UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

95 MSPR 264

REBECCA SHOCKLEY,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DE-0752-99-0344-I-2

DATE: December 5, 2003

John P. Gamlin, Esquire, Fort Collins, Colorado, for the appellant.

Lisa L. Leslie, St. Louis, Missouri, for the agency.

BEFORE
Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member
Chairman Marshall and Member McPhie both issue separate opinions.

ORDER

This case is before the Board by petition for review of the initial decision which sustained the appellant's removal. The two Board members cannot agree on the disposition of the petition for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) (5 C.F.R. § 1200.3(b)). This decision shall not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law as well as review the Board's regulations and other related material at our web site, *http://www.mspb.gov/mspb_library.html*.

FOR THE BOARD:

_____
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

SEPARATE OPINION OF SUSANNE T. MARSHALL

in

Rebecca Shockley v. United States Postal Service

MSPB DOCKET NO. DE-0752-99-0344-I-2

¶1 The Member would reverse the administrative judge's decision to sustain the agency's removal action. The Member would do so based on his belief that the agency violated the appellant's constitutional due process rights. To reach this result, the Member advocates modifying two Board decisions, *Powers v. Department of the Treasury*, 86 M.S.P.R. 256 (2000), and *Freeman v. Department of the Navy*, 88 M.S.P.R. 659 (2001). As the Member notes, however, the Board's decision in *Freeman* was ultimately affirmed by the United States Court of Appeals for the Federal Circuit in *Freeman v. Department of the Navy*, No. 01-3346 (Fed. Cir. Jan. 14, 2002).

¶2 The Member would find that the agency's action must be reversed under the test set forth by the Federal Circuit in *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). Although the Member finds that *Stone* applies, and that the agency violated the appellant's due process rights under *Stone*, he questions whether *Stone* is consistent with Supreme Court law. The Board need not interject itself into any debate on whether the Federal Circuit's opinion in *Stone* is inconsistent with Supreme Court precedent on due process. Nor does the Board have to modify *Powers* and *Freeman*. Rather, the facts of this case show plainly that under the *Stone* test, which the administrative judge applied, the agency did not violate the appellant's due process rights when it removed her.

¶3 The appellant waived her right to a hearing. Initial Decision (ID) at 2-3. The administrative judge therefore based her decision on the written submissions. The administrative judge's decision contains a thorough discussion of the charges and the documentary submissions. An appellant's

mere disagreement with an administrative judge's findings does not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Here, the appellant on petition for review does not disagree with any of the administrative judge's factual findings on the charged misconduct. Moreover, nothing in the record would cause the Board to reopen the record and substitute its factual findings for those of the administrative judge. Thus, the agency proved the specifications which the administrative judge sustained. The proven specifications supply the context in which to consider the alleged "due process" violation.

¶4 The appellant was the Postmaster of the Hiawatha, Kansas, Post Office. Initial Appeal File (IAF), Tab 6, Subtab 4S. In June 1997, the agency's Central Plains District Intervention Team visited the Hiawatha facility to address problems within the office. The team noted the hostility and tension in the office, as well as certain specific problems. According to the report, the appellant's management style was "lax and not in control." *Id.*, Tab 6, Subtab 4W. The team revisited the office in December 1997 and May 1998 and issued similar reports about the state of the Hiawatha facility. *Id.*, Tab 6, Subtabs 4T & 4V. Between January 16, 1998 and March 30, 1998, Audrey Kats, a Postmaster from Norton, Kansas, was sent to the Hiawatha facility to help the appellant with her management deficiencies. *Id.*, Tab 6, Subtab 4U. Despite these efforts by agency officials to assist the appellant in managing the Hiawatha Post Office, problems there continued. ID at 9-19.

¶5 Accordingly, on February 9, 1999, the appellant's supervisor and the Manager for Post Office Operations, Sam Gonzales, placed her on a performance improvement plan (PIP). IAF, Tab 6, Subtab 4Q. On June 8, 1999, the intervention team returned to the Hiawatha Post Office and found that the problems within the office still persisted. A report was issued

detailing the tension and the recurring deficiencies. *Id.*, Tab 6, Subtab 4J. The agency eventually concluded that the appellant's performance had not improved under the PIP, and it gave her a July 7, 1999 notice of proposed removal for unacceptable performance. *Id.*, Tab 6, Subtab 4F. On August 9, 1999, Richard Moore, Senior Manager of Post Office Operations, issued a decision letter removing the appellant. *Id.*, Tab 6, Subtab 4A.

