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APPENDIX K

APPENDIX K

5 USC 7513(b)(2) STATES:

" provides that an employee faced with a proposed termination "is entitled to ... a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer"

VII. INDEX TO APPENDICES

APPENDIX L

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ELIZABETH AVILES-WYNKOOP,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2019-1908

Petition for review of the Merit Systems Protection Board in No. DC-315H-16-0327-B-1.

Decided: September 2, 2020

ELIZABETH AVILES-WYNKOOP, Washington, DC, pro se.

DELISA SANCHEZ, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by ETHAN P. DAVIS, REGINALD THOMAS BLADES, JR., ROBERT EDWARD KIRSCHMAN, JR.

Before PROST, *Chief Judge*, LINN and TARANTO, *Circuit Judges*.

PER CURIAM.

Elizabeth Aviles-Wynkoop began working as a program analyst at the United States Department of Defense (DoD) in June 2015. Two months later, DoD placed her on administrative leave. In October 2015, DoD proposed to terminate Ms. Aviles-Wynkoop's employment, and after receiving her response, DoD terminated her employment in January 2016. Ms. Aviles-Wynkoop appealed to the Merit Systems Protection Board, which affirmed DoD's termination decision on the merits. We affirm.

I

Before she began working at the DoD job at issue in this matter, Ms. Aviles-Wynkoop served in other positions in the federal government. She started with a temporary appointment to a clerk typist position in September 1982, which soon became a career conditional appointment. She left that position in April 1990, but she returned to the federal government to work as a contract specialist from April 2003 to January 2009 and then worked as a contract oversight specialist from August 2011 to September 2014. Ms. Aviles-Wynkoop joined DoD as a program analyst on June 29, 2015.

On August 13, 2015, Ms. Aviles-Wynkoop met with Carol Ensley, Chief of Acquisition Management in Ms. Aviles-Wynkoop's department. Ms. Ensley informed Ms. Aviles-Wynkoop that several employees had expressed concerns about Ms. Aviles-Wynkoop's behavior, which they characterized as "inappropriate, overly aggressive, and unprofessional." S.A. 63. Ms. Aviles-Wynkoop rejected the characterization and, later that day, emailed Ms. Ensley and Mr. Russell to address the behavior in question. S.A. 141. In that response, she stated that her behavior was justified by a contractor's misconduct and several co-workers' subpar work habits. S.A. 141–42. Two weeks later, Ms. Aviles-Wynkoop missed a staff meeting, prompting an

email from Ms. Ensley asking Ms. Aviles-Wynkoop to provide notice of such absences in the future. S.A. 136. Ms. Aviles-Wynkoop replied that she did not believe that she had to report to Ms. Ensley. *Id.*

On August 28, 2015, Ms. Ensley placed Ms. Aviles-Wynkoop on paid administrative leave. S.A. 58. Ms. Ensley stated that the action did "not constitute a disciplinary or adverse action" and that Ms. Aviles-Wynkoop was "expected to remain available by telephone during [her] normal duty hours." *Id.*

In a letter dated October 27, 2015, Ms. Ensley proposed that Ms. Aviles-Wynkoop be terminated from her position. S.A. 60. The letter began with a statement that Ms. Aviles-Wynkoop had not yet served a full "probationary period" and was thus a "true probationer with limited pre-termination procedural rights and post-termination appeal rights." *Id.* The rest of the letter laid out the reasons for the proposal—Ms. Aviles-Wynkoop had refused to recognize Ms. Ensley as a supervisor; had "demonstrated a pattern of discourteous behavior towards contractors, fellow employees and management"; had refused to modify her behavior after being reprimanded; and had sent inappropriate emails to senior staff. S.A. 62–64. The letter concluded that Ms. Aviles-Wynkoop had ten days to submit an oral or written response, could "submit affidavits and other documentary evidence," and could seek the assistance of "an attorney or other representative." S.A. 65.

Because Ms. Aviles-Wynkoop did not receive the letter until November 6, 2015, she had until November 16, 2015, to submit a reply. She requested two extensions of the due date, and DoD and Ms. Aviles-Wynkoop agreed that she would present an oral reply on December 14, 2015, at the Pentagon. On December 11, 2015, Ms. Aviles-Wynkoop requested a third extension, which DoD denied. She and DoD agreed on a time on December 14 for her personal

appearance at the Pentagon, but she did not appear at that time, notifying DoD an hour later that she had experienced car troubles. She did, however, submit a written response.

On January 4, 2016, DoD terminated Ms. Aviles-Wynkoop's employment. In a written decision, Jerry Russell, Deputy Chief of the Business Resource Center, noted that Ms. Aviles-Wynkoop had not "dispute[d] the fact that any of the charged misconduct occurred"—she "merely provided the reasons [she] engaged in the misconduct." S.A. 69. Finding that those explanations did not "negate" the conduct, Mr. Russell evaluated the proposed penalty of termination. He stated that Ms. Aviles-Wynkoop was a "true probationer," S.A. 68, and on that premise found removal appropriate because Ms. Aviles-Wynkoop had not "demonstrated the ability to perform the essential functions of [her] position" and termination was necessary to "promote the efficiency of the service," S.A. 70. Mr. Russell went on, however, to decide that termination was the appropriate penalty, considering "all relevant *Douglas* factors," even on the assumption that Ms. Aviles-Wynkoop was a full employee. *Id.* Although Mr. Russell noted that the absence of a disciplinary record and her lengthy previous service were mitigating factors, he concluded that those factors were outweighed by several aggravating factors—her inflammatory behavior, the nature of her position, her direct insubordination, and her refusal to apologize—and the fact that a DoD manual recommended removal. S.A. 70–71.

