

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

2012 MSPB 121

Docket No. AT-0752-10-0474-I-2

**Katherine Adair Martinez,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

November 1, 2012

Kevin L. Owen, Esquire, and Zachary Wright, Esquire, Silver Spring, Maryland, for the appellant.

Gia M. Chemsian, Esquire, Washington, D.C., for the agency.

John L. Pressly, Jr., Esquire, Columbia, South Carolina, for the agency.

Judith G. Valois, Esquire, Sarasota, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision that reversed the agency's removal action based on a finding that the appellant's right to due process was violated. For the reasons set forth below, the Board GRANTS the agency's petition, VACATES the initial decision, and REMANDS this appeal to

the Atlanta Regional Office. We DENY the appellant's request for sanctions against the agency.

BACKGROUND

¶2 On August 18, 2009, the agency's Office of Inspector General (OIG) released an administrative investigation report entitled "Misuse of Position, Abuse of Authority, and Prohibited Personnel Practices Office of Information & Technology." Initial Appeal File, MSPB Docket No. AT-0752-10-0474-I-1 (IAF I-1), Tab 10, Volume (Vol.) 4, Subtab 4N. In the report, the OIG found that the appellant misused her position, abused her authority, engaged in prohibited personnel practices, failed to provide proper contract oversight, and did not properly fulfill her duties as a Contracting Officer's Technical Representative. *Id.* The agency subsequently proposed the appellant's removal from her Senior Executive Service position of Deputy Assistant Secretary for Information Protection and Risk Management in the Office of Information and Technology (OIT) based on five charges: (1) misuse of her official position for the personal gain of a friend; (2) engaging in a prohibited personnel practice; (3) inadequate contract oversight; (4) inappropriate use of a contractor; and (5) inappropriate sharing of nonpublic contracting information.¹ IAF I-1, Tab 10, Vol. 6, Subtab O; Vol. 3, Subtab G. The notice of proposed removal identified Roger Baker, the Assistant Secretary for OIT, as the deciding official. *Id.*, Tab 10, Vol. 6, Subtab O at 5. The appellant presented oral and written replies to Mr. Baker regarding the five charges. IAF I-1, Tab 10, Vol. 3, Subtabs H-I. Mr. Baker issued a decision sustaining all five charges (but only two of the three specifications of charge 1) against the appellant and directed that her removal was to be effective on February 5, 2010. IAF I-1, Tab 10, Vol. 2, Subtab B at 1.

¹ The agency initially based the proposed removal on four charges, but the agency issued a Notice of Amendment to the Proposed Removal on December 7, 2009, adding the fifth charge. IAF I-1, Tab 10, Vol. 6, Subtab O; Vol. 3, Subtab G.

¶3 The appellant timely refiled² an appeal of her removal after the agency issued a final decision on her formal equal employment opportunity complaint. Initial Appeal File, MSPB Docket No. AT-0752-10-0474-I-2 (IAF I-2), Tab 1. In a January 31, 2011 order, the administrative judge advised the parties that she had identified a possible due process violation. IAF I-2, Tab 29. Specifically, she was concerned about whether the appellant received a meaningful opportunity to respond to the proposed action because Mr. Baker, the deciding official, concurred in the OIG draft investigative report, which formed the basis of the charges in the matter. *Id.* at 2. The administrative judge provided the parties an opportunity to identify any material issue of fact in dispute with regard to the identified due process issue and to explain why a limited hearing was necessary in order to resolve such a factual dispute. *Id.* at 2-3. The parties filed briefs in response to the administrative judge's order. IAF I-2, Tabs 32, 34-37. The administrative judge cancelled the requested hearing after she notified the parties that she was reversing the agency's action based on finding that a due process violation occurred. IAF I-2, Tab 39, Initial Decision (ID) at 4.

¶4 The administrative judge concluded in her initial decision that, prior to undertaking the role of decision maker in the appellant's removal, Mr. Baker "painstakingly reviewed evidence . . . and issued findings that he concurred in the various violations [identified by the agency's OIG in its draft investigative report]." ID at 12-14. Mr. Baker then acted as the deciding official and determined that, based on misconduct identified in the OIG's final report, removal was appropriate. For these reasons, the administrative judge found that the risk was too high that the appellant missed her "only meaningful opportunity

² The administrative judge initially dismissed this appeal as premature because the appellant timely filed a formal equal employment opportunity complaint prior to filing the appeal with the Board. IAF I-1, Tab 11. In addition, we note that the administrative judge should have cited to 5 U.S.C. § 7543 as the source of the Board's jurisdiction in this case.