¶6 Based on a full and careful review of the documentary evidence submitted by the parties, the administrative judge found that the agency proved that: (1) the appellant did not change the starting times of carriers so as to improve the timely receipt of mail despite two years or warnings about a problem with untimely delivery of the mail; (2) the appellant's failure to properly manage the facility resulted in shortages of $1,370.00 and $68.53 which were discovered in financial audits dated January 25, 1999, and April 27, 1999; (3) the appellant inconsistently applied the agency's hold-mail policy; (4) the appellant was derelict in her duty as a manager when she did not take appropriate action on a customer's complaint that her mail was being mishandled; (5) the appellant did not take disciplinary action against an employee who admitted that she improperly dispatched mail; (6) the appellant did not properly schedule shifts and post schedules, which resulted in successful grievances by employees; and (7) the appellant did not improve the relationships and the working environment in the office because she did not implement suggested changes, did not insure that policies were followed, and did not treat all employees equally. ID at 9-19. It is against this backdrop of misconduct that the deciding official, Mr. Moore, tried to determine what penalty should be imposed.

¶7 For five pages in her initial decision, the administrative judge provides a thorough, well written and carefully reasoned analysis of why the appellant's due process rights were not violated by any *ex parte* information received by Mr. Moore when he considered the appropriate penalty. *Id.* at

20-24. Assuming that certain language in *Powers* regarding a "different outcome" is inconsistent with *Stone*, it is plain that the administrative judge applied the *Stone* test, which requires that an *ex parte* communication must be, as the administrative judge stated, "so substantial and so likely to cause prejudice that the employee was deprived of due process." ID at 24.

¶8 A claim of a due process violation is an affirmative defense. The appellant therefore had the burden of proving her defense by preponderant evidence. 5 C.F.R. § 1201.56(b). She did not meet that burden under the standard set forth in *Stone*, as further explained by the court in *Blank v. Department of the Army*, 247 F.3d 1225 (Fed. Cir. 2001).

¶9 The court in *Stone* said that "not every *ex parte* communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the claimant to an entirely new administrative proceeding." 179 F.3d at 1376-77. Rather, the court explained that "[o]nly *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice." *Id.* at 1377. The court provided a non-exhaustive list of factors that can help determine if a due process violation occurred.

¶10 According to the court, "[a]mong the factors that will be useful for the Board to weigh are: whether the *ex parte* communication merely introduces 'cumulative' information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." *Id.* The court did not require a mechanical application of these or any other factors. Rather, it held that "the Board should consider the facts and circumstances of *each particular case*." *Id.* (emphasis added). "Ultimately the inquiry of the Board is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to

a deprivation of property under such circumstances." *Id.* The latitude given to the Board to decide in each case whether a due process violation occurred is consistent with the Supreme Court case law discussed in *Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614 (2003). That law states that "'due process is flexible and calls for such procedural protections as *the particular situation* demands.'" *Id.* ¶ 15 (emphasis added; quoting *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)).

¶11 The Federal Circuit in *Blank* applied *Stone* and found no due process violation. The deciding official in *Blank* interviewed a number of agency employees before deciding to remove the appellant. 247 F.3d at 1227. The administrative judge found that these *ex parte* interviews did not violate Mr. Blank's due process rights. Specifically, the administrative judge concluded that the purposes of the interviews was to determine whether there were inconsistencies in the agency's case, and whether Blank's defenses of discrimination and hostile work environment were supported by the facts. *Id.* The administrative judge found that the information obtained by the deciding official was cumulative or inconsequential to the charges and, thus, did not constitute a due process violation which warranted reversal of the agency's action. *Id.* The Federal Circuit agreed, saying that "[w]hen a deciding official initiates *ex parte* communication that only confirms or clarifies information already contained in the record, there is no due process violation." *Id.* at 1229.

¶12 The court's decision in *Stone* indicates that the relevant period for determining whether a due process violation took place is the time between the date of the proposal notice and the date of the decision notice, that is, the time when an agency official is actually the deciding official in a case. *See id.* at 1376 (introduction of new and material information "by means of *ex parte* communications *to the deciding official*" undermines public employee's constitutional due process guarantee of notice and opportunity

to respond (emphasis added)). The administrative judge here properly recognized that the inquiry is whether, under the totality of the circumstances, any *ex parte* information provided to Moore when he was the deciding official was so substantial and so likely to cause prejudice that the appellant could not be deprived of her job under the circumstances. ID at 21. The evidence supports the administrative judge's conclusion that any information conveyed to Moore when he was the deciding official was not so substantial and so likely to cause prejudice as to warrant a reversal of the entire action.

¶13 As the court's opinions in *Stone* and *Blank* instruct, Moore's conversations about the appellant must be placed in context. Agency management had questioned the appellant's running of the Hiawatha facility on a number of grounds and on a number of occasions. The appellant's proven deficiencies included her inability or unwillingness to improve a poor labor climate, to communicate effectively, to handle customer complaints, and to correct unsatisfactory work performance, attendance deficiencies, and problems with meeting workload demands. IAF, Tab 6, Subtab 4Q. As mentioned above, after several negative reports from intervention teams on the state of the Hiawatha office, the agency placed the appellant on a six-month PIP. *Id.*

¶14 Mr. Gonzales, the appellant's supervisor, had discussions with and provided assistance to the appellant during the PIP. *Id.*, Tab 17. During the PIP period, Gonzales noted continuing problems with morale and employee behavior and continuing violations of Postal Service policies and procedures. *Id.*, Tab 17 and Tab 18, Ex. G at 7. Mr. Moore, who was a Manager of Post Office Operations, was also concerned about the appellant's lack of progress during the PIP. *Id.*, Tab 18, Ex. G at 7-8. As the administrative judge found and the record shows, most of the conversations that Moore had with Gonzales and other employees about the

appellant's performance took place before the agency decided to propose any discipline. ID at 21; IAF, Tab 18, Ex. G at 17.

