UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHRISTINE M. HALFACRE, Appellant, v. DEPARTMENT OF HOMELAND SECURITY, Agency.	DOCKET NUMBER DC-0752-12-0626-I-1 DATE: June 13, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Joseph V. Kaplan, Esquire, and Adria S. Zeldin, Esquire, Washington, D.C., for the appellant.

Michael W. Gaches, Esquire, Jennifer Kessler, Esquire, and Joseph Rieu, Esquire, Arlington, Virginia, 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 of the initial decision which sustained the appellant's removal. For the reasons set forth below, we GRANT

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

the appellant's petition and REVERSE the initial decision. The appellant's removal is NOT SUSTAINED.

The appellant, a Supervisory Program Specialist, served as Chief of Staff of the agency's Transportation Security Administration's (TSA) Office of Security Capabilities (OSC). On April 6, 2012, the agency proposed her removal based on lack of candor and misuse of government equipment. Initial Appeal File (IAF), Tab 8 at 80-85. Under the lack of candor charge, the agency alleged that, during an investigation conducted by the Office of Inspection into whether OSC's Assistant Administrator was involved in an inappropriate relationship with the appellant,[2] she provided a sworn statement in which she denied having had sexual relations with him, although she admitted that they had been in an intimate relationship. *Id.* at 143. The agency further alleged that, several days later, when the investigators told the appellant that they believed she had not been forthcoming during the first interview, she provided another statement in which she admitted that she had lacked candor during that first interview and that she had, in fact, had sex with the Assistant Administrator on a number of occasions. *Id.* at 205. Under the misuse of government equipment charge, the agency alleged that, during a 3-month period, the appellant misused the agency's email system by sending to, and receiving from, the Assistant Administrator approximately 200 messages of a personal and flirtations nature, i.e., not for official business, and that, during a 2-month period, she similarly misused her government-issued Blackberry by sending to, and receiving from, the Assistant Administrator approximately 1000 text messages of the same type. *Id.* at 81-82. Following her oral and written replies to the proposal in which she admitted the

[2] TSA's Handbook to Management Directive (MD) 1100.75-3, Employee Responsibilities and Conduct, warns against romantic or intimate relationships between two employees who have a direct or indirect supervisory relationship. IAF, Tab 8 at 285.

charged misconduct, *id.* at 35-38, 39-73, the agency issued a decision finding the charges sustained, warranting the appellant's removal,[3] *id.* at 4-11.

On appeal, the appellant argued that the penalty of removal was too harsh. *Id.*, Tabs 1, 17. She requested a hearing. *Id.*, Tab 1. She subsequently alleged that the agency had violated her due process rights. *Id.*, Tab 22. Thereafter the administrative judge issued an initial decision affirming the agency's action.[4] *Id.*, Tab 33, Initial Decision (ID) at 1, 17. He found that the agency proved its charges by preponderant evidence, ID at 4-8, that the appellant did not show that the agency deprived her of due process, ID at 8-12, and that the agency showed that removal was appropriate under the circumstances, ID at 12-17.

In her petition for review, the appellant argues that the administrative judge erred in finding that the agency did not commit a due process violation, Petition for Review (PFR) File, Tab 1 at 10-15, and in finding that removal was an appropriate penalty, *id.* at 16-19, 22-25. The appellant also challenges several of the administrative judge's rulings made prior to and during the hearing. *Id.* at 20-22. Finally, the appellant asserts that the administrative judge demonstrated sufficient bias to warrant his disqualification or reversal of the initial decision. *Id.* at 25-26. In a separate pleading, the appellant renews her motion, previously denied by the administrative judge, IAF, Tabs 29, 30, to proceed anonymously. PFR File, Tab 2. The agency has responded to the appellant's petition and renewed motion, *id.*, Tab 4, and the appellant has replied to the agency's response, *id.*, Tab 5.

The appellant first raised her claim of a due process violation in her amended prehearing submission. IAF, Tab 22. She argued that, in discussing the penalty factors supporting removal, the proposing official had noted certain

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[3] The Assistant Administrator resigned his position with the agency.

[4] In so doing, the administrative judge properly applied the provisions of MD 1100-75.3 rather than 5 U.S.C. chapter 75. *See Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶¶ 9-11 (2009), *aff'd*, 370 F. App'x 119 (Fed. Cir. 2010).

similarities between the appellant's first sworn statement and the statement provided by the Assistant Administrator, *id.*, Tab 8 at 82-83, but that the deciding official considered those similarities as suggesting that the appellant and the Assistant Administrator had coordinated their stories so as to avoid sharing with the agency the full extent of their relationship, *id.* at 31. The administrative judge found no due process violation under *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), reasoning that, because the proposing official had pointed out the similarities between the two statements, the appellant was provided notice and an opportunity to respond to the official's "apparent perception that [the appellant] may have colluded with [the Assistant Administrator] to provide similar statements . . . ." ID at 10.

