

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 62

Docket No. PH-0752-10-0412-I-1

**Barron D. Thomas,
Appellant,**

v.

**United States Postal Service,
Agency.**

June 14, 2011

Barron D. Thomas, Monroeville, Pennsylvania, pro se.

Lori L. Markle, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter comes before the Board on the appellant's petition for review of the September 7, 2010 initial decision affirming the agency's removal action. We GRANT IN PART and DENY IN PART the petition and, for the reasons discussed below, REMAND the case to the Northeastern Regional Office to apply the Federal Circuit's recent decision in *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011).

BACKGROUND

¶2 At the time of his removal, the appellant was a Mail Handler in the agency's Pittsburgh Network and Distribution Center. Initial Appeal File (IAF), Tab 5 at 24. On March 12, 2010, the agency proposed the appellant's removal based on four specifications under the charge of "Improper Conduct/Violation of the USPS Policy on Sexual Harassment." *Id.* at 15-18. All four specifications involved the appellant's alleged actions towards the same female employee, K.M.,¹ during December 2009. *Id.* at 15-16. The appellant was accused of touching K.M.'s buttocks on December 9th, her chest area on December 21st, and her buttocks on December 27th, as well as "continually subject[ing her] to demeaning, sexually derogative comments."² *Id.* The appellant was removed effective April 27, 2010. *Id.* at 10-14.

¶3 The appellant filed a timely appeal. IAF, Tab 1. Following a hearing in which the appellant chose not to testify, the administrative judge upheld three of the four specifications but determined that the agency had not proven that the appellant touched K.M. on her buttocks on December 27th. *See* IAF, Tab 26, Initial Decision (ID). The administrative judge also held that the appellant had not proven his affirmative defenses of race, sex, or age discrimination, harmful procedural error, or other miscellaneous affirmative defenses. She further held that removal was an appropriate penalty for the sustained specifications. *Id.* The appellant filed a timely petition for review to which the agency filed a timely response. PFR File, Tabs 1, 3.

¹ To protect the privacy of the alleged victim of the appellant's misconduct, initials have been used in place of names for the victim and witnesses in this case.

² The appellant does not dispute that the specifications, if proven, would constitute a violation of the USPS policy on sexual harassment. *See* Petition for Review (PFR) File, Tab 1. The agency included in its notice of proposed action an excerpt of its harassment policy which states that sexual harassment includes "deliberate or repeated unsolicited remarks with a sexual connotation or physical contact of a sexual nature that is unwelcome to the recipient." *See* IAF, Tab 5 at 17.

ANALYSIS

The administrative judge acted within her discretion when she decided not to permit the appellant to submit new evidence at the hearing.

¶4 In his petition for review, the appellant asserts that the administrative judge erred by prohibiting him from submitting “grievance letters” filed on the appellant’s behalf by his union. PFR File, Tab 1 at 2. An administrative judge has broad discretion to regulate the course of the hearing and to exclude evidence and witnesses which have not been shown to be relevant or material to the issues of the case. *Townsel v. Tennessee Valley Authority*, [36 M.S.P.R. 356](#), 359 (1988); see [5 C.F.R. § 1201.41\(b\)](#). The Board has held that in order to obtain reversal of an initial decision on the ground that the administrative judge abused his discretion in excluding evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed. *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 10 (2010); *Jezouit v. Office of Personnel Management*, [97 M.S.P.R. 48](#), ¶ 12 (2004), *aff’d*, 121 F. App’x 865 (Fed. Cir. 2005). At the opening of the hearing, the administrative judge refused to permit the appellant to introduce exhibits that had not been approved during the pre-hearing conference, that had been in his control prior to the pre-hearing conference, and that she determined were not relevant to the case at hand. See ID at n.1; Hearing Transcript, July 15, 2010 (HT-1) at 6-15; IAF, Tab 20 at 5. We find nothing in these documents that would have led the administrative judge to reach a different conclusion regarding the charge or the penalty. See PFR File, Tab 1 at 15-25. The appellant has therefore failed to make the required showing that the outcome was affected by the administrative judge’s decision.

The appellant has not shown error in the administrative judge’s credibility determinations.

