

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

94 M.S.P.R. 662

NEAL BROSS,

Appellant,

DOCKET NUMBER

DC-0752-01-0472-I-1

v.

DEPARTMENT OF COMMERCE,

Agency.

DATE: September 30, 2003

Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

John K. Guenther, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman

Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review and the appellant has filed a cross petition for review from the initial decision which reversed the removal action on a finding that the agency committed harmful procedural error in taking the action. We grant petitions such as these only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the appellant's cross petition for review presents no new, previously unavailable, evidence and does not show that the

administrative judge made an error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). We therefore DENY the appellant's cross petition for review. For the following reasons, we GRANT the agency's petition for review, AFFIRM the initial decision insofar as it found that the agency proved its charge, REVERSE the initial decision insofar as it found that the agency committed harmful procedural error, and SUSTAIN the agency's removal action.

BACKGROUND

¶2 The appellant worked for the United States Census Bureau, which is a unit of the Department of Commerce (the named agency), as a GS-13 Computer Specialist. Initial Appeal File (IAF), Tab 3, Subtab 4c. The agency removed him for the following charged misconduct, which the administrative judge found was proven.¹ On the morning of September 17, 1999, the appellant entered an agency building and used a computer assigned to him by the Census Bureau to access an Internet site displaying images of child pornography. *Id.*, Tab 7, Subtab 4m. The appellant proceeded to download 14 images of boys and girls under the age of 16 in various sexual situations. *Id.* The images downloaded by the appellant are described as depicting minor males engaging in sexual intercourse with minor females, manipulation of the genital areas of underage females, and nude or partially nude adult males having sexual intercourse with females under the age of 16. *Id.* Based on this conduct, the appellant was arrested and pled guilty in

¹ The appellant was charged with conduct unbecoming a federal employee, and with use of government property for unauthorized purposes. As the administrative judge noted, Initial Decision at 4-5, those two charges are based on the same incident and involve the same misconduct. The Board has held that, while the same actions may support more than one charge, they may do so only if the charges constitute separate offenses with separate elements of proof. *Langham v. U.S. Postal Service*, 92 M.S.P.R. 268, ¶ 13 (2002). Otherwise, the two charges duplicate each other and merge into a single charge. *Id.*, ¶ 14. In this case, we see no basis on which the agency could have sustained the charge of conduct unbecoming a federal employee in the absence of proof of the other charge. We therefore find that the former charge has merged into the latter, and we have considered the allegations as a single charge.

federal district court to a violation of Title 18 of the United States Code, Section 13, which makes it illegal to possess visual images depicting individuals under 16 years of age engaged as subjects of sexual conduct. *Id.*, Tab 7, Subtab 4a.

¶3 Despite finding that the appellant committed the charged misconduct, the administrative judge reversed the action. He did so because he believed that the agency violated a Memorandum of Understanding (MOU) between it and the appellant's union when, in place of the appellant's Division Chief, Dr. Tommy Wright, it assigned Wright's supervisor, Dr. Cynthia Z. F. Clark, as the proposing and deciding official. Initial Decision (ID) at 9 and 31-32; Hearing Transcript (Tr.) at 141. On petition for review, the agency contends that the administrative judge incorrectly reversed its action. Petition for Review File (PFRF), Tab 1.

ANALYSIS

The issue of interim relief

¶4 With its petition for review, the agency provided prima facie evidence of compliance with the administrative judge's interim-relief order. PFRF, Tab 1. The appellant filed a motion and three supplements asking the Board to dismiss the petition for failure to provide interim relief. *Id.*, Tabs 5, 15 and 16. The third supplement, filed on May 15, 2002, contains what has turned out to be the one remaining allegation of noncompliance, namely, that the agency "appeared" not to have made contributions to the appellant's Thrift Savings Plan (TSP) from January 7, 2002 (the date of the initial decision), through sometime in March 2002. *Id.*, Tab 16. The appellant stated that the agency had made the government's basic contribution to his TSP for the entire period of interim relief, but had only made a deposit for his personal TSP contributions beginning April 18, 2002. *Id.*