On February 3, 2016, Ms. Aviles-Wynkoop appealed her termination to the Board. In late March, the administrative judge assigned to the matter dismissed the appeal for lack of jurisdiction, determining that Ms. Aviles-Wynkoop had only probationary status. But the full Board vacated that decision, explaining that there was a genuine issue of material fact as to whether Ms. Aviles-Wynkoop's previous federal service qualified her to skip the probationary period. In January 2017, the administrative judge

found Ms. Aviles-Wynkoop to qualify as a full employee, thus giving the Board jurisdiction. Ms. Aviles-Wynkoop agreed to waive her right to an evidentiary hearing with witnesses testifying live, and the administrative judge set a March deadline for the submission of evidence. DoD submitted affidavits from Ms. Ensley, Mr. Russell, and others.[1]

On May 24, 2017, the administrative judge issued an initial decision, which affirmed DoD's decision to terminate Ms. Aviles-Wynkoop. The administrative judge first explained that there was a sufficient connection between Ms. Aviles-Wynkoop's "unprofessional behavior in the office" and her "ability to accomplish her duties satisfactorily." S.A. 9. Turning to the reasonableness of the penalty, the administrative judge noted that a "failure to follow instructions may be sufficient cause for removal." S.A. 10. Ms. Aviles-Wynkoop, he wrote, had committed several acts of misconduct and "each act of unprofessional conduct constituted intentional conduct of a serious nature." *Id.* Moreover, Ms. Aviles-Wynkoop had failed to correct her behavior despite a clear warning from her supervisor. *Id.* Accordingly, the administrative judge concluded, "the removal penalty comes within the bounds of reasonableness." *Id.* The administrative judge also rejected Ms. Aviles-

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[1] Ms. Aviles-Wynkoop suggests that it was improper for the Board to rely on those affidavits because they presented evidence that was not included in the notice of proposed termination. Petitioner's Supp. Br. at 12–13. The affidavits, however, were submitted before the evidentiary deadline establish by the administrative judge. And Ms. Aviles-Wynkoop has not identified any requirement that an agency attach to a notice of proposed termination all evidence of the misconduct described in the notice.

Wynkoop's claims that she had been denied due process and removed in retaliation for whistleblowing. S.A. 14–17.

Ms. Aviles-Wynkoop initially sought review by the full Board. Before receiving a final decision from the full Board, she filed a petition in this court as well. Because the Board had not rendered a final decision, we ordered her to show cause why the petition filed in this court should not be dismissed as premature. She then withdrew her request for review by the full Board, thereby making the administrative judge's initial decision the final decision of the Board, which we have jurisdiction to review under 28 U.S.C. § 1295(a)(9).

II

We must affirm the Board's determinations unless they are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Ms. Aviles-Wynkoop argues that the Board committed reversible error in reviewing three challenges—that DoD did not properly assess the factors relevant to imposing the penalty of removal, deprived her of due process, and retaliated against her for two protected whistleblowing disclosures. We reject Ms. Aviles-Wynkoop's arguments.

A

To sustain an adverse employment action based on improper conduct, an agency must establish not only that the charged conduct occurred and was sufficiently connected to the efficiency of the government service, but also that the penalty imposed was reasonable. *Bryant v. Nat'l Sci. Found.*, 105 F.3d 1414, 1416 (Fed. Cir. 1997). Of those elements, Ms. Aviles-Wynkoop focuses here only on the reasonableness of the penalty. The Board's review of an

agency-imposed penalty "is highly deferential," and "[i]t is well-established that selecting the penalty for employee misconduct is left to the agency's discretion." *Webster v. Dep't of Army*, 911 F.2d 679, 685 (Fed. Cir. 1990).

Ms. Aviles-Wynkoop argues that DoD failed to consider factors that are relevant to a penalty's reasonableness under *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 302, 305 (1981). But she does not show that DoD disregarded or misevaluated pertinent *Douglas* factors. More particularly, she does not show that the Board abused its discretion in determining that DoD reasonably considered the *Douglas* factors. S.A. 9–11.

The Board concluded that Mr. Russell, the deciding official, "appropriately determined that the appellant's removal was warranted under the facts and circumstances of this case." S.A. 10. Mr. Russell described Ms. Aviles-Wynkoop's behavior and listed several factors he considered to be aggravating: the nature of her job, which required her to "evaluate contractor employee performance, review programs, collaborate with customers in developing budgets and spend plans, and conduct presentations and briefings"; her refusal to recognize her supervisor; her continued misconduct after the August 13, 2015 warning; and her lack of remorse. S.A. 71. Each of those factors corresponds, respectively, to a *Douglas* factor—"the employee's job level and type of employment, including supervisory or fiduciary role"; "the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties"; "the clarity with which the employee was on notice of any rules that were violated"; and the "potential for the employee's rehabilitation." 5 M.S.P.R. at 305. Mr. Russell also consulted DoD's manual for "Disciplinary and Adverse Actions" and found that, even for a first-time offense, termination was a recommended penalty for insubordination. S.A. 71. This analysis matches another of the

Douglas factors—"consistency of the penalty with any applicable agency table of penalties." 5 M.S.P.R. at 305. And Mr. Russell expressly noted his consideration of Ms. Aviles-Wynkoop's length of service and lack of disciplinary record as mitigating factors. S.A. 71.