¶5 On review, the appellant asserts that the administrative judge erred in her credibility findings, particularly with respect to the alleged victim, K.M., and the

agency's other primary witness to the alleged conduct, A.A., because there were minor inconsistencies in their statements. *See* PFR File, Tab 1 at 4-7. However, the Board has held that inconsistent statements do not necessarily render a witness's testimony incredible. *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 459 (1987); *see also Jefferson v. Defense Logistics Agency*, [22 M.S.P.R. 10](#), 14 (1984) (holding that minor inconsistencies in testimony were not sufficient to justify holding that a witness did not observe an incident). The Board will defer to the credibility determinations of an administrative judge when they are based, explicitly or implicitly, upon the observation of the demeanor of witnesses testifying at a hearing because the administrative judge is in the best position to observe the demeanor of the witnesses and determine which witnesses were testifying credibly. *Haebe v. Department of Justice*, [288 F.3d 1288](#), 1300-01 (Fed. Cir. 2002); *see Smith v. Department of Veterans Affairs*, [93 M.S.P.R. 424](#), ¶ 4 (2003). The credibility determinations of an administrative judge are virtually unreviewable on appeal. *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1364 (Fed. Cir. 2002); *see Hambsch v. Department of the Treasury*, [796 F.2d 430](#), 436 (Fed. Cir. 1986).

¶6 Because the agency witnesses testified in a substantially similar manner regarding the conduct that comprised the first two specifications, and the administrative judge's credibility determinations were implicitly based on her observations, we cannot hold that the administrative judge erred in her determination that the witnesses were credible with respect to the allegations that the appellant touched K.M. on her buttocks on December 9th (specification 1), and in her chest area on December 21st (specification 2). *See* HT-1 at 156-59, 161-63 (testimony of K.M.); HT-1 at 235-37 (testimony of J.V.); HT-2 at 325-34

(testimony of A.A.).³ Accordingly, we affirm the findings of the administrative judge with respect to these two specifications.⁴

The agency did not prove by preponderant evidence its specification that the appellant continually subjected K.M. to demeaning, sexually derogative comments.

¶7 The fourth specification in the notice of proposed action stated that “[d]uring the alleged period of physical harassment” the appellant “continually subjected [K.M.] to demeaning, sexually derogative comments such as ‘sexy ass’ and ‘you’re so gorgeous.’” IAF, Tab 5 at 16. The ordinary meaning of the word “continually” is that it continues indefinitely without interruption or in steady rapid succession. *See Webster’s Ninth New Collegiate Dictionary* 284 (1985). The alleged period of physical harassment indicated in the notice of proposed action included three dates: December 9, December 21, and December 27, 2009. *See IAF, Tab 5 at 15-16.* This is a period of approximately 2.5 weeks. K.M. testified that the appellant’s comments were not “an every day occurrence” and that they happened “maybe once a week.” HT-1 at 172. This would mean, at most, that the comments occurred three times in a period of 2.5 weeks. Although the appellant’s comments were repeated, we cannot find that the frequency of this

³ The administrative judge held that, based upon K.M.’s testimony, the agency failed to prove its third specification, which involved the events of December 27th. *See ID at 6.* On petition for review, the agency does not dispute this finding and we see no indication that the administrative judge erred. *See PFR File, Tab 3.* Accordingly, we hold that specification 3 is not sustained.

⁴ The appellant raised the affirmative defenses of race, sex, and age discrimination below and discussed race discrimination in his petition for review. *See IAF, Tab 1 at 6; PFR File, Tab 1 at 8, 11.* We have reviewed the administrative judge’s determinations that the appellant failed to prove his discrimination affirmative defenses and discern no error. *See ID at 7-9.* The administrative judge also found that the appellant failed to prove that the agency committed harmful procedural errors during its investigatory process, that the agency predetermined his removal, or that it subjected him to double jeopardy. *ID at 9-10.* We affirm these findings. However, we note that there is an additional potential harmful procedural error issue that has not yet been addressed, which we discuss in detail below.

conduct rises to the level of continual. Accordingly, we do not sustain this specification.

The initial decision does not fully address the potential due process violation.

¶8 The appellant asserts that because none of the specifications in the notice of proposed action involved women other than K.M., he was harmed when the agency's deciding official saw statements from two other women that alleged that he had engaged in similar conduct towards them. PFR File, Tab 1 at 10; IAF, Tab 19 at 44-46, 52-54. The appellant asserts that the deciding official testified that these statements "weighted [sic] heavily in his decision" to remove the appellant. PFR File, Tab 1 at 10. While we cannot find such a statement in the transcript, the deciding official did testify that he had seen statements regarding the other women that caused him to believe that the appellant's conduct was intentional, and he admitted that one such statement did "factor" into his decision to remove the appellant. HT-2 at 393, 435-36.

¶9 In her initial decision, the administrative judge applied the harmful error test and held that, although the deciding official reviewed the statements from the other alleged victims, because the deciding official "testified that he based his decision on the charge and specifications contained in the notice of proposed removal," the penalty was sustained. ID at 12, 9-10.

