UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CLAUDE WEAVER v. DEPARTMENT OF THE NAVY	Docket No. SF075299017

OPINION AND ORDER

Appellant was a boiler plant operator at the Navy Public Works Center, Oakland, California. He was removed for striking his supervisor, and appealed to the San Francisco Field Office of this Board. A hearing was held at which appellant was represented by an official of his union. The presiding official sustained the removal in his initial decision, and appellant filed a timely petition for review.

Appellant's petition is based upon an offer to present additional witnesses, an alleged erroneous interpretation of the testimony by the presiding official, and an allegation of bias on the part of the presiding official.

All of the contentions in the petition relate to one central issue of disputed fact: the supervisor testified that appellant struck him in the mouth with his fist in an unprovoked attack, whereas appellant testified that he accidentally hit the supervisor with his forearm, while holding a bottle in his right hand and a carton in his left, in an attempt to fend off an unwarranted attack by the supervisor. There were no other witnesses to the incident. The presiding official determined that the supervisor's testimony on this point was more credible than appellant's.

Appellant now offers seven people whose proposed testimony would allegedly cast doubt on the supervisor's reputation, motivation, and veracity, an apparent attempt to reduce the credibility of his testimony. This ground for the petition is governed by the Board's interim regulations, in effect when the petition was filed, under which a petition for review will be granted if it is established that "New and material evidence is available that despite due diligence was not available when the decision of the presiding official was issued."[1]

[1] 5 C.F.R. § 1201.113(a), 44 Fed. Reg. 3952 (Jan. 19, 1979). The final regulation, now at 5 C.F.R. § 1201.115(a), is identical except in referring to the availability of evidence "when the record was closed" rather than when the initial decision was issued.

The record establishes that appellant was aware prior to the hearing that the issue of his supervisor's credibility would be material. The record also establishes that both parties requested the presence of certain witnesses at the hearing, but appellant did not include any of these seven people in his request. Appellant has not claimed that he lacked knowledge of the witnesses' identity, or that he was unaware prior to the hearing that they possessed relevant information, or that any of them were unavailable to be called at the hearing.

Appellant has made no showing of due diligence with respect to his failure to call these witnesses, or that they were unavailable when the initial decision was issued or when the record was closed. He has, therefore, plainly failed to satisfy the requirements of the Board's regulations governing reviews based on allegations of newly discovered evidence.

In arguing that the presiding official incorrectly interpreted the evidence, appellant has merely stated his disagreement with the presiding official's conclusions. Although stating that the testimony is in conflict, and citing his own testimony as evidence of that conflict, appellant has pointed to nothing in the record that could explain why his testimony should be assessed as more credible than that of his supervisor. Apart from the bias allegation discussed below, appellant has identified no evidence and given the Board no reason tending to show that the presiding official's credibility determination was in error.

Under 5 U.S.C. § 7701, the Board's presiding officials act as the Board's agents under delegated authority, issuing "initial" decisions which become final between the parties only if the Board itself does not review or reopen those decisions. The presiding officials have no independent statutory jurisdictions. Under this statutory scheme, it would not be appropriate for the Board to apply customary standards of appellate review, such as "clearly erroneous" or "arbitrary or capricious," to the findings of fact set forth in the initial decisions of its own employees. Compare *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 363-365 (1955); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-493 (1951). Consequently, in reviewing an initial decision, this Board is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning.

In undertaking such reviews, however, the Board must recognize that demeanor evidence cannot by its nature be reflected fully in the written transcript, with the result that the Board must depend heavily upon the presiding official's assessment of witness

credibility, at least when there are not other, perhaps more persuasive, indicia of credibility included in the record. For this reason, when questions of credibility are presented, due deference must necessarily be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. *Universal Camera, supra*, 340 U.S. at 496.

Such Board review of the presiding official's fact finding will ordinarily be undertaken only when the petitioning party makes a showing consistent with 5 C.F.R. § 1201.115(b), which requires a demonstration that the initial decision is based on an erroneous interpretation (or application) of the statutory requirements governing the weight of the evidence.[2] While the language of the petition may be simply drawn, there must be at least enough specified in the petition to enable the Board to ascertain whether there may be a serious evidentiary question justifying a complete review of the record. A mere conclusory allegation of factual error cannot be sufficient to trigger such a review, in view of Congress' clear desire to restrict the former multi-level appeals process. Before the Board will undertake the burden of a complete review of the record, the petitioning party must, as the regulation plainly states, explain in the petition why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error.