We see no reversible error in the Board's conclusion that DoD adequately considered the relevant penalty factors.

B

The for-cause removal protections of 5 U.S.C. § 7513(a) entitle federal employees to procedural due process rights. *Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999). "The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). And in the specific context of a tenured public employee whose termination has been proposed, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* We have endorsed this standard in the agency context, highlighting the "need for a meaningful opportunity for the public employee to present his or her side of the case." *Stone*, 179 F.3d at 1376.

Ms. Aviles-Wynkoop's informal brief in this court asserts that DoD committed a "gross abuse of due process." Petitioner's Br. at 1 (response to question 2). Before the Board, Ms. Aviles-Wynkoop specified two alleged due-process violations. First, she said, DoD incorrectly informed her that she was serving a probationary period. "A notice of proposed removal that mischaracterizes the proceedings as a probationary removal," she argued, "cannot be said to have provided an employee a 'meaningful opportunity to respond.'" Petition at 3–4. Second, she said, Mr. Russell relied, in his termination decision, on certain grounds "not specified in the proposal notice." *Id.* at 4.

As to the first, Ms. Aviles-Wynkoop has not shown that DoD's initial mistake about her probationary or full-employee status deprived her of the guaranteed right to respond to the proposed termination. Section 7513(b)(2) provides that an employee faced with a proposed termination "is entitled to . . . a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." Ms. Aviles-Wynkoop had more than a month to craft an answer—she received the proposal on November 6, 2015, and was allowed until December 14, 2015, to respond. S.A. 67. The letter of proposed termination expressly invited her to submit affidavits and documentary evidence. S.A. 65. Although "§ 7513 . . . do[es] not provide the final limit on the procedures the agency must follow," *Stone*, 179 F.3d at 1375, Ms. Aviles-Wynkoop has not stated with particularity what required process she was denied. We therefore reject her first procedural challenge.

We also reject Ms. Aviles-Wynkoop's second procedural challenge specified in her petition to the Board—that Mr. Russell "relied on several aggravating factors and characterizations not specified in the proposal notice." Petition at 4. Specifically, Ms. Aviles-Wynkoop pointed to Mr. Russell's findings that her alleged misconduct caused a "hostile environment," that several employees submitted formal complaints to her supervisor, that she did not apologize for her behavior, that she was "progressively counseled" by a supervisor, and that her misconduct was both "impertinent" and "intimidating." *Id.* But Ms. Aviles-Wynkoop has not shown that DoD failed to provide adequate "notice of the charges against" her in these respects. *Loudermill*, 470 U.S. at 546.

In the letter proposing termination, DoD stated that Ms. Aviles-Wynkoop had previously been reprimanded for "inappropriate, overly aggressive, and unprofessional conduct" and had "explicitly exhibit[ed] . . . disdain and utter

disrespect for contractors." S.A. 63. The Board properly determined that these statements put Ms. Aviles-Wynkoop on notice that she was being accused of creating a "hostile environment" and of acting in a manner that was "impertinent" and "intimidating." Similarly, in the letter, DoD highlighted the August 13 meeting in which Ms. Ensley "gave [Ms. Aviles-Wynkoop] documentation regarding specific observations and concerns pertaining to [the conduct]." *Id.* This statement, and the meeting itself, was enough to put Ms. Aviles-Wynkoop on notice that her coworkers had filed complaints about her behavior. DoD further stated in the letter of proposed termination that Ms. Ensley had on multiple occasions—once by email and once in person—advised Ms. Aviles-Wynkoop to modify her behavior. S.A. 62–63. The reference to Ms. Ensley's communications provided sufficient notice of what Mr. Russell later used the words "progressively counseled" to describe. Finally, DoD stated in its letter that when Ms. Aviles-Wynkoop was confronted about her behavior, she "attempted unsuccessfully to justify [her] professional conduct." S.A. 63. This statement sufficiently gave notice of DoD's belief in Ms. Aviles-Wynkoop's lack of remorse.

C

Under 5 U.S.C. § 2302(b)(8)(A), an agency may not take "a personnel action" against an employee who makes a protected disclosure, *i.e.*, "any disclosure of information" that the employee "reasonably believes evidences . . . any violation of any law, rule, or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." If an employee establishes the existence of a protected disclosure, and further establishes that the protected disclosure was a "contributing factor" to the agency's decision to take the personnel action, the agency may defeat the whistleblowing defense to the adverse action by demonstrating that it would have taken the action

regardless of the protected disclosure. *See Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1322 (Fed. Cir. 1999); 5 U.S.C. § 1221(e).

Ms. Aviles-Wynkoop argued to the Board that she had made two protected disclosures before the agency's termination decision. The first was in her August 13, 2015, email exchange with Ms. Ensley and Mr. Russell. Petition at 2 (referring to S.A. 141–42). In that exchange, she alleged, she "disclose[d] [her] belief that the contractors who were working in her office had access to privileged information in violation of agency rules" and that "contractors w[]ere still providing maintenance services to the cyber security office even though the maintenance agreement had expired." *Id.* The second protected disclosure, she contended, was in a phone call to a DoD Inspector General hotline, in which she stated that a certain contractor had failed to do its job properly. *Id.*

Substantial evidence supports the Board's finding that—even if, as we may assume without deciding, the specified disclosures qualified as "protected" and contributed to DoD's termination decision—DoD would have made the same decision to terminate in the absence of those disclosures. In *Carr*, we stated that the following factors are relevant to this inquiry: "the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." 185 F.3d at 1323. Here, the Board determined that DoD proved its firm belief that Ms. Aviles-Wynkoop created a "toxic" work environment; the hotline complaint was made months after Ms. Aviles-Wynkoop had already been placed on administrative leave; and most of the relevant misconduct took place before the August 13 email exchange. S.A. 17. On this record, we cannot say

that the Board committed reversible error in finding that DoD would have taken the same termination action had the alleged disclosure never been made.

