NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

DANIEL ASPREC NOVILLA,
Petitioner

v.

DEPARTMENT OF AGRICULTURE,
Respondent

2023-1118

Petition for review of the Merit Systems Protection Board in No. CH-0752-19-0220-I-2.

Before DYK, REYNA, and CHEN, *Circuit Judges*.

PER CURIAM.

ORDER

In response to this court's show cause order, Daniel Asprec Novilla argues in support of this court's jurisdiction. The Department of Agriculture urges dismissal.

Mr. Novilla appealed his removal from the Department to the Merit Systems Protection Board, asserting an affirmative defense that the removal was in retaliation for filing an Equal Employment Opportunity complaint alleging harassment based on race, national origin, color, and reprisal. The Board's decision affirming the Department's

APPENDIX A

removal action became final on October 30, 2020. This court received Mr. Novilla's petition for review of that final decision on October 28, 2022.

We first turn to the Department's argument that this appeal falls outside the jurisdiction that Congress established for this court. *See* 5 U.S.C. § 7703; 28 U.S.C. § 1295. Under 28 U.S.C. § 1295(a)(9), this court has jurisdiction to review a "final order or final decision" of the Board pursuant to 5 U.S.C. § 7703(b)(1), (d). Section 7703(b)(1) sends final Board decisions to us for review except for certain "[c]ases of discrimination subject to [5 U.S.C. § 7702]," which are instead diverted to district courts. § 7703(b)(1)(A); *see* § 7703(b)(2).

Although Mr. Novilla raised a claim of discrimination before the Board, "a petitioner's explicit waiver of h[is] discrimination claims in such a case effectively converts the case to a standard appeal of the adverse personnel action—providing this court with jurisdiction to review the Board's decision (without considering any discrimination claims)." *Harris v. SEC*, 972 F.3d 1307, 1318 (Fed. Cir. 2020); *see* § 7703(b)(1)(A) (diverting only "[c]ases of discrimination" to district court). And here, Mr. Novilla filed a Statement Concerning Discrimination indicating that he has abandoned his discrimination claims raised before the Board. *See* ECF No. 12 at 3.*

Having concluded that this appeal would otherwise be subject to our jurisdiction, we turn to timeliness. The timely filing of a petition from the Board to this court is a jurisdictional requirement and "not subject to equitable tolling." *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016

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* While Mr. Novilla's response to the court's show cause order discussed his discrimination allegations, that submission was filed before the revised Statement Concerning Discrimination.

(Fed. Cir. 2017). A petition for review of a final decision "shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1)(A); *cf.* Fed. R. App. P. 26(b)(2) (prohibiting this court from extending or reopening the time to file the petition for review "unless specifically authorized by law").

Here, Mr. Novilla does not dispute that his petition was filed outside of this statutory deadline. Rather, Mr. Novilla contends that his failure to timely file his petition for review is excusable because his prior lawyer informed him "he would file the petition for review" but in fact "never filed it," ECF No. 1-2 at 1. While this court is sympathetic to Mr. Novilla's situation, we can only consider whether the petition was timely filed and cannot excuse a failure to timely file based on individual circumstances. Because the appeal was untimely, we must dismiss.

Accordingly,

IT IS ORDERED THAT:

(1) The petition for review is dismissed.

(2) Each side shall bear its own costs.

FOR THE COURT

March 2, 2023
Date

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

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

DANIEL ASPREC NOVILLA,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
CH-0752-19-0220-I-2

DATE: September 25, 2020

Thomas D. Juanso, Esquire, Louisville, Kentucky, for the appellant.

Cliff Lockett, Esquire, Washington, D.C., for the agency.

BEFORE
Daniel Yehl
Administrative Judge

INITIAL DECISION

INTRODUCTION

On February 23, 2019, Daniel Novilla (appellant) timely filed an appeal challenging the decision by the U.S. Department of Agriculture (agency) to remove him from his position and the Federal service. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal. See 5 U.S.C. §§ 7511-7513.

Following multiple delays and hearing cancellations due to the extended unavailability of key witnesses, *inter alia*, the initial appeal was dismissed without prejudice on September 12, 2019, and automatically re-filed by the Board on December 5, 2019. IAF, Tab 48; Refiled Appeal File (RAF), Tab 1. The hearing requested by the appellant was held on January 28-29, 2020. RAF, Tab 8 (Hearing Compact Disc, (HCD)).

APPENDIX B

For the reasons outlined below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant worked as a Supervisory Public Health Veterinarian (SPHV), GS-0701-12, for the agency's Food Safety and Inspection Service (FSIS) at Southeastern Provision, a beef slaughter establishment located in Bean Station, Tennessee. IAF, Tab 1 at 1; Tab 8 at 4; RAF, Tab 7. In this supervisory position, the appellant was responsible for overseeing processes relating to ante-mortem and post-mortem inspections, and inspection operations at federally-regulated meat and poultry establishments. IAF, Tab 6 at 63-68. He was also responsible for providing technical and administrative direction to personnel whom he supervised. *Id.* The record reflects the appellant had more than 20 years of service with the agency at the time of his removal, and had been was assigned as the SPHV at Southeastern Provision for approximately 15 years. IAF, Tab 6 at 52-53; Tab 8 at 4.

On October 2, 2018, Luz Cantres, Labor and Employee Relations Division (LERD) Specialist, issued to the appellant a Notice of Proposed Removal (NOPR) based on a charge of Neglect of Duty. IAF, Tab 5 at 164-168. The NOPR cited reliance "primarily upon evidence obtained in the USDA, FSIS, Office of the Administrator, Internal Control Staff (ICS) Investigations, Report of Investigation (ROI), Case Number #Msc-SIR-18-002." *Id.* at 164. The NOPR further indicated that the "ROI produced evidence [the appellant] instructed Inspection Program Personnel (IPP) to allow the Southeastern Provision Establishment...to slaughter and process non-ambulatory cattle, in violation of Agency Regulations." *Id.* The NOPR did not denote specific dates on which the appellant allegedly instructed personnel to perform these actions in violation of agency regulations. *Id.*

The appellant provided oral and written replies to the proposed action on November 28, 2018. IAF, Tab 4 at 28; Tab 5 at 5-168. Krista Grimmett, LERD Branch Chief and the deciding official for the removal, conducted the oral conference. IAF, Tab 5 at 28. On February 11, 2019, Grimmett issued a decision sustaining the charge and proposed penalty of removal, effective on that date. IAF, Tab 4 at 23-26. The appellant then timely filed this appeal and requested a hearing. IAF, Tab 1.

On May 29, 2019, I conducted a prehearing conference in this appeal. IAF, Tab 24. During that conference, I accepted for adjudication the appellant's affirmative defenses of harmful procedural error (violation of agency policy and/or procedure), retaliation for engaging in protected activity (prior Equal Employment Opportunity (EEO) complaint), and violation of his rights to due process.[1]

Following the dismissal without prejudice of the initial appeal (*see* IAF, Tab 48) and the re-filing of the present appeal, I conducted a hearing via video-conference on January 28-29, 2020, and closed the record at the conclusion of the hearing. RAF, Tab 8 (HCD).

Applicable Law and Burdens of Proof

The agency has the burden of proving its misconduct charge by a preponderance of the evidence.[2] 5 C.F.R. §§ 1201.56(b)(ii), 1201.4(q). An agency's decision to discipline a federal employee must have a "rational basis." *Kmiecz v. Department of the Army*, 29 M.S.P.R. 673, 676 (1986). When

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[1] The appellant also raised an affirmative defense of collateral estoppel relating to his state unemployment compensation case, which I did not accept for adjudication. *See* IAF, Tab 24 at note 3.

[2] A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

an employee challenges an adverse action, the agency must establish three things. *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997). First, the agency must prove, by a preponderance of the evidence, that the charged conduct occurred. *Pope*, 114 F.3d at 1147 (citing 5 U.S.C. § 7701(c)(1)(B) (1994)). Second, the agency must establish a nexus between that conduct and the efficiency of the service. *Pope*, 114 F.3d at 1147 (citing 5 U.S.C. § 7513(a) (1994); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984)). Third, the agency must demonstrate that the penalty imposed is reasonable. *Pope*, 114 F.3d at 1147 (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981)). An appellant has the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(C).

In this decision, to resolve issues of credibility and the weight to be given written statements and other documentary evidence, I have been guided by *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981), and *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). According to *Hillen*, when resolving issues of credibility, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in questions; (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. *Id.*

The agency proved the charge of neglect of duty

The mission of the FSIS is to ensure "the health and welfare of consumers is protected by assuring that meat products are wholesome, not adulterated, and

properly marked, labeled, and packaged." IAF, Tab 4 at 24. The appellant's duties as a SPHV included, but were not limited to: performing and directing ante-mortem (before slaughter) inspections of livestock and/or poultry to detect, identify, and diagnose conditions that may render the food products unfit for human consumption; visual and digital examination; segregation and identifying as suspects livestock and/or poultry showing evidence of disease, injury, or physical abnormalities; condemnations of livestock and /or poultry found in a dying condition or condition which would render their meat unfit for human consumption and directs their removal from human food channels; directing the removal of condemned livestock and/or poultry for treatment where permitted; reviewing and determining the significance of disease conditions and their potential for affecting the wholesomeness of meat or poultry products increasing the hazard to public health; assuring enforcement of humane slaughtering and handling requirements; conducting post-mortem (after slaughter) examination of carcasses and parts, organs, and body tissues for evidence of disease, parasitic infestations, biological residues or other condition which might render the carcasses or parts unfit for human food; ensuring inspected carcasses are passed for food, retained for further examination, or condemned wholly or in part as unfit for human consumption; evaluating the quality of the inspection work by assuring proper inspection procedures and dispositions are accomplished, assuring that required standards of sanitation are met, that approved labels are used, and that facilities are properly maintained. IAF, Tab 6 at 63-64. The appellant also had "full authority to take corrective measures or order remedial action immediately when necessary to correct misinterpretations of rules and regulations, incorrect application of procedures, and any other deficiencies." *Id.* at 64.

In the SPHV position, the appellant was also responsible for ensuring he and his subordinates complied with agency policies and regulations concerning ante- and post-mortem inspection processes and procedures. One of those

regulations, FSIS Directive 6100.1, *Ante-Mortem Livestock Inspection*, Revision 2, provided: "[a]s required by the Federal Meat Inspection Act, IPP are to examine and inspect all livestock before slaughter to determine whether the animals are fit for slaughter for human food." IAF, Tab 6 at 72. The Directive further noted that, on March 18, 2009, FSIS published a final rule, *Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-mortem Inspection*, which required that "all non-ambulatory disabled cattle. . . that are offered for slaughter (including those that have passed ante-mortem inspection) be condemned and properly disposed of in accordance with 9 CFR 309.13." *Id.* at 70, 73. The appellant was familiar with these policies and regulations, and aware of his obligation to ensure both he and his personnel complied with the same. *Id.* at 52.

During the course of an agency investigation conducted between August 2017 and November 2017, multiple Food Safety Inspectors (FSIs) supervised by the appellant provided statements to investigators alleging they were instructed by the appellant, on unspecified occasions, to allow non-ambulatory disabled cattle, otherwise known as "downer cows" or "downers," at Southeastern Provision to be processed for human food consumption. *See* IAF, Tab 6 at 9-49. Specifically, investigators interviewed Tammy Hunt, James Miller, Sophia Blockett, Randy Goetz, Michael Phillips, and the appellant. *Id.*

Hunt and Miller related to investigators that they received instructions regarding passing non-ambulatory cattle directly from the appellant. IAF, Tab 6 at 12-18, 21- 24. Blockett, however, told investigators she received instructions regarding non-ambulatory cattle from Hunt and another employee, Dorothy Tatro. *Id.* at 27-31. On this point, Hunt acknowledged in her written statement that, although she knew the directives violated agency regulations, she complied and "trained and/or informed another Inspection Program Personnel (IPP) that there were exceptions to the regulations, which allowed non-ambulatory cattle to be processed for human food, according to Dr. Novilla." IAF, Tab 6 at 14-15. She

also provided an example in her statement of a particular instance when, she claimed, the appellant overruled her determination that a particular cow could not be processed for human food:

> [a]pproximately two years ago, a cow was delivered to the establishment in a red gooseneck livestock trailer. After the cow was offloaded from the trailer it walked very slowly, it shuffled about three steps and then fell down. I informed plant personnel the cow could not be processed for human food. However, Dr. Novilla over ruled me and told the establishment the cow was okay to be processed for human food. Dr. Novilla said according to his interpretation of the regulations the cow was ambulatory disabled.