When the alleged factual error relates to a credibility determination, as in this case, the petition for review must contain some specification of evidence or reasons warranting a review of the presiding official's credibility finding. But here the petitioner has not identified any internal inconsistencies or inherent improbability in his supervisor's testimony, or any contradiction of that testimony by independent witnesses or independently corroborated evidence, or any reliance by the presiding official on hearsay lacking in probative value, unsubstantiated rumor, surmise, conjecture or speculation. Nor has the petitioner identified anything in the record that could arguably justify attributing greater credibility to his own testimony, or identified any error in the reasoning on which the presiding official predicated his credibility finding, or referred to anything else in the record that suggests the presiding official's credibility assessment was erroneous. The presiding official devoted a substantial portion of the initial decision to his findings on the credibility question, which were clearly made with care.

In view of the deference due the presiding official's opportunity to observe the demeanor and hear the testimony of the witnesses, and the complete lack of anything in the record that appellant has referred us to or any other reasons advanced by appellant that

[2]The interim regulation, in § 1201.113(b), was the same.

could warrant reversal of the presiding official's determination, we find no basis for granting the petition to review that determination.

Appellant's final allegation, of bias by the presiding official, arises from a claim that the presiding official improperly relied on certain notes the supervisor had taken regarding past instances of conduct problems with appellant. An allegation of bias is a serious matter challenging the integrity of the presiding official and going to the core of the judicial function. Such charges are not taken lightly, and should not be lightly presented. It is well settled, however, that an incorrect ruling by a presiding official, standing alone, is not evidence of bias. See *In the Matter of King*, 1 MSPB 144 (1979).[3] Here appellant has pointed to nothing other than the allegedly incorrect ruling to support his charge of bias. Thus, appellant has failed to state a reason which would cause us to review the record for bias, even were we of the opinion that the presiding official's ruling was in error. Therefore, this purported basis for review of the initial decision is also insufficient.

Accordingly, the petition for review of the initial decision is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days from receipt of this decision by appellant.

For the Board:

RONALD P. WERTHEIM.

May 20, 1980.

[3]In fact, it was not error for the presiding official to consider those notes. The record shows that the notes were included by the agency in its adverse action file submitted to the presiding official and to appellant. Appellant was thus aware of them in a timely manner and had ample opportunity to prepare a rebuttal prior to the hearing. The supervisor who prepared the notes testified, and was cross-examined by appellant's representative concerning the incidents described in the notes. Although the record does not indicate whether or to what extent the presiding official considered the notes, it was entirely proper for him to admit and consider them.

MERIT SYSTEMS PROTECTION BOARD

San Francisco Region

APPEAL OF CLAUDE H. WEAVER

Under 5 CFR Part 752 and 5 CFR Part 1201

Initial Decision No. SF075299017

Date: May 15, 1979

INTRODUCTION

By letter received on March 5, 1979, Maxon Powell, Business Agent, Union of Public Works Center, San Francisco Bay Employees, submitted an appeal on behalf of Claude H. Weaver (appellant) from the action of the Department of the Navy, Navy Public Works Center, San Francisco Bay, Oakland, California (agency), removing him from the position of Boiler Plant Operator, WG-11, Step 5, $10.92 per hour, effective February 27, 1979.

Jurisdiction over appeals from removal actions where the notice of proposed removal is received on or after January 11, 1979 is defined and limited by the "Civil Service Reform Act of 1978" (PL 95-454 of October 13, 1978) as well as the pertinent implementing regulations, 5 CFR Part 752 (as published in the January 16, 1979 Federal Register) and 5 CFR Part 1201 (as published in the January 19, 1979 Federal Register).

Appellant was a nonprobationary career employee in the Federal competitive service; therefore, his timely appeal of the removal action falls within the purview of 5 CFR 752.405(a) and 5 CFR 1201.3.

Appellant requested a hearing under the provisions of 5 CFR 1201.23(b) which was held on April 5, 1979 at Oakland, California. A verbatim transcript of the hearing, with exhibits, is a part of the appeal record.

ANALYSIS AND FINDINGS

Procedural Considerations

Appellant did not claim any violation of the procedural entitlements as set forth under 5 U.S.C. 7513(b) and 5 CFR 752.404.