III

Ms. Aviles-Wynkoop has a filed a motion in this court asking us to direct DoD to produce to her all of her work-related emails from June 29, 2015, to January 4, 2016. We deny the motion. The appropriate time for seeking discovery was when the matter was before the Board, whose rules provide for discovery and give the administrative judge wide discretion regarding discovery. *See* 5 C.F.R. §§ 1201.41, 1201.73; *Curtin v. Off. of Pers. Mgt.*, 846 F.2d 1373, 1378–79 (Fed. Cir. 1988). Ms. Aviles-Wynkoop has not identified any Board error regarding discovery in this case or provided any other basis for us, as an appellate court, to act regarding further document discovery at this stage.

IV

For the foregoing reasons, the decision of the Board is affirmed.

The parties shall bear their own costs.

AFFIRMED

VII. INDEX TO APPENDICES

APPENDIX M

United States Court of Appeals for the Federal Circuit

ELIZABETH AVILES-WYNKOOP

PETITIONER

v.

DEPARTMENT OF DEFENSE

RESPONDENT

Docket Number 2019-1908

PETITIONER'S PETITION FOR COMBINED PANEL REHEARING AND REHEARING EN BANC

I am a Pro Se Litigant, and it is my sincere belief that the Panel Decision is contrary to the following Decisions of The Supreme Court of The United States, precedents of this Court, and The United States Constitution.

Although the Petitioner did not specifically point out each issue in detail concerning due process as it relates to the above stated Supreme Court mention, this will be fully discussed now. On page 5 of the Court's Decision, the Court stated, "Ms. Aviles-Wynkoop has not stated with particularity what required process she was denied."

It is now obvious that I did not specify enough detail to satisfy this Court. The Petitioner has an opportunity to state her due process claims in specific detail to this Honorable Court. Pro Se Litigants do the best they can. I sincerely apologize to this Court for my lack of detail in my complaint. In my Board Appeal, on page 3, I did cite the Cleveland Board of Education v.

Loudermill, 470 U.S. 532, 546 (1985) decision as the authority that absolutely states The Constitution requires an opportunity to respond before an adverse action can be effectuated. After consulting with some Labor lawyers, and others, I was informed that it appears from the surface that the Panel Decision may have made an oversight from their Land Mark Decisions pertaining to 'due process' as it relates to providing Petitioners their Constitutional Right to respond before an adverse action can be effectuated. In other words, The U.S. Supreme Court and The Constitution have mandated that the pursuit of life, liberty, and property can't be deprived without the opportunity to respond before an adverse action can be effectuated. For clarification, The U.S. Supreme Court and The Constitution have declared that a federal job is a property right. These are the exact words from the Laudermill Decision.

As the Panel pointed out in their Decision, I did complain that the agency's Decision Letter denied me due process because the Decision Letter contained issues that were not stated in the Proposal letter. The Merit Systems Protection Board (M.S.P.B.) refers to this issue as harmful procedural error. The Decision Letter became effective without informing me that I had a right to address the additional issues that were not contained in the Proposal Letter. In the Panel's Decision Letter, they specifically stated, "Ms. Aviles-Wynkoop has not identified any requirement that an agency attach to a Notice of Proposed Termination all evidence of the misconduct described in the notice". I have raised the denial of due process since the initiation of my complaint. Specifically, my denial of due process was established by my Constitutional Fifth (5^{th}) Amendment right, and The Supreme Court Decision pertaining to Cleveland Board of Education v. Laudermill, 470 U.S. 532, 546 (1985). The U.S. Supreme

Court opined that a federal employee must be given a meaningful opportunity to invoke the discretion of the decision maker before a personnel action is finalized. For example, if the Decision Letter contains additional charges or information that was not contained in the Proposal Notice, then this constitutes an ex parte communication, and a direct violation of the U.S. Supreme Court Decision that mandates the employee has a right to invoke the discretion of the decision maker before a personnel action is finalized. It is impossible for the employee to invoke discretion if information is withheld or not provided to him or her before a final personnel action is finalized. In other words, the agency can't terminate an employee, and then tell the employee she can respond to the charges that were not contained in the Proposal Letter. More significantly, this Court, The U.S. Court of Appeals for The Federal Circuit has held that ex parte communications that introduce new and material information about a federal employee's case to a deciding official constitute a due process violation. Stone v. Federal Insurance Corporation, 179 F.3d 1368, 1376-77 (Fed Cir 1999). In other words, if the Proposal Letter does not list all charges in the notice, then any information that was considered outside of the Notice, constitutes an ex parte communication, and a due process violation.

On page 5 of the Panel's Decision, the Panel specifically stated, "Ms. Aviles-Wynkoop suggests that it was improper for the Board to rely on those affidavits because they presented evidence that was not included in the Notice of Proposed Termination During Probationary Period. The affidavits, however, were submitted before the evidentiary deadline established by the Administrative Judge (AJ). Ms. Aviles-Wynkoop has not identified any requirement

that an agency attach to a Notice of Proposed Termination During Probationary Period all evidence of the misconduct described in the notice." I pray and hope that the above information has fully addressed the Court's concern about detail responses. The following information is designed to explain my position with more detail in order for the Court to make a decision based on facts.