¶15 For example, Moore stated that "a lot" of the discussion with Mr. Gonzales and Ms. Kats took place before the proposal letter was issued. IAF, Tab 18, Ex. G at 20. One thing Moore wanted to know was whether the appellant could be reassigned to a postal facility where she could be given another chance to succeed. *Id.*, Tab 18, Ex. G at 59-60. The appellant, however, declined any reassignment. *Id.* Since these pre-proposal inquiries by Moore concerned alternatives to an adverse action, the administrative judge did not err in finding that they did not impart *ex parte* information to Moore when he was the deciding official. Rather, these communications were part of Moore's management responsibilities before an adverse action was proposed, not part of his duties as a deciding official once an action had been proposed. Thus, they do not implicate *Stone*. *See* ID at 21-22.

¶16 Other information gathered by Moore, assuming it was gathered after the proposal notice was issued, concerned matters specifically included in the proposal letter, for example, the appellant's showing of favoritism to some employees and her policies on hold mail and vacation mail. *See*, *e.g.*, IAF, Tab 18, Ex. G at 41-45. This information was cumulative of the documentary evidence which the agency had assembled to support the proposed action and which had already been made available to the appellant. Such information is not the type of *ex parte* communications proscribed by *Stone*, as further explained in *Blank*. *See Blank*, 247 F.3d at 1229; *Stone*, 179 F.3d at 1377.

¶17 A large number of other items which Moore investigated were, as the administrative judge found, aimed at determining the accuracy of statements made in the appellant's response to the proposed removal. ID at 22. The appellant's response to the proposed action was lengthy and raised matters not directly mentioned in the proposal letter. *See* IAF, Tab 6, Subtab 4B.

Moore stated in a deposition that he talked with Gonzales about the assertions made by the appellant in her response to the proposed removal to see if Gonzales "was accurate in his position." *Id.*, Tab 18, Ex. G at 57. Thus, Moore's primary, if not sole purpose, in asking questions was to determine whether the appellant's allegations were supported by the facts. This is exactly the type of activity which the court in *Blank* found was not a violation of due process. 247 F.3d at 1229.

¶18 It was not a violation of due process for Moore to try and verify and clarify the claims raised by the appellant in her reply to the proposed removal before deciding if the charge should be sustained and if removal was an appropriate penalty. To the contrary, Moore arguably would have neglected his responsibilities as a deciding official if he had not investigated the appellant's allegations.

¶19 Further, to the extent Moore asked questions beyond the scope of the appellant's response, he did so, as the administrative judge pointed out, to see if the appellant could be rehabilitated, if the appellant could be assigned to another facility, or if a penalty less than removal could be imposed. ID at 22; IAF, Tab 18, Ex. G at 36. Moore declared that he spoke several times with Gonzales to see if alternative discipline had been considered and if "everything possible [had been done] to ensure that [the appellant] could be successful in her current position." IAF, Tab 18, Ex. G at 15 & 19-20. Such inquiries are intended to benefit the appellant, not to deny her due process.

¶20 The administrative judge identified a communication that, in her view, was "problematic." That communication involved the appellant's alleged inconsistent application of leave policies to Carolyn Milne and Margret Meyer. ID at 23-24; *see* IAF, Tab 18, Ex. G at 28. The communication was not problematic, however, but one that easily passes the *Stone* test.

¶21 In the first place, the proposal notice charged the appellant with unacceptable performance and mentioned the hostile, uncooperative and tense environment in the office. IAF, Tab 6, Subtab 4F. The notice gave "examples" and mentioned a "few of the issues" that led to the charge. The leave policy issue therefore relates to the general charge against the appellant. Moore's inquiries on the appellant's application of leave policies to Milne and Meyer were thus the kind of investigatory communications that confirm or clarify pending charges and do not introduce new and material information. *See Blank*, 247 F.3d at 1229. Further, in her response to the proposed removal, it was the appellant who specifically referred to leave usage by Milne and Meyer. *Id.*, Tab 6, Subtab 4B, pp. 1 & 6. The appellant raised the issue, and Moore merely attempted to confirm and clarify it before he made his decision, just as the deciding official in *Blank* did in a similar situation. *See* 247 F.3d at 1229. In addition, when asked if the leave issue was something which caused him to sustain the charge, Moore did not say that it was. He merely stated that it was something he considered as part of the "nature of the climate in the office." *Id.*, Tab 18, Ex. G at 29. The administrative judge therefore correctly found that, under these circumstances, Moore's receipt of information on Milne's and Meyer's leave usage does not warrant reversal of the entire action.

