UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 135

Docket No. PH-0752-12-0279-I-1

Debra A. Lopes,

Appellant,

v.

Department of the Navy,

Agency.

December 31, 2012

Evan S. Greenstein, Washington, D.C., for the appellant.

Albert Haughton, Groton, Connecticut, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board based on the administrative judge's August 2, 2012 order certifying an interlocutory appeal of his June 4, 2012 order regarding the effect to afford, in the current appeal, the administrative judge's findings in the appellant's prior removal appeal. For the reasons discussed below, we AFFIRM the administrative judge's ruling as MODIFIED, VACATE the order

that stayed the processing of this appeal, and RETURN the case to the regional office for further adjudication consistent with this Opinion and Order.[1]

BACKGROUND

¶2 Effective November 20, 2009, the agency removed the appellant based on three charges of misconduct: (1) misuse of her government telephone; (2) misuse of her government laptop computer; and (3) misuse of her government desktop computer.[2] MSPB Docket No. PH-0752-10-0118-I-1, Initial Appeal File (0118 IAF), Tab 4, Subtabs A, C, I. In support of its first charge, the agency asserted that, between March 27, 2009, and June 30, 2009, the appellant made 368 calls, totaling 18.7 hours, from her government office telephone that were not related to agency business. *Id.*, Subtabs C, I. In support of its second charge, the agency asserted that, between March 27, 2009, and June 30, 2009, the appellant used her government laptop computer to access at least 113 web sites that were not related to her assigned duties. *Id.* In support of its third charge, the agency brought ten specifications, five of which alleged that on specific dates the appellant used her government desktop computer to access between 62 and 300 web sites not related to the appellant's official duties. *Id.* The remaining five specifications alleged that on three dates the appellant used her government desktop computer to utilize her administrative privileges to access numerous documents not related to her assigned duties, that she utilized her administrative privileges to load 43

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for appeal and the order certifying the administrative judge's order as an interlocutory appeal both predate the issuance of the new regulations. Even if we considered this matter under the previous version of the Board's regulations, the outcome would be the same.

[2] As noted in the Board's June 17, 2011 Opinion and Order, the administrative judge apparently interpreted the agency's removal action as being based on one charge with twelve specifications, rather than three separate charges. *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 3 n.1 (2011).

programs, and that she sent at least 16 e-mails that were not related to her assigned duties. *Id*.

¶3 After holding the hearing requested by the appellant, the administrative judge found in a March 25, 2010 initial decision that the agency established the sole specification under the first charge, failed to establish the sole specification under the second charge, and established seven of the ten specifications under the third charge. 0118 IAF, Tab 15, Initial Decision (0118 ID) at 5-16. The administrative judge also found that the agency established a nexus between the sustained misconduct and the efficiency of the service and that the penalty of removal was reasonable. *Id*. at 16-18.

¶4 In a June 17, 2011 Opinion and Order, the Board discussed the applicability of the Court of Appeals for the Federal Circuit's decisions in *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), to the facts of that case and determined that the deciding official improperly considered prior discipline and alleged past instances of misconduct in deciding to remove the appellant even though those incidents were not included in the proposal notice. *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶¶ 5-13 (2011). The Board found that, because the agency violated the appellant's due process guarantee to notice, the agency's action could not be excused as a harmless error and the appellant's removal must be cancelled. *Id*., ¶ 13. The Board concluded that "[t]he agency may not remove the appellant unless and until she is afforded a new 'constitutionally correct removal procedure.'" *Id.* (citing *Ward*, 634 F.3d at 1280, and *Stone*, 179 F.3d at 1377).

¶5 Effective March 2, 2012, the agency removed the appellant a second time based on misuse of her government telephone and misuse of her government desktop computer. MSPB Docket No. PH-0752-12-0279-I-1, Initial Appeal File (0279 IAF), Tab 4, Subtabs A, B, H. In support of the misuse of her government telephone charge, the agency again asserted that, between March 27, 2009, and

June 30, 2009, the appellant made 368 calls, totaling 18.7 hours, from her government office telephone that were not related to agency business. *Id.*, Subtab H. Regarding the misuse of her government desktop computer charge, the agency brought seven specifications, which were essentially the same specifications asserted in the agency's November 20, 2009 removal action and sustained by the administrative judge in the initial decision in the appeal of that removal. *Compare* 0118 IAF, Tab 4, Subtabs C, I, *with* 0279 IAF, Tab 4, Subtabs B, H; 0118 ID. The appellant has filed an appeal of the March 2, 2012 removal action.[3] 0279 IAF, Tab 1.