I sincerely believe that the Panel may have made an oversight or did not see certain parts of my Pre-Hearing Submissions. Pertaining to my Corrected Revised Response to the Respondent's Brief dated July14, 2020, on page 13, I stated, "Since 5 C.F.R. 752.404 (f) forbids the agency from considering any reason not specified in the advance notice of proposed action, agencies must consider in preparing the advance notice required by section 7513 (b)(1) all of the factors in which they intend to rely in any subsequent decisions" For only clarification purpose, I have enclosed a copy of 5 C.F.R.752.404 (g) for the court's review (**Addendum C**). In addition, I cited 5 Decisions in which this C.F.R. was confirmed in other Circuits. In other words, this is the C.F.R. that ban ex parte communications. Even without citing this C.F.R. I believe that your Decision on Ward v. USPS, 634 F3d 1274 (Fed. Cir 2011) forbids new information not provided to a federal employee-is considered as an ex parte communication. In essence, the Ward Decision and 5 C.F.R.752.404 (g)- demand that all information that was considered in the decision-making process, this information must be provided to the employee in order for the employee to make an adequate defense. According to Ward and 5 C.F.R. 752.404 (g), the proposed action must contain all of the information in which the agency relied upon to make a decision. If an agency makes a decision on

information that was not specified in the Proposed action, then this is the introduction of new information that was not provided to the employee, is considered as an ex parte communication. 5 C.F.R.752.404 (g) just clarifies the Ward decision for non-attorneys and labor representatives.

Pertaining to Ward- WARD v. USPS, 634 F.3d 1274 (Fed Cir 2011), the introduction of any new or material information that the decision maker received or considered in the decision-making process, and not provided to the employee, then this constitutes an ex parte communication, and a due process violation. In my case, the agency listed several aggravating charges in the Decision Letter, that were not listed in the Proposal Letter (due process violation).

If the AJ had adhered to Board procedures pertaining to 5 C.F.R.752.404 (g), the Ward decision, and did his job, then this issue would not be in this Court. The rule is simple and fair. If the agency commits an ex parte communication during the decision-making process, then the agency can't prevail based on Ward and 5 C.F.R.752.404 (g).

SPECIFIC GROUNDS FOR REVERSIBLE ERROR BASED ON THE PANEL'S DECISION DATED SEPTEMBER 2, 2020

Pertaining to the Panel's Decision dated September 2, 2020, the Panel stated " Section 7513 (b) (2) provides that an employee faced with a proposed termination "is entitled to…a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer" In my case, the Decision Letter was dated January 4, 2016 (which contained the ex parte communications). The

effective date of the Decision Letter was also January 4, 2016, which is a clear violation of the 7-day minimum requirement rule. This is exactly why an agency should never make a Decision effective the same day it was issued. Most agencies permit at least 7 days prior to the Decision becoming effective (according to my Board Representative). We now have a clear and confirmed due process violation that the agency created.

I would like to take this time to make a minor correction to 5 C.F.R.752.404 (f). The correct citation should be 5 C.F.R.752.404 (g). I will fully clarify and specify the exact language contained in 5 C.F.R.752.404 (g) at the summary of my brief. The primary difference is that the (f) should be changed to (g).

In addition, The 5th Amendment to the Constitution guarantees me due process pertaining to the deprivation of my property interest (job) without due process. This will be discussed later.

THE AGENCY MADE A GROSS VIOLATION OF MY 5th AMENDMENT RIGHT

The Constitution states only one command twice. The Fifth Amendment says to the Federal Government that no one shall be "deprived of life, liberty, or property." Without due process. The 5th Amendment and the Appellate Courts have determined that a federal job is a property right.

The Respondents violated my property right by denying My Constitutional Right to respond to all of the charges that were contained in the Proposal, and Decision Letters before an agency decision was made (Terminating my employment without a response from me). I

was denied of My Constitutional Right to respond to the additional charges in the Decision Letter, that were not contained in the Proposal Letter (ex parte communications). The Constitution makes it clear that the Government can't deprive an employee of his or her property right without due process. In other words, the employee must have an opportunity to respond to the charges BEFORE an agency Decision is made.

Specifically, pertaining to my case, the Government made a decision to immediately terminate my employment on January 4, 2016, without providing me My Constitutional Right to respond to the Notice of Decision on Proposed Termination During Probationary Period that contained ex parte communications that were not contained in the Notice of Proposed Termination During Probationary Period. It is my understanding that the introduction of new information not provided to the employee is often called ex parte communications.

According to Laudermill, "The right to due process is "absolute" and does not depend on the merits of the claim." 71

In the AJ 'initial decision' the AJ commented, "an action in which such process is not provided must be reversed. See Stephen v. Department of the Air Force, 47, M.S.P.R. 672 (1991)." According to the AJ citation about due process, and it is clear that I did not have an opportunity and my right to respond to all of the charges, whether they are contained in the Proposal or Decision Letter before I was Terminated, then this is a blatant abuse of my due process rights as guaranteed by the Fifth Amendment to the Constitution. Whether it be a

criminal or civil matter, the Government can't prevail with a proven 5th Amendment Constitutional violation. Pertaining to my case, the Government told me that I could respond to the charges 1 year and 2 months after I had been Terminated. The 5th Amendment requires a right to respond before a removal, not 1 year and 2 months after removal. The AJ abused his authority by misleading the Panel that he had the authority to establish new response deadlines that clearly violated the due process rights guaranteed by The 5th Amendment. The 5th Amendment clearly states an employee has the right to respond and address the charges prior to a removal. In direct violation of The 5th Amendment, and without any authority, the AJ created a new order basically stating that the agency had a new deadline to gather evidence and solicit affidavits to support their Termination Letter dated January 4, 2016. The new illegal deadline became March 24, 2017.

