

51 Fed. Reg. 25,160 (1986) (to be codified at 5 C.F.R. § 1201.129).¹

The Board has carefully considered the Recommended Decision and the record in light of the exceptions, responses and the post-hearing briefs. We AFFIRM and ADOPT, AS MODIFIED HEREIN, the CALJ's findings of fact and conclusions of law, and MODIFY the penalties imposed.

I. Background

The OSC's complaint, brought pursuant to 5 U.S.C. §§ 1206(a), (e)(1)(D), and (g), charged respondents with violations of 5 U.S.C. § 2302(b)(4), (5), and (6)² and 5 C.F.R.

¹ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

² 5 U.S.C. §§ 2302(b)(4), (5) and (6) provide:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority --

* * * *

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

§§ 4.3, 330.601 and 735.209.³ These violations were charged in connection with the establishment of and selection for two Secretary, GS-4, positions in 1983 and 1984, and center around the attempt to place a certain employee in a particular position.

Briefly, the facts as found by the CALJ are as follows. R.D. at 2-4. Respondents Ross and Catledge worked at the Veterans Administration Outpatient Clinic (clinic) in Las Vegas, Nevada. Ross was the Personnel Officer, GS-11, for the agency; Catledge was her subordinate as a Personnel Management Specialist, GS-9. Due to a planned 1984 computer installation, the Director of the clinic asked a current temporary employee, Melissa Hughes, in

³ 5 C.F.R. § 4.3, "Prohibition against securing withdrawal from competition," provides:

No person shall influence another person to withdraw from competition for any position in the competitive service for the purpose of either improving or injuring the prospects of any applicant for employment.

5 C.F.R. § 330.601, "Withdrawal from competition," provides:

An applicant for competitive examination, an eligible on a register, and an officer or employee in the executive branch of the Government shall not persuade, induce, or coerce, or attempt to persuade, induce, or coerce, directly or indirectly, a prospective applicant to withhold filing application, or an applicant or eligible to withdraw from competition or eligibility, for a position in the competitive service, for the purpose of improving or injuring the prospects of an applicant or eligible for appointment. OPM shall cancel the application or eligibility of an applicant or eligible who violates this section, and shall impose such other penalty as it considers appropriate.

5 C.F.R. § 735.209, "General conduct prejudicial to the Government," provides:

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

September, 1983, to perform the duties of coordinator and site manager for the new system. Also in September, 1983, the Director asked Ross to develop a job description for the coordinator/site manager position and to draft the position description in such a way that Hughes could qualify for it.

The job description was prepared and classified, Secretary I, GS-4, OPM was asked to forward a certificate of eligibles, and Hughes was "name-requested" for the position. In OPM's certificate Hughes was ranked the lowest of five candidates. In December, Ross sent the other candidates a letter describing the computer duties and Catledge telephoned them, to discuss the duties and determine their availability. Catledge recorded that two candidates had declined consideration, and then he selected Hughes. Upon OPM's review of the selection process, OPM found irregularities, disallowed Hughes' selection, and directed the clinic to reconstruct the certificate.

A new position description was developed, Secretary II, and in April, 1984, Ross again requested a certificate of eligibles from OPM. OPM's second certificate of five candidates did not include Hughes. Ross reported to OPM that fewer than three of the candidates were available and requested a supplemental certificate. OPM issued a supplemental certificate of three candidates, with Hughes being the lowest ranked one. In July, 1984, Ross selected Hughes. Hughes was terminated in August, 1984, at the direction of OPM based upon the clinic's alleged improper appointment process.

After a lengthy hearing and post-hearing briefs, the CALJ found that Catledge violated 5 U.S.C. §§ 2302(b)(4) (Count 1), (b)(5) (Count 5, one of two allegations), (b)(6) (Count 10, two of four allegations), and 5 C.F.R. §§ 4.3 (Count 5), 330.601 (Count 6), and 735.209 (Count 2).⁴ The CALJ also found that Ross had violated 5 U.S.C. §§ 2302 (b)(4) (Count 7), and (b)(6) (Count 8), and 5 C.F.R. § 735.209 (Count 9). Based upon the sustained charges, the CALJ recommended that Catledge be demoted from a GS-9 to a GS-7 for a period of three years and Ross be suspended for 45 days.