[to] invoke the discretion of the decisionmaker” before her removal took place. ID at 14 (quoting *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 543 (1985)). The administrative judge found unavailing Mr. Baker’s deposition testimony that he provided the appellant a meaningful opportunity to reply. ID at 13. The agency filed a petition for review, and the appellant filed a response. Petition for Review (PFR) File, Tabs 1, 6.

ANALYSIS

¶5 We grant the agency’s petition for review to address the administrative judge’s decision to reverse the agency’s removal action based on her finding that the agency violated the appellant’s due process rights. Regarding this issue, the agency argues, inter alia, that the administrative judge “misapplied and failed to consider direct and relevant [Board] precedent concerning pretermination procedural due process rights available to federal employees.” PFR File, Tab 1 at 10-11. Specifically, the agency argues that the administrative judge erred in her application of *Svejda v. Department of the Interior*, [7 M.S.P.R. 108](#) (1981), and in her failure to apply *Facciponti v. U.S. Postal Service*, [15 M.S.P.R. 183](#) (1983).

¶6 In *Svejda*, the same official who had sustained an employee’s unsatisfactory performance rating was later designated as the deciding official for the employee’s proposed performance-based removal action. *Svejda*, 7 M.S.P.R. at 110. The appellant claimed that his due process rights had been violated because the deciding official in the adverse action had also been the supervisor who had sustained his unsatisfactory rating. *Id.* at 110-11. The Board explained that it would be a violation 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 [the] ‘risk of unfairness is [i]ntolerably high.’” *Id.* at 111 (quoting *Withrow v. Larkin*, [421 U.S. 35](#), 58 (1975)). However, in *Svejda*, the Board found the appellant’s argument unpersuasive, concluding that there is no general proscription of appointing a deciding official

who is familiar with the facts of the case and who has expressed a predisposition contrary to the appellant's interests. *Id.* at 111; *see Baldwin v. U.S. Postal Service*, [26 M.S.P.R. 383](#), 387 (1985) (the fact that the deciding official was somewhat familiar with the facts concerning the case and had concurred with proposing the removal did not proscribe his appointment as the deciding official); *Beatty v. Department of Housing & Urban Development*, [20 M.S.P.R. 436](#), 438 (1984) (there was no due process violation or harmful error committed where the deciding official was fully apprised of, and had concurred in, the desirability of demoting the appellant before considering his response to the proposal notice), *aff'd*, 765 F.2d 162 (Fed. Cir. 1985) (Table).

¶7 The administrative judge cited *Svejda* for the proposition that an agency is not prohibited from appointing a deciding official who is familiar with the facts of the case and who has expressed a predisposition contrary to the appellant's interests. ID at 9-10. However, she found that "the deciding official [in this case] expressed a conclusion based on the evidence, not simply a predisposition." ID at 10 n.5. It is unclear why she found Mr. Baker's consideration of and concurrence in the findings of the OIG report constituted a "conclusion," whereas the deciding official's sustaining of an unsatisfactory performance rating in *Svejda* was a mere "predisposition." In any event, the Board has previously concluded that the mere fact that the deciding official was fully apprised of, and had concurred in, the desirability of taking an adverse action before considering the appellant's response to the proposal notice was an insufficient basis on which to find a due process violation or harmful error in the absence of specific allegations indicating that the agency's choice of the deciding official made the risk of unfairness to the appellant "intolerably high." *Beatty*, 20 M.S.P.R. at 438; *see Baldwin*, 26 M.S.P.R. at 387.

¶8 The agency also contends that the administrative judge failed to discuss *Facciponti*, which it cited in its due process brief. PFR File, Tab 1 at 7; IAF I-2, Tab 37 at 4-5. In *Facciponti*, the agency removed an employee for misconduct

following an agency investigation. *Facciponti*, 15 M.S.P.R. at 184. The deciding official testified that he saw the agency inspector's report concerning the misconduct long before the agency issued the proposal notice and that "he pretty much knew" that such a serious offense would warrant the appellant's removal from the agency. *Id.* at 185. The Board determined that the appellant had been afforded an opportunity to respond to the charges cited against him in the notice of proposed removal and, in fact, had responded both orally and in writing. *Id.* The Board also credited the deciding official's testimony that he had considered the appellant's responses, as well as the appropriateness of lesser penalties. *Id.* at 185-86. Therefore, the Board found that the agency did not commit harmful error in removing the appellant. *Id.* at 186. In subsequent similar cases, the Board concluded that the fact that the deciding official may have been predisposed to severely discipline an employee before receiving his response to the notice of proposed adverse action did not constitute harmful procedural error *or a violation of law* if the appellant was afforded an opportunity to reply to the charges against him and, in fact, did submit a response that was considered by the deciding official before he made a final decision. *Deskin v. U.S. Postal Service*, [76 M.S.P.R. 505](#), 517-18 (1997); *Jackson v. Veterans Administration*, [22 M.S.P.R. 350](#), 353 (1984).