¶10 Following the issuance of the initial decision, the Federal Circuit issued its decision in *Ward*, [634 F.3d 1274](#). Prior to the court's holding in *Ward*, the Board had held that:

Where an ex parte communication does not relate to the charge itself, but relates instead to the penalty, the Board has not considered such error to be denial of due process of law to be analyzed under the factors set forth in *Stone [v. Federal Deposit Insurance Corporation]*, [179 F.3d 1368](#), 1377 (Fed. Cir. 1999)]; rather, the Board will remedy the error by doing its own analysis of the penalty factors. The agency's error, therefore, does not necessarily require mitigation of the penalty; the question is whether removal is within the bounds of reasonableness, considering the pertinent factors other than [those contained in the ex parte communication].

Ward v. U.S. Postal Service, [112 M.S.P.R. 239](#), ¶ 10 (2009) (internal citations omitted), *overruled by Ward*, [634 F.3d 1274](#). In its *Ward* decision, the Federal Circuit expressly overruled this approach and held that if the 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 due process violation. *Ward*, [634 F.3d at 1280](#). To the extent that the Board has held differently in cases such as *Rodriguez v. Department of Homeland Security*, [108 M.S.P.R. 76](#), ¶ 33 n.4 (2008), *aff’d*, 314 F. App’x 318 (Fed. Cir. 2009); *Biniak v. Social Security Administration*, [90 M.S.P.R. 682](#), ¶ 10 (2002); and *Groeber v. U.S. Postal Service*, [84 M.S.P.R. 646](#), ¶¶ 9-11 (2000), *aff’d*, 13 F. App’x 973 (Fed. Cir. 2001), those cases are expressly overruled.

¶11 In *Ward*, the court instructed the Board to apply the factors from *Stone* to determine whether “new and material information” was introduced. *See Ward*, [634 F.3d at 1280](#). Under the *Stone* test,

Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice. In deciding whether new and material information has been introduced by means of *ex parte* contacts, the Board should . . . [consider]: 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. 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.

Stone, 179 F.3d at 1377; *see also Blank v. Department of the Army*, [247 F.3d 1225](#), 1229 (Fed. Cir. 2001) (applying the *Stone* test). However, if the *ex parte* communication is not sufficiently substantial to rise to the level of a due process violation, then “the Board [is] required to run a harm[ful] error analysis to determine whether the procedural error require[s] reversal.” *Ward*, [634 F.3d at 1281](#); *see 5 U.S.C. § 7701(c)(2)(A)*. Harmful error is an “[e]rror by the agency

in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.” *Ward*, [634 F.3d at 1281](#); [5 C.F.R. § 1201.56\(c\)\(3\)](#).

¶12 The application of 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 – cannot be determined from the written record.⁵ The deciding official testified that the statements of the other women were a factor in his decision but also that he would have removed the appellant even if he had not seen the statements by the other women. HT-2 at 393, 435-36, 472. The deciding official’s two statements appear to conflict, and the administrative judge did not conduct a detailed *Hillen* analysis enabling us to determine whether the deciding official’s knowledge of the other alleged victims created “undue pressure” on the deciding official. *See Hillen*, 35 M.S.P.R. at 458; ID at 11-12. As the hearing official, the administrative judge is in the best position to resolve this question. *See Haebe*, 288 F.3d at 1299-1300. We therefore remand this case to the Northeastern Regional Office.

¶13 On remand, in accordance with the Federal Circuit’s holding in *Ward*, the administrative judge must apply the *Stone* factors to the issue of the deciding official’s receipt of the statements by the other alleged victims. *See Ward*, [634 F.3d at 1280](#); *Stone*, 179 F.3d at 1377. In conducting her analysis, the administrative judge should allow the parties to provide additional relevant evidence and argument regarding the *Stone* factors, including the presentation of further hearing testimony, if necessary. If a due process violation is found, the

⁵ In *Ward*, the court noted that “[i]n *Stone*, [the court] held that ‘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’ is a relevant factor in determining whether the *ex parte* communications violated due process. This, however, is only one of several enumerated factors and is not the ultimate inquiry in the *Stone* analysis.” *Ward*, [634 F.3d at 1280](#) n.2 (internal citations omitted).

administrative judge must reverse the agency's action and order the agency to restore the appellant until he is afforded a "new constitutionally correct removal procedure." *Stone*, 179 F.3d at 1377; *see Ward*, [634 F.3d at 1280](#). If no due process violation is found, then the administrative judge should conduct a detailed harmful error analysis with regard to any procedural error concerning the penalty determination for the sustained specifications. *See Ward*, [634 F.3d at 1281](#); [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#).

ORDER

¶14 This appeal is remanded to the Northeastern Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.