Since the Recommended Decision in this case was issued, the Federal Circuit issued *Horner v. Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987), rev'g *Special Counsel v. Williams*, 27 M.S.P.R. 97 (1985) (hereafter *Williams*). *Williams* examined the Special Counsel's authority to bring charges of alleged violations of regulations pursuant to 5 U.S.C. § 1206(e)(1)(D) and determined that, in the circumstances of that case, the Special Counsel's section 1206(e)(1)(D) authority did not extend to the alleged violations of 5 C.F.R. Part 735. In the instant case, two of the Special Counsel's charges, Counts 3 and 9, involve alleged violations of 5 C.F.R. § 735.209. These charges relate to the parties' alleged dishonest conduct of misrepresenting the facts to the Special Counsel investigators.

⁴ The CALJ's interpretation of and findings regarding 5 C.F.R. §§ 4.3 and 330.601 comport with those of the court in *Filiberti v. Merit Systems Protection Board*, 804 F.2d 1504 (9th Cir. 1986).

The parties have not had an opportunity to brief the applicability of *Williams* to this case. However, because the gravamen of the alleged misconduct of both respondents is the prohibited personnel practice charges and because the Board sustains those charges, see 7 and 9, *infra*, the Board finds that the prohibited personnel practices are sufficient to sustain the penalties. Thus, the Board need not address whether the Federal Circuit's holding in *Williams* prohibits the Special Counsel's charges of section 735.209 in this case.

II. Analysis

Respondent Catledge takes exception to the findings and credibility determinations of the CALJ but only cites to the record once in his attempt to show that the CALJ drew the incorrect conclusion from the evidence. Respondent Catledge's exceptions simply disagree with the CALJ's findings and are a reargument of the evidence presented to the CALJ in his post-hearing brief. A mere disagreement with the adjudicator's findings, without specific record citations and persuasive argument of error, is insufficient for the Board to overturn the findings. See *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984). We find that the CALJ dealt adequately with Catledge's arguments in the Recommended Decision, and, accordingly, these exceptions are rejected for the reasons given by the CALJ.

In one instance, Catledge cites record evidence to argue that the CALJ erred when he found that Catledge falsely recorded that two candidates for the secretary position declined consideration. The CALJ made this finding based upon testimony

and an OPM memorandum (C-49),⁵ quoted in part in the Recommended Decision at 15. Catledge argues that the CALJ misinterpreted the OPM memorandum, and that the memorandum actually supports his claim that he did not falsely report to OPM two declinations. We disagree with this contention and affirm the CALJ's interpretation of the OPM memorandum, i.e., that the memorandum simply states what had been recounted to OPM and does not reflect OPM's determination that the alleged declinations were accurate.

Catledge made these arguments before the CALJ, who rejected them. We agree with the CALJ findings. We, therefore, deny respondent Catledge's exceptions in their entirety and sustain the charges.⁶

Respondent Ross excepts to the CALJ's credibility determination in which he found that she "intentionally failed to mail the OF-5 forms to the four candidates in question." Recommended Decision at 28. For the most part, Ross simply disagrees with the CALJ's weighing of the testimony and documentary evidence which resulted in the determination that

⁵ C-49 refers to complainant's exhibit number 49; similar narrative of the same events is recorded in C-38 and C-55.

⁶ Catledge now argues that his "5 years' experience in the personnel field," R.D. at 11, was six years prior to his 1983 re-entry into the federal service. Resp. Catledge Exceptions at 1. This argument was not made before the CALJ, and it is not new and material evidence that was not known before. Thus, the Board will not consider this newly fashioned argument. Cf. *Meglio v. Merit Systems Protection Board*, 758 F.2d 1576 (Fed. Cir. 1984).

Ross's testimony was less credible.⁷ She does not cite to the record to support her allegations of error. As stated earlier, mere disagreement with the CALJ's findings, without specific record citations to support alleged errors, is not sufficient to reverse the CALJ's findings. *Hoban, supra*.