Id.

Investigators also interviewed the appellant during the investigation. IAF, Tab 6 at 51-54. He denied ever instructing food inspectors to allow non-ambulatory cattle to be processed for human food consumption. *Id.*

At hearing, Hunt testified she was supervised by the appellant from approximately 2009 until June 2017. HCD (Hunt). She also received on-the-job training (OJT) from him when she first arrived at Southeastern Provision. *Id.* Hunt testified she completed formal "red meat" training around 2009. *Id.* She recalled being interviewed by agency investigators in October 2017, and testified that the statement she provided at that time was truthful and not coerced. *Id.*

Hunt further testified regarding the differences between healthy cattle and "cull" cattle, which are frequently severely disabled due to disease, injury, etc. HCD (Hunt). She testified that in her mind the regulatory requirements are quite clear: if a cow goes down before ante-mortem inspection, and does not get back up, it is considered a "downer," or non-ambulatory, and cannot be processed for human food. *Id.* Additionally, she testified, the regulations require that when a cow goes down after passing ante-mortem inspection and cannot get back up, the supervisory veterinarian should be called over and the animal condemned. *Id.*

Relevant to this appeal, Hunt testified she was repeatedly instructed by the appellant to allow cows that were ambulatory and passed ante-mortem inspection,

but then subsequently fell down, to be processed for human food consumption. HCD (Hunt). She believed this directive contradicted her understanding of agency regulatory requirements, and she claims she frequently challenged the appellant when he gave her such a directive. *Id.* However, she testified, she also recognized that the appellant was her supervisor, and she followed his directive. *Id.* She also instructed other FSIs, whom she trained, to follow the appellant's directives when he was in the plant. *Id.*

Hunt recalled the appellant telling her that he discussed the non-ambulatory cattle issue with Dr. Kermit Harvey, District Veterinarian Medical Specialist (DVMS), on multiple occasions. HCD (Hunt). The appellant told her that he and Dr. Harvey agreed "common sense" should be used in those situations not directly addressed by the regulations. *Id.* She further testified that she requested the appellant provide her with written confirmation of these conversations with Dr. Harvey during which they confirmed there was a "gray area" in the regulations, but he was never able to do so. *Id.*

Hunt testified she contacted her second-level supervisor, Letha Lapp, and the union regarding the appellant's instructions to allow non-ambulatory cattle to be processed for human consumption. HCD (Hunt). She also provided a letter to the union detailing her concerns. *Id.* However, she was told to continue following the appellant's directives. *Id.* She estimated approximately 3-4 downer cows per week were passed for processing between 2014 and 2017, at the appellant's direction. *Id.* This practice posed a significant risk to public health because non-ambulatory cattle often carry central nervous system diseases such as "Mad Cow" disease. *Id.* After the appellant left Southeastern Provision in 2017, Hunt recalled passing zero non-ambulatory cows for processing. *Id.*

I observed Hunt's demeanor while testifying, and found her credible. She testified in a straightforward manner, without evasion. *Hillen*, 35 M.S.P.R. 453, 458. Furthermore, there is no evidence in the record which indicates she harbors any particular bias towards the appellant that would cause her to fabricate her

allegations. I found her testimony was also consistent with her written statement to investigators in October 2017.

Miller testified he was employed as a FSI at a poultry plant in Florida at the time of the hearing, but previously worked for the appellant as a GS-7 Consumer Safety Inspector (CSI) at Southeastern Provision from 2014 to 2016. HCD (Miller). He testified the duties of a CSI are similar to those of a FSI. *Id.* Miller stated he received both formal red meat training and on-the-job training (OJT) from the appellant, and recalled conversations with the appellant regarding the processing of downer cows. *Id.* He recalled a couple instances when he observed cows ambulating before falling down. *Id.* If the cow could not get back up, he texted the appellant to request guidance. *Id.* The appellant, in turn, asked Miller whether he had seen the cow up and moving, and if so, the appellant told him that the cow was suitable for human food processing. *Id.* Miller complied, even though he believed the instruction to be inconsistent with regulatory requirements. *Id.* Miller testified that he elected not to report the appellant's instructions to anyone. *Id.* Additionally, as a GS-7 CSI, Miller could not instruct the establishment to condemn a cow, but he also would not allow the establishment to process a non-ambulatory cow for human food without his supervisor signing off on the decision. *Id.* Thus, he left such dispositions up to the SPHV, like the appellant, which would be done after Miller departed the inspection area. *Id.* Thus, Miller never directly observed the appellant passing a downer cow. *Id.*

Miller recalled being interviewed by agency investigators, and signing a statement that was prepared by one of the investigators and presented to him. HCD (Miller). He testified that the statement he provided was accurate and truthful to the best of his recollection. *Id.*

I observed Miller's demeanor while testifying and found him credible. He testified in a straightforward manner, without hesitation or evasion, and appeared sure of his facts. *Hillen*, 35 M.S.P.R. 453, 458. I find no evidence in the record

which indicates he harbors any particular bias towards the appellant that would cause him to fabricate his allegations, or shape this testimony. His testimony was consistent with the written statement he provided to investigators.

Blockett testified she worked as a GS-7 FSI at Southeastern Provision from 2016 to 2017. HCD (Blockett). During that time she performed ante- and post-mortem inspections under the appellant's supervision for approximately 7 or 8 months. *Id.* She testified the appellant provided her with OJT, and she also attended formal red meat training. *Id.* However, Hunt and another employee (Dorothy Tatro) also trained Blockett. *Id.* It was during this additional training, Blockett testified, when she was instructed that if she saw a cow ambulatory at one point but later become non-ambulatory, it could still be processed for human food consumption so long as no other health issues were observed. *Id.* Though these instructions were not consistent with the agency regulations she reviewed, she nonetheless thought the rules were perhaps different at a "cull" plant like Southeastern. *Id.* She estimated approximately two non-ambulatory cows per day were allowed to be processed for human consumption at Southeastern on the days she performed ante-mortem inspections. *Id.*

Blockett testified that, to the best of her recollection, she only observed the appellant pass one non-ambulatory cow for processing. HCD (Blockett). However, she did not recall the appellant ever directly instructing her, or any other inspector, to pass a non-ambulatory cow for processing. *Id.* Thus, she testified she only received instructions regarding the "exception" to the non-ambulatory processing rules from Hunt and/or Tatro. *Id.*

The record reflects Blockett provided two statements to investigators: one on August 16, 2017, and another on August 22, 2017. IAF, Tab 6 at 26-38. Her union representative, David Ford, was present for the second interview, but not the first. *Id.* The content of the two statements was largely consistent, however. *Id.*

I observed Blockett's demeanor while testifying, and found her credible, although her knowledge of the inspection processes and procedures was limited. *Hillen*, 35 M.S.P.R. 453, 458. Her voice dropped several times during the course of her testimony, and I found portions of her testimony to be rambling and non-responsive. However, I attributed such instances to nervousness rather than evasion. Furthermore, as with the majority of other witnesses, I saw no evidence in the record suggesting Blockett harbors any particular bias towards the appellant that would cause her to fabricate testimony. I also found unpersuasive the appellant's claim that Blockett's testimony was influenced by Ford's presence as a witness during the second interview.

Ford provided testimony concerning his knowledge of the allegations made by other inspectors, to him, about the appellant instructing them to pass downer cows for processing. HCD (Ford). In his role as a local union official, Ford testified, he received reports from Hunt and others indicating the appellant had instructed them to allow downer cows to be processed if they already passed ante-mortem inspection. *Id.* He testified he found no reason to question the validity of the allegations his co-workers presented to him regarding the appellant's instructions. *Id.* He further related that as a union official he brought various concerns to management about the inconsistent instructions the appellant provided regarding inspection standards, among other matters, and these concerns were discussed during one or more labor-management meetings. *Id.*

Ford also testified that he conversed with establishment personnel, and through those conversations he learned that various agency employees (like the appellant) seemed to employ inconsistent inspection standards. HCD (Ford). In particular, he recalled showing establishment personnel the regulatory instructions prohibiting the processing of non-ambulatory cattle for human food consumption, and in response, they claimed they were told if inspectors "saw it up," they "could have it," or words to that effect. *Id.*

From the appellant's written reply to the proposed removal, it is evident there was an acrimonious work relationship between Ford and the appellant. IAF, Tab 5 at 5-161. Specifically, the record reflects Ford filed multiple grievances against the appellant in his role as union official, both on his own behalf and on behalf of other bargaining unit employees. *Id.* The union, including Ford, also accused the appellant of accepting bribes from Southeastern Provision, including a Fiat automobile. *Id.* at 108-110. In response, the appellant filed a harassment complaint against Ford, despite the fact that he was a higher-graded employee who supervised Ford on occasion when Ford performed relief CSI duties at Southeastern. *Id.* The appellant accused Ford of making numerous false and baseless allegations against him as a form of discrimination. *Id.*

I observed Ford's demeanor while testifying and found him credible. He testified in a straightforward manner. *Hillen*, 35 M.S.P.R. 453,458. Though as noted there is evidence in the record indicating Ford may have harbored a bias towards the appellant that could influence his testimony, given their history of work-related conflict, I also find he had no direct knowledge of the allegations charged by the agency. That is, his knowledge of the factual allegations was limited to what others reported to him. Therefore, notwithstanding his potential bias, I found his testimony to be of minimal value.

Dr. Harvey testified as the agency's Deputy District Manager, Jackson District. HCD (Harvey). He testified that he was one of the District's subject matter experts on the processes and procedures regarding slaughter, ante- and post-mortem inspections, and animal welfare practices, among other matters. *Id.* He was very familiar with the specific processing regulations cited in the appellant's removal notice (9 C.F.R. § 309.3 and FSIS Directive 6100.1), and routinely discussed the requirements of those regulations with veterinarians during plant visits. *Id.* Specific to this case, Dr. Harvey testified that he discussed the regulatory requirements concerning non-ambulatory cattle with the appellant during his visits to Southeastern Provision. *Id.* He also noted that

Southeastern was the only cull plant in the District, and thus had higher instances of pathologies, disease, etc. *Id.*

Dr. Harvey provided a comprehensive historical overview of the development of the agency's rules with respect to non-ambulatory cattle, and in particular addressed the policy change in 2009 which removed any potential "gray area" from the inspection process. HCD (Harvey). He noted that the FSIS "final rule," referenced above, required all non-ambulatory disabled cattle be condemned, including those that had passed anti-mortem inspection. *Id.* He noted there was zero tolerance in this area, due to the potential dangers of exposing the public to unhealthy livestock, and that he repeatedly emphasized this point to agency personnel during plant visits. *Id.*

Dr. Harvey testified that he had no knowledge of the appellant's purported instructions to process non-ambulatory cattle. HCD (Harvey). He added, however, that had he been presented with "clear and convincing" evidence of such instructions, he would have reported those actions to the appellant's chain of command. I observed Dr. Harvey's demeanor while testifying and found him to be both credible and extremely knowledgeable. *Hillen*, 35 M.S.P.R. 453,458. He testified unequivocally, in a straightforward manner. There is no evidence in the record that he harbors any particular bias towards the appellant that would cause him to fabricate his testimony.

In his testimony regarding the charged conduct, the appellant denied ever instructing Hunt, or any other inspector, to pass a "downer" cow for slaughter. HCD (Novilla). He noted that, when he started at Southeastern in 2002, it was a permissible practice in limited circumstances to allow non-ambulatory disabled cattle to be processed for human consumption. *Id.* However, he recalled a blanket prohibition on passing downer cows was implemented in 2004, and that he trained both inspectors and other veterinarians (as a mentor) in accordance with the processing requirements outlined in Directive 6100.1. *Id.*

The appellant argued the allegations made by Hunt and Miller in their affidavits to investigators were false. HCD (Novilla). However, he suggested no reasons why either of these employees would fabricate such allegations. He testified he thought he had a good working relationship with Hunt, but after reviewing her affidavit and listening to her hearing testimony, he concluded she must be biased. *Id.* Regarding Miller, he testified there were "good days and bad days" with respect to their working relationship, but he did not elaborate on what he perceived to be "bad days," or what caused them. *Id.*

I observed the appellant's demeanor when he testified, and found him to be less credible than Hunt or Miller. *Hillen*, 35 M.S.P.R. 453,458. Several of the answers he provided were nonresponsive and evasive, and his demeanor appeared defensive when was pressed on cross-examination. Other portions of his testimony were simply not believable. For example, he testified that he first learned of his right to submit affidavits or other evidence in response to the proposed removal on the day before the hearing in this appeal, despite the fact that the right is clearly outlined in the section of the NOPR titled "RIGHTS," and he provided oral and written replies to the NOPR. HCD (Novilla); *see also* Tab 5 at 167-68. Conversely, Hunt and Miller presented similar allegations to agency investigators, but their accounts were not so similar as to suggest their statements were coordinated. Thus I found their allegations to be credible, in particular given the lack of perceived motivations to fabricate their accusations.