¶5 The appellant was not sure that the agency had failed to deposit funds into his TSP for the period January 7, 2002, through March 2002 to cover his personal contributions. He asserted only that, after once contacting the TSP Thrift Line,

“[t]hese [sic] appeared to be no recent adjustment for the missed contributions from January through March.” *Id.*, Tab 16. The appellant’s statement is in contrast to a sworn declaration from Judith Selock, Chief of the agency’s Benefits and Retirement Staff, that the agency had arranged for the crediting of the appellant’s TSP account at his 10% contribution rate, plus the agency’s contribution, retroactive to January 7, 2002. *Id.*, Tab 14, Ex. 4. Ms. Selock’s declaration is accompanied by documentation showing that this was done.

¶6 The unchallenged evidence also shows that, in its efforts to promptly comply with the interim-relief order, the agency overpaid the appellant by not deducting his share of TSP contributions from the back pay awarded to him pursuant to the order. *Id.*, Tab 14, Ex. 4, Att. 2. Rather than collect the overpayment, the agency allowed the appellant to keep the money and instead used its own funds to pay his personal share of TSP contributions for the period January 7 through March 23, 2002. *Id.*

¶7 In view of this record, we find that the agency has submitted sufficient proof of compliance with the interim-relief order. Accordingly, we deny the appellant’s motion to dismiss the agency’s petition.

The claim of harmful procedural error

¶8 The administrative judge found that the agency violated an MOU with the American Federation of Government Employees (AFGE) when it assigned Dr. Clark to serve, in place of Dr. Wright, as the proposing and deciding official, (This opinion will generally refer only to the “deciding official” since it is uncontested that whomever the agency designated would act as both the proposing and the deciding official.)

¶9 In September 1985, the agency and the AFGE entered into an MOU establishing a procedure for designating “proposing/deciding officials.” IAF, Tab 50, Ex. A1. Paragraph 1 of the MOU provides as follows: “Division Chiefs or their equivalents will normally serve as both Proposing and Deciding Official

on conduct-based actions.” Paragraph 3(b) of the MOU states, in relevant part, that a “higher level management official will be the Proposing and Deciding Official for . . . conduct-based actions in precedent-setting cases.” Thus, under the terms of the MOU, Division Chiefs or their equivalents would “normally” act as deciding officials, but the agency reserved the right to name a higher-ranking official as the deciding official in “precedent-setting cases” involving misconduct.

¶10 Dr. Wright was the Chief of the Statistical Research Division where the appellant was assigned. Tr. at 34. Under the MOU, he or his equivalent would “normally” be designated as the deciding official when the charged misconduct concerned an employee in the Statistical Research Division. The agency has shown, however, that this was a “precedent-setting” case which allowed it under the MOU to designate Dr. Clark as the deciding official.

¶11 The MOU’s provision that division chiefs or equivalent officials will “normally” serve as proposing and deciding officials indicates that the agency and the union regarded most disciplinary decisions as other than “precedent-setting,” as they used that term. Indeed, the record shows that the agency has rarely invoked this provision.² Under these circumstances, we find that the provision at issue here covers cases that differ significantly from those the agency

² The assistant chief of the agency’s human relations division testified that there had been only one other case, since the CBA went into effect in 1985, in which an official higher than the division chief served as the deciding official in an action against a member of the bargaining unit. Tr. at 225, 242. She also indicated that a higher-level official was designated because the division chief “had not been to work in a long time,” because he “was afraid that the employee might decide to go after him,” and because “he just didn’t want to do anything.” *Id.* at 242-43. Evidently, therefore, the present case is the only one in which the agency has invoked the “precedent-setting” provision. We do not conclude from this, however, that the agency must distinguish this case from all other cases since 1985. The MOU provision at issue here does not require that all “precedent-setting” cases must be decided by an official above the division director level. Instead, it only provides that they “may be” decided by such an official.

has handled previously, i.e., that it covers cases that will set a precedent in an area where there previously was none.