IT IS VERY DIFFICULT FOR THE COURTS TO RENDER A FAIR AND IMPARTIAL DECISION WHEN THEY ARE MISLED, PROVIDED INACCURATE AND FALSE INFORMATION FROM THE GOVERNMENT

It is now clear that this Honorable Panel was misled by the Government that the AJ was acting within the scope his authority. This AJ should have known that he did not have any authority to establish new response deadlines that were in direct violation of the 5th Amendment. These are the facts. On October 27, 2015, the agency Proposed Removal on single charge that specified" Notice of Proposed Termination During Probation Period". In the body of this Notice, the agency cited allegations of misconduct to support the Termination on the Probation charge. If anyone reads the Notice of Probation Termination, this document speaks for itself. On January 4, 2016, the agency issued a Decision Letter

stating that my Termination was immediately effective on January 4, 2016. I raised the issue that the Decision Letter contained information that was not stated in the Proposal Letter. In other words, ex parte communications.

On March 24, 2016, the AJ dismissed my appeal for lack of jurisdiction. I filed a Petition for Review on this issue. On September 12, 2016, the Board remanded the case. On January 12, 2017, the AJ opined that I was not a probationary employee, and I was entitled to a full Board Appeal. Whenever a federal agency loses a Jurisdictional Hearing, then their case can't be advanced because of a Constitutional Bar. The Bar is the 5th Amendment due process protection rights.

The AJ and the Respondents knew they did not have any authority to extend deadlines to a terminal procedurally defective case because of The 5th Amendment due process rights.

IT IS A DOCUMENTED FACT THAT THE AGENCY OFFICIALS COMMITTED PERJURY AND THE OBSTRUCTION OF JUSTICE BY SUBMITTING SWORN AFFADAVITS THEY KNEW WERE FALSE

Thank God for the United States Court of Appeals for the Federal Circuit. For the first time since my case was initiated, I now have the opportunity to report criminal activity to an unbiased body. It is significant to note that this allege criminal activity was reported to the AJ with documented proof. The AJ ignored this evidence and ruled in favor of the agency. These are the facts. According to the agency officials, I was a model employee and they were glad to have me as a member of the staff (documented proof). However, if you read the Proposal and Decision Letters, there is no mention that I ever was a good employee. In fact, these

Letters portray me as one of the worse employees on earth. The problem came when I discovered these officials were engaged in the practice of awarding illegal personal service contracts around $125,000 to individuals who could not qualify to receive the contracts. Management Officials were also awarding personal service contracts for employees who could not do the job after receiving a promotion. Personal Service Contracts require Congressional Approval. Management actually told me that I was on thin ice because I could not keep my mouth shut. I tried to keep quiet. However, when I discovered they awarded a company called Net Centrics a 50-million-dollar contract after Net Centrics failed to complete their first contract. Please understand that this is nothing more than a corrupt ongoing criminal empire that survives by immediately retaliating and terminating all Whistleblowers. I found out that a Whistleblower does not stand a chance with this group. I simply refused to be a part of this group and become rich. It is significant to note that my Board Representative filed a written statement to the AJ and stated that this group was so corrupt and dishonest, and they should be referred for a full RICO investigation. My Board Rep was a former U.S. Department of Justice employee. I also received the maximum penalty for my refusal. After all, committing perjury and lying is not a problem when it comes to protecting their multimillion-dollar criminal empire. This was more than I could take. These people told me that contract fraud was nothing to worry about because there was no accountability or penalty for contract fraud. They proved their point by referencing an article in the Washington Post indicating that the tax payers got ripped off for 125 billion dollars pertaining to fraud and waste. Their point was crystal clear. Not a single person was

held accountable or disciplined. I tried my very best to be quiet and look the other way. Contract fraud and waste was flowing like wine. Since, I was the certifying authority for the contractors to get paid, the agency was asking me to certify work that had not been done. I just could not do this. Finally, I made a bold decision to tell management that they were unprofessional, crooked, and unethical in the manner they awarded contracts. My e-mail is dated August 13, 2015 and is contained in the record. This was a protected disclosure under the Enhanced Whistle Blower Protection Act of 2012. Prior to this e-mail, I was a model employee. Before Mr. Jerry Russell saw my e-mail dated August 13, 2015, Mr. Russell sent me an e-mail addressing "observation concerns" dated August 14, 2015, in which he stated,

"my apologies for the confusion, hopefully this will clarify (1) there was a meeting with Labor Relations yesterday that I attended with Carol. The purpose of the meeting was to discuss Carol's observations as presented to you yesterday. I did not draft the paper and it was important that I attended as Carol's supervisor to discuss issues raised (2) For the record- I do not have any concerns with your performance and I'm very glad to have you as part of the team. I know Carol is as well. Please consider this e-mail as a formal apology from me for any miscommunications that have occurred over the past day or so. I do not have any intentions of further communications with LMER. In fact LEMR has stated that this is a matter between the first line supervisor and the employee and that I should not be involved unless required."

