UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

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| ANGELO FACCIPONTI | ) | |
| v. | ) | DOCKET NUMBER |
| UNITED STATES POSTAL SERVICE | ) | NY07528110376 |

OPINION AND ORDER

Angelo Facciponti (appellant), a preference eligible, was removed from his position of General Services Supervisor with the U.S. Postal Service (agency) for altering or causing to be altered at his direction, two agency documents concerning the appraisal of candidates for promotion to supervisory positions.

Appellant petitioned the New York Regional Office of the Board for appeal of the removal action. He denied altering the agency documents concerning the appraisal of the candidates for promotion. Additionally, appellant claimed that the agency had committed harmful procedural error in effecting his removal action because: (1) in investigating the incident upon which his removal was based, the agency violated section 221.17 of its Administrative Support Manual which prohibits a postmaster from discussing information concerning offenses or suspected offenses of postal employees with anyone outside of the Inspection Service; and (2) the agency's deciding official did not consider appellant's reply in determining whether the charges should be sustained. Appellant also claimed that the removal action was the result of discrimination on the basis of national origin (Italian). In an initial

decision dated December 4, 1981, the presiding official reversed the removal finding: (1) that the agency committed harmful error in arriving at its decision because the deciding official had already made up his mind to remove appellant at the time the notice of proposed removal was issued and therefore failed to consider appellant's reply; and (2) appellant failed to establish that the removal was the result of discrimination on the basis of national origin.

The agency has now filed a timely petition for review of the initial decision contending that the presiding official erred in determining that: (1) the agency failed to consider appellant's reply; (2) the agency was required to establish motive for appellant's alleged misconduct; and (3) there is a likelihood under the facts of the case that appellant would prevail on the merits. The petition for review is GRANTED.

The record in this appeal shows the agency's deciding official testified that after seeing a March 27, 1981, report from an agency Inspector relating to the falsification of appraisal documents, but long before the issuance of the June 23, 1981, notice of proposed removal, he "pretty much knew" that such a serious offense would warrant appellant's removal from the agency. Tr. 244-45, 260-62. Based upon this testimony, as well as the conflicting and incredible testimony of the agency's only alleged eyewitness, the presiding official found that the deciding agency official was biased in his decision to remove appellant and therefore committed harmful error under 5 U.S.C. § 7701(c)(2)(A), warranting reversal of the action.

Citing Hunger v. Department of the Interior, 2 MSPB 274 (1980), the presiding official reasoned that, under 5 U.S.C. § 7513(b)(2) and 5 C.F.R. §§ 752.203(f) and

752.404(f), an employee against whom removal is proposed is entitled to a meaningful opportunity to defend against the charges leveled against him. Inasmuch as the appellant had strongly contravened the charges and denied the specific changes on the documents in question were in his handwriting, the presiding official found it to be within the range of appreciable probability that an impartial decision-maker would have further investigated the charges in consideration of appellant's replies.

The Board has previously held, as the presiding official noted in his initial decision, "[t]here is no general proscription of the appointment as a deciding official of a person who is familiar with the facts of the case, and has expressed a predisposition contrary to appellant's interests." Initial decision at 4, n.6; Svedja v. Department of the Interior, 7 MSPB 36. Although Svedja is dispositive of the issue of harmful error, the Board finds that the presiding official erred in the application of Svedja to the pertinent facts of this case and, therefore, disagrees with the presiding official's harmful error finding for the following reasons. Under 5 U.S.C. § 7513(b) (2), an employee against whom removal is proposed is entitled to a reasonable time to answer orally and in writing the charges cited against him in the notice of proposed removal. See also 5 C.F.R. §§ 752.203(f) and 752.404(f). This requirement is designed to afford an employee a meaningful opportunity to respond to the charges. Cf. Bize v. Treasury, 3 MSPB 261 (1980). We find that appellant was afforded this opportunity and did, in fact, submit a written reply to the charges on July 2, 1981, and an oral response on July 21, 1981. Further, the deciding official testified that he did consider appellant's responses, and that before deciding that

appellant should be removed based on the charges leveled, he also considered the appropriateness of lesser penalties. Tr. 245, 248, 258. In this regard, the presiding official's determination that the agency committed harmful error in the application of its procedures in arriving at a decision is ill-founded. Accordingly, the presiding official erred in finding that the agency committed harmful error in the application of its procedures in arriving at a decision to remove the appellant. Parker v. Defense Logistics Agency, 1 MSPB 489, 498 (1980).