¶22 Moreover, even though the administrative judge stated that "[h]ad this issue [on leave] been totally removed, [she would] not find that the decision of the deciding official would have been different," this comment is in the form of an alternative finding based on language in *Powers*. *Id.* This alternative finding does not call into question the administrative judge's application of the *Stone* standard that an investigative interview amounts to a due process violation only if the appellant proves that it introduced new and material information and was "so substantial and so likely to cause prejudice" that her constitutional rights were violated. *See* ID at 24.

¶23 The court in *Stone* stated that *ex parte* contacts could violate due process if they "were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." 179 F.3d at 1376-77. The appellant did not show that any *ex parte* information was likely to result in undue pressure on Moore to rule in a particular manner. On the contrary, the evidence shows that Moore's inquiries were intended to help him verify whether the charged conduct occurred and, if so, what the proper penalty should be. *See*, *e.g.*, IAF, Tab 18, Ex. G at 25. There is no evidence showing that anyone applied "undue pressure" to Moore, as the court in *Stone* intended that term to be used.

¶24 Considering the record as a whole, the appellant has not proven by preponderant evidence that any *ex parte* communications by Mr. Moore were so substantial and so likely to have caused prejudice that she was denied due process under the circumstances. The appellant's petition for review therefore should be denied, and the agency's action sustained.

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Date Susanne T. Marshall
Chairman

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

Rebecca Shockley v. United States Postal Service

MSPB Docket No. DE-0752-99-0344-I-2

¶1 The appellant has petitioned for review of the initial decision sustaining her removal. For the reasons stated below, I would grant the petition, reverse the initial decision, and not sustain the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant, a Postmaster, EAS-18, for unacceptable performance. Appeal File, Docket No. DE-0752-99-0344-I-1 (I-1 File), Tab 1, Appeal Form, Blocks 9, 10; *id.*, Tab 6, Agency File, Subtab 4A. The appellant filed a timely appeal of the action, and the administrative judge assigned to the appeal issued an initial decision sustaining the charge and all but one of its specifications. *Id.*, Tab 1; Appeal File, Docket No. DE-0752-99-0344-I-2, Tab 3, Initial Decision (ID). In her initial decision, the administrative judge also found that the penalty of removal was reasonable; that the appellant had been given sufficient advance notice of the reasons for her removal; that the agency had not acted improperly in terminating her performance-improvement period before the end of the 6-month period it originally had been scheduled to cover; and that, although the deciding official had engaged in ex parte communications regarding the appellant's case before issuing his removal decision, those communications were not so substantial and so likely to cause prejudice that the appellant was denied her due process rights. ID at 20-26.

¶3 In her timely petition for review, the appellant alleges that the charge should not have been sustained, that the penalty of removal is unreasonable, and that the administrative judge erred in finding that her due process rights

had not been violated by the deciding official's ex parte communications. Petition for Review (PFR) File, Tab 1. The agency has filed a timely response to the petition. *Id.*, Tab 4.

ANALYSIS

¶4 In its July 1999 proposal notice, the agency stated that it had been attempting to help the appellant manage her post office since 1997, and that the office environment remained hostile, "uncooperative, and in a constant state of tension and turmoil" despite these efforts. Agency File, Tab 4A at 1. Specifically, it alleged that the appellant had failed to implement a management recommendation that she solve one of the problems by modifying carriers' work hours; that financial audits in January and April 1999 had found stock shortages of $1,370 and $68.53, respectively; that the appellant had applied a "hold mail" policy that was inconsistent with agency policy; that she had applied her own policy inconsistently within her post office; that she improperly appeased one of her employees by changing the service provided to a postal customer; that she failed to discipline a clerk for mishandling a claim despite her awareness that the clerk should be disciplined; that she failed to discipline another clerk for repeatedly failing to dispatch mail; that her failure to schedule her employees' work properly had led to two grievances; and that her failure to post a schedule on time had led to the filing of another grievance – a grievance that she denied "rather than dealing with the issue …." *Id.*, Tab 4A at 1-3.

¶5 I find no need address the appellant's argument that the administrative judge erred in sustaining all but one of these specifications,[1] or her argument that she erred in finding removal a reasonable penalty for the

[1] The specification the administrative judge did not sustain was the one in which the appellant was alleged to have improperly appeased one of her employees by changing the service provided to a postal customer. ID at 13-14.

sustained specifications and charge. As I indicate below, I would find that the appellant's removal can not be sustained because the deciding official's ex parte communications denied the appellant her constitutional right to due process.