¶6 In a June 4, 2012 order, the administrative judge explained that he held a status conference with the parties to discuss the issues to be adjudicated in the instant case in light of the Board's reversal of the prior removal action pursuant to the Federal Circuit's *Ward* decision. 0279 IAF, Tab 12 at 1. The administrative judge ruled that he would schedule a hearing "which will address only the agency's penalty selection and the appellant's affirmative defenses," and that he would not "relitigate the charges . . . as the identical charges were previously sustained in [his March 25, 2010 initial decision] and [his] findings with respect to those charges were left undisturbed by the Board's" June 17, 2011 decision. *Id*. (emphasis in original). The administrative judge concluded that he did not believe that limiting the scope of the hearing would deny the appellant due process and that it would serve the interests of judicial economy. *Id*. at 1-2.

¶7 The appellant then moved for the administrative judge to certify as an interlocutory appeal the issue of whether the appellant is entitled to a "new full hearing on the merits of her removal." 0279 IAF, Tab 14 at 4. In an August 2, 2012 order, the administrative judge granted the appellant's motion and certified his June 4, 2012 ruling set forth above as an interlocutory appeal. *Id*., Tab 18.

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[3] The appellant was represented in her first appeal by the same attorney who represents her in the instant appeal.

The administrative judge also stayed the processing of the appeal pending the Board's resolution of the interlocutory appeal. *Id.* at 3; *see* 5 C.F.R. § 1201.93(c).

ANALYSIS

¶8 The question presented by the administrative judge's certified ruling is whether, when the Board reverses an agency's removal action on procedural grounds, an administrative judge may limit the hearing in an appeal of a second removal action based on the same charges that were previously sustained by the administrative judge, so as to not rehear the merits of the agency's charges. We start by noting that, contrary to the administrative judge's assertion, his findings in the March 25, 2010 initial decision regarding the charges were not "left undisturbed by the Board's" June 17, 2011 decision. 0279 IAF, Tab 12 at 1. Rather, the Board's decision reversed the initial decision, and the Board stated that it was not making a finding with respect to the agency's charges. *Lopes*, 116 M.S.P.R. 470, ¶¶ 1, 14 n.4. Because the Board explicitly made no finding regarding the merits of the agency's charges and there has not been a final decision regarding those charges, we find that the administrative judge cannot rely on his previous initial decision as a basis for findings in the instant case.[4]

¶9 However, the Board and its administrative judges routinely incorporate the record from one matter filed by an appellant into the record in a second matter filed by the same appellant. *See, e.g.*, *Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 12 n.1 (2005) (incorporating a list of disclosures

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[4] We note that the concepts of claim preclusion and issue preclusion are not applicable here because the Board's June 17, 2011 decision reversed the initial decision, specifically did not address the merits of the agency's charges, and does not constitute a final decision on the merits of the agency's charges. *See Davis v. U.S. Postal Service*, 2012 MSPB 118, ¶ 17; *McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005). Similarly, the law of the case doctrine is not applicable here because the instant matter is a separate and distinct appeal from the appellant's first case. *See Boucher v. U.S. Postal Service*, 2012 MSPB 126, ¶ 16.

submitted into the record in one individual right of action appeal into the record in another appeal); *Pastor v. Department of Veterans Affairs*, 94 M.S.P.R. 353, ¶ 16 (2003) (explaining that the administrative judge stated that the record in the appeal before the administrative judge would be incorporated into the appellant's refiled appeal); *Jeffery v. Office of Personnel Management*, 56 M.S.P.R. 151, 155-56 (1992) (remanding an appeal to the regional office to incorporate the record in a previous removal appeal into the record in a retirement appeal). The Board has even found that evidence from an appeal involving one appellant may be incorporated into the record in an appeal brought by another appellant. *Strauss v. Office of Personnel Management*, 39 M.S.P.R. 132, 135-36 (1988). In addition, it is well settled that a Board administrative judge has broad discretion to control the course of the hearing before him, including the authority to exclude duplicative evidence. 5 C.F.R. § 1201.41(b); *see Sanders v. Social Security Administration*, 114 M.S.P.R. 487, ¶ 10 (2010); *Sigler v. Department of the Army*, 63 M.S.P.R. 103, 110 (1994); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985).

