UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 64

Docket No. DE-0752-11-0445-I-1

Brian E. Bennett,

Appellant,

v.

Department of Justice,

Agency.

August 16, 2013

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Andrew M. Dunnaville and Nathan Mires, Washington, D.C., 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 reversing the appellant's removal. We GRANT the agency's petition, VACATE the initial decision IN PART, and REMAND this appeal for further adjudication consistent with this Opinion and Order.[1]

[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.

BACKGROUND

¶2 The agency proposed the removal of the appellant, a Supervisory Criminal Investigator, based upon six charges: (1) misuse of a government vehicle; (2) failure to secure or protect his Bureau-issued firearm; (3) operating a government-owned vehicle (GOV) after consuming alcohol; (4) transporting a firearm after consuming alcohol; (5) providing false information to a law enforcement officer in the course of an official inquiry; and (6) conduct unbecoming a Supervisory Special Agent. Initial Appeal File (IAF), Tab 7 at 37-43. With respect to the fifth charge, the proposal notice stated:

> You hold a position in which your honesty and integrity must be unquestioned. In this case, you compromised your honesty by telling the arresting officer that you did not have your weapon with you, when, in fact, you did. Your conduct as set forth in this notice is such that sustaining **REASON 5** alone would be enough to support removal.

Id. at 41.

¶3 The appellant, through his counsel, submitted a written response to the notice of proposed removal. *Id.* at 22-36. After the appellant submitted his response, the deciding official sent an email to a Human Resources (HR) Specialist making the following request:

> I would like you to work on a draft of this decision but before I give you the information on this case, please check the [database] to determine what has been done in terms of discipline for employees who provided false or misleading information to law enforcement (especially local law enforcement) . . . .

IAF, Tab 27, Exhibit I at 12. The HR Specialist provided the following response:

> I have reviewed the [Professional Review Board (PRB)] files to the best of my ability and . . . the PRB has been consistent in proposing removal when there [are] issues of false statement[s] to law enforcement . . . . In large part the penalty was due [to] the Giglio criteria.

Id.[2] The deciding official responded by asking, "Did the decisions completely uphold the proposals and can you provide [me] with the names of cases you found?" *Id.* The HR Specialist responded with a list of five comparators: two had been removed; one had resigned in lieu of removal; one had the proposed removal reduced to a "downgrade" that was later mitigated by the Board to a 30-day suspension; and one had the proposed removal reduced to a 45-day suspension. *Id.* at 11. The deciding official thereafter issued a decision letter in which she sustained all six charges and removed the appellant. IAF, Tab 7 at 17-21. She stated in the decision letter that the charge of providing false information to a law enforcement officer in the course of an official inquiry alone was a sufficient basis for removing the appellant, *id.* at 18, but the letter made no reference to *Giglio* concerns as an aggravating penalty factor.

¶4 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1. Because the appellant raised claims of harmful procedural error and violations of law, the administrative judge advised the parties during the hearing that there was evidence in the record to support a claim of violation of due process under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), and *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), and invited the parties to address these issues in their closing statements. IAF, Tab 36.

¶5 After considering the parties' written closing statements, the administrative judge issued an initial decision reversing the appellant's removal. IAF, Tab 50, Initial Decision (ID). Relying on *Solis* and *Ward*, the administrative judge

---

[2] Under *Giglio v. United States*, 405 U.S. 150 (1972), investigative agencies must turn over to prosecutors, as early as possible in a case, any potential impeachment evidence concerning the agents involved in the case. *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 4 n.1 (2012). The prosecutor will then exercise his discretion regarding whether the impeachment evidence must be turned over to the defense. *Id.* A "*Giglio*-impaired" agent is one against whom there is potential impeachment evidence that would render the agent's testimony of marginal value in a case. Thus, a case that depends primarily on the testimony of a *Giglio*-impaired witness is at risk. *Id.*

determined that the deciding official violated the appellant's right to due process by improperly relying on *Giglio* concerns in sustaining his removal. ID at 3. Specifically, the administrative judge determined that, although the deciding official did not mention *Giglio* issues as an aggravating penalty factor in the letter removing the appellant or in her hearing testimony, the agency's decision to propose and implement the penalty of removal for the appellant's misconduct was nonetheless based in part on *Giglio* concerns as related to the charge of providing false information to a law enforcement officer. ID at 5-7. Finding that such information could not fairly be deemed cumulative or immaterial, the administrative judge reversed the removal action, concluding that the agency violated the appellant's due process rights by denying him notice and an opportunity to respond to the specific information it considered. ID at 6-7. The administrative judge determined, however, that the appellant failed to meet his ultimate burden of proof to show that the agency's action was based on prohibited race discrimination. ID at 9.

