UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 48

Docket No. SF-0752-11-0690-I-1

Kenneth M. Hulett,

Appellant,

v.

Department of the Navy,

Agency.

June 21, 2013

Brook L. Beesley, Alameda, California, for the appellant.

Patricia Zengel, San Diego, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Vice Chairman Wagner issues a separate opinion concurring in part and dissenting in part.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his removal. For the reasons set forth below, we GRANT the petition for review,[1] AFFIRM the administrative judge's finding that the agency proved

[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 review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

its charge by preponderant evidence, but VACATE the administrative judge's findings regarding nexus and penalty. We REMAND the appeal to the Western Regional Office for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his Lead Firefighter position, which is a testing-designated position, for illegal drug use. Initial Appeal File (IAF), Tab 7 at 11, 14-15, 123-25. It alleged that it scheduled a reasonable suspicion drug test based on the appellant's behavior and appearance on March 26, 2011, that the appellant took a drug test on March 29, 2011, and that the appellant tested positive for marijuana. *Id.* at 123.

¶3 The appellant filed a Board appeal of his removal. IAF, Tab 1. He alleged, inter alia, that "the agency committed harmful error by the deciding official considering aggravating factors [ ] that the appellant was not charged with [ ] in the penalty determination and/or consider[ing] *ex parte* communications that violated [the] appellant's due process guarantee of notice." IAF, Tab 17 at 3. Further, the appellant raised claims of disability discrimination (regarded as an individual with a disability), discrimination for "successfully completing a supervised drug rehabilitation program and no longer engaging in illegal drug use," and retaliation for prior equal employment opportunity activity. *Id.* at 3-4, Tab 20 at 4-5.

¶4 After holding a hearing, the administrative judge affirmed the removal action. IAF, Tab 21, Initial Decision (ID) at 1, 18. He sustained the charge of illegal drug use based on evidence of a positive urinalysis test and the appellant's admission that he used marijuana. ID at 1-6. The administrative judge further found that the appellant failed to prove his affirmative defenses of harmful error, disability discrimination, and retaliation for his prior equal employment opportunity activity. ID at 7-10. Further, the administrative judge determined

that the agency proved that a nexus exists between the sustained misconduct and the efficiency of the service and that the penalty of removal falls within the tolerable limits of reasonableness. ID at 10-17.

¶5 The appellant has filed a petition for review.[2] Petition for Review (PFR) File, Tab 3. The agency has responded in opposition to the petition for review. PFR File, Tab 5.

ANALYSIS

Remand is necessary to address the appellant's due process and harmful error claims.

¶6 In *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit (Federal Circuit) examined what constitutionally-guaranteed procedures were due a non-probationary public employee prior to his removal from his position. *Hanley*

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[2] On review, the appellant does not challenge the administrative judge's findings that the agency proved the charge of illegal drug use and that the appellant failed to prove his affirmative defenses of disability discrimination and retaliation. Therefore, we do not address these matters. 5 C.F.R. § 1201.115. The appellant appears to argue that the administrative judge improperly curtailed his cross-examination of the deciding official regarding actions that the agency took against other employees for the same offense. Petition for Review (PFR) File, Tab 3 at 3. Because the appellant has not explained what information he hoped to elicit from further examination or how it might have changed the outcome of the appeal, we find that this argument provides no basis to disturb the initial decision. *See Washington v. Department of the Navy*, 30 M.S.P.R. 323, 326 (1986); *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights). We disagree with the dissent that the appellant satisfied the Board's pleading standards by stating that his filings from below are "incorporated" by reference into his petition for review. PFR File, Tab 3 at 1-2. Attempts to incorporate by reference briefs that were filed below are insufficient to meet the Board's standards. *See Cole v. Department of Transportation*, 18 M.S.P.R. 102, 105 n.3 (1983). A petition for review must contain sufficient specificity for the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record. *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992). Under the Board's regulations, the petition for review itself must identify any procedural or adjudicatory errors and explain how they affected the outcome of the initial decision. 5 C.F.R. §§ 1201.114(b), .115(b), (c).