On the issue of credibility, respondent Ross correctly states that the Board may substitute its own judgment for that of the CALJ when credibility determinations rest upon "articulated rationales for disbelieving the testimony" based upon the record evidence, rather than the demeanor of witnesses. *Cochran v. Department of Justice, INS*, 16 M.S.P.R. 343, 346 (1983); Reply to Special Counsel's Exceptions to Recommended Decision at 3. However, the Board will not substitute its judgment unless "substantial questions exist with regard to the presiding official's credibility resolutions." *Id.* See also *Jackson v. Veterans Administration*, 768 F.2d 1325 (Fed. Cir. 1985), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (Board not free simply to disagree with fact-finder). In her exceptions, Ross simply argues anew the arguments presented to the CALJ. We find that the CALJ properly weighed the testimony and documentary

⁷ At one point, respondent Ross challenges the CALJ's finding that she falsely reported to OPM that a candidate was not interested in the position because the "evidence is not clear and convincing." Exceptions at 3. This is not the appropriate standard. The CALJ sustains a charge upon a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(ii). Preponderance of the evidence is defined at section 1201.56(c)(2) as: "[t]hat degree of relevant evidence which 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."

evidence and found Ross's explanations wanting. We, therefore, deny respondent Ross's exceptions and sustain the charges.

The OSC excepted only to the penalty imposed upon respondent Ross, arguing that the penalty is too light in relation to the sustained conduct -- intentionally failing to mail inquiries to four candidates concerning their availability for a position, subsequently falsely reporting to the Office of Personnel Management (OPM) the status of certain candidates, and making false statements during the OSC investigation -- and is inconsistent with the penalty imposed upon Catledge. We agree.

We believe that, upon the sustained conduct and in view of the fact that Ross was Catledge's supervisor,⁸ the appropriate penalty would be a one-grade demotion for a minimum period of one year.

As to the penalty imposed upon Catledge, Catledge states in his exceptions that he is now a GS-11 and the imposed penalty would be a reduction of four grades. Since it was clearly the intent of the CALJ to impose a two-grade reduction, we hold that

⁸ Record evidence demonstrates that Ross was aware of at least some of Catledge's activities relating to placing a certain employee in the Secretary position (Exhibits C-48, 49, 55). As Personnel Officer, Ross was responsible for the "entire personnel management program" of the VA Clinic. C-59, Transcript at 7, Interview of Sue Abney Ross. As a supervisor, Ross should be held to a high standard of accountability for her actions, active or passive. See *Brown v. Department of Transportation, FAA*, 735 F.2d 543 (Fed. Cir. 1985) (supervisory position taken into account in finding violation and appropriate penalty); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (employee's job level and type of employment, including supervisory, and prominence of position relevant in determining appropriate penalty).

Catledge should be demoted to a GS-9, but only for a minimum period of one year.

Finally, we note that, the Special Counsel's section 1206(e)(1)(D) authority to bring charges based upon allegations of regulation violations has been limited by the Federal Circuit in *Williams*, see 5-6, *infra*. The extent of that limitation is untested. However, as to the charges that respondent Catledge violated 5 C.F.R. §§ 4.3 (Count 5) and 330.601 (Count 6), these allegations were duplicative of alleged prohibited personnel practices in violation of 5 U.S.C. §§ 2302(b)(5) and (6), which we found to have been proven. As we held in *Special Counsel v. Mongan*, MSPB Docket No. HQ12068610004 (April 17, 1987), the existence of more than one legal basis for a challenge to a respondent's conduct does not justify the imposition of a greater penalty. Therefore, even if these two legal bases for the charges are outside the Special Counsel's section 1206(e)(1)(D) authority under *Williams*, a lesser penalty would not be justified.

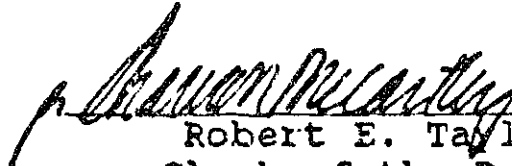
III. Conclusion

Accordingly, the Board AFFIRMS the findings of fact and conclusions of law of CALJ Reidy AS MODIFIED, and ADOPTS AS MODIFIED, and incorporates herein, his Recommended Decision as the final decision of the Board.

This is the final decision of the Board. The Veterans Administration is ORDERED to reduce Sue Abney Ross from a GS-11 to a GS-10 and Scott Catledge from a GS-11 to a GS-9 for minimum periods of one year. The Special Counsel shall file a report of

compliance with this decision with the Clerk of the Board within 30 days of the date of this Final Decision and Order. Respondents may obtain judicial review of this Order in an appropriate United States Court of Appeals. See 5 U.S.C. § 1207(c).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.