¶6 A nonprobationary federal employee, such as the appellant in this case, has a constitutional right to minimum due process in a removal proceeding. *Special Counsel v. Department of Veterans Affairs*, 75 M.S.P.R. 219, 222 (1997); *see Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). The core elements of this due process right are prior notice of the action and an opportunity to respond. *Special Counsel v. Department of Veterans Affairs*, 75 M.S.P.R. at 222. When the deciding official in a removal case receives, through ex parte communications, new and material information regarding the charges or the evidence, the employee is no longer on notice of the charges against her, the evidence on which the agency relies, or both. *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999). Under those circumstances, therefore, the employee's due process rights are violated. *Id.*[2]

¶7 In the present case, there is no doubt that the deciding official received ex parte communications regarding the charges and evidence against the appellant before he issued his decision to remove her. The notice of decision itself includes a statement that the deciding official "discussed the proposed removal with" the proposing official, as well as repeated

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[2] In *Gilbert v. Homar*, 520 U.S. 924, 927-35 (1997), the U.S. Supreme Court indicated that a failure to inform the employee of the existence of some of the evidence on which it relied would not, under some circumstances, violate the employee's due process rights. The circumstances at issue there, however, are not present here. *See id.* at 931-35 (the Court considered the fact that the employee was suspended, rather than removed, that the state needed to act quickly, that there was a relatively low risk that the employee would be erroneously deprived of his pay, and that additional procedures likely would have been of little value).

references to the deciding official's "investigation" of the case. Decision Notice, I-1 File, Tab 6, Subtab 4A at 1-2. The same notice also includes the following: A description, by an official with whom the deciding official had "investigat[ed]" the case, of the alleged disorganization of the appellant's office and files, and the deciding official's "find[ings]," during his "investigation of the facts," that the appellant had been inconsistent in administering policies she had instituted and that she had allowed other employees to transfer stock "without first filling out the proper paperwork …." *Id.* None of these matters were specifically mentioned in the proposal notice. Proposal Notice, *id.*, Subtab 4F. Moreover, the deciding official acknowledged in his deposition that he had had "at least 1 and less than 10" discussions regarding the proposed removal with the proposing official after the latter official had issued his notice proposing to remove the appellant. Moore Deposition, I-1 File, Tab 18, Ex. G at 15. He also acknowledged on that occasion that he had relied on matters not addressed in the proposal, including the alleged disorganization mentioned in the decision letter, the appellant's allegedly inequitable leave administration, problems allegedly caused by "extensive breaks," and the appellant's allegedly "stepping out of the office unexpectedly, leaving nobody in charge …." *Id.* at 23-24, 28-29, 60-61.

¶8 Not all ex parte communications violate an employee's due process rights. Instead, as indicated above, only those communications that introduce "new and material information" to the deciding official have that effect. *Stone*, 179 F.3d at 1376-77. In this case, the administrative judge found that no "new and material" information had been communicated to the deciding official. Specifically, she found that the information communicated to the deciding official regarding the appellant's alleged disorganization was "in the nature of cumulative evidence," and that it was "not of sufficient weight to have warranted a different outcome." ID at 23. With respect to the

appellant's alleged actions relative to the transfer of stock to her employees, the administrative judge found that the deciding official was only replying to the appellant's assertion, in response to the proposal notice, that her alleged stock shortage simply reflected the transfer of stock to her employees; and she stated that no ex parte communication with respect to this matter had occurred, since the information on which the deciding official had relied had been provided by the appellant. *Id.* With respect to the allegedly inequitable leave administration, she found that the matter was "not of sufficient weight to have warranted a different outcome," and that the communication regarding this matter therefore was also not material or otherwise a violation of the appellant's due process rights. *Id.* at 23-24. She did not specifically address the remaining matter, i.e., the appellant's alleged absences from the office.

¶9 The administrative judge's reliance on indications that some of the ex parte communications were "not of sufficient weight to have warranted a different outcome" is consistent with the approach the Board took in *Powers v. Department of the Treasury*, 86 M.S.P.R. 256, 262 (2000); and it is consistent with the approach a majority of the Board took in *Freeman v. Department of the Navy*, 88 M.S.P.R. 659, 663-64 (2001), *aff'd*, No. 01-3346 (Fed. Cir. Jan. 14, 2002) (Table). Moreover, I note that our reviewing court affirmed the Board's decision in *Freeman*, along with its finding that the deciding official's receipt of information on an ex parte basis did not deny the appellant his due process rights. *Freeman*, No. 01-3346, slip op. at 3-4. In doing so, however, the court indicated that the "different outcome" test the Board had applied was not supported by its decision in *Stone*, and that the approach could, "in some cases, be tantamount to the harmless error test [the court] rejected" in that case. *Id.* at 4. It indicated further that it approved of the approach taken by then-Chairman Slavet in her concurring opinion in the case. *Id.* at 3. That concurring opinion

indicated that the majority's "outcome determinative test" was inconsistent with *Stone*, and that factors described in *Stone* should be used instead in determining whether a due process violation had occurred. *Freeman*, 88 M.S.P.R. at 666-67 (Chairman Slavet, concurring).