On review, the appellant renews her argument that a due process violation occurred because she was not on notice that she was being charged with engaging in a coordinated effort to deceive which, in turn, was used to aggravate the penalty, and similarly that she was not on notice, based on language in the decision letter as supported by the deciding official's hearing testimony, that the charge of lack of candor, in essence, was converted to a charge of falsification.

When an agency intends to rely on an aggravating factor as the basis for the imposition of a penalty, that factor should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to it before the deciding official. *See Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 5 (2011). In *Ward*, our reviewing court explained 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 constitutional due process violation because it potentially deprives the employee of notice of all the evidence being used against him and the opportunity to respond to it. *Ward*, 634 F.3d at 1280. In determining whether a due process violation has occurred, the Board has held that there is no basis for distinguishing between ex parte information provided to

the deciding official and information personally known to him, if the information was considered in reaching the decision and not previously disclosed to the appellant. *See Lopes*, 116 M.S.P.R. 470, ¶¶ 10-13.

In this case, the proposing official stated in the notice of proposed removal that there were similarities in the two statements, and she provided examples, but she did not indicate that she attached any significance to that fact. IAF, Tab 8 at 82-83. During the hearing, she testified that the similarity did not impact her ultimate decision to propose removal. Hearing Transcript (HT) at 28. On the other hand, the deciding official specifically stated in the decision notice that he "considered as an aggravating factor" the fact that the two statements were "very similar" which "gave the impression that [the appellant and the Assistant Administrator] coordinated [their] less-than-candid statements in an effort to deceive the agency." IAF, Tab 8 at 31, 177. The deciding official reiterated in his hearing testimony that he had considered that factor. HT at 130. He also acknowledged that in his deposition he stated that "if there is a deliberate attempt – if there is evidence . . . to suggest it could be a deliberate attempt to mislead the Agency that (sic) that . . . is a factor that weighs towards aggravating the penalty." *Id.* at 178-79. And, in his hearing testimony, the deciding official then agreed that he had determined that the facts in this case gave the impression that the appellant attempted to deceive the agency. *Id.* at 179.

The record evidence, therefore, supports a finding that, in reaching his decision, the deciding official relied on information that the appellant had attempted to deceive the agency and that he did so without disclosing such information to the appellant. *See Bennett v. Department of Justice*, 119 M.S.P.R. 685, ¶ 10 (2013). Whether a due process violation occurred under such circumstances, however, depends on the following factors: (1) whether the information was new rather than cumulative, (2) whether the employee knew of the information and had a chance to respond to it, and (3) whether the information was of a type likely to result in undue pressure upon the deciding

official to rule in a particular manner. *Stone v. Federal Deposit Insurance Corporation*, 170 F.3d 1368, 1377 (Fed. Cir. 1999); *Lopes*, 116 M.S.P.R. 470, ¶¶ 10-12. Here, the information was new, not cumulative, because intent is not required to prove lack of candor, as charged in this case, but it is a feature of the more serious charge of falsification. *Rhee v. Department of Transportation*, 117 M.S.P.R. 640, ¶ 10 (2012). The appellant did not know that the deciding official considered that she had attempted to deceive the agency, and she did not have a chance to respond to that information. While no clear evidence of undue pressure exists in the record, the deciding official's consistent statements in the decision letter and in his hearing testimony are evidence of the materiality of his perception that the appellant had attempted to deceive the agency in the deciding official's decision to remove her. *See Lopes*, 116 M.S.P.R. 470, ¶ 12. We find, therefore, that the agency violated the appellant's due process rights.

Because the agency violated the appellant's due process guarantee to notice, her removal must be cancelled. *See Ward*, 634 F.3d at 1280. The agency may not remove the appellant unless and until she is afforded a new "constitutionally correct removal procedure." *See Stone*, 179 F.3d at 1377; *see also Ward*, 634 F.3d at 1280.

Accordingly, we REVERSE the initial decision and DO NOT SUSTAIN the removal action.[5]

ORDER

We ORDER the agency to cancel the removal action and to restore the appellant effective May 24, 2012. *See Kerr v. National Endowment for the Arts*,

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[5] Based on our disposition, we need not address the appellant's claim on review that the penalty is too severe. Finding that the appellant's claims are insufficient to overcome the presumption of honesty and integrity that accompanies administrative adjudicators, we DENY the appellant's motion to disqualify the administrative judge because of bias. *See Young v. U.S. Postal Service*, 115 M.S.P.R. 424, ¶ 19 (2010). Similarly, in the absence of unusual circumstances, we DENY the appellant's renewed motion to proceed anonymously. *See Ortiz v. Department of Justice*, 103 M.S.P.R. 621, ¶ 6 (2006).

726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, 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.

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).

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).

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.

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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.