For the Court's record, pertaining to **ADDENDUM B**, Mr. Jerry Russell e-mail dated August 14, 2015, was introduced to the Board record, M.S.P.B. Docket Number DC-315H-16-0327-B-1 -Exhibit I, page 9- March 30, 2017. In fact, my Board Representative communicated the statement to the AJ, since the deciding official has vacated all of the charges, then why is the case being advanced. After the charges were vacated and the agency lost the Jurisdictional Hearing, My Board Representative filed a Formal Motion for Full

Reinstatement. The AJ denied the motion. My case should have been resolved at the Board Level because the Agency vacated all of their charges with an apology attached. Even though I am not an attorney, I know you can't advance a case without any evidence.

THE PERJURY AND OBSTRUCTION OF JUSTICE CHARGES ARE CONFIRMED BY THE FOLLOWING ACTIVITY

Prior to August 14, 2015, I was a model employee according to Mr. Russell's email dated August 14, 2015 (**ADDENDUM B**). The following statement is critical. On August 14, 2015, Mr. Jerry Russell, the Deciding Official vacated the "Observation" document that listed all prior charges, and then apologized for the charges had been filed. Everything was good until Mr. Russell read my first e-mail dated August 13, 2015, in which I listed a number of issues pertaining to contract fraud, the crooked and unethical manner in which contracts were awarded. It is now official that I was Terminated because I presented Whistleblowing concerns directly to Mr. Russell and Upper Management. I had a legitimate right to raise concerns about illegal activity without being Retaliated Against. When Mr. Russell read my e-mail also dated August 13, 2015 addressed to him, and other executive managers specifically stating that they were unprofessional, unethical, and crooked in the manner they awarded contracts. Personal Service contracts are 100% illegal without congressional approval- he immediately placed me on administrative leave on August 28, 2015 without any pending charges because he vacated every charge on August 14, 2015. From August 28, 2015 to January 4, 2016, Mr. Russell could not create any additional charges because I was placed on Administrative Leave and banned from the facility. Therefore, Mr. Jerry Russell, Carol Ensley, and Victor Shirley all agreed to enter into a conspiracy to commit perjury and

obstruct justice for the purposes of silencing and punishing me for my Whistleblowing activity. Mr. Jerry Russell and Carol Ensley knew the sworn affidavits were 100% false because Russell and Ensley had vacated every charge on August 14, 2015. Mr. Russell even apologized for the charges being noted from the very beginning. Without any pending charges, perjury was the only way to get rid of me and silence my Whistleblowing activity.

THE AGENCY OFFICIALLY VACATED AND DISSMISSED ALL OF THEIR CHARGES ON AUGUST 14, 2015 (SEE ADDENDUM B)

This will probably go down in history as one of the worse fraud and dishonesty case ever presented to this Court. It is not wise to knowingly commit foolish perjury and obstruct justice and have this information submitted to the nation's second highest court without thinking about the potential of receiving strong sanctions from the U.S. Department of Justice Criminal Division. Since I am not an attorney, I do not know what to do about this. The AJ was presented with **ADDENDUM B** and other evidence that confirmed the agency had vacated all charges against me. The AJ ignored all of the evidence in my favor, and ruled against me. For knowingly submitting false sworn affidavits to this Court, Mr. Russell, Ms. Ensley, and Mr. Shirley should receive the maximum sanctions possible. Lying to the Board probably will not get you a prison sentence. Lying and submitting intentional false sworn affidavits to the Federal Courts is a high risk for a prison sentence. I have to give them credit, they have been very successful with lying and submitting false documents to M.S.P.B. and the Courts without much to worry about. They do not have an excuse for what they did because I sent many e-mails that their activity was wrong and they were ripping off the tax payers for millions of dollars. This is how they became rich. They would falsely state and fill

out Government documents that the work had been completed, when it was not. Remember, there is no accountability or penalty for gross contract fraud. Nobody likes the Whistleblower, in most cases, the Whistleblower is the only one who gets punished because the corrupt people make up lies and use unjust adverse action to silence the Whistleblower. It works 100% of the time. This is so unfair because the Whistleblower can't afford to hire competent counsel because they earned their money the right way. I can only pray and hope that this Court will see the truth and perhaps appropriately deal with the liars and corrupt high-ranking SES officials who commit foolish perjury. It is their anger and retaliation that have placed them is this Court. They have worked very hard to receive the maximum sanctions possible, and the maximum compensatory damages possible.

THE 8 MILLION DOLLAR WHISTLE BLOWER COMPLAINT SHOULD BE CONFIRMED FOR THE FOLLOWING REASONS

Pertaining to law suits, if a party fails to defend an action, then that party usually lose. In my particular case, the Government did not, and could not address the Whistleblowing claims because they were true. First of all, I will establish that I made a protected disclosure to Mr. Jerry Russell and his executive staff- that they were committing fraud and waste by being unprofessional, crooked, and unethical in the manner they awarded contracts. This disclosure is confirmed by the August 13, 2015 email and in Form 11, Informal Brief. In the agency's Proposal Letter, page 5, the agency proposed that I be Terminated based on my

August 13, 2015 email, stating that they were unprofessional, crooked, and unethical in the manner they awarded contracts (this was a protected disclosure). On January 4, 2016, the

agency issued a Termination Letter indicating that my removal was based on the Proposal Notice indicating that management was unprofessional, crooked, and unethical in the manner they awarded contracts. This is a text book example of Reprisal and Retaliation. It is now confirmed that I was Terminated for making a protected disclosure to the executive management staff before I was Terminated. I also filed two subsequent complaints to the Department of Defense (DoD) Inspector General. I later learned that the IG could not investigate SES Government Officials. Since the agency failed to address the Whistleblowing charges, the full 8 million dollars should be awarded. I believe a criminal referral would be proper for the perjury charges. I am also respectfully requesting that I be immediately reinstated at the GS 14 level with back pay and interest, and any other remedy the court deems appropriate to make me whole.