¶12 The present case meets this criterion. The agency submitted un rebutted evidence that no Census Bureau employee had ever been accused of or charged with the type of misconduct in which the appellant had engaged. A search of the agency's records revealed that although prior cases involved misuse of agency computers, they dealt with matters such as using the computers for homeowners' association business or personal tax matters. *Id.* at 368-69. At the union's request, the agency looked for any other case in which a Census Bureau employee may have used agency Internet access and computer equipment to download and possess images of children engaged in sexually graphic activities. *Id.* at 379, 410. It found no such case. *Id.* Moreover, we find that the criminal nature of the appellant's use of the computer distinguishes this case significantly from the other unauthorized uses mentioned above. Thus, on its facts, this case was precedent-setting.

¶13 For the reasons stated above, we find that the agency was authorized to designate, as the deciding official in this case, an official above the division director level, that the appellant accordingly has not shown that the agency violated the MOU, and that he therefore has not substantiated his claim of harmful procedural error.

The penalty

¶14 The administrative judge sustained the charged misconduct. The only remaining issue is whether the agency proved that its choice of penalty was reasonable.

¶15 In determining that removal was an appropriate penalty for the use of a government computer on government property to download child pornography and for violating federal laws which prohibit the possession of visual images depicting persons under the age of 16 as subjects of sexual conduct, Dr. Clark

considered the following mitigating factors. She took into account the appellant's past work record which was good, his 13 years of service, the lack of any prior discipline, and a letter from his counselor. IAF, Tab 3, Subtab 4d; Tr. at 53.

¶16 Balanced against these factors, Dr. Clark considered the conduct, which she found to be “decidedly more serious” than accessing or possessing a pornographic image of an adult since, as stated in her decision letter, accessing or possessing child pornography “victimizes children.” IAF, Tab 3, Subtab 4d. Dr. Clark considered how the appellant's misuse of the agency's computer system negatively impacted his ability to work as a Computer Specialist. *Id.*; Tr. at 66-68. She also took into consideration the appellant's inability to convince her that he would not engage in this type of conduct again, the criminal nature of the misconduct, the clarity with which he had been put on notice of the rules for using agency equipment, and the consistency of the selected penalty with agency guidance. IAF, Tab 3, Subtab 4d; Tr. at 68-70 and 115-16.

¶17 We see no error in these considerations, or in the agency's conclusion that, despite the positive factors mentioned above, the seriousness of the appellant's misconduct warranted removal. Under these circumstances, there is no basis for the Board to substitute its judgment for that of the agency. We therefore sustain the penalty of removal.

The appellant's cross petition for review

¶18 In his cross petition for review, the appellant asserts a number of errors or omissions by the administrative judge. PFRF, Tab 12.³ Most of these matters are addressed above, for example, issues pertaining to the claim of harmful

³ The appellant also has renewed his motion that the record be sealed, or that a pseudonym be substituted in the case caption for his name. PFRf, Tab 12 at 2 n.1. That motion is denied. *See Social Security Administration v. Doyle*, 45 M.S.P.R. 258, 262 (1990).

procedural error and the penalty. In addition, the appellant alleges a denial of constitutional due process. *Id.*, Cross Petition for Review at 4-5. The appellant's claim of a denial of due process, however, is made in a summary fashion. For instance, he contends that "the deciding official had a sufficiently high bias or predisposition towards removal of the Appellant that she failed fairly to evaluate his reply." *Id.* at 4; *see also id.* at 30. This assertion lacks an explanation of how the appellant arrived at this conclusion or a citation to any evidence in support of the assertion. For this reason, and because the appellant's arguments are otherwise unpersuasive, we see no basis for granting the appellant's cross petition for review.

ORDER

¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.