To prove neglect of duty, the agency must prove: (1) the employee engaged in conduct touching upon his duties as an employee; (2) the employee was on notice of the standard of care; (3) the employee engaged in conduct that violated the standard of care and duty; and (4) the conduct evidenced a lack of due care, at a minimum. *Thomas v. Department of Transportation*, 110 M.S.P.R. 176 (2008) *citing Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 26 (2001) (negligence established on showing of duty, the employee's knowledge, and breach of duty); *Green v. Department of the Navy*, 61 M.S.P.R. 626 (1994);

McIntire v. Federal Emergency Management Agency, 55 M.S.P.R. 578 (1992) (neglect of duty).

It is clear that the conduct alleged by the agency was related to the performance of the appellant's duties, and that he was aware of the standard of care required of him as it related to ensuring the health and welfare of consumers through proper inspection of meat products. That standard of care undisputedly included ensuring his subordinates complied with agency policies and regulations concerning ante- and post-mortem inspection processes and procedures.

Turning then to the last two prongs the agency must prove to sustain a charge of neglect of duty, I find preponderant evidence shows the appellant engaged in conduct that violated the standard of care and duty, and that such conduct evidenced a lack of due care, at a minimum. *Thomas*, 110 M.S.P.R. 176, ¶ 9. The appellant argues the agency failed to meet its burden because, in part, it failed to introduce evidence such as video recordings to corroborate the witness statements regarding the appellant's alleged instructions. The appellant's point is well-taken, and I agree the lack of corroborating evidence weakens the agency's case. However, I disagree with the appellant that the agency's lack of evidence of consumer harm resulting from the processing of non-ambulatory cattle at Southeastern Provision also undercuts its case. Multiple witnesses testified regarding the significant risks to public health which non-ambulatory cattle could pose, if consumed. Furthermore, a showing actual harm is not a required element of the agency's burden on a neglect of duty charge.

The evidence before me on the charge consists entirely of witness statements and testimony. Having considered the totality of record evidence, and having found both Hunt and Miller to be more credible than the appellant, I find it is more likely than not the appellant instructed inspectors to allow Southeastern Provision to process non-ambulatory cattle for human food consumption in violation of 9 C.F.R. § 309.1 and FSIS Directive 6100.1. Accordingly, I find the agency proved the charge of neglect of duty by preponderant evidence.

Based on the foregoing, the neglect of duty charge is SUSTAINED.

Affirmative Defenses.

As noted above, the appellant asserted the affirmative defenses of denial of due process, retaliation for prior EEO activity, and harmful procedural error. IAF, Tab 24. An agency's decision may not be sustained if the employee shows: (1) harmful procedural error in the application of the agency's procedures in arriving at such decision; (2) the decision was based on a prohibited personnel practice as described in 5 U.S.C. § 2302(b); or (3) the decision was not in accordance with applicable law. 5 U.S.C. § 7701(c)(2). *See Ray v. Department of the Army*, 97 M.S.P.R. 101, ¶ 12 (2004), *aff'd*, 176 Fed. Appx 110 (Fed. Cir. 2006). An appellant has the burden of proving these affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(b)(2)(i)(C).

Harmful Procedural Error/Due Process Violation – Evidence File

The appellant contends the agency committed harmful procedural error and/or denied his right to due process in relation to production of the evidence file. IAF, Tabs 20, 27-28. First, he avers the agency committed harmful error and/or denied him due process when it failed to provide him with the evidence it relied on in sustaining the charge and penalty of removal. IAF, Tabs 24, 27-28. Second, he asserts the agency violated his due process based on the deciding official's review and consideration of *ex parte* evidence. *Id.* In essence, he asserts that because the evidence file was not provided to him, but was provided to the deciding official, the evidence should be deemed *ex parte* and consideration of such violated his due process.

5 U.S.C. § 7513(b)(1) requires a proposal notice stating the specific reasons for the proposed action. OPM regulations at 5 C.F.R. § 752.404 (b)(1) require the employing agency to inform the employee of his right to review the material relied on to support the reasons stated for the action proposed. Although

an agency may supply an evidence file with the proposal, the statute only requires that the agency supply the material relied on at the employee's request. 5 U.S.C. § 7513(e).

The appellant claims he "did not receive ANY evidence until the agency submitted its response file in this appeal, on March 18, 2019." IAF, Tab 27 at 7. That is, he contends he did not receive any of the documents found in the agency evidence file (*see* IAF, Tab 6 at pages 5-85), which included several witness affidavits, on which the agency based its action. *Id.* He also takes issue with the agency's failure to produce (1) the entire investigative file from which it pulled the affidavits relied on, and (2) and copies of additional investigations it initiated that involved allegations against the appellant.[3] IAF, Tab 27 at 8.

The appellant testified he received a copy of the NOPR on Friday, October 5, 2018. HCD (Novilla). He stated he received a blue envelope from his then-supervisor, Dr. Charles Zickus, containing only the 5-page NOPR. *Id.* He agreed that he refused to sign the NOPR acknowledging his receipt, but also states he asked Dr. Zickus about the ROI referenced in the notice and did not receive a response. *Id.* He further avers that, at the time, he was unaware of the ICS investigation or of the existence of the affidavits relied on by the agency. *Id.* The appellant claims he did not receive a copy of the evidence file until March 2019, after he filed this appeal, and that he was not aware of two of the affidavits in the evidence file until the day before the hearing, in January 2020. *Id.*; *see also* Tab 28 at 5.

The evidence reflects the appellant was represented by an attorney, Charles Matlock, at the time he made his oral and written replies. IAF, Tab 4 at 28. At the hearing, the appellant testified that Mr. Matlock mentioned "eight times"

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[3] The appellant specifically refers: to OIEA CID Investigation #20170953, initiated around January 2017; a August 2017 "CID" investigation, Case #MSC-SIR-18- 001, and another investigation, "Internal control staff ROI, Office of the Administrator case # MSC-SIR-18-002." IAF, Tab 27 at 8.

during the oral reply conference that the agency had not provided any evidence to the appellant. HCD (Novilla). I find this claim to be dubious, for the following reasons.

Mr. Matlock represented the appellant during the first two and a half months this appeal was pending before the Board,[4] yet never identified a claim that the agency did not provide the appellant with a copy of the evidence file before it issued the decision to remove him. However, he did file notice that the appellant intended to assert the affirmative defense of EEO retaliation. IAF, Tabs 10 and 12. Both the appellant and Matlock participated in multiple status conferences, yet never mentioned the claim regarding the lack of evidence. It was not until May 28, 2019, when the appellant filed his prehearing submission, that he first raised the claim.[5] IAF, Tab 20. Thus, the appellant claims that this significant procedural issue was pointed out to the deciding official eight times during the oral reply conference, yet there is no reference to the claim found in the oral conference notes, the appellant's written reply, or his petition for appeal.[6] IAF, Tab 1; Tab 4 at 28; Tab 5 at 5-162.

The evidence shows that on October 2, 2018, Cantres sent an email to Dr. Larry Davis, Jackson (Mississippi) District Manager, Subject Daniel A. Novilla. IAF, Tab 29 at 15. Cantres also sent courtesy copies of the email to Gregory

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[4] Matlock was succeeded by another attorney-representative, Thomas Juanso, on May 5, 2019. IAF, Tab 15.

[5] Because a due process violation requires reversal of an agency action, a due process claim can be alleged at any stage during the processing of an appeal, to include at the hearing. Therefore, while I adjudicated the appellant's claim(s), the appellant's delay in raising the claim before the Board undermines the credibility of the claim.

[6] The petition only vague references the appellant's removal as "a result of harmful procedural error," while also referring to exculpatory affidavits the agency purportedly ignored. IAF, Tab 1 at 6.

Brookhouser, David Thompson, William Griffin, and Christina Walker. *Id.* The email read as follows:

> Good afternoon. Please be advised that a proposal has been issued for the above reference employee. If the employee has any questions regarding the notice, he should be directed to me. (Please note that the employee should be receiving two copies of the evidence file). Thank you.
>
> Please ensure **these** documents are placed in a sealed blue envelope addressed to the employee and hand delivered.

Id. The referenced documents consisted of attachments with the following titles: "NOVILLA NOPR Final.pdf," "NOVILLA Evidence File.pdf," "NOVILLA NOPR REP.PDF," and "NOVILLA Evidence File.pdf." *Id.* The email also included instructions to deliver two additional attached documents to the Supervisor/person delivering the notice, titled: "Cover.pdf" and "NOVILLA NOPR REC.PDF." *Id.* There was also a supervisory copy of a document, "NOVILLA NOPR SUPV.PDF," attached to the email. *Id.* at 16.

Dr. Davis forwarded the email from Cantres to Dr. Zickus, Frontline Supervisor (FLS) and the appellant's direct supervisor at that time. IAF, Tab 29 at 18-19, 21. Dr. Zickus indicated in a sworn declaration under penalty of perjury that he complied with Cantres's instructions and provided copies of the NOPR and evidence file to the appellant. *Id.* That is, he states he printed copies of the NOPR and evidence file, inserted those documents into a blue envelope, and provided the envelope and its contents to the appellant during a meeting "at M995 JBS Swift, a federally-regulated establishment located in Louisville, KY." *Id.* at 19. This establishment was the appellant's duty station at the time. *Id.* Dr. Zickus further recalled the appellant: opened the envelope and perused the contents; expressed general disagreement with certain statements he read; and refused to sign the NOPR after consulting with his attorney. *Id.*

The NOPR indicated that "[t]he evidence and material upon which this proposal is based are enclosed." IAF, Tab 5 at 167. The record reflects Dr. Zickus delivered the NOPR to the appellant on October 5, 2018. IAF, Tab 5 at

168; HCD (Zickus and Novilla). The NOPR also includes the initials "CZ" next to an annotation indicating the appellant's refusal to sign the document acknowledging his receipt. IAF, Tab 5 at 168.

Dr. Zickus also testified at hearing regarding the issuance of the NOPR and evidence file. HCD (Zickus). He related he had been the direct supervisor of the appellant for a little over a year at the time he issued the NOPR. *Id.* His description of the delivery of the NOPR and evidence was consistent with his sworn statement. *Id.* It was also identical, he testified, to the process he had used numerous times previously (around 3-4 times per year, over 10 years) in other disciplinary actions. *Id.* He recalled providing the appellant with everything required in the email. He did not discuss the specifics of the NOPR with the appellant, because he had not reviewed the NOPR or evidence prior to the meeting with the appellant and had not involvement with the alleged misconduct. *Id.* On cross examination, Dr. Zickus recalled providing the appellant with a packet containing, approximately, 100 pages. HCD (Zickus). He estimated the maximum capacity of the blue envelope he used was about 200 pages.

I observed Dr. Zickus's demeanor while testifying, and found it to be clear, concise, and forthright. *Hillen*, 356 M.S.P.R. 453, 458. He testified unequivocally, in a straightforward manner. Therefore, I found his testimony regarding this issue to be credible. I also found no evidence in the record indicating he harbored any particular bias towards the appellant that would cause him to fabricate his testimony.

Cantres testified she has been an LER Specialist since the early 1990s, and that her primary area of responsibility is in and around Philadelphia, Pennsylvania. HCD (Cantres). At the time relevant to this appeal, she covered the Jackson District due to agency turnover. *Id.* She testified that, for the appellant's NOPR, she may have reviewed a more extensive investigative file to pull out the documents she deemed pertinent to the charge of neglect. *Id.*

However, she testified she did not purposefully withhold or conceal documents that may have weakened the agency's case, or strengthened the appellant's response. *Id.* She added that relevance is her only guides when assembling an evidence file.

