

Agencies reluctant to show cards, undermine due process in hiring

These days, private sector employers want more information about job candidates, aside from what has been provided through normal channels, such as résumés. A 2012 CareerBuilder survey

found that almost two out of five employers researched job candidates on social networking sites. While this independently-obtained, unrebutted information is generally considered fair game in the realm of private sector recruitment, it can be unlawful in the federal civil service. At the Merit Systems Protection Board, this type of information is referred to as an “ex parte” (i.e., one-sided) communication. Federal employees have a constitutional right to be notified of the reasons for a removal action and to respond to them. When a deciding official bases a removal decision on information from an

ex parte communication not mentioned in a removal notice, the employee is deprived of the opportunity to adequately respond to all of the charges against him or her. I have long been concerned about due process violations caused by ex parte communications, and I worry the problem is worsening. In fact, shortly before President George W. Bush in December 2003 designated me as the MSPB’s vice chairman, I butted heads with the board’s chairman in *Shockley v. U.S. Postal Service*

(2003). I sought to oppose the removal of an employee whose due process rights appeared to me to have been violated by ex parte communications received by a deciding official. To me, the chairman in this case seemed overly concerned with how consequential ex parte communications were to the charges. Yes, the U.S. Court of Appeals for the Federal Circuit’s decision in *Stone v. Federal Deposit Insurance Corporation*

(1999) said, “Only ex parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice.” And to determine what qualifies as “new and material” information, the Board needs to consider whether the information: 1. is cumulative or new; 2. was known to the employee who also had the opportunity to respond to it; and 3. would unduly pressure the deciding official into making a particular decision. However, as I stated in *Shockley*

, “Nothing in these factors...indicates that the materiality of an ex parte communication should be judged, for due process purposes, according to whether the communication affected the outcome of the case.” The MSPB seems to forget that all evidence is cumulative; it builds and builds in the mind of the fact finder. Consequently, the Board has operated under the assumption that it can identify what tidbit of evidence tilted the scale in the mind of the

deciding official. It is like pinpointing the exact straw that broke the camel's back. The Federal Circuit's recent decision in *Young v. Department of Housing and Urban Development*

(2013) highlighted the dangers associated with this underestimation of cumulative information. In this case, the agency claimed *ex parte* communications to a deciding official did not result in a due process violation; they were cumulative in that they merely "confirm[ed] and clarif[ied] information that was already contained in the record." The court rejected this assertion, noting that the *ex parte* communications constituted the introduction of new and material information because they marked "a 'huge' departure from written statements already on the record." Further, the court said "the first Stone

factor [i.e., cumulative v. new information] strongly suggests a due process violation while any deficiency of the third factor [i.e. undue pressure] is less significant." While I doubt *Young*

will compel agencies to show all their cards when it comes to all of the reasons behind removal actions, the decision at least emphasizes that every card counts, whether it is an ace or a deuce. And it is up to federal employees and their attorneys to make sure agencies are hiding nothing up their sleeves. Neil McPhie is the Virginia Managing Partner for Tully Rinckey PLLC and the former chairman of the U.S. Merit Systems Protection Board. He concentrates his practice in federal sector employment and labor law and can be reached at info@fedattorney.com

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