UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CRAG T. COONS	)	
v.	)	DOCKET NUMBER SE07528110128
DEPARTMENT OF THE NAVY	)	

OPINION AND ORDER

Appellant, Crag T. Coons, was removed from his position as a Digital Computer Systems Administrator, GS-13, with the Puget Sound Naval Shipyard (agency) based on the charges of (1) creating an appearance of conflict of interest; and (2) interfering with the agency investigation concerning allegations in charge (1). He filed an appeal with the the Board's Seattle Regional Office. Following a four-day hearing, the presiding official issued an initial decision in which he found both charges supported by a preponderance of the evidence, although the seriousness of charge (1) was mitigated. However, he reversed the removal action finding that the agency had committed harmful procedural error under 5 C.F.R. §1201.56(c)(3) because of the serious lack of impartiality on the part of the proposing official, Robert Borquist. The presiding official reached this conclusion because the deciding official testified that he relied heavily upon a memorandum prepared by Borquist recommending removal and that he would have accepted a recommendation by Borquist of any lesser penalty short of no action at all.

The agency filed a timely petition for review alleging first, there is new and material evidence now available that,

despite due diligence, was not available prior to the close of the record and second, that the presiding official misinterpreted appellant's burden of proof as to affirmative defenses under 5 C.F.R. § 1201.56(b)(1) and that in lieu of reversing the action, the Board should examine the record de novo, applying the standards set forth in Douglas v. Veterans Administration, 5 MSPB 313 (1981) in selecting an appropriate penalty.

The agency contends that there exists new and material evidence consisting of a cost-factor analysis between several shipyards and an examination of the overhaul of a single class of submarine, that, despite due diligence, was not available prior to the close of the record. However, this evidence was not enclosed with the petition for review. Further, even assuming the allegations contained in the petition for review concerning the document to be true, this evidence merely attempts to impeach the testimony of one witness, Victor Peters, and relates only to issues collateral to the appeal. Impeaching evidence does not constitute new and material evidence. Fleming v. Department of Health and Human Services, 4 MSPB 277 (1980).

The presiding official did err, however, in reversing the agency action based on harmful procedural error under 5 C.F.R. § 1201.56(c)(3) because he found that the deciding official would have taken an action less severe than removal had that been recommended by Borquist, a person found to be so biased against appellant that he was incapable of giving an impartial recommendation.

The Board finds that the bias of the proposing official in this case is not the kind of factor that should have been analyzed under the harmful error standard set forth at 5 C.F.R.

§ 1201.56(c)(3) and our decision in Parker v. Defense Logistics Agency, 1 MSPB 489 (1980) but rather is a factor that goes towards determining whether the penalty imposed by the agency was within the parameters of reasonableness. Douglas, supra.

The deciding official, Commander John Huntley Boyd, Jr., testified at the hearing that he would have imposed any penalty short of no penalty at all had it been recommended by Borquist. [Hearing Transcript [Tr.] at 624, 629, 639]. Therefore, although he also testified that he considered various factors in removing appellant [Tr. 626-28], the Board finds that it must reanalyze the relevant mitigating factors without the taint of the proposing official's recommendation having any weight in our determination.1/

In order to determine what penalty, if any, is appropriate, the Board will consider the following Douglas factors: (1) nature and seriousness of the offenses;

1/ As found by the presiding official, the proposing official, Borquist, was biased against appellant because:

(1) Borquist had opposed appellant's initial appointment to the position as head of appellant's division but had been overruled by other members of the selection committee;

(2) Borquist and the appellant just didn't like each other;

(3) Borquist was dissatisfied with appellant's administrative management and personnel practices. The record shows that 10 months prior to the notice of proposed removal Borquist had attempted to have appellant transferred out of his department;

(Continued)

(2) employee's job level; (3) past disciplinary record; (4) past work record; (5) clarity with which appellant was on notice of any rules that were violated in committing the offense; and (6) mitigating circumstances surrounding the offense.