Merits

Appellant received the advance notice of proposed removal on January 24, 1979 which specifically set forth the reason for the action as follows:

> 1. You are officially notified that it is proposed to remove you from the rolls of the Navy Public Works Center, San Francisco Bay, for striking and inflicting bodily injury to your

supervisor on 31 October 1978 (first offense). This proposal is based on the following:

a. At approximately 0815 on 31 October 1978 you came into the office of your supervisor, Mr. Frank Gonsalves, and asked if he had taken the water sample for the Bureau of Mines. He told you that he had not, and that you would have to do it. He told you that he also wanted to discuss with you the possibility of your being reassigned to the Treasure Island site for cross-training.

b. When informed that you might be reassigned, you became angry, shouted at Mr. Gonsalves, and demanded that you be allowed to talk to the Department Director. When you insisted on doing so, Mr. Gonsalves told you to go use the phone in the boiler room area.

c. Mr. Gonsalves started to close the office door, but you pushed the door open, forced your way into the office, and struck him in the mouth with your right fist. As a result of the blow, Mr. Gonsalves suffered a laceration inside his lower lip, and two of his teeth were fractured.

On December 7 and 11, 1978, LCMD Prine F. Osborn, Director, Utilities Department, Public Works Center, conducted an investigation of the October 31, 1978 incident involving appellant and his supervisor, Frank Gonsalves. The file contains his January 2, 1979 report of investigation in which he set forth his findings of facts and conclusions. The report also contains: his notes of the interviews with both appellant and Mr. Gonsalves concerning the incident; the reports of Mr. Gonsalves' medical and dental examinations; and also Mr. Gonsalves' file notes of previous instances in which he, as appellant's immediate supervisor, had either admonished or counseled appellant when his conduct or attitude had been unacceptable. (Appeal File Tab 10)

LCMD Osborne testified during the hearing that the October 31, 1978 incident at the Boiler Plant had not been witnessed by any other employee. The only other employee who was working in the Boiler Plant at the time was too far away either to see or to hear what happened. Osborn stated that appellant and Mr. Gonsalves had told conflicting stories as to what had occurred.

LCMD Osborne explained that prior to his investigation of the incident he had not known appellant and that he had known Mr. Gonsalves only casually. He testified that Mr. Gonsalves had explained to him what had happened as follows: that the discussion between appellant and himself became very heated when he mentioned to appellant the possibility of a reassignment to Treasure Island; that appellant, who was standing in the doorway of his office, loudly stated that he was going to call the Director and protest any such reassignment and then turned toward the Boiler Room

where the operator's telephone was located; and that he started to close his office door, whereupon appellant pushed the door open, entered the office, and then struck him on the mouth with his closed fist.

LCMD Osborne testified that appellant related his version of the incident as follows: that during the discussion on October 31, 1978, Mr. Gonsalves told him in an angry tone that he was going to transfer him to Treasure Island; that he considered such a transfer as further harassment on the part of Mr. Gonsalves; that he told Mr. Gonsalves that he was going to call the Director and protest; that when he moved toward the telephone in the office, Mr. Gonsalves started to attack him and push him out of the office so that he could not use the phone; and that he threw up his arms in order to protect himself from Mr. Gonsalves' attack and in doing so Mr. Gonsalves' mouth struck his forearm resulting in the injury.

Mr. Gonsalves testified during the hearing that on the morning of October 31, 1978 appellant came to his office, stood in the doorway, and asked whether the water samples had been taken. He told appellant to take the routine water samples and, as appellant was about to leave, he told appellant that he would like to discuss the possibility of sending him to Treasure Island for cross training. He claimed that when he mentioned the possibility of assignment to Treasure Island, appellant became very angry, lost control of himself, and began to shout that he was being harassed and demanded to see the Director. Gonsalves pointed out that a few days earlier he had given appellant his annual performance evaluation with a rating of satisfactory and that appellant became very angry, claiming that he should have received an outstanding rating.

Mr. Gonsalves stated that he had attempted to calm appellant, but without success, so he told appellant that he could use the phone in the boiler plant area to call the Director. Believing that the conversation had ended and that appellant was leaving, he stated that he had started to close the office door, when suddenly, without any warning, appellant pushed the door open and struck him in the mouth with his fist.

Mr. Gonsalves claimed that he was both surprised and stunned by appellant's actions, and even more so when appellant walked rapidly into the boiler plant area to where another employee, Kenneth Gibson, was working and started to yell that he, Mr. Gonsalves, had attacked him. He stated that he went over to Mr. Gibson and told him not to pay any attention to appellant, explaining that appellant had struck him and displayed his lacerated lip. Mr. Gonsalves then reported the incident to his supervisor, John Bolick, who directed him to obtain medical and dental treatment. (TR pp. 6-8.)

