UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 16

Docket No. CH-0752-04-0620-M-1

John Doe,

Appellant,

v.

Department of Justice,

Agency.

January 15, 2010

Richard L. Swick, Esquire, Washington, D.C., for the appellant.

Jeffrey B. Killeen, Esquire, Pittsburgh, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

Vice Chairman Wagner recused herself and did not participate in the adjudication of this appeal.

OPINION AND ORDER

¶1 This case is before the Board on remand from the United States Court of Appeals for the Federal Circuit, which vacated our final decision and remanded for further proceedings. For the following reasons, we FIND that the agency had the authority to investigate and discipline the appellant for the conduct at issue in this case, FIND that there is a nexus between some of the charged conduct and the efficiency of the service, and REMAND this appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency's Federal Bureau of Investigation (FBI) removed the appellant from his GS-13 Special Agent position based on a charge of "Unprofessional Conduct – Videotaping Sexual Encounters With Women Without Their Consent." Refiled Appeal File (RAF), Tab 3, Subtabs 4a, 4b, 4e. The agency based the action on the appellant's signed, sworn statements indicating that, while he was employed by the agency, he videotaped his sexual encounters with three women, two of whom worked as support staff in the appellant's division, without their knowledge or consent. *Id.*, Subtab 4e at 1-2. In effecting the removal, the agency's deciding official noted that the appellant's actions were contrary to the FBI's suitability requirements, and that "[i]t is your surreptitious violation of the privacy and trust of these women under the most intimate of circumstances that has caused the FBI to deem you unsuitable for continued employment in a position of such trust as that of Special Agent in an agency dedicated to the core values of integrity, reliability, and trustworthiness." *Id.*, Subtab 4b at 1, 3. In his response to the proposed action, the appellant referenced the FBI's Personal Relationships Policy, which he claimed provided that the agency's Office of Professional Responsibility (OPR) "does not investigate allegations based upon the morality of romantic or personal relationships, or upon the marital status or gender of the parties, unless they would realistically be subject to prosecution and thus impact upon the accomplishment of the FBI's mission." *Id.*, Subtab 4d at 4-5; *see* RAF, Tab 13, Ex. D at 1. Nevertheless, in his decision notice the deciding official wrote that "[i]n fact, your non-consensual recording may have constituted a violation of criminal law," and in any event "it is not your relationships with these women but your videotaping them without their knowledge upon which this disciplinary matter is based." RAF, Tab 3, Subtab 4b at 3.

¶3 On appeal to the Board, the appellant asserted that there was no connection between his admitted secret recording of the now-destroyed videotapes and his performance as an agent with the FBI, but raised no affirmative defenses such as

allegations of discrimination, violation of law, or harmful procedural error. RAF, Tab 11 at 2. After a hearing, the Board's administrative judge (AJ) reversed the action, finding that the agency proved the factual allegations underlying its charge but did not show by preponderant evidence that discipline promoted the efficiency of the service. RAF, Tab 21 at 2-4. The AJ noted several arguments raised by the agency in a memorandum of law as to why its action promoted the efficiency of the service. *Id*. at 4-5. The AJ found that "[c]oncerning the propriety of imposing discipline for the appellant's admitted off-duty conduct, the agency primarily argues that the appellant's conduct 'appears' to violate the law of the State of Ohio, where the conduct occurred, and that it would have violated the voyeurism laws of other states had the conduct occurred in those jurisdictions." *Id*. at 4. The AJ also noted that the agency "further characterizes the appellant's conduct as 'egregious,' that it directly impacted two employees of the subject Midwestern Division Office, that it was 'blatantly inconsistent' with the FBI's mission," and that it affected the efficiency of the FBI because it violated the agency's suitability standards requiring its employees to conduct themselves with integrity and honesty. *Id*. at 4-5. Nevertheless, the AJ found, after a review of the applicable Ohio statute, that the agency did not show that the appellant was realistically subject to prosecution based on the admitted facts in the case. *Id*. at 10-12. The AJ further found that the agency did not identify any impact the appellant's conduct had on the performance of the appellant, any employee, or any aspect of the agency's operation, and did not demonstrate that the appellant "was directly responsible for the release in the agency's Division Office of interpersonal information bearing on . . . [his intimate or romantic] relationships." *Id*. at 15, 17-18. Finally, the AJ found that the agency did not distinguish the severity of the appellant's off-duty conduct in his intimate relationships from the conduct of other agents whose actions in their off-duty personal relationships, with their spouses or partners in adulterous affairs, or in

paying for the services of prostitutes, had not been found by the agency to form a sufficient nexus with agency operations to warrant discipline. *Id*. at 17-18.