Cantres testified that she frequently functions as a proposing official in disciplinary actions, and occasionally acts as a deciding official. She estimated "about 99.9% of the time" she does not know the employee for whom she is proposing or deciding a disciplinary action. *Id.* That was the case with the appellant. *Id.*

Cantres testified that, in her role as an LER Specialist, she assembled the evidence file for the appellant's proposed removal, which consisted mostly of witness affidavits from the ICS investigation. HCD (Cantres). She indicated in a sworn declaration that the copy of the NOPR, and the evidence file located in the agency response to this appeal, are the same documents she emailed to Dr. Davis on October 2, 2018. IAF, Tab 29 at 12. She further stated in her sworn declaration at ¶ 6:

> I sent the proposed removal and evidence file to Dr. Larry Davis, Jackson Mississippi District Manager, for delivery to Dr. Daniel Novilla. In my email, I included instructions on delivering copies of the proposed removal and evidence file to Dr. Novilla. Those instructions were to insert the copies of the proposed removal and evidence file in a blue envelope and hand deliver the envelope to Dr. Novilla. The instructions also required that Dr. Novilla be provided with and asked to sign the copy of the proposed removal labeled "receipt copy".

Id. at 12-13.

Grimmett testified that she conducted a telephonic oral reply conference with the appellant and his attorney (Charles Matlock) on November 28, 2018. HCD (Grimmett); IAF, Tab 29 at 25. Grimmett's assistant, Suzette Rhodes, "observed" the telephonic conference and took notes. HCD (Grimmett). A copy of the oral conference notes were provided to the appellant, and are found in the record. IAF, Tab 4 at 28; Tab 29 at 28. Grimmett acknowledged the notes did

not capture every statement made during the conference, which she believed lasted a little over an hour, but she believed the notes accurately summarized the topics discussed. HCD (Grimmett). She testified she did not recall the appellant, or his representative, mentioning to her at any time during the conference that he did not receive the evidence file supporting the proposed removal. She added that, based on her considerable experience in labor and employee relations and as a deciding official, had such a claim been raised to her then she would have stopped the conference, ensured he promptly received a copy of the evidence file, and allowed him additional time to respond. *Id.*

Even if I were to accept as true the appellant's claim that the agency failed to provide him with a copy of the evidence at the time he received the NOPR, he has offered no evidence showing the efforts he (or his representative) made to obtain the evidence file after he received the NOPR. He did not present testimony or a sworn statement from Matlock describing such efforts, and in his hearing testimony he simply offered that he thinks Matlock emailed Cantres about the evidence. HCD (Novilla). The only shred of evidence the appellant offered, other than this speculative testimony, was a portion of an email Matlock forwarded to the appellant, in November 2019, which purportedly contained an excerpt of Matlock's outline notes from the oral conference hearing. IAF, Tab 27 at 31-32. However, the appellant did not produce the outline itself, which Matlock had emailed to him on November 28, 2018. *Id.* For the foregoing reasons, I find the appellant failed to prove that the agency failed to provide him with the evidence file, or that its failure to provide him with the evidence or notify him that he could review these materials upon request, constituted a reversible due process violation under the circumstances of this case.

To the extent the appellant submits the agency' actions constituted harmful error for failure to comply with 5 C.F.R. § 752.404(b), an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in

the absence or cure of the error. *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 47 (2007); *Gilmore* v. U.S. Postal Service, 103 M.S.P.R. 290, ¶ 6 (2006). Here, as in *Gilmore*, the appellant was clearly aware of the existence of relevant documents supporting the agency's action, as the NOPR referenced the investigation generally, and Hunt's affidavit in particular. IAF, Tab 5 at 164-65. The NOPR also referenced the appellant's own statement. *Id.* In reviewing the appellant's brief (IAF, Tabs 27-28) and the record evidence, I find the appellant has failed to show that the likely outcome in this case would have been different in the absence of the agency's alleged procedural error. Thus, I find that the appellant has failed to prove that the agency committed a harmful procedural error.

To the extent the appellant contends the agency committed harmful error or violated his due process rights when it failed to provide him with a copy of the entire ICS investigation, or copies of other investigations he identified, I find such an argument even less availing. The appellant was not entitled to materials not relied on by the agency. Furthermore, it is undisputed the appellant had the right to request production of these documents during the discovery process before the Board. Accordingly, I find he failed to show the agency committed harmful error or denied him due process relative to production of the other investigations he identified.

I similarly find the appellant failed to meet his burden of showing a due process violation based on the deciding official's consideration of *ex parte* evidence. Procedural due process requires that certain substantive rights, including the property interest established by certain kinds of federal employment, cannot be deprived unless constitutionally adequate procedures are followed. *Young v. Department of Housing & Urban Development*, 706 F.3d 1372, 1377 (Fed. Cir. 2013) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) and *Stone v. Fed. Deposit Ins. Corp.*, 179 F.3d 1368, 1375 (Fed. Cir. 1999)). As relevant here, the essential requirements of due

process demand that the appellant receive notice and an opportunity to respond. Accordingly, the appellant is entitled to notice of the charges against him, an explanation of the agency's evidence, and an opportunity to present his side of the story before termination.

When an agency obtains new and material information through *ex parte* communications, an appellant's constitutional due process guarantee of notice and the opportunity to respond are undermined. *Young*, 706 F.3d 1372, 1377 (citing *Stone*, 179 F.3d 1368, 1376). Where an employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information, procedural due process guarantees are not met because the employee is no longer on notice of the reasons for dismissal and/or the evidence relied upon by the agency. *Id.*; *see also Ward v. U.S. Postal Service*, 634 F.3d 1274, 1278 (Fed. Cir. 2011).

Significantly, however, not every *ex parte* communication is a procedural defect that is so substantial and so prejudicial as to undermine the due process guarantee and require an entirely new administrative proceeding. *Young*, 706 F.3d 1372, 1377. For instance, the court has held that "[w]hen a deciding official initiates ex parte communication that only confirms or clarifies information already contained in the record, there is no due process violation." *Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001); *see also Grimes v. Department of Justice*, 122 M.S.P.R. 36, ¶ 11 (2014); *Lange v. Department of Justice*, 119 M.S.P.R. 625, ¶ 8 (2013); *Seeler v. Department of Interior*, 118 M.S.P.R. 192, ¶ 8 (2012); *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 8 (2012). Rather, "only ex parte communications that introduce new and material information" to the deciding official violate the due process guarantee of notice. *Young*, 706 F.3d 1372, 1377 (*quoting Stone*, 179 F.3d 1368, 1377).

In *Stone*, the Federal Circuit identified several useful factors to consider when determining if new and material information has been introduced by means of ex parte contacts: (1) whether the ex parte communication introduces

"cumulative" information or new information; (2) whether the employee knew of the communication and had a chance to respond; and (3) whether the ex parte communication resulted in undue pressure upon the deciding official to rule in a particular manner. *Stone*, 179 F.3d 1372, 1377. Where "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," a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure. *Id.* Such a violation is not subject to the harmless error test. *Id.*, (citing *Sullivan v. Department of the Navy*, 720 F.2d 1266, 1274 (Fed. Cir. 1983)). In addition, the *Stone* analysis applies whether the ex parte communication relates to the charge itself or the penalty. *See Ward*, 634 F.3d 1274, 1279-80.

Having found above that the appellant failed to show either that the agency failed to provide him with the evidence file, or that he made reasonable efforts to obtain the evidence and was denied, I cannot conclude that the evidence file itself was *ex parte*. The documents in the evidence file were not new; they were derived from the ICS investigation which concluded months before the action was ever proposed. Furthermore, Grimmett credibly testified that she only reviewed the NOPR, the evidence file, the oral conference notes, and the appellant's written reply submission in reaching her decision.[7] HCD Grimmett. She testified she did not discuss the allegations or the evidence with any of the witnesses or the investigators. *Id.*

Grimmett acknowledged on cross-examination that, as the LERD Branch Chief, she had access to the entire ICS ROI and she "perused" the entire file when she first received it, in order to assign it to an LER Specialist (Cantres). *Id.* However, she clarified that in her consideration of the proposed removal, she only reviewed the documents listed above because she was cognizant she would

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[7] *Hillen*, 35 M.S.P.R. 453, 458.

likely act as the deciding official in any subsequent formal disciplinary action, and thus needed to remain "objective." *Id.* I further note that a fairly significant amount of time passed between the issuance of the NOPR in October 2018, and her decision in February 2019. The Court has stated that "a deciding official's knowledge of an employee's background only raises due process or procedural concerns where that knowledge is used as a basis for the deciding official's determination on either the merits of the underlying charge or the penalty to be imposed." *Norris v. Securities & Exchange Commission*, 675 F.3d 1349, 1354 (Fed. Cir. 2012).

For the foregoing reasons, under the circumstances presented here I find no due process violation based on Grimmett's consideration of ex *parte* information.

Harmful Procedural Error

The appellant also alleged the agency committed harmful procedural error and or a violation of his constitutional due process rights:

> when [it] violated [the appellant's] rights to invoke the fifth amendment, in response to questioning by agency personnel pursuant to pending administrative and/or criminal investigations performed by the agency, and when the agency violated Department Personnel Manual (DPM) Chapter 751, Appendix A, USDA Guide for Disciplinary Penalties22, which requires the agency to refer certain accusations to the appropriate authority (including the false and malicious bribery allegation made against Appellant).

IAF, Tab 27 at 20-22; Tab 28 at 12. The appellant argued that "the criminal or potentially criminal investigation by the Agency of matters outside of it authority, and in a manner not consistent with the Constitution, and in violation of Garrity, Kalkines, and Miranda," various cited agency policies and directives, and his Weingarten rights, required reversal of his removal. IAF, Tab 28 at 15. It appears he alleged that agency investigators (Kenneth Cash, Lisa Roth, Manuel Madrid, and Katherine Bercaw-Hartl) forced him to provide written statements during the course of multiple investigations, some of which do not even appear to

be related to the charge within the scope of this this appeal, without providing him with the requisite warnings.

In *Miranda v. Arizona*, 384 U.S. 436, 470 (1966), the Court held that there was a right to counsel attendant to the self-incrimination clause. The privilege against compulsory self-incrimination may be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory where the individual reasonably believes that his statements may be used against him in a criminal proceeding. Miranda warnings[8] are necessary only in custodial interrogations. *Tannehill v. Department of the Air Force*, 58 M.S.P.R. 219, 222 (1993). The element of custody involves the deprivation of an individual's liberty of freedom of action, in any significant way, during questioning by law enforcement officers. *Wilkes v. Veterans Administration*, 6 M.S.P.R. 732 (1981), citing *Rhode Island v. Innis*, 446 U.S. 291 (1980). The determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 322-23 (1994). The appellant presented no evidence suggesting he was subjected to a custodial interrogation. Therefore, I find *Miranda* warnings inapplicable to the circumstances surrounding the ICS interview.

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[8] The Fifth Amendment requires law-enforcement officials conducting a custodial interrogation to advise the subject of his constitutional right not to incriminate himself. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Statements made during such an interrogation without *Miranda* warnings may not be used in a Board proceeding. *Cooper v. U.S. Postal Service*, 42 M.S.P.R. 174, 178 (1989) (an employee's pre-removal statement, given during custodial detention to agency investigators, may be used against the employee in Board proceedings only if the employee waived his or her Fifth Amendment rights), *aff'd*, 904 F.2d 46 (Fed.Cir.1990) (Table) with *Connett v. Department of the Navy*, 31 M.S.P.R. 322, 327 (1986) (if an employee gives a statement to agency officials in a non-custodial setting, the agency may use the statement against the employee in Board proceedings regardless of whether it gave the employee a *Miranda* warning), *aff'd*, 824 F.2d 978 (Fed.Cir.1987) (Table).

To the extent the appellant alleges his August 22, 2017, statement to agency investigators, included in the agency file, may not be used because he did not receive the warnings required by *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973), and *National Labor Relations Board v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959 (1975), I find such arguments unavailing. In *Kalkines,* the court held that an employee cannot be disciplined for remaining silent unless he is informed that his responses and their fruits cannot be used against him in a criminal matter. *Kalkines*, however, is inapplicable under the facts of this case. The decision letter does not indicate that the appellant was disciplined in whole or in part for remaining silent, nor does it indicate his failure to cooperate with the investigation was an aggravating factor for penalty selection. The record shows Investigator Madrid told the appellant ICS does not issue *Kalkines* warnings. IAF, Tab 5 at 58. He further stated that, should the appellant disclose information with potential criminal implications: (1) he would not be required to sign a statement and/or supply other evidence; (2) the administrative investigation would cease immediately; and (3) the case would be handed over to the Office of Inspector General for consideration. *Id.* Regarding the appellant's compulsory cooperation with the administrative investigation, Madrid cited the following:

> Departmental Regulation Chapter 751 – Discipline, Subchapter 3 – Agency Investigations of Employee Misconduct, 3-10. RIGHTS AND OBLIGATIONS OF EMPLOYEES, a. Cooperation with Investigation. Employees are obligated to provide information to authorized representatives of the Department if an investigation relates to an official matter and the information is obtained in the course of employment or as a result of relationships incidental to USDA employment. This includes the furnishing of a signed sworn or affirmed statement. Failure to cooperate with an investigation may constitute the basis for disciplinary action. This obligation does not infringe on an employee's right to invoke the protection of the Fifth Amendment to the Constitution with regard to self-incrimination. (7 C.F.R. 0.735-23(c)). This right applies only to investigation of criminal acts - not to violation of administrative rules or regulations.