¶10 I recognize that the court's decision in *Freeman* is nonprecedential, and that holdings in a nonprecedential decision are not binding on the Board. I believe, however, that we should reconsider our approach in *Powers* and *Freeman* given the court's decision in the latter case. For reasons stated below, I would find that the Board's approach must be modified.

¶11 In *Stone*, 179 F.3d at 1377, the court indicated that the Board should consider the facts and circumstances of the particular case in determining whether information communicated on an ex parte basis to the deciding official was "new and material." It indicated further that the following factors were among those that would be "useful for the Board to weigh":

> [W]hether the *ex parte* communication merely introduces "cumulative" information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner.

Id. Nothing in these factors, or elsewhere in *Stone*, indicates that the materiality of an ex parte communication should be judged, for due process purposes, according to whether the communication affected the outcome of the case. Instead, while the likely effect on the outcome is relevant in addressing procedural errors under 5 U.S.C. § 7701(c)(2)(A), *see Turner v. United States Postal Service*, 85 M.S.P.R. 565, 567 (2000), the *Stone* court specifically stated that determinations as to whether ex parte communications had violated employees' procedural due process rights were not subject to that test. *Stone*, 179 F.3d at 1377. Accordingly, I think the Board should overrule its decisions in *Powers* and *Freeman* to the extent these cases relied on a "different outcome" test in determining whether the employees' due process rights were violated.

¶12 I see no need to remand this appeal for further consideration of the due process issue. No hearing was held below,[3] and the present record provides an adequate basis for resolution of this issue.

¶13 As noted above, the due process issue in this case concerns communications the deciding official evidently received regarding five matters: (1) The alleged disorganization of the appellant's office and files; (2) the appellant's allegedly inconsistent application of policies she had implemented; (3) her alleged failure to document her transfer of stock to employees; (4) her allegedly inequitable leave administration; and (5) her alleged extensive breaks, unexpected departures from the office, and failure to designate an acting postmaster in her absence.[4]

¶14 I agree with the administrative judge that the only information regarding stock transfers that has been shown to have been communicated to the deciding official after issuance of the proposal notice is the information the appellant provided in response to that notice. I-1 File, Tab 6, Subtab 4B at 3. Nothing in the record indicates, however, that the appellant was the source of the information communicated to the deciding official regarding the other four matters listed above. Instead, that information evidently was communicated by officials such as the proposing official and a postmaster who had been assigned, prior to the removal proposal, to help the appellant

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[3] Although the appellant requested a hearing before the administrative judge, she subsequently withdrew that request. I-1 File, Tab 1, Appeal Form, Block 30; *id.*, Tab 14 at 1.

[4] The deciding official also referred in his notice of decision to his "find[ing] that at one point in the past things were so bad the Postal Service removed [the appellant] from [her] office for a period of time …." Decision Notice at 2. I see no need to decide whether the deciding official's consideration of this matter – a matter not mentioned in the proposal notice – supports a finding that the agency violated the appellant's due process rights. For the reasons given below, the deciding official's consideration of other matters is sufficient to support such a finding.

improve her performance. *E.g.*, Decision Notice at 1-2; Moore Deposition at 15.[5]

¶15 As noted above, the administrative judge found that the information the deciding official received regarding the allegedly disorganized state of the appellant's office and files was "in the nature of cumulative evidence." This finding apparently is based in part on indications that the deciding official referred to this matter in an attempt to rebut the appellant's claim, in her reply to the proposal to remove her, that the postmaster who had been assigned to help her had provided no guidance on improving the office environment, and that she had instead "primarily focused on reorganizing the office files." ID at 22-23; I-1 File, Tab 6, Subtab 4B at 2; *id.*, Subtab 4A at 1-2. The administrative judge also indicated, in support of her finding, that the deciding official "appeared to be thinking in terms of rehabilitation" when he referred to the claim of disorganization. ID at 22.

¶16 I am not persuaded that these circumstances cause the information at issue here to be cumulative rather than "new." Nothing in the proposal notice suggests that the appellant's lack of organization in her office was a factor in the proposal. In fact, nothing in it suggests that the appellant was deficient with respect to this matter. Moreover, nothing in the decision notice, the deciding official's deposition, or elsewhere suggests to me that the deciding official considered the matter only as reflecting on the appellant's rehabilitation potential; and the fact that the alleged disorganization was a matter other than the alleged deficiencies described in the proposal notice suggests that it was an additional reason for removing the appellant, rather than evidence that the appellant was or was not likely to correct the alleged deficiencies on which the proposal notice relied. I

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[5] The deciding official acknowledged during his deposition that he had never met the appellant or even spoken to her on the telephone. Moore Deposition at 8-9.

would, therefore, find that "new" information was communicated to the deciding official regarding the alleged disorganization of the appellant's office and files.