Mr. Gonsalves further noted that appellant had been a very good Boiler Plant Operator, but had been a supervisory problem in the past because of his short temper and aggressive attitude. (TR pp. 91-99.)

In his interview with LCMD Osborne, as well as in his testimony during the hearing, appellant stated that on October 31, 1978 he had talked to Mr. Gonsalves about the water samples and then, as he was leaving the office, Mr. Gonsalves told him that he was going to transfer him to Treasure Island. Appellant asserted that this was further harassment directed toward him by Mr. Gonsalves who, only a few days earlier, had given him what appellant believed was an unfair performance evaluation. The discussion developed into an angry confrontation and appellant testified that he then informed Mr. Gonsalves that he was going to call the Director and complain that Mr. Gonsalves and Mr. Bolick were harassing him and trying to force him out of his position.

Appellant alleged that when he had moved toward the office phone in order to call the Director, Mr. Gonsalves immediately started to yell and swear at him and attacked him by pushing him out of the office. Appellant maintained that he had raised his arms to fend off Mr. Gonsalves, and then had run from the office and yelled to Mr. Gibson that Mr. Gonsalves was hitting him. Appellant denied that he struck Mr. Gonsalves in the mouth with his fist. Regarding the injury sustained by Mr. Gonsalves, appellant stated that Mr. Gonsalves' mouth may have come in contact with his forearm while he was defending himself. (TR pp. 113-116.)

Appellant further testified that he did not shout or behave in an aggressive manner when interviewed by LCMD Osborne. He explained that he is somewhat hyperactive and that after working for many years in noisy boiler plants he had developed a tendency to speak in a loud voice. He acknowledged that LCMD Osborne had twice told him to lower his voice. (TR pp. 123-127.)

General Foreman John D. Bolick, appellant's second-line supervisor, testified during the hearing that Mr. Gonsalves had telephoned him on October 31, 1978 and reported that appellant had struck him. He immediately went to the job site, spoke to both Mr. Gonsalves and appellant, and directed Mr. Gonsalves to obtain medical treatment. He further testified that he had found Mr. Gonsalves' explanation of the incident to be more credible than appellant's because he was aware of appellant's temper and, additionally, appellant had previously been involved in an altercation with another employee. Mr. Bolick also noted that appellant had been argumentative and short tempered toward management on past occasions. (TR pp. 26-31.)

In his appeal to this office, appellant contended that the agency had removed him from his position, not for striking a supervisor,

but in reprisal for having filed a formal charge of assault against a supervisor, Mr. Gonsalves, for allegedly attacking him on October 31, 1978. The appeal file contains a letter from appellant's representative addressed to John Bollick, dated November 1, 1978, stating that it was to be considered as a formal charge against Mr. Gonsalves for assaulting appellant on October 31, 1978. (Appeal File—Tab 7.) Appellant argued that the agency had failed to consider or to take any action on this formal charge filed by appellant (TR pp. 4-5). The agency pointed out that the November 1, 1978 letter from appellant's representative was considered and that the deciding official specifically referred to it in February 21, 1979 decision letter.

I have weighted all of the evidence and testimony presented in this appeal and I find that the testimony of Mr. Frank Gonsalves is more believable than that of appellant. Accordingly, I find the charge that appellant struck and injured his supervisor on October 31, 1978 is sustained by a preponderance of the credible evidence. I further find that the removal action was warranted and was taken for such cause as will promote the efficiency of the service. [5 CFR 1201.56(b)(2).]

INITIAL DECISION

The removal action is affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 17, 1979 unless a petition for review is filed with the Board within thirty (30) calendar days after the petitioner's receipt of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulation.

The petition for review must be received by the Secretary to the Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419 no later than thirty (30) calendar days after receipt of this decision. A copy of the petition must be served on all other parties and intervenors to this appeal.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the decision of the Presiding Official was issued; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of law, rule, or regulation, or a misapplication of established policy; or

(3) The decision of the Presiding Official is of a precedential nature involving new or unreviewed policy considerations that may have a substantial impact on a civil service law, rule, regulation, or a more Government-wide policy directive.

Under 5 U.S.C. 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

THOMAS J. MANGAN,
Presiding Official.