

GEORGE J. SVEJDA
v.
DEPARTMENT OF THE INTERIOR

Docket No.
DC07528010078

OPINION AND ORDER

The appellant was removed from his position as Historian (Research Specialist), GS-12, for unsatisfactory performance. He appealed the agency's action to the Board's Washington, D.C. Field Office, alleging, *inter alia*, that the underlying cause of his removal was "malice and bad faith." Additionally, appellant asserted that the removal action was procedurally defective, and that the efficiency of the service would best be promoted by his retention and reassignment to another position. The presiding official, finding no harmful error, and concluding that the charges against appellant were supported by a preponderance of the evidence, sustained the agency's action as having been taken for the promotion of the efficiency of the service. Appellant has petitioned the Board to review the presiding official's decision. 5 C.F.R. § 1201.115.

The record reveals that prior to his removal from employment, appellant had been given an unsatisfactory performance rating. The rating was sustained by Manus J. Fish, Regional Director, National Capital Region, National Park Service, and appellant requested review of that decision by an *ad hoc* committee, as provided by agency procedures. In the course of its deliberations, the committee informed appellant that certain factual questions had arisen "which we have requested management to answer." On January 14, 1980, appellant was notified of the committee's decision to sustain the rating.

On January 18, 1980 the agency notified appellant of its proposal to remove him.

In this context, appellant contends that his rights were violated by the designation as deciding official in the removal action of the agency official who had previously sustained his unsatisfactory performance rating, Mr. Manus J. Fish. He alleges that this designation constituted harmful error by the agency in the application of its procedures.

Under 5 C.F.R. § 1201.56(b)(1), the appellant has the burden of proving that the agency's action was harmful to him. Preliminary to proof of harm, however, is a showing of error. No statute or regulation prohibits an agency from appointing a deciding official such as the one chosen here. See 5 U.S.C. § 7513; 5 C.F.R. §752.404. Appellant contends, however, that the selection of Mr. Fish as the deciding official constituted a violation of due process.

The constitutional guarantee of procedural due process applies to a non-probationary employee's removal from Federal employment. *Arnett*

v. Kennedy, 416 U.S. 134, *reh. den.* 417 U.S. 977. It is violative of due process to allow an individual's basic rights to be determined either by a biased decisionmaker or by a decisionmaker in a situation structured in a manner such that "risk of unfairness is intolerably high." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975); *See also In re Murchison*, 349 U.S. 133, 136 (1955).

We must then view appellant's due process contention in two possible lights. For if appellant has established either actual bias on the part of the decisionmaker, Mr. Fish, or has established that the situation created by the agency by its nature established an intolerably high risk of unfairness, then appellant's procedural due process rights have been violated.

With regard to specific bias, appellant contends that Mr. Fish as the agency's deciding official considered appellant's performance on a feasibility study in reaching his decision on the removal action even though it was not a part of the proposal notice and was found acceptable by the *ad hoc* committee. While the record reflects, as appellant asserts, that the deciding official disagreed with the conclusion of the committee in that respect (Hearing Transcript III-40), the Board finds this insufficient evidence of bias in light of the lack of evidence to indicate that performance on this study formed a part of the reason for removal. *See, e.g.*, Initial Decision at 2; Hearing Transcript III-45, 46; *see also Monahan v. United States*, 354 F.2d 306 (Ct. Cl. 1965); *Sibert v. Department of Health, Education, and Welfare*, 4 MSPB 132, 133 (1980).

Regarding the possibility of bias inherent in the agency's designation of an individual who had reviewed appellant's performance and found it wanting as the deciding official in the subsequent removal action, the Board finds that there 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 the appellant's interests. *Keeney v. United States*, 150 Ct. Cl. 53 (1960). Accordingly, even where an adverse action against an appellant was reversed on procedural grounds, the deciding official in that case is not barred, simply for that reason, from performing the same function when removal proceedings are reinstated. *McGhee v. Johnson*, 420 F.2d 445 (10th Cir. 1969). Nor has appellant set forth specific facts and circumstances attendant to the agency's selection of a deciding official in the present case which would make the risk of unfairness to him "intolerably high." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). Accordingly, we find no error in the selection of Mr. Fish as deciding official in this case, and we find no violation of appellant's right to due process in that respect.