Appellant, employed as a Digital Systems Administrator, was the division head of the Automated Data Processing (ADP) Division, and supervised approximately 80 persons. The agency charged him with, and supported by a preponderance of the evidence, the following offenses: 1) that he had created the appearance of a conflict of interest because of his association with James Blodgett and Blodgett Key-punching, Inc., over a period of time during which Blodgett Keypunching held a contract with the Shipyard. As a result of this association, appellant became interested in a computer package which Blodgett designed to serve pharmacists and sold to individuals who would operate it on their own. In the course of exploring the feasibility of this venture, appellant started to recruit other employees, attended a meeting-demonstration with two area pharmacists who assumed

---

(Note 1 continued)

(4) Appellant was uniformly respected for his competence and upgrading his division while Borquist was generally considered incompetent (in fact, the strongest testimony regarding Borquist's competence was that he was an "average" supervisor);

(5) As proposing official, Borquist was not merely a conduit through which appellant passed his written reply. He wrote, and presented to the deciding official, a cover memorandum denigrating the evidence favoring appellant.

him to be a Blodgett employee, and arranged, paid for and attended a meeting at the Holiday Inn in which the computer package was demonstrated; Initial decision at 12; and 2) when the above incident was under investigation by the agency, appellant told two witneses whom he suspected of being his accusers that "he would find out who was behind this and 'sue the bastards' not caring who won or lost, only to cost those involved a large amount of money." Initial decision at 16. These individuals interpreted his remarks as threats and as found by the presiding official, constituted interference with the investigation.

Although there is some conflict in the record concerning whether or not appellant was on notice that there were agency standards of conduct concerning activities that could be considered as a conflict of interest, the presiding official correctly found that the standards of conduct are largely a matter of common sense and cover an area for which employees must be presumed to know the law. Initial decision at 14.

Appellant presented the following evidence in support of mitigation.

Appellant has been employed by the agency for 13 years beginning as a GS-5 and worked his way up to a GS-13 head of the ADP division. He had no previous disciplinary record and several performance appraisals prepared by Borquist show that his work was considered satisfactory.

In addition, several witnesses testified regarding respect for appellant's competence and his upgrading of the ADP unit.2/

2/See Initial decision at 21. The presiding official found these witnesses, including the former Commander Victor Peters to be credible. Even Borquist, while denigrating appellant, recognized appellant's technical ability and contributions to the ADP unit.

Further, the presiding official found that although the agency had proven the charges by a preponderance of the evidence, he found the following mitigating factors concerning the conflict of interest charge: 1) Borquist was aware of appellant's involvement with Blodgett but said nothing about it; 2) appellant's involvement with Blodgett was common knowledge around the office and appellant made no effort to conceal his activities; and 3) appellant did not believe or realize that he was creating a conflict situation at the time. Initial decision at 14-15.

The charges for which appellant was removed are serious. This Board has sustained removals based on the charge of creating an appearance of conflict of interest. See Wilkes v. Veterans Administration, 6 MSPB 611 (1981); Lavelle v. Department of the Air Force, MSPB Docket Number DA075209157 (December 10, 1981). Creating the appearance of a conflict of interest constitutes a serious breach of trust. The Government clearly has an interest in prohibiting such conduct, and in ensuring that its agents and employees are not compromised in the performance of their duties as a result of any outside influences. See Deal v. Department of Justice, MSPB Docket Number SL07528010006 (May 10, 1982); Lavelle, supra. Appellant's actions could place into question his integrity and the propriety of decisions he would have to make concerning the ADP unit. Further, threatening one's subordinate and one's supervisor with frivolous legal action is conduct that represents poor judgment, especially from a person who is a supervisor of approximately eighty persons.

In light of the mitigating factors in this case, however, the Board cannot find that appellant's removal

is within the parameters of reasonableness. The evidence of record shows that the bias of Borquist was instrumental in the agency's decision to remove appellant since the deciding official repeatedly stated that he would have taken any penalty recommended by Borquist short of no penalty at all. Appellant has a long and satisfactory performance record and it would not promote the efficiency of the service to remove him based on the sustained charges.

Nonetheless, this Board cannot and will not condone appellant's behavior. Because of his poor judgment in matters involving his supervisory and managerial capacity, some doubt exists as to appellant's ability to satisfactorily perform his supervisory and managerial duties. Under these circumstances, a reduction in grade to the next lower non-supervisory position for which appellant is qualified is the maximum penalty which the Board could find to be within the parameters of reasonableness. Davis v. Department of the Treasury, MSPB Docket Number NY075209075 (October 2, 1981).

Accordingly, the findings of fact concerning the two charges contained in the initial decision are AFFIRMED as MODIFIED herein and the finding of harmful error is VACATED. The agency is hereby ORDERED to cancel the removal of Crag Coons and substitute in its place a reduction-in-grade to the next lower nonsupervisory position for which appellant is qualified. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Seattle Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final Order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

APR 4 1983
(Date)

Washington, D. C.

Robert E. Taylor
Secretary