¶9 In this matter, similarly, Mr. Baker saw an investigative report, the agency provided the appellant with notice of the charges, and the appellant responded both orally and in writing. IAF I-1, Tab 10, Vols. 2, 3, 4, Subtabs D, E, H, I, N at 22-26. Although the agency's deciding official in *Facciponti* did not express his concurrence with the inspector's report, as Mr. Baker did here, he did testify that he was predisposed to remove the appellant. *Facciponti*, 15 M.S.P.R. at 185. Because of the similarities between *Facciponti* and this case, the agency correctly asserts that the administrative judge should have considered *Facciponti* and addressed its relevance.

¶10 In addition, the agency cites *Withrow*, 421 U.S. at 58, in support of its position that there is a “strong presumption that agency deciding officials will discharge their duties in an unbiased manner.” PFR File, Tab 1 at 11. In *Withrow*, the Supreme Court concluded that it was within the bounds of due process for a state medical examining board to perform both the investigative and adjudicatory functions in a physician licensing matter. 421 U.S. at 47-58. In doing so, the Court found that there is a presumption of honesty and integrity for those serving as administrative adjudicators. *Id.* at 47. *Withrow* does not address whether it is permissible for an agency deciding official to have previously been involved in the investigation leading to the adverse action in question. However, the Board has cited *Withrow* for the proposition that due process is violated when an individual’s basic rights are determined either by a biased decision maker or by a decision maker in a situation structured in a manner such that the “risk of unfairness is intolerably high.” *Svejda*, 7 M.S.P.R. at 111. The burden is on the appellant to establish actual bias or an intolerable risk of unfairness. *Id.*

¶11 At this stage, there has been no such showing. As explained above, a deciding official’s familiarity with the facts of the case and expressed predisposition contrary to the appellant’s interests does not constitute a due process violation or harmful error. *Deskin*, 76 M.S.P.R. at 517-18; *Baldwin*, 26 M.S.P.R. at 387; *Jackson*, 22 M.S.P.R. at 353; *Facciponti*, 15 M.S.P.R. at 185-86; *Svejda*, 7 M.S.P.R. at 111; see *McGhee v. Johnson*, [420 F.2d 445](#), 448 (10th Cir. 1969) (the fact that the same official decided an employee’s removal in an earlier, procedurally flawed removal action did not invalidate the official’s second determination to remove the employee). This is so even if the deciding official had gone so far as to concur previously in the desirability of taking the adverse action against the employee. *Baldwin*, 26 M.S.P.R. at 387; *Beatty*, 20 M.S.P.R. at 438. Furthermore, both the Board and our reviewing court have found that it is permissible for an individual to be both the proposing and deciding official in an action. *E.g.*, *DeSarno v. Department of Commerce*, [761 F.2d 657](#), 660 (Fed. Cir.

1985) (“The law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case.”); *Teichmann v. Department of the Army*, [34 M.S.P.R. 447](#), 449-52 (1987) (a deciding official's initial predisposition to decide against an employee is insufficient to vitiate the agency proceeding when the deciding official is willing to change his mind and fully considers all evidence of record, including the appellant’s oral and written replies, before reaching his decision), *aff’d*, 854 F.2d 1327 (Fed. Cir. 1988) (Table).

¶12 While the administrative judge acknowledged the precedent allowing for the proposing and deciding official to be the same person, she dismissed the precedent as “not determinative” in this case. It does not appear that the administrative judge properly considered and applied the relevant precedent in this matter. Moreover, she did not hold a hearing and weigh the evidence in order to determine whether the appellant established actual bias or an intolerable risk of unfairness. Rather, the administrative judge seems to have assumed that Mr. Baker’s views must have been impermissibly tainted in the course of reviewing and concurring in the draft OIG report. ID at 13-14 (noting that because Mr. Baker “painstakingly reviewed evidence . . . and then issued findings that he concurred in the various violations, the risk of unfairness [wa]s dangerously high and [wa]s contrary to the dictates of even the minimum of due process”). Because the administrative judge failed to hold a hearing, she was unable to consider all of the relevant evidence, especially any testimony Mr. Baker might provide. Accordingly, we find that remand is appropriate to allow the administrative judge to consider all of the relevant evidence and apply the relevant case law.

ORDER

¶13 We VACATE the initial decision and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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