Id. at 58-59. Based on the facts presented, I find the appellant failed to establish the agency committed harmful error by failing to provide him with a *Kalkines* warning.

In *Weingarten*, the court held that, upon request, an employee is entitled to union representation at an investigatory interview if the employee reasonably believes the interview might result in disciplinary action. There is no evidence to suggest the appellant, a supervisor, was a bargaining unit employee. Furthermore, his termination Standard Form (SF)-50 reflects a "bargaining unit status" of "8888," indicating that the appellant was ineligible for inclusion in a bargaining unit. Thus, the appellant was not entitled to union representation and the agency did not err by failing to provide him a *Weingarten* warning.

Even assuming the appellant could demonstrate the agency committed error in obtaining his statement, I find he failed to prove that any such error would have likely changed the outcome in this case. There is no evidence to show that the removal was sustained based on information the appellant provided in his August 2017 statement. IAF, Tab 6 at 51-54. In fact, Grimmett identified Hunt's affidavit and the other witness affidavits as the primary documents she found proved the charge. HCD (Grimmett). Accordingly, I find the appellant failed to show by preponderant evidence that the agency committed harmful procedural error concerning his interview statement that was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

Retaliation for prior EEO Activity

To establish a prima facie case of retaliation for engaging in protected activity, the appellant must show that: (a) he engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the retaliation and the adverse employment action. To establish a genuine nexus between the protected activity and the

adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. If the appellant meets this burden, the agency must show that it would have taken the action even absent the protected activity.

The Board reviews allegations of Title VII discrimination and retaliation for engaging in EEO activity using the analytical framework established by the U.S. Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), to determine whether reversal of an action is warranted under 5 U.S.C. § 7701(c)(2)(B). *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015). First, the Board will inquire whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. *Savage,* ¶ 49. Such a showing is sufficient to establish that the agency violated 42 U.S.C. § 2000e–16 (Title VII), thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). However, the *Mt. Healthy* test assures that an employee who belongs to a protected group is not thereby granted immunity from the ordinary consequences of misconduct or poor performance. *Savage*, ¶ 50 (citing *Mt. Healthy*, 429 U.S. 274, 285-86).

The evidence shows the appellant filed a formal complaint of discrimination on July 14, 2016, which alleged the agency subjected him to harassment based on his race, national origin, color, and reprisal. IAF, Tab 5 at 6-14. He asserts that the agency's initiation of an investigation in January 2017, which ultimately to the October 2018 proposal to remove him, is indicative of retaliation for his EEO activity. IAF, Tab 17 at 8-13; Tab 20 at 26. He further argues that other employees who "were similarly situated to him in all relevant respects" were not disciplined based on the same or similar allegations. IAF, Tab 17 at 12-13; Tab 20 at 27. However, at no point has the appellant provided evidence of comparator employees.

I find the appellant failed to show that the proposing official or deciding official were named in the appellant's prior EEO activity, or that either official had any involvement with the complaint or the underlying allegations. Neither Cantres nor Grimmett were ever in the appellant's chain of supervision. HCD (Cantres, Grimmett). Both testified they were aware of his EEO complaint because he referenced it in his statement to the investigators. *Id.*; IAF, Tab 6 at 52. The appellant included documents related to his EEO complaint as part of his written reply to the NOPR, and he also discussed it during his oral reply conference. IAF, Tab 4 at 28; Tab 5 at 5-162. However, Cantres and Grimmett testified, credibly, that his complaint had no bearing on the decisions to propose his removal or sustain the proposal. HCD (Cantres, Grimmett). Additionally, the appellant offered no evidence suggesting either official was influenced by individuals identified in the appellant's EEO complaint in making their decisions to propose or sustain the removal.

Considering the above, I find the appellant failed to establish that retaliation for his prior EEO activity was a motivating factor in his removal. Accordingly, I find he failed to meet his preponderant evidence burden on his affirmative defense of retaliation.

The agency showed the removal action promotes the efficiency of the service and is reasonable.

The agency bears the burden of proving nexus, *i.e.*, a clear and direct relationship between the articulated grounds for the adverse action and either the appellant's ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 10 (2010). An agency may establish nexus by showing that the employee's conduct (1) affected his or his coworker's performance; (2) affected management's trust and confidence in the employee's job performance; or (3) interfered with or adversely affected the agency's mission. *Id.*, ¶ 11.

Here, there is an unequivocal relationship between the appellant's conduct and the efficiency of the service. His misconduct occurred at work, and his neglect of duty resulted in both the agency's loss of trust and confidence in his ability to perform his duties as a SPHV, and an adverse impact on the agency's ability to accomplish its mission. *See Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 8 (2010) (nexus may be shown when there is a clear and direct relationship between the grounds for the adverse action and the ability of the appellant to perform her job duties satisfactorily). The agency, therefore, has established the adverse action was properly taken for cause and promotes the efficiency of the service. *See Brown v. Department of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000).

Where, as here, all of the agency's charges are sustained, the Board will review an agency imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Campbell v. Department of the Army*, 123 M.S.P.R. 674, ¶ 25 (2016) (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 06 (1981)). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Id.* It is not the Board's role to decide what penalty it would impose, but, rather, to determine whether the penalty selected by the agency exceeds the maximum reasonable penalty. *Lewis v. General Services Administration*, 82 M.S.P.R. 259, ¶ 5 (1999). Thus, the Board will modify a penalty only when the Board finds that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272, ¶ 20 (2001).

In *Douglas*, the Board articulated several factors an agency should consider in selecting a penalty under chapter 75. *See Davis v. U.S. Postal Service*, 120

M.S.P.R. 457, ¶ 7 (2013). Among the factors to be considered are the nature and seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the employee's ability to perform his assigned duties, the consistency of the penalty with the agency's table of penalties, if any, and the consistency of the penalty imposed on other employees for same or similar misconduct. *Id.* The seriousness of the appellant's misconduct is always one of the most important factors in assessing the reasonableness of an agency's penalty determination. *Id.*

The seriousness of the appellant's actions cannot be minimized. As an SPHV for the FSIS, the appellant held a critical role in the agency's mission of ensuring food safety and public health. HCD (Grimmett); IAF, Tab 4 at 24. It is undisputed that allowing non-ambulatory disabled cattle to be slaughtered and processed for human food consumption, in violation of agency directives, placed the public health at risk. *Id.* Moreover, as a supervisor, the appellant was charged with an even greater level of responsibility to ensure those whom he supervised also performed their duties in accordance with proper inspection processes and procedures. The appellant was clearly on notice of the directives and regulations concerning non-ambulatory cattle, based on his extensive training and 20 plus years of service with the agency. *Id.*

Grimmett testified she considered as mitigating factors the appellant's length of service, lack of prior disciplinary record, and performance ratings. HCD (Grimmett). She also considered his allegations that he had experienced harassment and discrimination at the agency since 2010. HCD (Grimmett). Finally, Grimmett determined that the appellant's potential for rehabilitation was minimal, and that alternative sanctions would not deter future misconduct given the seriousness of the misconduct and the appellant's denial of any culpability. *Id.*

I find the agency's penalty is within the bounds of reasonableness and promotes the efficiency of the service, and thus is entitled to deference.

Grimmett considered and weighed the applicable *Douglas* factors in relation to the sustained charge. *See Davis*, 120 M.S.P.R. 457, ¶ 6. Accordingly, based on the foregoing, the agency's penalty determination is AFFIRMED.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Daniel Yehl
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 30, 2020**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in

which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of

authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court

within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section

2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

Peter R Marksteiner

US Court of Appeals Federal Circuit

Clerk of the Court

My petition for review should not be dismissed because of my review below of the MSPB decision, showing the agency/MPSB's flagrant disregard of my due process rights. Below is my review of the judge's decision and one can see that I was denied a fair hearing. I never had a chance. The judge sided with the agency and its witnesses, disregarding the fact I was already gone from Southeastern on 6/10/2017.

MSPB initial decision-review Applicable law and burdens of proof

Page 3 The agency had the burden of proving its misconduct charge by a preponderance of the evidence. The only "evidence" the agency had in evidence file are the witness statements, nothing else.

The evidence file consisted of-

Directive 6100.1 and 6100.2, Directive 4430.1, the witness statements, including my forced statement taken in 8/17/2017 by CID investigators' Kenneth Cash and Lisa Roth, a form document citing a CID investigation by Larry Hortert, and my performance appraisal. The ICS ROI Report of Investigation MSC-SIR-18-002 cited in Notice of Removal was not in evidence file.

Footnote- Judge does not accept affirmative defense of collateral estoppel relating to my state unemployment compensation case. In KY unemployment decision it states-

In September 2017, the employer received a report by an unknown person that claimant had directed staff to process downer cows. On 10/11/2017 a food inspector name unknown(Tammy Hunt), provided a statement claimant directed staff to allow downers. On 11/17/2017, an investigation began into the allegation. Even though judge did not accept collateral estoppel, the unknown report on 9/2017 is directly related to my case. Luz Cantrez, who appeared for the agency, at the telephonic conference, provided the witness statements, but not the unknown report.

I did not get this unknown report(A due process violation).

Notice date of unknown report, 9/2017. Also date of Hunt statement, 10/11/2017. I left for Louisville, KY on 6/10/2017, 3 months before the unknown report, 4 months before the Hunt statement and 5 months before the investigation.

Footnote- preponderance of evidence is that degree of relevant evidence that a reasonable person considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

The allegation that I instructed inspectors to pass downer cows is not a fact.

APPENDIX C

Allegation- a claim or assertion that someone has done something illegal or wrong, typically one made without proof.

Page 4 When an employee challenges an adverse action agency must establish three things-

The agency must prove by preponderance of evidence that the charged conduct occurred.

Agency must establish a nexus between conduct and efficiency of the service.

Agency must demonstrate the penalty imposed is reasonable.

First, the agency cannot prove the charged conduct occurred. They have no corroborating evidence. Just the witness statements and testimony. If this is allowed, anyone can say anything that a person did something illegal and the accused person will be removed based on what the other person said.

Two, there is no nexus because the charged conduct and efficiency of service. It did not happen.

Three, removing an employee with 22 years' experience with no corroborating evidence is not reasonable. It is unlawful and illegal.

Page 4

To resolve issues of credibility, judge says he was guided by

Borninkhof v DOJ, 5MSPR 77, 83-87, Hillen v Dept. Army, 35 MSPR 453, 458.

When resolving issues of credibility, a judge must-

identify factual questions in dispute, summarize evidence on each disputed question, state which version he believes, and explain in detail he found chosen version more credible

considering such factors as-

1 the witness opportunity and capacity to observe in question

2 the witness character

3 any prior inconsistent statement by the witness

4 a witness bias or lack of bias

5 contradiction of witness version of events by other evidence

6 the inherent improbability of the witness version of events

7 the witness demeanor

Firstly, the factual question in dispute are not facts, but allegations. They did not prove I instructed inspectors to pass downers. There is no corroborating evidence.

The AJ did not explain in detail why he found Hunt/Miller more credible. He just said they are credible, they have no bias, so it is more likely than not, Novilla instructed them to pass downers. That was the judge's reasoning.

Hunt said she addressed my instructions to Lapp and Ford/Union, but they told her to continue following instructions. She said she knew it was wrong, but since I was her supervisor, she continued to follow the alleged instructions. For 4 years, from 2014 to 6/2017, when I left for Louisville, KY.

The above statement is an inconsistent statement, a contradiction, and an inherent improbability.

Judge chose to ignore this. Hunt was at Southeastern since 2014, Miller from 2015, yet appellant did not get NOPR till 10/5/2018, 16 months after he left Southeastern. Agency conducted CID investigation between 8-11/2017, but the appellant left Louisville, KY in 6/10/2017. Why wasn't appellant investigated in 2014/2015/2016 or before he left in 6/10/2017?

page 6

During the course of an agency investigation conducted between August-Nov 2017, multiple food safety inspectors supervised by appellant provided statements to investigators alleging they were instructed by the appellant, on unspecified occasions, to allow non-ambulatory cattle known as downers, at Southeastern to be processed for human food consumption. Specifically, investigators interviewed Tammy Hunt, James Miller, Sophia Blockett, Randy Goetz, Michael Phillips, and the appellant. Hunt said she knew directives violated agency regulations, but she complied and trained others there were exceptions according to Dr Novilla.