¶4 After the agency petitioned for review of the initial decision, the Board granted the petition, reversed the initial decision, found that the agency proved by preponderant evidence a nexus between the appellant's conduct and the efficiency of the service, and remanded the appeal for further adjudication. *Doe v. Department of Justice*, 103 M.S.P.R. 135, ¶¶ 1, 6 (2006). The Board noted that under its case law an agency may establish a nexus between off-duty misconduct and the efficiency of the service by showing that the employee's conduct (1) affected the employee's or his coworkers' job performance, (2) affected management's trust and confidence in the employee's job performance, or (3) interfered with or adversely affected the agency's mission. *Id*., ¶ 7. The Board found that although it appeared that the appellant had not violated a law in the state in which the conduct occurred, his conduct was "clearly dishonest" and the FBI required its employees to behave in an honest and trustworthy manner and to comport themselves on and off duty so as not to discredit themselves or the FBI. *Id*., ¶¶ 8-9. The Board found that the appellant's failure to live up to those standards caused his supervisor and other employees to lose confidence in his honesty and integrity, question his judgment, and have much less confidence in his ability to perform any job. *Id*., ¶ 10. The Board further found that the two FBI employees the appellant videotaped became aware of the tapes, information and rumors regarding the videotaping spread throughout the division, the information and rumors were upsetting to both of the employees and interfered with their ability to concentrate on their work, and the Assistant Special Agent in Charge needed to spend time counseling them and making sure that they and other employees concentrated on their work rather than on the gossip and rumors related to the videotaping. *Id*. The Board noted that although the appellant did not divulge the existence of the tapes to his coworkers, the agency did not charge him with such action; rather, the agency charged him with admittedly improper

conduct that, when discovered and disclosed to others, predictably and understandably caused emotional distress to the FBI employees he had videotaped, adversely affected his division's operations, and caused his supervisors to lose trust and confidence in him. *Id.*, ¶ 11. The Board also noted that although the FBI's Personal Relationships Policy provided that OPR "does not investigate allegations based upon the morality of romantic or intimate relationships, or upon the marital status or gender of the parties, unless they would realistically be subject to prosecution and thus impact upon the accomplishment of the FBI's mission," the agency did not base its charge on the morality of the appellant's relationships with the women he videotaped; instead, it based its charge on conduct in which the appellant engaged during those relationships. *Id.*, ¶ 12. The Board concluded that "even if the policy could be construed as limiting the agency's ability to establish nexus, . . . it does not preclude a finding of nexus in this case." *Id*.

¶5 On remand, the AJ mitigated the penalty of removal to a 120-day suspension and a directed reassignment, at the agency's option, of the appellant to another agency field office. Board Remand File, Tab 13 at 2, 15. The agency petitioned for review, and the appellant cross-petitioned for review of that initial decision. *See Doe v. Department of Justice*, 107 M.S.P.R. 397, ¶ 1 (2007), *vacated and remanded*, 565 F.3d 1375 (Fed. Cir. 2009). In its final decision, the Board granted the agency's petition for review, denied the appellant's cross-petition for review, and sustained the removal action, finding that the penalty of removal was not so harsh and unconscionably disproportionate to the appellant's misconduct that it amounted to an abuse of discretion. *Id.*, ¶¶ 1, 14.