¶10 Based on the above, we find that the administrative judge in the instant appeal -- the same administrative judge who heard the hearing testimony in the appellant's first appeal -- may, at his discretion, incorporate into the record in the case and bar any portions of the record from the previous appeal that he deems appropriate. Thus, for example, he may incorporate the hearing testimony of some or all of the witnesses.[5] While the administrative judge may incorporate

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[5] In her motion for certification of an interlocutory appeal, the appellant cites *Webb v. U.S. Postal Service*, 3 M.S.P.R. 389, 392 (1980), and *Naekel v. Department of Transportation*, 21 M.S.P.R. 11, 13 (1984), for the proposition that a hearing is an important right for a federal employee facing an adverse action and that the administrative judge's authority to control the proceedings must be balanced with the appellant's right to be heard. 0279 IAF, Tab 14 at 6. We agree with the appellant's assertion, but nothing in *Webb* or *Naekel* suggests that under the circumstances present here the administrative judge may not incorporate portions of the record from the appellant's first appeal into the record in her second appeal.

testimony from the prior appeal into the record in this appeal, he must also afford the parties the opportunity to fully develop the record in this appeal, consistent with his authority to exclude irrelevant and duplicative testimony. Accordingly, while the administrative judge may incorporate hearing testimony from the first appeal into the record in this appeal, he must also allow the parties to further develop the record to the extent that it is relevant and nonduplicative of the evidence that is already in the record.[6] *See Strauss*, 39 M.S.P.R. at 136 (although the incorporation of evidence from an appeal involving another individual is permissible, it may not serve as a basis for denying a party the opportunity to call and cross examine witnesses).

¶11 The administrative judge's determinations regarding the incorporation of evidence and the further development of the record shall be the result of the careful balancing of the interests of expeditious case processing, administrative economy, due process, and fundamental fairness to the parties before the Board. While the administrative judge has broad discretion to control the proceedings before him, like all rulings regarding the admissibility of evidence, the administrative judge's rulings regarding the incorporation of evidence from another appeal shall be subject to review by the Board under an abuse of discretion standard.[7] *See Ryan v. Department of the Air Force*, 117 M.S.P.R.

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[6] The administrative judge's initial decision in the second appeal must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Wilson v. Department of Homeland Security*, 118 M.S.P.R. 62, ¶ 4 (2012); *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

[7] The appellant cites *Umshler v. Department of the Interior*, 55 M.S.P.R. 593, 597 (1992), *aff'd*, 6 F.3d 788 (Fed. Cir. 1993) (Table), *Riese v. U.S. Postal Service*, 40 M.S.P.R. 666, 672 (1989), and *McLaughlin v. Office of Personnel Management*, 62 M.S.P.R. 536, 545 (1994), for the proposition that the limitation of a hearing is only appropriate where the appellant is not denied due process or the interests of judicial economy are served. 0279 IAF, Tab 14 at 6-7. We agree with the appellant's concern, and the administrative judge shall ensure that the appellant's due process rights are

362, ¶ 5 (2012); *Niswonger v. Department of the Air Force*, 64 M.S.P.R. 665, 672 (1994); 5 C.F.R. § 1201.115(c).[8]

ORDER

¶12 This matter is returned to the Northeastern Regional Office for further adjudication consistent with this interlocutory decision.

FOR THE BOARD:

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

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protected. *See* 5 C.F.R. § 1201.11 (stating that "[i]t is the Board's policy that [its regulations] will be applied in a manner that ensures the fair and efficient processing of each case").

[8] We note that the provision in 5 C.F.R. § 1201.115(c) that the Board may grant a petition for review when the outcome of the case is affected by an administrative judge's ruling during the course of the appeal that constitutes an abuse of discretion was added to the Board's regulations on November 13, 2012. Because this addition to the Board's regulations simply expressly stated what has been the Board's practice, we see no significance to the fact that the appeal was filed prior to the regulatory change.