v. Department of Transportation, 90 M.S.P.R. 43, ¶ 8 (2001). Citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-46 (1985), the Federal Circuit held that an employee is entitled to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond to the charges. *Stone*, 179 F.3d at 1375-76; *see Hanley*, 90 M.S.P.R. 43, ¶ 8. Based on this precept, the court held that the introduction of new and material information by *ex parte* communications to the deciding official undermines those due process guarantees. *Stone*, 179 F.3d at 1376; *see Hanley*, 90 M.S.P.R. 43, ¶ 8. The court stated that, where there is evidence of such an *ex parte* communication, the Board must determine whether the *ex parte* communication was so substantial and so likely to cause prejudice that no employee could fairly be subjected to a deprivation of property under such circumstances. *Stone*, 179 F.3d at 1377; *see Hanley*, 90 M.S.P.R. 43, ¶ 8.

¶7 The Federal Circuit in *Stone* made clear 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"; rather, "[o]nly *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice." *Stone*, 179 F.3d at 1376-77. The court specifically identified three factors "[a]mong the factors" that the Board should consider in determining whether an *ex parte* communication violated an employee's due process rights: (1) "whether the *ex parte* communication merely introduces 'cumulative' information or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) 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." *Stone*, 179 F.3d at 1377.

¶8 In *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011), the Federal Circuit clarified that the due process analysis articulated in *Stone*

applies whether the *ex parte* communication related to the charge itself or to the agency's penalty determination. Subsequently, the Board held that the court's decisions in *Ward* and *Stone* "suggested no basis on which to distinguish *ex parte* communications introducing new and material information not included in the notice of proposed removal that was previously unknown by the deciding official from material information related to an employee's past disciplinary record and alleged past instances of misconduct personally known and considered by the deciding official." *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 10 (2011).

¶9 In his petition for review, the appellant alleges that the administrative judge erred in not finding a due process violation under the Federal Circuit's decisions in *Ward* and *Stone*. PFR File, Tab 3 at 1, 4-5. However, the administrative judge did not address due process or the Federal Circuit's decisions in his initial decision. *See* ID. In fact, the administrative judge did not identify the appellant's due process claim as an issue for adjudication in this appeal. *See* IAF, Tab 19. The record reflects, however, that the appellant alleged below that the deciding official "relied on substantial *ex parte* communications of the type likely to result in undue pressure upon [her] to rule in a particular manner, without notice to [the appellant] and [an] opportunity to respond." IAF, Tab 17 at 3. The appellant's assertion tracks the Federal Circuit's language in *Stone* regarding the factors that "the Board should consider in determining whether an *ex parte* communication violated an employee's due process rights." *See Stone*, 179 F.3d at 1377. Thus, the appellant implicitly raised a due process claim.

¶10 The Board has consistently required administrative judges to apprise appellants of the applicable burdens of proving a particular affirmative defense, as well as the kind of evidence required to meet those burdens, and to address those defenses in any close of record order or prehearing conference summary and order. *England v. U.S. Postal Service*, 117 M.S.P.R. 255, ¶ 8 (2012); *Wynn*

v. U.S. Postal Service, 115 M.S.P.R. 146, ¶¶ 10, 13 (2010). As set forth above, the administrative judge did not identify the appellant's due process claim as an issue for adjudication, and there is no indication that the appellant was informed of the means for proving this affirmative defense. Further, nothing in the record reflects that the appellant abandoned or withdrew his due process claim. Thus, the administrative judge should have informed the appellant of the burdens of proving his affirmative defense and conducted a *Ward-Stone* analysis regarding the appellant's claim that the deciding official considered *ex parte* communications regarding certain aggravating factors in her penalty assessment. For these reasons, we REMAND this case to the regional office for further adjudication. *See England*, 117 M.S.P.R. 255, ¶¶ 11, 12, 14 (remanding the appeal for the administrative judge to inform the appellant of his burdens of proof regarding his affirmative defenses and to adjudicate those affirmative defenses).