¶6 On review of the Board's final decision, the court vacated both the Board's determination that the action promoted the efficiency of the service and the Board's ruling regarding the reasonableness of the penalty of removal, and remanded for further proceedings not inconsistent with its opinion. *Doe v. Department of Justice*, 565 F.3d 1375, 1383 (Fed. Cir. 2009). The court first

noted that the agency's own regulations circumscribed the conduct the agency could investigate and consider as grounds for removal of an employee, and that the Board's decisions had focused on whether the FBI's inquiry into the appellant's personal affairs, and the attendant disciplinary removal, were in accordance with the FBI's Personal Relationships Policy. *Id*. at 1379. The court held that the FBI's policy did not condone disciplinary consideration of an employee's morality in romantic or intimate relationships in the absence of (1) a violation of criminal law, (2) an adverse impact on the agency's ability to perform its responsibilities, or (3) a violation of an internal regulation, and that the policy indicated that OPR "may investigate conduct of employees in the context of a personal relationship only if that conduct is criminal . . . ." *Id*.

¶7 The court found that although the Board had held that the appellant's clearly dishonest off-duty conduct was sufficient to trigger the agency's investigation and justify the removal decision, the Board had failed to articulate a meaningful standard as to "when private dishonesty rises to the level of misconduct that adversely affects the 'efficiency of the service'," that using only "clearly dishonest" as a standard risked arbitrary results, and that the articulation of a standard was necessary particularly in light of the "apparent conflict between the FBI's policy on investigating personal relationships and its policies requiring their agents to act with '[i]ntegrity and [h]onesty.'" *Id*. at 1380. The court noted that "[w]ithout a predetermined standard - .e.g., the legality of the conduct – to clarify when the agency may and may not investigate the personal relationships of its employees, it is conceivable that employees could be removed for any number of 'clearly dishonest' misrepresentations, from those made to preserve the sanctity of a romantic relationship to cheating in a Friday night poker game." *Id*. at 1381. The court held that "[t]o allow the Board decision to stand would be to recognize a presumed or per se nexus between the conduct and the efficiency of the service," and that it could not endorse such an interpretation because the required nexus was not one that can be presumed based on the appellant's

conduct "speaking for itself." *Id*. Thus, the court remanded the case so that the Board "may articulate a meaningful standard as to when private misconduct that is not criminal rises to the level of misconduct that adversely affects the efficiency of the service, and apply that standard to the facts of this case." *Id*.

¶8 The court further held that the Board had failed to address the fact that the FBI's decision to sustain the charge and to impose the penalty of removal was influenced "at least in part by the assumed criminality of the behavior." *Id*. The court found that it remained unclear whether "the deciding officials at the FBI interpreted its policy to *require* a criminal finding, such that they could only investigate Doe if his surreptitious videotaping of his sexual liaisons was criminal." *Id*. The court found that the "deciding officials" at OPR as well as the appellant's own supervisors were "under the impression that Doe's conduct violated state voyeurism laws, and was reasonably subject to criminal prosecution," and that "while the Board agreed with the AJ's conclusion that Doe's conduct was not criminal, it failed to examine what role that impression played in the initial decision by the agency to remove Doe based on 'clearly dishonest' conduct proscribed by the FBI policy." *Id*. at 1381-82. Thus, the court held that "[b]ecause the Board sustained the agency's decision without regard to the violation of law issue, it did not consider whether the FBI would have disciplined Doe absent assumed criminality." *Id*. at 1382. Accordingly, the court indicated that the Board must determine whether the agency exceeded its authority in determining that the employee's action would adversely affect the efficiency of the service. *Id*. More specifically, the court held that the Board must (1) determine whether the FBI had the authority to discipline the appellant for his actions, and (2) even if it could impose discipline, determine whether the agency would have imposed discipline "absent the legal error, i.e., whether the FBI would impose discipline now that the FBI's legal error (the assumed criminality) has been corrected." *Id*.