Why did judge think this was credible? He didn't ask Hunt you knew directives violated regulations, but you continued to follow instructions for 4 years?!? Is this lawful? Judge believed this contradiction.

It is an inherent improbability that she continued to follow instructions and passed downer cows for 4 years.

Notice judge says "inspectors provided statements to investigators alleging they were instructed by appellant...." Judge says allegations. Not a fact.

Page 8

Hunt said she believed this directive contradicted her understanding of agency regulations, and she frequently challenged appellant when he gave her such a directive. However she testified appellant was her supervisor so she followed. Judge believed this contradiction and found her credible.

Hunt testified she contacted her second level supervisor, Letha Lapp and the Union(David Ford) regarding the appellant's instructions to allow downers to be processed. She also provided a letter to the union detailing her concerns. However, she was told to continue following the appellant's directives. She estimated approximately 3-4 downer cows per week were passed between 2014-2017.

The judge found this credible. This is an inconsistent statement, a contradiction, and an inherent improbability. The judge didn't even ask Hunt you continued to pass downers per week for almost 4 years because your 2nd level supervisor Lapp and Union/Ford told you? Why didn't you contact the District office/Dr. Harvey knowing that the alleged instructions were against regulations? Judge didn't ask these questions to Hunt. He just found her statement credible.

I was in Southeastern Provision from 8/2002 to 6/2017. The plant was the biggest cull cow plant in Jackson District Office and its highest processing capacity was 300 cows per day. Since it was also a cull cow kill(40%), there was a lot of pathology, so I trained many veterinarians and inspectors there. I

started my career with USDA in Jackson, MS in 1997 and I was a relief veterinarian and covered all of the plants in Southern MS when in-plant SPHVs were on leave. I was promoted to a poultry plant in Morristown, TN in fall of 1998 and stayed till 8/2002. In 8/2002, I was promoted to a red meat patrol in Knoxville, TN, which consisted of 5 slaughter plants and 3 processing plants. This included Southeastern. In 2002 downer cows were allowed. The requirement then was performing an antibiotic residue test called a STOP test. In 2004, a cow positive for BSE from Canada was processed in Washington state. And the USDA under Secretary Ann Veneman prohibited all downers, a complete blanket ban on all downer cows entering all slaughter facilities. This included cows who were up and ambulatory during ante-mortem inspecton, but subsequently went down. They were all condemned.

Now the judge knows how many years I have been at Southeastern. But he did not ask me why would I follow the directives from 2004 to 2017, and then all of a sudden instruct inspectors to start passing downers. Hunt said I instructed her in 2014 to pass downers. Why would I follow the directives for so long then suddenly instruct inspectors to pass downers? He completely disregards this. An inherent improbability. The agency does not even give a reason why I instructed inspectors to pass downers in 2014 in the Notice of proposed Removal. They just said the ROI produced evidence I did.

I did not get this letter from Hunt to Union (A due process violation). Instead, judge writes "This practice posed a significant risk to public health because non-ambulatory cattle often carry CNS diseases such as mad cow disease.

After appellant left Southeastern, Hunt recalled passing zero non-ambulatory cows for processing. (An inconsistent statement/contradiction/inherent improbability)

Hunt testified she was interviewed twice by investigators, but I only received one statement on 3/18/2019. I did not get the second statement(A due process violation). Judge does not include this in decision, but I have the hearing transcript.

Judge found that many downer cows per week were passed for years, and Lapp, the Knoxville circuit supervisor and the Union/Ford told Hunt to continue following instructions(an inherent improbability; but judge found this credible).

Page 9

Miller recalled a couple instances when he observed cows ambulating before falling down. If the cow could not get back up he texted appellant to request guidance. The appellant asked Miller whether he had seen the cow up and moving, and if so, the appellant told him the cow was suitable for human food processing. Miller complied even though he believed the instruction to be inconsistent with regulations.

Miller testified that he elected not to report the appellant instructions to anyone. How convenient. Hunt supposedly reports me to Lapp and Ford/Union in 2014, but Miller does not. Miller said he could not instruct establishment to process a downer cow without his supervisor signing off on the decision. Thus he left such dispositions to the SPHV, which would be done after Miller departed the inspection area. Thus Miller never directly observed appellant passing a downer cow. Miller is lying here. I never signed off on passing a downer cow. He conveniently does not mention my criteria for cows that go down.

If a cow is presented down and cannot get back up during ante-mortem inspection it is condemned. This includes cows that pass ante-mortem inspection, but subsequently goes down, they are condemned.

This is the guidance written in USDA FSIS Directive 6100.1. I have been following this instruction in the Directive from 2004 to 6/2017, when I left for JBS, Louisville, KY, a swine slaughter/processing plant.

Page 10

Blockett testified she was at Southeastern from 2016-2017. She was still there when I left in 6/2017.

Miller left for FL in 12/2016. He was there about 2 years. Hunt was there in 2014 and she was still there when I left in 6/2017. In fact the day I left, the plant managers and inspectors, including Hunt and Blockett threw me a going away party, complete with cake and ice cream, and everyone signed a card. I even have pictures of the party, taken by me and others.

She testified she only observed the appellant pass one downer for processing. She didn't recall the appellant directly instruct her, she only received instructions regarding the exception from Hunt and/or Tatro. She provided two statements to investigators, on 8/16/2017 and 8/22/2017. The second statement contained the statement where she observed the appellant pass a downer.

Judge found blockett's demeanor while testifying and found her credible. He found no bias that would cause her to fabricate testimony. Judge found Miller's demeanor credible. He found no evidence in record which indicates he harbors had any bias that would cause him to fabricate his allegations (judge says allegations again). Judge found Hunt's demeanor credible. He found no evidence she harbors any bias that would cause her to fabricate her allegations (again judge says allegations).

If that is true, all three had no bias that would cause them to fabricate the allegations, what about about Randy Goetz and Michael Phillips? They were at Southeastern from 2014 on till I left 6/11/2017. Why didn't they same thing as the other three. Makes you wonder why the three inspectors alleged I instructed them to pass downer cows, but not the other two. And to top it off, Hunt was not investigated and did not give her affidavit till 10/11/2017and Miller not till 11/12/2017. Blockett gave hers in 8/16/2017, Over 2 months after I left on 6/10/2017.

Page 11

Ford testified he received reports from Hunt and others indicating the appellant had instructed them to allow downer cows to be processed if they already passed ante-mortem inspection. He testified he found no reason to question the validity of the allegations(again judge says it) his co-workers presented to him regarding the appellant's instructions.

So judge does not ask him- Hunt gave you/the Union a letter(on page 8) detailing her concerns regarding appellant's instructions, but you, as a Union official, told her to continue following appellant's directives. Judge does not ask Ford why did you tell Hunt to follow the appellant directives, knowing it is a significant public health risk passing downer cows for human food?

(This is an inconsistent statement/contradiction/inherent improbability)- and judge chose to ignore it.

Page 12

judge writes Ford filed multiple grievances against appellant. The union, including Ford accused the appellant of accepting bribes including a Fiat. In response, the appellant filed a harassment

complaint against Ford, despite the fact he was a higher grade employee.

I don't see why that would matter. I filed a harassment claim with Office of Civil Rights against Ford and Lapp on 7/10/2016. On 1/2017, there was a covert CID investigation at Southeastern where the Union alleges I was passing downer cows. The Union brought it up during the quarterly LMR Labor Management meeting. But the deputy District Manager at the time, Dr. David Thompson answers the Union there is no evidence Dr. Novilla is passing downer cows.

As for the Fiat allegation, Dr. Thompson answered the Union if you have credible reports the Fiat came from the plant, we will report it to the Office of Ethics. The Union did not have any evidence the Fiat came from the establishment. I told the USDA lawyer Clif Lockett during my deposition I fully bought the auto on my own. I have a copy of the buy order from Carmax. During my deposition, towards the end, Lockett asked me if I was aware that James Brantley, owner of Southeastern and other managers, sold beef from downer cows to White Castle Corporation. My lawyer and I were taken aback by the question, so I asked him to repeat the question. He repeated it, and I answered no. After the deposition I was thinking why did Lockett ask me that question. Could it be if I knew, then they would have to give me the ROI, and if not they wouldn't have to? All I know is something happened at Southeastern. How? Investigators showed up at the plant in 8/11/2017, 2 months after I left. I have a copy of my deposition.

Ford testified during the hearing that he was deposed by the investigators, but I did not get a copy of this document(a due process violation). Judge does not include this in decision, but I have the hearing transcript. Judge finds Ford's demeanor credible. He writes he had no direct knowledge of the allegations charged by the agency, that is his knowledge of the factual allegations was limited to what others reported to him(yes a letter from Hunt was given to Ford/Union in 2014).

So judge ignores the fact that Hunt reported me to Lapp and Ford/Union on 2014, but they instruct her to continue to follow my instructions for 4 years(2014 to 2017, till I left for Louisville on 6/10/2017)

An inconsistent statement/contradiction/inherent improbability.

Page 13

Harvey testified he had no knowledge of appellant's purported instructions to process downers.

Dr Harvey added had he been presented with "clear and convincing" evidence of such instructions, he would have reported those actions to the appellant's chain of command. Judge does not ask Harvey "well, Hunt reported appellant's instructions in 2014, but both Lapp and Ford/Union told her to continue to follow appellant's instructions. Why didn't Lapp and Ford report Novilla to the Jackson district office, to you, as deputy district manager?

Judge just writes Harvey's demeanor credible and does not harbor bias.

Page 14

Judge writes the appellant argued the allegations made by Hunt and Miller were false. He suggested no reason why either of these employees would fabricate such allegations. He writes he found their allegations to be credible, given the lack of perceived motivations to fabricate their accusations.

Judge completely forgets that Hunt just testified she reported me on 2014 to Lapp and Ford, Miller was there from 2015-12/2016, yet the investigation did not begin till 8/2017 and another, on 11/2017.

Why wasn't I investigated on 2014-2017, before I left for Southeastern. This is an inherent improbability. But judge found them more credible than me, so it must be true.

Judge states he observed my demeanor when he testified and found me to be less credible than Hunt or Miller. Several of the answers he provided were nonresponsive and evasive, and his demeanor appeared

defensive. Well who wouldn't be, a person is being accused of something illegal, when that person left Southeastern 16 months before, and now is being removed from his position of 22 years, based on the words of 2 people. Why didn't they investigate me when Hunt told Lapp and the Union 3 years before, in 2014? Hunt testified she even sent a letter to the Union/Ford. But nothing happened.

Page 15

Judge writes I find preponderant evidence shows the appellant engaged in conduct that violated the standard of care and duty. The appellant argues the agency failed to meet its burden because it failed to introduce evidence such as video recordings to corroborate witness statements. Appellant's point is well taken, and I agree the lack of corroborating evidence weakens their case. However, I disagree with appellant that agency's lack of evidence of consumer harm also undercuts its case. Multiple witnesses testified regarding the significant risks to public health which non-ambulatory cattle could pose, if consumed. So if multiple witnesses testified about the risks of downer cows being consumed, why did Lapp and the Union/Ford instruct Hunt to continue following my "instructions" and pass downers?

I did not say "lack of evidence of consumer harm" resulting from processing of downers undercuts its case. I did not say where did the downers go. What I said was prove it that I instructed these inspectors to pass downer cows. They cannot prove it. All they have from the "evidence" file are the 2 statements from Hunt/Miller that I instructed them. They do not have corroborating evidence to show I told these inspectors to pass downer cows. No video/audio, no texts/emails, transcripts or memos showing I told them to pass downer cows. If persons can remove another federal worker from his position, and the only thing they have are uncorroborated witness statements, how is that lawful?

Judge writes the evidence before me on the charge consists entirely of witness statements and testimony. Having considered the totality of record evidence, and having found both Hunt/Miller more

credible than the appellant, I find it is more likely than not the appellant instructed inspectors to allow

Southeastern to process non-ambulatory cattle for human food consumption. Accordingly, I find the agency proved the charge of neglect of duty by preponderant evidence.

So, the written statements and testimony is now evidence. Nothing was corroborated, verified or authenticated. The inspectors said it, they have no bias, appellant gave no reason for inspectors to fabricate the allegations, so it must be true he instructed them to pass downer cows from 2014 on.

Judge completely forgets Hunt reported me to Lapp/Union-Ford in 2014, An investigation began in 8/2017, Hunt does not say anything till 10/2017 and Miller does not say anything till 11/2017.