Finally, the agency asserts as error the presiding official's determination that the evidence adduced at the hearing reveals that there is a substantial likehood that appellant could prevail on the merits. We agree with the agency that the presiding official erred in so finding. The presiding official should have evaluated the evidence to determine whether the agency had established its case against the appellant by a preponderance of the evidence. Our review of the record in this case discloses that the agency has clearly failed to support its charges against appellant by a preponderance of the evidence.

The agency bases its charges against appellant on essentially two factors. First, that the documents in question had been altered and second, that appellant was the individual who altered the documents or directed that the documents be altered. Appellant has not contested the allegation that the documents were altered and the agency has introduced testimony by a handwriting expert to support its allegation that the documents had been altered. See Hearing Transcript at 267-279. Accordingly, the agency has established by a preponderance of the evidence, that the documents in question were altered.

In order to sustain its action against appellant, the agency was, however, also required to show, by a preponderance of the evidence, that it was appellant who either altered the documents or directed that they be altered. The agency has failed to make such a showing. The handwriting expert called by the agency did not express an opinion as to whether appellant had altered the documents, and the sole agency witness to allege that appellant had caused the alterations to be made cannot be considered to be credible. As found by the presiding official, the testimony by that witness Ms. Sifonte, was both contradictory and incredible.[1/] The presiding official also found that during the relevant time period, Ms. Sifonte had possession of the documents in question and, therefore, had the best opportunity to alter the documents herself.[2/] Tr. 196-8; cf. Maxfield v. Department of Transportation, MSPB Docket No. DE07528110038 (June 6, 1982).

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1/ The record shows that Ms. Sifonte recanted testimony given at the hearing. After denying that she was "wired" (wore a recording device) during certain meetings with appellant concerning the appraisals of candidates (Tr. 160-1, 208-9), she later admitted through the agency's representative that she had given false testimony. Tr. 413. The agency maintained that its Inspector, Mr. Smith, advised Ms. Sifonte not to divulge that she had been "wired." Even if this were true, such explanation would not change the fact that Ms. Sifonte prevaricated while under oath.

2/ Ms. Sifonte testified that after the interviews of the classes of candidates at issue, she took possession of the papers and she was the one that submitted them to the personnel office. Additionally, she stated that she was the one who charted the sick leave, the years of service and the composite appraisals of the candidates. She also, personally, transcribed the information from the appraisal forms to the charts. Tr. 196-8.

Inasmuch as the agency's key witness (Ms. Sifonte) has given false testimony before this Board, and the agency has failed to provide any independent evidence which would establish a connection between the altered documents and the appellant, we find that the agency has failed to prove by preponderant evidence that appellant committed the offense for which he is charged.

Accordingly, the initial decision dated December 4, 1981, reversing the agency action removing appellant is AFFIRMED as MODIFIED by this Opinion and Order.

This is the final order of the Merit Systems Protection Board in this appeal.

The agency is hereby ORDERED to furnish proof of compliance with the initial decision, which orders the agency to cancel appellant's removal, to the Office of the Secretary of the Board within twenty (20) days of the issuance of this order. Any petition for enforcement of this Order shall be made to the New York Regional Office in accordance with 5 C.F.R. § 1201.181(a).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

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 Court not later than thirty (30) 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 filed with the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

MAY 3 1983
(Date)

Robert E. Taylor
Secretary

Washington, D.C.