¶9 Finally, noting that the record indicated that the appellant's supervisor and the deciding official had lost confidence in the appellant's honesty and integrity, questioned his judgment and ability to perform his duties, and found his misconduct serious because they believed it violated Ohio state law, the court noted that "[b]ecause it seems probable that Doe was disciplined at least in part because the deciding official mistakenly believed that his misconduct was in violation of the law, it is necessary to know what conclusion the decision makers would have reached, and what penalty they would have imposed, if the possibility that the conduct was criminal was removed from consideration." *Id*. at 1382-83. The court held that in the absence of a violation of criminal law, the FBI was permitted to discipline an employee for off-duty personal conduct only if the conduct impacted the agency's ability to perform its responsibilities or if the conduct constituted a violation of an internal regulation. *Id*. at 1383. Thus, the court remanded the case to the Board to consider "whether the agency (1) rendered its decision based on a determination that Doe's conduct satisfied either of those two prongs; and thereafter (2) would have imposed the penalty of removal as an appropriate disciplinary measure, independent of any determination that a violation of criminal law had occurred." *Id*.

ANALYSIS

The agency had the authority to investigate and discipline the appellant for the conduct at issue in this case.

¶10 An agency is required to act in accordance with the procedures it adopts for itself, and the Board will enforce employee rights derived from such rules, regulations, policies, and collective bargaining agreements. *Campbell v. U.S. Postal Service*, 75 M.S.P.R. 273, 279 (1997); *see Hudson v. Department of the Navy*, 86 M.S.P.R. 398, ¶ 6 (2000), *aff'd*, 15 F. App'x 812 (Fed. Cir. 2001). For example, if an agency's policy prohibits it from disciplining an employee under certain circumstances, the Board will find that such a charge cannot be sustained.

See Sadowski v. Defense Logistics Agency, 40 M.S.P.R. 655, 658 (1989) (the agency improperly charged the appellant with both AWOL and abuse of sick leave because a management instruction prohibited the use of more than one offense to describe a single incident). Here, many of the issues raised in the court's decision remanding this case to the Board relate to the agency's "Personal Relationships Policy," which is set forth in a March 27, 2001 memorandum sent to all employees by former FBI Director Louis J. Freeh. In pertinent part, that policy provides as follows:

> INTRODUCTION
>
> *The private lives of FBI employees, and their relationships with others, are subject to inquiry by the Office of Professional Responsibility (OPR) only when the conduct may: (1) negatively impact upon the ability of the Bureau to perform its responsibilities; (2) violate the law; or (3) violate an internal regulation.* Current manual provisions prohibit certain conduct, such as sexual harassment, but do not provide overall guidance on how personal relationships may involve misconduct subject to discipline. The following policy statement is intended to inform employees of harmful institutional consequences which can result from personal relationships and require disciplinary action.
>
> 1. CONDUCT OR RELATIONSHIPS INVOLVING VIOLATIONS OF THE LAW
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> Off-duty conduct which violates federal, state, or local law or involves law enforcement contact is reportable to OPR because it has a direct connection with the FBI's law enforcement mission and its need to maintain an effective and respected workforce. Employees are subject to discipline for offenses involving prostitution, public indecency, sexual assault, statutory rape, domestic violence, bigamy, and other violations which are prosecuted under the criminal law of the jurisdiction where they are committed. *OPR does not investigate allegations based upon the morality of romantic or intimate relationships, or upon the marital status or gender of the parties, unless they would realistically be subject to prosecution and thus impact upon accomplishment of the FBI's mission*.
>
> 2. MISUSE OR COMPROMISE OF GOVERNMENT POSITION, PREMISES, PROPERTY, WORKING HOURS, OR OTHER INTERESTS

> While normal interaction between employees in the workplace may involve reasonable discussion of social contacts during nonduty hours, the guiding rule is that personal relationships are to be pursued on personal time with personal resources. Unauthorized passengers may not be transported in FBI vehicles. Personal acquaintances may not be permitted improper access to FBI space. Physical intimacies in a government workspace or vehicle, or while on duty, are inappropriate and unprofessional. *Employees must not allow their personal relationships to disrupt the workplace, compromise the interests of the government, or make them subject to manipulation*. For example, romantic or intimate relationships between a Special Agent and a current informant, witness, or subject are prohibited because they may negatively impact upon the credibility of the persons involved and of the overall investigation and prosecution, or make the Agent vulnerable to improper pressure.

RAF, Tab 13, Ex. D at 1-2 (emphasis added).