An inherent improbability.

But they both said I instructed them, judge says it is more likely than not he did instruct them. That is his criteria, they are more credible than appellant, so it must be true. Judge is using subjective reasoning, his opinion or feeling, with no corroborating evidence. How is this lawful?

It is unlawful and illegal.

Page 16

judge writes appellant contends the agency committed harmful procedural error and denied his right to due process in relation to production of the evidence file. 5USC 7513(b)(1) requires a proposal notice stating the specific reasons for the proposed action. OPM regulations 5 CFR 752.404(b)(1) require the agency to inform the employee of his right to review the material relied on to support the reasons stated for the action proposed.

Why was the ROI MSC-SIR-18-002 provided to the deciding official, but not to me? They are saying the witness statements was produced from the ROI. So why was the ROI withheld from me?

Judge writes-

An agency decision may not be sustained if employee shows-

1. harmful procedural error in application of agency procedures at arriving at such decision.

2. The decision was based on a prohibited personnel practice

3. The decision was not in accordance with applicable law (5USC 7701(c)(2), Ray v Dept of Army, 97 MSPR 101.12.

It is a harmful procedural error when the agency does not provide the appellant with all the documents (The ROI MSC-SIR-18-002) used to remove me. The decision was not in accordance to applicable law. How can you remove an employee of 22 years, and base that decision on the unproven statements of 2 employees, which was taken after the appellant left the plant?

Page 17

He writes the statute only requires the agency supply the material relied on (5 USC 7513e).

I did not receive any "evidence" until 3/18/2019. I asked Zickus who gave me the NOPR Notice of proposed removal on 10/5/2018, where is the ROI MSC-18-002 and the Hunt affidavit? He didn't answer

but told me to get in touch with Luz Cantres. I call Cantres office and she ignores my calls. I was not aware of the other affidavits of Hunt/Miller/Goetz/Phillips because the only affidavit cited in the NOPR was Hunt's.

Judge writes- he also takes issue with agency's failure to produce (1) the entire investigative file, and (2) copies of additional investigations initiated that involved allegations against the appellant.

Footnote-

OIEA CID investigation 20170953- This was the covert investigation initiated by Compliance Investigation Division where the Union alleged I was passing downers, and Southeastern supposedly bribed me with my Fiat. This document number was cited on page 9 of evidence file.

Case # MSC-SIR-18-001- initiated on 8/2017, when investigators Kenneth Cash and Lisa Roth traveled to Louisville, KY to interview me about the Southeastern. I told them I left Southeastern 2 months ago in June and I wasn't about to make a statement(I did not have an attorney at the time), but they forced me to write a statement or else they will take disciplinary action against me. The investigators did not issue me a Kalkines warning, and it was imperative they get my statement to coincide with their case against me.

Internal control staff ICS ROI MSC-SIR-18-002- Probably initiated 11/2017. This is the Report of investigation that is cited in the NOPR given to me by Zickus on 10/5/2018. In the NOPR it states the ROI produced evidence that I instructed inspection personnel to allow Southeastern in Bean Station, TN to slaughter and process non-ambulatory cattle. That's why I asked Zickus where is this ROI and Hunt affidavit.

Judge writes- thus the appellant claims that this significant procedural issue was pointed out to the deciding official Grimmett 8 times during the oral conference, yet there is no reference to the claim found in the oral conference notes. That's because the deciding official maliciously left it out. But we recorded the oral conference where Matlock and I asked her where is the ROI and Hunt statement. The Oral conference was on 11/28/2018.

I have a copy of the audio recording. You can hear me state where are the documents you cited in NOPR. I mentioned to judge during the status conference on 5/28/2019 I did not get ROI cited in NOPR and the Hunt statement was not provided until 3/18/2019, over a month after I was removed on 2/15/2019.

Page 20

Judge writes-

Zickus indicated in a sworn declaration under penalty of perjury that he complied with Cantres instruction and provided copies of NOPR and evidence file. Zickus further recalled appellant opened envelope and expressed general disagreement with certain statements he read. NOPR indicated "the evidence and material upon which this proposal is based are enclosed.

But the "evidence" and material was nowhere to be found.

The reason I expressed disagreement is because the NOPR said ROI and Hunt statement, but the documents were not in the envelope. Notice on page 19 Cantres email says- please note employee should be receiving two copies of the evidence file- So that's 200 pages!

Judge writes-

On cross examination, Zickus recalled provided the appellant with a packet containing approximately

100 pages. He estimated the maximum capacity of the blue envelope he used was about 200 pages.

Looks like Zickus committed perjury because there is no way 100 pages, let alone 200 pages, could fit in the blue envelope. I tested the capacity of this blue envelope, and I could barely fit 84 pages, I could not fit the NOPR, which is 5 pages. The entire evidence file is 87 pages(plus NOPR of 5 pages=92 pages). I have the actual blue envelope, It is form 53-E-8701, which is the envelope the Jackson District office uses to transmit memos/letters to be opened only by the recipient.

Page 22

Judge writes- Grimmett acknowledged the notes did not capture every statement made during the conference. Grimmett's assistant, Suzette Rhodes, observed the conference and took notes, but I find it hard to believe she did not write down when we mentioned 8 times we did not get ROI and Hunt statement. But I have a copy of the conference audio recording, and one can clearly hear when Matlock and I mentioned we didn't get the documents.

But Rhodes and Grimmett purposely left it out in the conference notes. She testified she did not recall the appellant or his representative, mentioning to her at any time during the conference he did not receive the evidence file supporting the proposed removal. Grimmett lied.

I have a copy of Matlock's email 11/2018 and his outline notes showing where it is written we did not get the Hunt affidavit.

Judge writes- an agency error is harmful only where the record shows the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. 5CFR 752.404(b), Pinegar v FEC 105 MSPR 677, Gilmore v USPS 103 MSPR 290.

Now how would the judge know this, that the agency would have reached the same conclusion if they gave me the ROI and all other investigations? Did he examine ROI MSC-SIR-18-002?

Judge writes- Here, as in Gilmore, the appellant was clearly aware of the existence of relevant documents supporting the agency's action, as the NOPR referenced the investigation generally, and Hunt's affidavit in particular. So judge is saying it was ok not to give ROI to appellant because he was aware of it. That should suffice.

It does not matter if the agency conclusion would be different or not. Bottom line, they did not provide the ROI MSC-SIR-18-002 to me, which is a due process violation.

Page 23

He writes- In reviewing appellant's brief and record evidence, I find appellant failed to show the likely outcome in this case would have been different in the absence of the agency's alleged procedural error.

Like I said above how does the judge know this, the likely outcome in this case would have been different in the absence of the agency's alleged procedural error?

The agency committed a harmful procedural error by not giving me the ROI MSC-SIR-18-002.

They purposely did this to hide who truly passed downer cows at Southeastern. Remember, the CID investigation began on 8/2017, 2 months after I left for Louisville. The Hunt statement was taken 10/11/2017 and the Miller statement was 11/12/2017. The unknown statement in KY unemployment letter was 9/2017. There are no witness statements taken before 6/10/2017, the day I left for Louisville, KY.

All the above dates show I was already gone from Southeastern.

Judge writes- To the extent the appellant contends the agency committed harmful error or violated his due process rights when it failed to provide him with a copy of the entire ICS investigation, or copies of other investigations he identified. The appellant was not entitled to materials relied on by the agency.

Why not? It states in page 1 of NOPR-

"The ROI report of investigation case number MSC-SIR-18-002 produced evidence that you instructed inspection personnel to allow Southeastern M8327 in Bean Station, TN to slaughter and produce non-ambulatory cattle in violation of agency regulations."

Judge is wrong here. If the ROI produced the witness statements, then I am entitled to see the ROI and the other investigations if they are related to the proposed removal. You cannot just remove a federal employee of 22 years with just witness statements. That is unlawful and illegal and against the 5th and 14th amendment of the constitution- due process clause.

Page 24- judge writes where an employee has notice of only of certain charges or portions of the evidence and the deciding official considers new and material information, procedural due process guarantees are not met because the employee is no longer on notice of the reasons for the dismissal and or evidence relied on by the agency.

Young v Department of HUD 706 F3d 1372, 1377 Stone v FDIC 179 Fd3d 1368, 1375.

Judge contradicts himself here. First he says I was not entitled to materials relied on by the agency, but the ROI produced the witness statements. The agency cannot just provide the witness statements and not provide the ROI MSC-SIR-18-002. You cannot have one without the other. And I don't even consider the witness statements "evidence"-they were not corroborated or substantiated.

Page 25- judge writes the documents in evidence file were not new, they were derived from the ICS investigation which concluded months before the action was ever proposed. Exactly judge, you said it yourself, the documents/witness statements came from the ICS investigation. Therefore, I was entitled to get the ROI MSC-SIR-18-002.

Just because the investigation concluded months before, the investigation was about me and the agency's ploy/conspiracy to remove me. The action was proposed already in 8/2017 after I left, probably in 1/2017 with the covert CID investigation.

Judge writes- Grimmett "credibly" testified that she only reviewed the NOPR, the evidence file(which was really Hunt/Miller statements), the oral conference notes, and appellant's written submission in reaching her decision.

How can the deciding official reach the decision to remove based on witness statements of 2 inspectors which were never corroborated? Judge writes she had access to the entire ICS ROI and she perused the entire file in order to assign it to an LER specialist(Labor Employee Relations). However she clarified in her consideration she only reviewed the documents listed above because she was cognizant she would likely act as the deciding official in any subsequent disciplinary action and needed to remain "objective."

How can the deciding official remain objective when she had access to the entire ROI? She was already biased and could not remain objective, because she viewed the information in the ROI. But the appellant

who is the accused, could not even view the ROI. This is a blatant violation of the fifth and fourteenth amendment of the US constitution.

Judge writes- The court has stated that a deciding official's knowledge of an employee's background only raises due process/procedural concerns where that knowledge is used as a basis for the deciding officials determination on either the merits or the penalty to be imposed. Norris v SEC 675 Fd 1349, 1354.

So judge just believes Grimmett when she only reviewed the NOPR/witness statements/conference notes/appellant's written reply in reaching her decision. He doesn't take into account she reviewed the entire ICS ROI but does not take into account the appellant did not, even though the ROI is cited in the NOPR.

Now, I'm not a lawyer, but with Grimmett being able to view entire ICS ROI and for her to say she didn't take that into account in her decision to remove, but not the appellant, it looks like Ex Parte evidence to me. Judge did write on page 24- where an employee has notice of portions of evidence and deciding official considers new and material information, procedural due process guarantees are not met because the employee is no longer on notice of the reasons for the dismissal and/or evidence relied upon by the agency. Young 706Fd 1372,1377(citing Stone 179 F3d 1368, 1375).

It does not matter whether she said she did not consider the ROI in her decision. She was able to review the entire ICS ROI but not the appellant. This is Ex Parte.

Judge writes page 25-

In Stone, the federal circuit identified several useful factors to consider when determining new information by means of ex parte contacts-

whether the ex parte communication introduces cumulative or new information, whether employee knew of the information and had a chance to respond, whether the ex parte communication resulted in undue pressure upon deciding official to rule in a particular manner.

The employee knew of the ROI but did not get a chance to respond because the judge said I am not entitled to the materials because that's not what the agency used to remove, even though it was cited in the NOPR, and the deciding official got a chance to see the ICS ROI but not the appellant. This is definitely unlawful and illegal when the deciding official saw the ROI but not the appellant. It caused the deciding official to rule in a different manner. Judge is definitely wrong when he says he finds no due process violation based on Grimett's consideration of Ex Parte Information. She was able to review the entire ROI, but not the appellant.

Page 26- Judge writes the appellant also alleged the agency committed harmful procedural error and a violation of his due process rights when it violated the appellant's rights to invoke the 5th amendment.

Investigators Ken Cash and Lisa Roth went to JBS slaughter plant in Louisville, KY on 8/18/2017 and forced me to write an affidavit or else face potential discipline. I was not about to write a statement because I told them I was already gone from Southeastern. But they said If I did not comply they said I would face disciplinary action. They did not issue a Kalkines warning. They just said there was a CID

investigation initiated at Southeastern and they needed my statement. I did not know this at the time, but it was about me and their case to remove me from the agency.

After Cash and Roth left, in October 2017, Manuel Madrid said I needed to sign my statement under oath. By this time, I got legal representation from Kator Parks. The agency flew in another investigator, Katherine Hartl and she came into my office, and placed the affidavit I made with Cash/Roth in August, so I can sign my statement under oath. My lawyer, Juliette Niehuss told Madrid we are invoking Novilla's right to silence 5th amendment because you have refused to issue a Kalkines warning. Madrid told Hartl to pick up my statement and leave.