¶17 The second and fourth matters listed above appear to overlap somewhat. That is, the appellant's allegedly inequitable leave administration appears to be one of the policies the appellant allegedly applied in an inconsistent manner. As with the matter addressed above, nothing in the proposal notice indicates that the appellant was deficient with respect to these matters. Moreover, although evidence concerning the appellant's institution of some policies was submitted with the appellant's response to the removal proposal, nothing in her submissions appears to have raised the issue of inequitable or inconsistent administration of those or other policies. Instead, the deciding official indicated that he discovered evidence of the alleged deficiencies in the "investigation of the facts" that he had conducted. Decision Notice at 2; I-1 File, Tab 6, Subtab 4B at 1. Accordingly, I would find that the information regarding these matters that was communicated to the deciding official on an ex parte basis also was new, rather than cumulative.

¶18 Finally, the appellant's alleged "extensive breaks" and "stepping out of the office unexpectedly, leaving nobody in charge" also are not mentioned in the proposal notice or in any other documents disclosed to the appellant when her removal was proposed; and nothing in the proposal notice even suggests that the appellant was deficient in these areas. I-1 File, Tab 6, Tabs 4F-4W. Accordingly, the information regarding these matters on which the deciding official relied is – like the information he received regarding the appellant's alleged disorganization and her allegedly inequitable and inconsistent administration of leave and other policies – new, rather than cumulative. The first of the three *Stone* factors therefore supports a finding that the appellant's due process rights were violated.

¶19 The second *Stone* factor also supports such a finding. The agency does not challenge the appellant's assertions, *e.g.*, I-1 File, Tab 18, Appellant's Close of Record Submission at 3, 6-7, that she learned of the ex parte communications mentioned above only after the decision to remove her had been issued. Clearly, therefore, she had no opportunity to respond to them before the agency issued its decision.

¶20 Finally, the third *Stone* factor – "whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner" – also supports a finding that the appellant's due process rights were violated. On two occasions, the deciding official indicated that the information communicated to him ex parte was a significant factor in his decision. First, as noted above, he referred repeatedly in his decision notice to the information he received during ex parte communications, i.e., information regarding the appellant's alleged lack of organization and inequitable administration of policies. Decision Notice at 1-2. In referring to the alleged lack of organization, he indicated that he had accepted as true the allegations that the appellant was "unable to find anything in [her] office," that she "could not find anything when it was needed and did not know where necessary paperwork was," and that, even after assistance had been provided, she "still had to search through stacks of paperwork to find anything when [the proposing official] … would ask for something"; and he then stated, "In fact, that was part of the Performance Improvement Plan that you never accomplished." *Id.* In referring to the appellant's allegedly inequitable administration of policies, he stated that the policies the appellant had instituted "were actually part of the problem within the office," that she "would enforce them with only part of the workforce," and that her "inconsistency … [was] <u>in large part a cause of the problems in the office</u>." *Id.* (emphasis added).

¶21 The deciding official also indicated during his deposition that the ex parte information was a significant factor in his decision to remove the appellant. He acknowledged that he had relied on the appellant's alleged disorganization in making his decision. When asked about the extent to which he had done so, he testified that he had given greater weight to other factors. Each of the other factors to which he had given greater weight was one that came to his attention only through ex parte communications. These factors included the appellant's allegedly inequitable administration of leave and other policies, "problems with extensive breaks," and "problems with [the appellant's] stepping out of the office unexpectedly, leaving nobody in charge." Moore Deposition at 23-24, 61.[6]

¶22 Under the circumstances described above, I would find that the information communicated to the deciding official was "new and material," as that term is used in *Stone*. In light of the weight given to that information, its effect on the deciding official's consideration of the proposal to remove her, and the absence of any opportunity for the appellant to rebut or explain that information, I would find that the ex parte communications in this case violated the appellant's due process rights. *See Stone*, 179 F.3d at 1377 (the ultimate inquiry, in determining whether ex parte communication violated employee's due process rights, "is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no

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[6] The administrative judge found in her initial decision that the deciding official had "repeatedly stated that all of the factors were considered in her performance as manager, none being considered more serious than the others." ID at 24. She did not identify the basis for this finding, however, and the deciding official's statement that is cited above is inconsistent with this finding. Moreover, I note that, when specifically asked whether he gave each of several factors (including the alleged disorganization, "problems … between management and craft," and the appellant's attendance) equal weight, he declined to "put a percentage on any one factor." *Id.* at 24-25.

employee can fairly be required to be subjected to a deprivation of property under such circumstances").