¶11 On remand, the administrative judge shall apprise the appellant of his burden and the elements of proof regarding his due process claim and obtain clarification from the appellant as to the alleged *ex parte* communications regarding aggravating factors that the deciding official allegedly considered in her penalty assessment.[3] In accordance with the Federal Circuit's holding in *Ward*, the administrative judge shall apply the *Stone* factors. *See Ward*, 634 F.3d at 1280; *Stone*, 179 F.3d at 1377; *see also Gray v. Department of Defense*,

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[3] On review, the appellant alleges that the agency did not provide advance notice that it was considering: his conviction for driving under the influence; his "observed impairment"; his "incapability to perform his duties as assigned"; his use of a "mind-altering drug"; his willful defiance and insubordination regarding his illegal drug use; the consistency of the penalty with the other 12 cases of positive drug tests within the fire program; the notoriety of his misconduct; the deciding official's belief that individuals, like the appellant, who use illegal drugs lack rehabilitative potential; and the deciding official's belief that alternative, lesser discipline has not been a successful deterrent for employees to avoid drug use. *See* PFR File, Tab 3 at 2-4. At the hearing, the appellant's representative questioned the deciding official regarding her consideration of these aggravating factors and whether advance notice was provided to the appellant. *See* Hearing Compact Disc.

116 M.S.P.R. 461, ¶ 7 (2011). If an *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, then the administrative judge must find a violation of due process, reverse the agency action, and order the agency to restore the appellant until he is afforded a "new constitutionally correct removal procedure." *Ward*, 634 F.3d at 1280; *Stone*, 179 F.3d at 1377; *Gray*, 116 M.S.P.R. 461, ¶¶ 7, 12. If no due process violation is found, then the administrative judge shall conduct a harmful error analysis with regard to any procedural error concerning the penalty determination. *See Ward*, 634 F.3d at 1281; *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 11 (2011).

ORDER

¶12 For the reasons discussed above, we GRANT the petition for review and REMAND this case to the Western Regional Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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

CONCURING AND DISSENTING OPINION OF ANNE M. WAGNER

in

Kenneth M. Hulett v. Department of the Navy

MSPB Docket No. SF-0752-11-0690-I-1

¶1 I agree with the majority that this appeal should be remanded for consideration of the appellant's due process and harmful procedural error claims. I dissent from the majority's determination that the appellant failed to show that his substantive rights were prejudiced by the administrative judge's curtailment of testimony and evidence with regard to the appellant's disparate penalty claim. Majority Opinion, ¶ 5 n.2. Therefore, I would also remand this appeal for consideration of whether the agency-imposed penalty is entitled to deference because it failed to consider all of the relevant factors and to exercise management discretion within tolerable limits of reasonableness.

BACKGROUND

¶2 In his prehearing submission, the appellant asserted that the penalty of removal exceeded the bounds of reasonableness, that he had been subjected to a disparate penalty, and that the agency failed to consider mitigating factors including his mental health factors, his 21 years of successful service, the availability of alternate sanctions, his ability to be rehabilitated, and disparate treatment in the agency penalty selection. Initial Appeal File (IAF), Tab 17 at 3. The appellant further asserted that the agency's actions were discriminatory under the Rehabilitation Act and taken in retaliation for prior equal employment opportunity protected conduct. *Id.* at 3-4. The appellant also filed an objection to the administrative judge's prehearing conference summary. IAF, Tab 20. In this pleading, the appellant objected to the administrative judge's denial of his motion alleging that agency counsel had improperly advised the deciding official not to answer questions regarding the consistency of the penalty during his

deposition.[1] *Id.* at 2. The appellant further noted that the administrative judge informed him during the prehearing conference that he could ask "any questions he wanted at hearing." *Id.* However, the appellant still objected to the administrative judge's ruling because it denied him prehearing discovery of relevant information, prejudiced his ability to prepare for hearing, and subjected him to surprise tactics at hearing. *Id.*

¶3 Later, during the hearing, the administrative judge limited the appellant's examination of the deciding official regarding the penalties given to other employees who also had tested positive for illegal drug use. IAF, Hearing Compact Disc (HCD), Deciding Official Testimony. In particular, the administrative judge found that the appellant's proffered comparators were removed for illegal drug use, but were subsequently offered a last chance settlement agreement (LCSA) that allowed them to remain on duty, and that an agency was not required to explain the lesser penalties imposed upon these employees because their charges were resolved by settlements. IAF, Tab 19 at 1; Initial Decision (ID) at 12-13.