¶6 The agency has filed a petition for review and submits the deciding official's sworn affidavit in which she states that she did not consider *Giglio* issues in determining to remove the appellant. Petition for Review (PFR) File, Tabs 1-2. The appellant has filed a response in opposition to the agency's petition and a motion to strike the affidavit, but he does not challenge the initial decision insofar as it concludes that he failed to establish his discrimination claims. PFR File, Tabs 7-8.

ANALYSIS

¶7 When an agency intends to rely on aggravating factors as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official. *Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 5 (2011). Our reviewing court has explained that, if

an 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 constitutional due process violation because it potentially deprives the employee of notice of all the evidence being used against him and the opportunity to respond to it. *Ward*, 634 F.3d at 1280. However, not every ex parte communication rises to the level of a due process violation; only ex parte communications that introduce new and material information to the deciding official constitute due process violations. *Stone*, 179 F.3d at 1376. The question 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." *Ward*, 634 F.3d at 1279 (citations omitted).

¶8 The Board will consider the following factors, among others, to determine whether an ex parte contact is constitutionally impermissible: (1) "whether the ex parte communication merely introduces 'cumulative' information or new information"; (2) "whether the employee knew of the information 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. A due process violation is not subject to the harmful error test; instead, the employee is automatically entitled to a new, constitutionally correct removal proceeding. *Ward*, 634 F.3d at 1279.

¶9 In *Solis*, the Board employed the *Ward/Stone* analysis and concluded that the agency's reliance on *Giglio* issues in imposing the appellant's removal without providing him notice and an opportunity to respond to those issues violated the appellant's due process rights by denying him notice of the specific information considered and an opportunity to respond. *Solis*, 117 M.S.P.R. 458, ¶ 10. Here, as in *Solis*, the agency did not provide the appellant notice regarding *Giglio* issues in its proposal letter. Unlike *Solis*, however, in which the deciding official admitted to considering information not included in the notice of

proposed removal, here the deciding official never indicated that her knowledge of the *Giglio* information in the email had influenced her consideration of the *Douglas* factors or weighed in her ultimate decision to remove the appellant. The record as a whole thus establishes only that the deciding official had *knowledge* of the *Giglio* information contained in the HR Specialist's email, not that she considered it.

¶10 A deciding official's knowledge of information only raises due process or procedural concerns where that knowledge is a basis for the deciding official's determinations on either the merits of the underlying charge or the penalty to be imposed. *See Ward*, 634 F.3d at 1280; *cf. Norris v. Securities and Exchange Commission*, 675 F.3d 1349, 1354 (Fed. Cir. 2012) ("A deciding official's knowledge of an employee's background only raises due process or procedural concerns where that knowledge is a basis for the deciding official's determinations on either the merits of the underlying charge or the penalty to be imposed."). Currently, the record is insufficiently developed to determine whether the deciding official's knowledge of the information in the email served as a basis for her determinations on either the merits of the underlying charge or the penalty to be imposed.

¶11 Although the agency submits the deciding official's affidavit on review in which she denies considering this information, as the hearing official, the administrative judge is in the best position to resolve this question in the first instance. *Durr v. Department of Veterans Affairs*, 119 M.S.P.R. 195, ¶ 15 (2013); *see Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). We therefore find that remand is necessary for further development of the record in order to address the potential due process violation. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible,

considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor).

¶12 On remand, in accordance with the Federal Circuit's holding in *Ward*, the administrative judge must determine whether the deciding official relied on this information, and, if so, whether such reliance rises to the level of a due process violation. In conducting her analysis, the administrative judge should allow the parties to provide additional relevant evidence and argument regarding the *Stone* factors, including further hearing testimony. If a due process violation is found, the 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, the administrative judge should then determine whether the agency committed harmful error within the meaning of 5 U.S.C. § 7701(c)(2)(A) and 5 C.F.R. § 1201.56(b)(1) and (c)(3). *See Ward*, 634 F.3d at 1281-82. If she finds that there was no harmful procedural error, she should then adjudicate the merits of the agency's charges.[3]

[3] Based on our disposition, we need not address the parties' other arguments on review or rule on the appellant's motion to strike the deciding official's affidavit.

ORDER

¶13 This appeal is remanded to the Denver Field Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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