Respectfully submitted, Date:

Elizabeth Aviles-Wynkoop, Pro Se October 3, 2020

PETITIONER'S TABLE OF CONTENTS CASE 19-1908

TABLES OF AUTHORIES

ATTACHMENTS AS ADDENDUM

ADDENDUM A:

19-1908 U.S. Court of Appeals for the Federal Circuit Document 65, Decision dated September 2, 2020

ADDENDUM B:

Jerry Russell email dated August 14, 2015 apology

ADDENDUM C:

5 C.F. R. 752.404 (g)

ADDENDUM A

ADDENDUM A

SEE ATTACHED:

19-1908 U.S. Court of Appeals for the Federal Circuit Document 65, Decision dated September 2, 2020

ADDENDUM B

ADDENDUM B

August 14, 2015 email Jerry Russell apology for August 14, 2015 email 11:58 AM.

-----Original Message-----
From: Russell, Jerry H Jr CIV (US)
Sent: Friday, August 14, 2015 11:58 AM
To: Aviles-Wynkoop, Elizabeth CIV WHS EITSD (US); Ensley, Carol A CIV WHS EITSD (US)
Subject: RE: Remarks made against me, Elizabeth Aviles Wynkoop at JITSPP

Elizabeth -

My apologies for the confusion, hopefully this will clarify...

(1) There was a meeting with Labor Relations yesterday that I attended with Carol. The purpose of the meeting was to discuss Carol's observations as presented to you yesterday. I did not draft the paper and it was important that I attended as Carol's supervisor to discuss issues raised.

(2) For the record - I do not have any concerns with your performance and I'm very glad to have you as a part of the team. I know that Carol is as well.

Please consider this email a formal apology from me for any miscommunications that have occurred over the past day or so.

I do not have any intentions of further communications with LMER. In fact, LMER has stated that this is a matter between the first line supervisor and the employee and that I should not be involved unless required.

Jerry

Jerry H. Russell
Resource & Supplier Management, WHS EITSD
Joint IT Service Provider, Pentagon
Comm: 571-372-0110 | BB: 571-212-1041

ADDENDUM C

ADDENDUM C

5 C.F.R. 752. 404 (g) states:

Title 5: Administrative Personnel
PART 752—ADVERSE ACTIONS
Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

§752.404 Procedures.

(g) Agency decision. (1) In arriving at its decision the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

CERTIFICATE OF COMPLIANCE

I, Elizabeth Aviles-Wynkoop, in reliance upon the word count of the word processing system used to prepare this motion, certify that this motion complies with the type-volume limitation of

Fed. R. App. P. 27(d)(2) because it contains 4181 words but within the 15 page limit, excluding the parts of the motion exempted by Fed. Cir. R. 27(d)(2).

CERTIFICATE OF SERVICE CASE 19-1908

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Email sent to **prose@cafc.uscourts.gov** and sent OVERNIGHT EXPRESS U.S. POSTAL SERVICE with 3 copies to:

US Court of Appeals For The Federal Circuit

Peter R. Marksteiner

Clerk of Court

717 Madison Place, NW

Washington, DC 20439

Hand Delivered: Petitioner:

Elizabeth Aviles-Wynkoop, Pro-Se

753B Delaware Ave SW

Washington, DC 20024

Agency Representative US Postal Service Mail:

JOSEPH H. HUNT, Assistant Attorney General

Commercial Litigation Branch

Civil Division

U.S. Department of Justice

950 Pennsylvania Ave NW

Washington, DC 20530

Phone (202) 514-3368; Fax (202) 514-9963

Agency Representative US Postal Service Mail:

ROBERT E. KIRSCHMAN, Jr. Director

Commercial Litigation Branch

Civil Division

U.S. Department of Justice

1100 L St NW, RM 12124

Washington, DC 20530

Phone (202) 514-3368; Fax (202) 514-9963

Agency Representative US Postal Service Mail:

REGINALD T. BLADES, Jr. Assistant Director

Commercial Litigation Branch

Civil Division

U.S. Department of Justice

1100 L St NW, 8th Floor

Washington, DC 20530

Phone (202) 307-6288; Fax (202) 305-7643

Agency Representative US Postal Service Mail:

Delisa Sanchez

Commercial Litigation Branch

Civil Division

U.S. Department of Justice

1100 L St NW, RM 12124

Washington, DC 20530

Phone (202) 307-6288; Fax (202) 305-7643

October 3, 2020 _____

Date Name: Elizabeth Aviles-Wynkoop, Pro-Se

VII. INDEX TO APPENDICES

APPENDIX N

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ELIZABETH AVILES-WYNKOOP,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2019-1908

Petition for review of the Merit Systems Protection Board in No. DC-315H-16-0327-B-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, LINN*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

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* Circuit Judge Linn participated only in the decision on the petition for panel rehearing.

ORDER

Petitioner Elizabeth Aviles-Wynkoop filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on November 12, 2020.

FOR THE COURT

November 5, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

VII. INDEX TO APPENDICES

APPENDIX O

United States Court of Appeals for the Federal Circuit

ELIZABETH AVILES-WYNKOOP,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2019-1908

Petition for review of the Merit Systems Protection Board in No. DC-315H-16-0327-B-1.

MANDATE

In accordance with the judgment of this Court, entered September 2, 2020, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

November 12, 2020

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court