¶4 On review, the appellant states that he "relies substantively on his MSPB submissions of record received into evidence or is a part of the adjudication file, and is hereby incorporated thereto in this PFR as specific objection[s] and challenge[s] to the ID." Petition for Review (PFR) File, Tab 3 at 1-2. The appellant also specifically argues:

> When [the deciding official] was questioned regarding factor #6, she again admitted that the "consistency of the penalty" information was

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[1] In support of this pleading, the appellant attached a copy of the deciding official's deposition, which shows that agency counsel directed her to not answer questions regarding the factual circumstances of 12 comparator employees who had tested positive for illegal drug use but were not removed from service. In addition, agency counsel also directed the deciding official to not explain why the agency had offered other employees, who also had used illegal drugs, the opportunity to avoid removal in last chance settlement agreements but did not provide the appellant with a similar opportunity to avoid removal. IAF, Tab 20 (Deposition Transcript at 29-32).

> not provided to the appellant or put on notice thereto. [The deciding official] further testified at hearing and during her deposition discovery, that there were approximately 12 cases of positive drug tests within the fire program, and considered it an aggravating facts [sic]. When queried further, [the deciding official] admitted (which she fully explained and identified each fire department individual during deposition discovery) that Firefighter [D] had tested positive for "illegal drug use" (and same exact charge as the appellant), and was still employed with the fire department.
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> When the undersigned appellant representative continued to question [the deciding official] regarding other fire department employees with same or similar offenses, that were identified in deposition discovery by [the deciding official], *i.e.*, Firefighters [D, H, and P], all charged with "illegal drug use," the [administrative judge] abruptly disallowed any further questioning from the appellant regarding others that were charged with "illegal drug use," which was prejudicial error and harmfully denied appellant full opportunity to question the agency's deciding official at hearing on factor #6 (consistency of the penalty).

PFR File, Tab 3 at 3 (emphasis in the original).

ANALYSIS

¶5 Where, as here, the agency's charge is sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors[2] and exercised management discretion within the tolerable limits of reasonableness. *See Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 7 (2010). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Id.* If, however, the deciding official failed to consider the relevant factors, the Board need not defer to the agency's penalty determination. *Id.* The appellant's allegation that the agency treated him disparately compared to another employee

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[2] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board articulated a non-exhaustive list of factors to be considered when evaluating the penalty to be impose for an act of misconduct.

is an allegation of disparate penalties to be proven by the appellant and considered by the Board in determining the reasonableness of the penalty. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010).

¶6 The Board has held that, to establish disparate penalties, the appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but [the Board] will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Lewis*, 113 M.S.P.R. 657, ¶ 15; *see Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 (2012). If an appellant does so, the agency must then prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Boucher*, 118 M.S.P.R. 640, ¶ 20.

¶7 As noted above, the administrative judge found that the appellant proffered comparators who received decisions of removal for illegal drug use, but were subsequently offered LCSAs mitigating the penalty, and that the Board has held that an agency is not required to explain lesser penalties imposed against employees whose charges were resolved by settlements, despite apparent similarities in circumstances. *See* ID at 12-13; *see also Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 42 (1999); *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325, *aff'd*, 975 F.2d 869 (Fed. Cir. 1992) (Table). The Board's precedent declining to compare a penalty to other actions resolved through settlement is grounded in its longstanding policy in favor of settlement. However, the Board has carved out a significant exception to that policy where an appellant alleges that the agency unlawfully discriminated in its settlement practice. *See Spahn v. Department of Justice*, 93 M.S.P.R. 195, 203-07 (2003). In *Spahn*, the appellant claimed that the agency unlawfully discriminated against her on the basis of gender by inflicting a harsher penalty on her than on seven male colleagues who committed similar misconduct. *Id.* Noting the "strong" public policy favoring settlements, the Board found the public policy against unlawful discrimination to

be stronger and concluded that the fact that the disciplinary actions against the seven men had been resolved through settlement agreements did not preclude the appellant from establishing them as comparators. *Id.* at 207.

¶8 In this case, the appellant has also alleged that his removal was a result of unlawful discrimination. IAF, Tab 1 at 5. It is not entirely clear from the record whether he is specifically alleging that the agency's failure to offer him a last chance agreement is a result of unlawful discrimination.[3] Nevertheless, the administrative judge appears to have summarily foreclosed discovery and consideration of the appellant's disparate penalty claim based on the theory that "an agency is not required to explain lesser penalties imposed against other employees whose charges were resolved by settlement." IAF, Tab 19 at 1; ID at 12-13. To the extent that he did so, that was reversible error under *Spahn*. Moreover, given the current record, a question exists regarding whether there were similarly-situated employees who received lesser discipline for illegal drug use without entering into settlement agreements.

