post-hearing brief, has not disclosed that the appellant made such a request.6/ The appellant's attempt to introduce this "new evidence" therefore appears to be untimely. See generally Abarr v. Department of Transportation at 1-2, MSPB Docket No. CH07528!F0833 (September 19, 1983). Because of our findings on the merits of the third charge, however, it is unnecessary to determine whether consideration of this evidence would be proper.

The third charge against the appellant is based on his failure to submit a form 520 to the agency seeking advance approval of the "outside activity" of owning (and leasing to others) real estate. The agency contends that the form 520, along with the approval of the agency, is required by section 169.21 of the agency's Inspection Operations Manual and by section 3118.3 of the FDA Staff Manual Guide. The appellant, on the other hand, alleges that neither section covers activities such as ownership of real estate; and that his reporting of the ownership in an agency form 473 was sufficient to meet agency requirements with respect to this matter.

We have reviewed the two sections of instructions which the agency has cited in support of its position. Neither section includes any clear statement that ownership of real estate is an "outside activity" for which agency approval is required. Section 169.21 of the Inspection Operations Manual proscribes certain activities involving a conflict of interest, but includes no definition of "outside activities." Agency file, tab 3. Section 3118.3 of the FDA Staff Manual Guide provides that "outside activities include . . . [e]mployment (whether compensated

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6/ See hearing transcript at 7, where the appellant's representative stated that he "would not seek to delay this proceeding."

or not)" and six other activities. None of the latter six activities includes ownership of real estate.7/ Furthermore, although the definition in section 3118.3 indicates that the list of activities is not exhaustive, and although ownership of real estate is not listed as a specific exception to the reporting requirement, we find that the activity of "employment" (which is not described further in that section) cannot be assumed to include the "activity" in which the appellant has engaged. In light of the absence of any clear indication that the agency's instructions require advance approval of the activity, we find that the agency has failed to support the third charge against the appellant by a preponderance of the evidence.8/

Finally, the appellant alleges that the presiding official erred in sustaining the fourth charge against him. The record shows that this charge (the use of government facilities, equipment, and personnel to conduct outside activity) is based on the agency's allegation that "a considerable amount of [the appellant's real estate corporation's] letterhead was found on [his] desk with the [office] telephone number imprinted on the stationery"; that "[t]his [was] proof that [the appellant] was conducting business from the . . . Office"; and that "[t]here were also copies of correspondence found which had been typed by [the

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7/ The six activities consist of "Writing/Editing," "Public Appearances," "Holding office in professional societies," "Professional or Consultative Services," "Outside Standard-setting," and "Holding office under State or local government."

8/ Because of this finding, it is unnecessary for us to reach the appellant's allegation that the presiding official improperly placed the burden of proof regarding this issue on him rather than on the agency.

office's administrative clerk] and signed by [the appellant]."9/ Agency file, tab 4.

The scope of this charge was reduced somewhat after the appellant responded to the proposal notice. In the notice by which the appellant was informed of the decision to remove him, the deciding official stated that there was "no suggestion in any of the investigative reports to suggest that this activity has interfered with [the appellant's] efficiency"; and that the "only evidence that [the appellant's business required official time] is in [the appellant's] response . . . indicat[ing] that a building contractor needed to contact [him]" two or three times. Agency file, tab 6 at 2. That official stated further, however, that "[t]he amount of file material, correspondence and firm's stationary [sic] found on and around [the appellant's] desk strongly indicates that official facilities, general office space and file space, was being used"; and that it "also seems to be undisputed that the government typewriter was used to type some of the correspondence for [the] outside activity." Id. at 3.

The presiding official found that the agency had not shown that the appellant used government personnel for his business. He sustained the charge, however, on the basis of "testimony reflect[ing] that a secretary did some typing for his company, although not at his direction," and on the basis of evidence that the appellant "also kept some of his business correspondence in his desk." Initial decision at 6.

9/ The appellant's allegation that the agency's failure to substantiate the third charge against him causes the fourth charge to be improper, is not persuasive. Although the portion of the proposal notice in which the latter charge was made did include the phrase "[n]ot only was your outside activity not approved by management," agency file, tab 4 at 2, the substance of this charge is that the appellant used government facilities, equipment, and personnel for non-agency business, and not that the non-agency business was itself improper.

We note that the appellant was not the sole owner of the real estate in question. Another employee in the appellant's office also was a partner in the corporation under which this property was held; and his signature appeared on the only letter introduced by the agency which bore the administrative clerk's initials. A showing that the office's administrative clerk "did some typing for [the appellant's] company" therefore does not establish that the appellant was responsible for the administrative clerk's action. In addition, the agency has not objected to the presiding official's finding that it had not shown that the appellant used government personnel for his business.10/ Accordingly, we find that the record does not support this part of the charge. The only portion of this charge which remains, therefore, is the part which concerns the appellant's use of his desk to store papers related to his business. Even if this activity constitutes a violation of the agency's requirement, it is in our view so minor (especially in the absence of any showing that the appellant was aware of a prohibition on this use) that it cannot support adverse action against the appellant.

In view of the foregoing analysis, the agency's action is hereby REVERSED, the presiding official's order that a 30-day suspension be imposed is VACATED, and the agency is ORDERED to cancel the appellant's removal, to award the appellant back pay in accordance with 5 C.F.R. § 550.805, and to submit proof of its compliance with this order to the Office of the Clerk of the Board within 20 calendar days of the date on which this opinion is issued. Any petition for enforcement of this order shall be made to the Dallas Regional Office of the Board in accordance with 5 C.F.R. § 1201.181(a).

10/ The agency has not responded to the petition for review.

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 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.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.