Appellant next contends that his right to due process was violated when the agency submitted allegations of misconduct, other than those

on which the charges were based, to the presiding official.¹ He states that the submission prejudiced the presiding official's consideration of the case and it shows that the agency relied on reasons other than those in the advance notice.²

The Board finds no merit to these contentions. The presiding official specifically referred to this evidence as being "irrelevant to the current charge," Initial Decision at 4, and clearly did not consider it in support of the specifications of inadequate performance. *Haynes v. United States*, 418 F.2d 1380 (Ct. Cl. 1969). In regard to the second contention, the Board finds that submission of new allegations of misconduct to the presiding official, in response to appellant's allegations on appeal, by itself, does not show that the agency considered reasons other than those in the proposal notice in reaching the decision to take adverse action against the appellant. *Washington v. Summerfield*, 228 F.2d 452, 454 (D.C. Cir. 1955); *Richardson v. Hampton*, 373 F.Supp. 833, 837-838 (D.D.C. 1974), *aff'd mem.*, 527 F.2d 853 (D.C. Cir. 1975). *See also Douglas v. Veterans Administration*, 5 MSPB 313, 331, n.65 (1981).

Finally, appellant contends that his right to due process was violated by *ex parte* communications between agency officials and the *Ad Hoc* Performance Rating Review Committee, which reviewed his performance rating. As appellant correctly notes, the instant adverse action was based on some of the same instances of allegedly inadequate performance as were reviewed by the committee in connection with the performance rating. However, appellant has not alleged, and the record does not show, that *ex parte* communications occurred with respect to the removal action *per se*.

The Board has carefully considered appellant's contention. We find, first, that we lack jurisdiction to review the decision of the performance rating review committee and the procedures by which it arrived at that decision.³ *Marsh v. Department of the Army*, 2 MSPB 143 (1980). Our

¹He asserts that these allegations were contained in a "secret file" which should have been shown to him when, in preparation for the reply to the notice of proposed action, he asked to review the record.

²Under 5 C.F.R. 752.404(b) an employee may review "the material which is relied on to support the reasons for action given in the notice." There is no corollary statutory requirement; 5 U.S.C. 7513(b)(1), however, requires that the advance notice inform the employee of "the specific reasons for the proposed action." Having found that the agency did not rely on the evidence in this file in taking its action, *see infra* and the presiding official's discussion of this matter in the initial decision at 2, the Board finds that the failure of the agency to show this material to appellant was not error. Appellant was furnished with the files in question prior to the hearing on his appeal and, presumably, explored this topic to the extent he believed it relevant at the hearing. *See Bize v. Department of the Treasury*, 3 MSPB 261, 264 (1980); *Gilbert v. Johnson*, 419 F. Supp. 859 (N.D. Ga. 1976).

³As noted above, however, appellant was put on notice of the committee's request and was, therefore, free to assert any right to which he felt he was entitled. Further, in a non-adversary proceeding, reasonable requests for information from the decisionmaker are not "inherently unfair or prejudicial." *Rifkin v. United States*, 209 Ct. Cl. 566, 591 (1976).

review is limited to the removal action and whether appellant's rights in connection with that action have been properly protected. While there is clearly a link between those two actions, we disagree with appellant's assertion that they are so closely related that the committee's actions require the reversal of the removal action. In connection with the removal action appellant had, prior to the issuance of the agency's decision, the opportunity to present to the deciding official his response to the proposed action. More importantly, he was provided a full and fair hearing by the Board's presiding official. The hearing lasted for four days, and after its completion, she reviewed the record *de novo* and made an impartial decision on the validity of the charges on which the agency relied.⁴ Under these circumstances, the Board finds that appellant has failed to meet his burden of proving that any error which may have occurred in the performance rating review process was harmful to his rights under 5 U.S.C. § 7513 and implementing regulations. See C.F.R. § 1201.56(b)(1).

Accordingly, the petition for review of the initial decision of September 19, 1980, fails to meet the requirements of 5 C.F.R. § 1201.115, and is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., July 9, 1981

⁴See *Pascal v. United States*, 543 F.2d 1284, 1288 (Ct. Cl. 1976), holding that any error in the agency's investigation into the matters with the employee was charged "would not vitiate the removal unless that investigatory failure tainted the adversary administrative hearing or process." See also *Fitzgerald v. United States*, 623 F.2d 696, 699 (Ct. Cl. 1980); *Gilligan v. Department of Housing and Urban Development*, 4 MSPB 312 (1980); *Vann v. Department of the Navy*, 1 MSPB 472 (1980).