¶23 The U.S. Court of Appeals for the Federal Circuit has held that, when an ex parte communication such as this violates a nonprobationary employee's procedural due process rights, the affected action cannot be sustained. *Stone*, 179 F.3d at 1377. It has indicated further that the matter is not subject to the "harmful error" test of 5 U.S.C. § 7701(c)(2)(A), and that, in such a situation, the merits of the action are to be disregarded. *Id.* This approach appears to me to be inconsistent with *Carey v. Piphus*, 435 U.S. 247, 260-61 (1978), in which the U.S. Supreme Court held that, in the absence of proof that the denial of procedural due process had "actually caused … some real … injury," the denial did not entitle a person to more than nominal damages. Moreover, while *Piphus* did not concern the removal of a government employee, other U.S. courts of appeals have applied the holding stated above to such removals. *See, e.g., Brewer v. Chauvin*, 938 F.2d 860, 862-65 (8th Cir. 1991).[7] I note further that, while the Federal Circuit has relied on *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967), and *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978), *Camero* was decided before *Piphus*, and *Ryder* was decided before Congress enacted

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[7] Decisions in which the other circuits have applied the *Piphus* holding to cases involving the removals of government employees include the following: *Caban-Wheeler v. Elsea*, 71 F.3d 837, 841-42 (11th Cir. 1996); *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1420 (10th Cir. 1994); *Piroglu v. Coleman*, 25 F.3d 1098, 1102 (D.C. Cir. 1994); *Miner v. City of Glens Falls*, 999 F.2d 655, 660 (2d Cir. 1993); *Hill v. City of Pontotoc, Mississippi*, 993 F.2d 422, 425-26 (5th Cir. 1993; *Sutton v. Cleveland Board of Education*, 958 F.2d 1339, 1352 (6th Cir. 1992); *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74, 81 (3d Cir. 1989); *Alexander v. City of Menlo Park*, 787 F.2d 1371, 1375-76 (9th Cir. 1986); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1265 (7th Cir. 1985); *Taliaferro v. Willett*, 588 F.2d 428, 428 (4th Cir. 1978); *Hernandez del Valle v. Santa Aponte*, 575 F.2d 321, 324 (1st Cir. 1978).

the "harmful error" provision cited above.[8] It could be argued persuasively, therefore, that the holdings on which the Federal Circuit has relied have been overruled. In addition, although *Piphus* concerned actions of state government officials, rather than those of federal officials, the reasoning in that decision does not indicate that the Court's approach to federal officials' actions would differ in any way.[9] Finally, although I am aware of U.S. Supreme Court decisions indicating that improper employment-related actions or decisions by the federal government may entitle an employee to substantial damages even absent a specific finding that the employee would not have been separated in the absence of the impropriety, those decisions do not appear to include findings that the employees' constitutional due process rights were denied, and they do not indicate that a statutory or other provision similar to the "harmful error" provision of 5 U.S.C. § 7701(c)(2)(A) was applicable to the cases. *See Greene v. United States*, 376 U.S. 149 (1964); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957).

¶24 For the reasons stated above, it could be argued that the appellant's removal should not be overturned if the agency shows that the removal would have been effected in the absence of the error shown here. That is, it could be argued that the action should be sustained if the agency establishes that the

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[8] The Federal Circuit also has relied on *Sullivan v. Department of the Navy*, 720 F.2d 1266, 1274 (Fed. Cir. 1983). *Stone*, 179 F.3d at 1377. *Sullivan*, however, relied on *Camero* and *Ryder*. *Sullivan*, 720 F.2d at 1271-74.

[9] In *Bishop v. Wood*, 426 U.S. 341, 349 & n.14 (1976), the Supreme Court expressed a reluctance to interfere in state personnel relationships. The specific matter before the Court in that case, however, was whether the Court should defer to the state's interpretation of its own law concerning whether the plaintiff was a tenured employee or an "at will" employee. *See id.* at 345-47; *cf. Stone*, 179 F.3d at 1374 (property rights are created and defined, not by the Constitution, but by sources such as statutes). The issue of the proper remedy for a constitutional violation, therefore, was not addressed in *Bishop*.

appellant would have been removed even if she had been given an opportunity to respond to the ex parte communications at issue here. *See, e.g., Alexander v. City of Menlo Park*, 787 F.2d 1371, 1375 (9th Cir. 1986) (the employer has the burden of proving that the action would have been effected in the absence of the due process violation). It also could be argued that, because the agency has not been given an opportunity to make such a showing, and because the appellant has not been given an opportunity to rebut any evidence the agency presents on this subject, the Board should remand this case to the field office for further adjudication. As indicated above, however, this approach would be inconsistent with *Stone*, and *Stone* is a precedential decision issued by our reviewing court, the U.S. Court of Appeals for the Federal Circuit. Precedential decisions of that court are binding on us. *See Fairall v. Veterans Administration,* 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

¶25 Accordingly, I would find, consistent with *Stone*, that the appellant's removal cannot be sustained because the appellant's procedural due process rights were violated by the deciding official's receipt and consideration of ex parte communications. Because I believe the appellant's due process rights were violated, and because our reviewing court has held that we may not sustain an action affected by such a violation, I would not reach the merits of the specifications stated in the proposal notice. My view of the record suggests to me, however, that only one of the agency's specifications was supported by preponderant evidence. That specification, which concerns the appellant's allegedly untimely posting of a schedule on a single occasion, does not appear to warrant removal.

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Date Neil A. G. McPhie
Member