¶9 In the deciding official's *Douglas* factors worksheet, she stated that the penalty of removal is consistent with the penalties imposed on other employees for similar offenses, that "there have been an isolated number of lesser decisions," that "[i]t is this supervisor's opinion that a penalty less than removal has not proven as an effective deterrent for drug usage," and that "[r]egion-wide over an approximated period of 7 years there have been approximately 12 cases of positive drug tests within the fire program." IAF, Tab 7 at 17. Further, she stated

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[3] It is difficult to fault the appellant for failure to specifically claim that the agency engaged in disparate treatment discrimination or retaliation in its settlement practice because the agency has successfully managed to avoid throughout this appeal to provide any explanation why it treated him differently from the comparator employees. In addition, the appellant did claim in his prehearing statement that the agency failed to consider his "medical mental health" as a mitigating factor. IAF, Tab 17 at 3. Thus, he did directly reference a part of his discrimination claim in his challenge to the reasonableness of the penalty.

that "[r]emedies less than removal have historically not proven successful within the Fire & Emergency Services program as a deterrent to drug usage. A suspension of 90-days for one case hasn't resulted in a successful deterrent for employees to avoid drug use." *Id.* at 17-18.

¶10 From the record, it appears that the appellant sought information from the agency regarding these 12 cases of positive drug tests referenced in the *Douglas* factors worksheet. With his prehearing submission, the appellant attached redacted documents showing that three employees who received decision notices of removal for illegal drug use later executed LCSAs. *See* IAF, Tab 17, Exhibit B. However, neither the agency, nor the appellant, submitted any information regarding the other cases in which employees tested positive for illegal drug use. To the extent that the deciding official testified at the hearing and during her deposition that certain employees who tested positive for illegal drug use were not removed, it is unclear whether these employees entered settlement agreements or whether they received lesser discipline from another deciding official. *See* HCD, Deciding Official Testimony; IAF, Tab 20, Deposition Transcript at 73-80.

¶11 Based on the foregoing, it is unclear from the record whether the appellant is included among the 12 cases of positive illegal drug use, whether the three employees who entered LCSAs were the only employees who were not removed for illegal drug use, and whether any of the employees who tested positive for illegal drug use are, indeed, similarly-situated to the appellant under *Boucher* and *Lewis*. Thus, I would direct, on remand, that the parties submit additional evidence and argument regarding the penalty given to the employees in the 12 cases of positive drug tests mentioned by the deciding official.

¶12 Furthermore, based upon the deciding official's oral and written statements, I also doubt whether she properly considered the appellant's rehabilitative potential and the consistency of the penalty with the agency's policies regarding illegal drug use and rehabilitation. *See* HCD, Deciding Official Testimony;

IAF, Tab 7 at 18-19, Tab 20, Deposition Transcript. The Board has abandoned deference to an agency's penalty determination where the deciding official has misjudged the appellant's rehabilitative potential. *See Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 21, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006) (unpublished).

¶13 Finally, I disagree with the majority's determination that the appellant has failed to show that his substantive rights have been prejudiced on the basis that he has failed to explain what information he hoped to elicit from further examination of the deciding official or how it might have changed the outcome of the appeal. Majority Opinion, ¶ 5 n.2. By excluding all testimony regarding why the appellant was treated differently from the 12 comparator employees, the administrative judge's rulings effectively prevented the appellant from presenting his disparate penalty claim. Our reviewing court has found that such rulings can have a substantial effect on the outcome of a case, and constitute harmful error. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012) (finding harmful error when the Board excluded all witnesses offered by the appellant to testify on the agency's motive to retaliate in a whistleblower retaliation affirmative defense).

¶14 Accordingly, I dissent from the majority's decision to not remand this appeal for further consideration of whether the agency-imposed penalty is entitled to deference because it failed to consider all of the relevant factors and to exercise management discretion within tolerable limits of reasonableness.

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Anne M. Wagner
Vice Chairman