The purpose of Cash and Roth coming to my office was to obtain my statement to include in their case against me. I did not have to give any statement because I was already gone from Southeastern. I should have remained silent but I didn't know the investigation happening at Southeastern was about me.

Judge writes page 29- Grimmett identified Hunt's affidavit and other witness affidavits as the primary documents she found proved the charge.

So judge says to remove a federal employee with 22 years service, all one needs to do is get a few false witness statements in an "evidence" file, and that employee is gone. Nothing else, no corroborating evidence-no video/audio, emails, memos showing I instructed inspectors to pass downer cows, just a person's words on paper.

Page 30 Retaliation for prior EEO activity

Judge writes- the evidence shows the appellant filed a formal complaint of discrimination on 7/14/2016.

He asserts that the agency's initiation of an investigation on 1/2017 which ultimately to the 10/2018 proposal to remove him, is indicative of retaliation for his EEO activity. He further argues that other employees who were similarly situated to him were not disciplined. However, at no point has the appellant provided evidence of comparator employees.

(There are no comparator employees because I was the only one being harassed)

Background- In mid-2011, Ford and Lapp accused me of approving "for cooking only" beef trim to Southeastern(It was supposed to go to a cooking plant). David Ford and another inspector, Tony Merritt filed witness statements where they stated I told them I passed the trim to go to Southeastern. Of course this was not true, but they removed me from my patrol assignment and placed me in another establishment. I secured legal representation in 2012 and by Jan 2013 I won my case. The agency settled, I went back to my patrol, and the case never went to MSPB. The reason why is because none of the managers at Southeastern said I approved the beef trim to the plant. The case in 2011 is the same as the case in 2018, false witness statements. When I came back, Ford and the Union/ Lapp continued harassing me. I filed a harassment complaint with Office of Civil Rights against Ford and Lapp on 7/14/2016. In 1/2017 that's when the allegation I was passing downer cows began. I left for Louisville in 6/10/2017 thinking I would be far from the harassment. I was wrong. It followed me to Louisville. They tried to remove in 2011, and it did not work. So they began another conspiracy to remove me a second time in 2018.

Notice there are no investigations which began prior to 7/14/2016. The first covert investigation began in 1/2017, and the second on 8/2017. There are no witness statements gathered prior to 7/14/2016,

even though Hunt stated I started instructing her to pass downer cows in 2014. CID investigators did not come to JBS Louisville, KY to force me to write a statement until 8/2017. So there is a correlation with my harassment claim on 7/2016 and the CID investigations which began in 2017- retaliation for prior EEO activity.

Judge writes- However, Cantres and Grimmett testified credibly, that his complaint had no bearing on the decisions to propose his removal or sustain his proposal. Considering the above, I find the appellant failed to establish the retaliation for his prior EEO activity was a motivating factor in his removal.

SO why was a CID investigation conducted in 1/2017? Dr. David Thompson informed the Union during the LMR Labor management meeting when they brought it up about the downers and Fiat, there is no evidence Dr. Novilla is passing downer cows and no evidence of a bribe. Why was an ICS investigaton initiated in 8/2017, 2 months after I left Southeastern? No investigation was conducted prior to 7/14/2016, in spite of the fact that Hunt at the Hearing said I instructed her in 2014 to pass downers, 3-4 downer cows/week until I left in 6/2017. Is it a coincidence that the investigations began after 2016, and not in 2014?

Judge writes- to establish a prima facie case of retaliation for engaging in protected activity the appellant mush show- he engaged in protected activity, the accused official knew of the protected activity, the adverse action could under the circumstances have been retaliation, there was a genuine nexus between retaliation and the adverse employment action.

I filed a harassment claim in 7/2016; the officials knew that I filed, The adverse action could be retaliation because the adverse action occurred after 2016, in 2018, the adverse action was taken because it was after the harassment claim, and the agency did not show it would have taken the adverse action absent the protected activity. The adverse action was taken after the claim in 2016- the covert CID investigation in 1/2017 and the other investigation in 8/2017, after appellant left for Louisville, KY in 6/2017.

Page 32- judge writes the agency showed the removal action promotes the efficiency of the service and is reasonable.

So I see it is reasonable to remove an employee of 22 years of service using only 2 witness statements and their testimony with no corroborating evidence and withholding the ROI from the employee even when agency said the witness statements came from the ROI.

He writes- His misconduct occurred at work, and his neglect of duty resulted in both the agency's loss of trust and confidence in his ability to perform his duties as a SPHV, and an adverse impact on the agency's ability to accomplish its mission. Ellis v DOD, 114 MSPR 407, 8

So now judge is stating it was misconduct, he ignored the fact I was gone from Southeastern in 6/2017, ignored the fact that Hunt said I instructed her in 2014 to pass downers, ignored the fact that she reported me to Lapp and the Union/Ford, but they told her to continue to follow my instructions, and the investigations did not begin till 8/2017. There are no investigations which began in 2014, when Hunt said I instructed her to pass downer cows.

There is no nexus between grounds for the adverse action and ability of appellant to perform job duties because the agency cannot or did not prove appellant instructed inspectors to pass downer cows.

Judge writes- the agency therefore has established the adverse action was taken for cause and promotes the efficiency of the service. Brown v Department of the Navy, 229 F3d 1356, 1358

The action was not taken for cause because the agency cannot or did not prove appellant instructed inspectors to pass downer cows.

Page 33 Judge writes- board articulated several factors an agency should consider in selecting a penalty under chapter 75 See Davis v USPS, 120 MSPR 457, 7

Among the factors to be considered are the nature and seriousness of the offense, the employee's past disciplinary record, the supervisors confidence in employee ability to perform his assigned duties, the consistency of the penalty imposed on other employees for same or similar misconduct.

The seriousness of the appellant's actions cannot be minimized. As an SPHV for the FSIS, the appellant held a critical role in the agency's mission ensuring food safety and public health. It is undisputed that allowing downers to be slaughtered and processed in violation of agency directives, placed the public health at risk. The appellant was clearly on notice of the directives and regulations concerning downers based on his extensive training and 20 plus years of service.

So now judge is saying that I did instruct inspectors to pass downer cows, completely disregarding the Hunt and Miller statements were taken several months after I left Southeastern. I did not get the NOPR until 10/5/2018, and I left Southeastern 6/10/2017, 16 months later.

Why didn't the agency investigate me in 2014, when Hunt supposedly informed her second level supervisor Lapp. She even wrote a letter to Ford and the Union, which I have never gotten(a due process violation) discussing her concerns. But they both told her to continue following my alleged instructions. The judge found this credible, which is mind-boggling and an inherent improbability.

Grimmett in her Decision on proposed removal dated 2/11/2019 writes-

I considered the agency's 10/2/2018 proposed removal, the evidence file(the witness statements), the oral reply along with supporting documentation you provided to support your response. The proposed action is supported by the evidence of record and accordingly, I find the charge proven.

So she based her decision to remove me from my position based on 2 witness statements. That is it.

Even though she was able to review ROI Report of Investigation MSC-SIR-18-002, which to this day, I have never seen, but they cited in the Notice of proposed Removal.

On page 2 Having found I committed the offense above(Neglect of Duty), she determined

whether the penalty of removal is appropriate using the Douglas Factors(Douglas v Veterans Administration 5 MSPR 280)-

factor 1 The nature and seriousness of the offense, and their relationship to your duties and responsibilities, including whether the offenses were repeated.

She writes- The file demonstrates that you allowed non-ambulatory disabled cattle to be slaughtered and processed in violation of FSIS Directive 6100.2 and 9CFR 309.13.

So I allowed downer cows to be processed, and all she used are 2 witness statements, Hunt and Miller, which the agency could not or would not corroborate, and judge did say earlier, lack of corroboration weakens their case, but however, added lack of consumer harm does not undercut their case, which I did not say. What I did say is prove I instructed the inspectors to pass downer cows. They cannot.

They didn't even show me the ROI MSC-SIR-18-002 which is a due process violation under the 5th and 14th amendment to the US constitution. Why didn't they show me? Maybe that ROI, the other ROI and the CID investigation 20170953 shows what really happened after I left in Southeastern in 6/2017. I was not given the chance to review the ROI, only the deciding official. Besides judge said I was not entitled to the materials because that's not what the deciding official used to remove me, only the witness statements.

Factor 2 your job level- I was a permanent full time employee at the GS-0701-12 level.

Deciding official completely disregarded I was already gone from Southeastern in 6/10/2017, and the witness statements were taken several months after(Hunt in 10/2017/Miller in 11/2017)

No witness statements were taken in 2014 when Hunt started passing downers and when she reported me to Lapp and Ford/Union. No witness statements taken during the covert CID investigation in 1/2017.First statement statement in 8/10/2017(Sophia Blockett), 2 months after I left Southeastern.

Notice on page 1 of Decision the location is Louisville, KY, but in Notice of proposed Removal which I received from Zickus dated 10/5/2018, it shows Bean Station, TN. That's because the agency wanted their case against me to show Bean Station to coincide and synchronized with the CID investigation in 8/2017. They even tried to show the location of my performance appraisal show Bean Station, but I refused to sign the form unless I can change the location to Louisville, KY.

Factor 3- Your past disciplinary record- I do not have a disciplinary record.

Factor 4- Your length of service and performance- my length of service is 22 years and performance is fully successful. But deciding official removes me anyway based on uncorroborated witness statements.

Factor 5- official writes Your misconduct goes to the very core of your responsibilities.

She is saying its misconduct now but agency cannot prove it.

Factor 6- Consistency of penalty. Far as I know I am the only SPHV with 22 years service who was removed based on uncorroborated witness statements.

Factor 7- Consistency of penalty with applicable table of penalties.

She writes the USDA guide provides for a penalty of reprimand to removal for first offense of neglect of duty. So she removes me for neglect of duty using witness statements only.

Factor 8- The notoriety of the offense or its impact upon the reputation of the agency.

She completely disregards I was already gone from Southeastern on 6/10/2017(See answer to Factor 1)

Factor 9 The clarity with which you were put on Notice of any rules that was violated in committing the offense or had been warned about the conduct in question. You further that you allowed the establishment to slaughter the cattle to be used for pet food.

I am confused here. Didn't the judge say several times in his MSPB decision I instructed inspectors to pass downer cows for human consumption? Now deciding official Grimmett is saying I allowed the establishment to slaughter the downers for pet food.

Factor 10 Although you acknowledged having received the proper training and admitting that you allowed the establishment to slaughter the non-ambulatory cattle for use in pet food, you continue to deny engaging in the misconduct.

This is like factor 9. They cannot even get their stories straight. I have been gone almost 4 years, but I am pretty sure downer cows can be rendered and used for pet food.

Factor 11 Mitigating circumstances

Official writes I stated there was no evidence of downers. You further stated that you had a pattern of issues from 2010 and feel you continue to fight for your job repeatedly. You feel you are being discriminated against and provided me with a copy of the EEOC decision.

Official does not really answer this factor. But like I said in background above, they tried to remove me in 2011 with false statements, and in 2018 with false statements. From 1997 to 2010, I got along with my co-workers, inspectors, and supervisors(Dr. Jamison and Dr. McAnally). My problems did not begin until Letha Lapp and David Ford came to the Knoxville circuit in late 2010.

Factor 12 The adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

As you have admitted to engaging in misconduct I do not believe any alternative sanctions will deter such misconduct in this matter.

First she says in factor 10 I deny engaging in the misconduct, but here now in factor 12 I admit in engaging in misconduct. I did not admit to any misconduct. The agency cannot prove I instructed inspectors to pass downer cows. It was a worldwide conspiracy to remove one person from federal service using only false statements.

Page 33 judge writes- Grimmett testified she considered as mitigating factors the appellant's length of service, lack of disciplinary record, and performance ratings. She determined appellant's potential for rehabilitation was minimal, and alternative sanctions would not deter future misconduct given the seriousness and appellant's denial of culpability.

So my 22 years of service, no disciplinary record and fully successful ratings did not matter to deciding official. She just used the uncorroborated witness statements to remove me.

Judge even said it was reasonable to remove me, disregarding I was already gone in 6/2017, investigations did not begin till 8/2017, and Hunt reported me in 2014 but nothing happened until after I left. Deciding official completely misinterpreted Douglas factors and its application.

-Daniel Novilla

Attachments- Notice of Proposed Removal/Decision on Removal/KY unemployment Hearing Decision