¶11 As set forth above, the FBI policy provides that the private life of an FBI employee like the appellant is subject to inquiry by OPR when conduct "may" negatively impact upon the ability of the FBI to perform its responsibilities, violate the law, or violate an internal regulation.[1] Because the policy does not define the term "may," the ordinary, contemporary, common meaning of the word applies. *See Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1342 (Fed. Cir. 2005); *Pugach v. Office of Personnel Management*, 46 F.3d 1081, 1083 (Fed. Cir. 1995). We find that the ordinary, contemporary, common meaning of

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[1] In contrast to this provision, which specifically addresses when *conduct* that takes place within the private lives of FBI employees is subject to inquiry, the policy statement that "OPR does not investigate allegations based upon the morality of romantic or intimate relationships, or upon the marital status or gender of the parties, unless they would realistically be subject to prosecution and thus impact upon accomplishment of the FBI's mission," addresses the *morality* of a *relationship*, which is not at issue in this case. *Cf. Hall v. Office of Personnel Management*, 102 M.S.P.R. 682, ¶ 9 (2006) (the whole of a statute should be considered in determining its meaning, and statutory provisions should be read in harmony, leaving no provision inoperative, superfluous, redundant, or contradictory). The charge against the appellant was not based on the morality of his relationships, i.e., whether it was immoral to be dating the women in question, but on conduct in which the appellant engaged during those relationships.

the term "may," within the context of the FBI policy in this case, "indicate[s] possibility or probability," and refers to a "reasonable possibility." Merriam-Webster's Collegiate Dictionary 717 (10th ed. 2002); *see Christiania General Ins. Corp. of New York v. Great American Ins. Co.*, 979 F.2d 268, 276 (2d Cir. 1992) (a provision requiring notice when it "appears likely" that a claim will or "may" involve a policy does not require a probability – much less a certainty – that the policy at issue will be involved; all that is required is a "reasonable possibility" of such happening, based on an objective assessment of the information available). This interpretation makes sense because the FBI may not be certain that a law or regulation has been violated, or that its ability to perform its responsibilities has been negatively impacted, until an inquiry has been conducted. Moreover, this interpretation is consistent with the opinion of the deciding official in this case, Jody Weis, RAF, Tab 3, Subtab 4b at 6, who testified that OPR could intervene in a matter if an employee's on- or off-duty conduct disrupted the office such that people were not working as a result. Hearing Transcript (HT) at 77, 134-35 (testimony of Weis that "if it's disrupting the office, if the function of the office, if the office's effectiveness and efficiency is disrupted because of [legal, off-duty, personal sexual] behavior, I believe our personal relationship policy would allow us to look into that if it was referred to us"), 136-39 (testimony of Weis that despite the policy statement that OPR does not investigate the morality of relationships, OPR could still investigate the matter if a personal relationship disrupted the workplace or compromised the interests of the government). The Personal Relationships Policy clearly states that employees must not allow their personal relationships to disrupt the workplace. RAF, Tab 13, Ex. D at 2.

¶12 Here, even assuming that there was no reasonable possibility that the appellant's conduct violated a law, we find that there was at least a reasonable possibility that the appellant's actions of videotaping his sexual encounters with three women without their consent, two of whom worked for the agency,

negatively impacted the agency's ability to perform its responsibilities and violated an internal regulation.[2] In this regard, the record indicates that the two FBI employees the appellant videotaped without their consent became aware of the tapes, that information and rumors regarding the videotaping spread throughout the division, that the information and rumors were upsetting to both of the employees, that it interfered with their ability to concentrate on their work, and that the Assistant Special Agent in Charge (ASAIC), Gary Klein, needed to spend time counseling them and making sure that they and other employees concentrated on their work rather than on the gossip and rumors related to the videotaping. *See, e.g.*, RAF, Tab 7, Subtab 4a at 7, 24-30; RAF, Tab 3, Subtab 4t at 1-2; *id.*, Subtab 4u at 2; *id.*, Subtab 4v at 4; *id.*, Subtab 4w at 2-3; *id.*, Subtab 4y at 2-4. Thus, because the appellant's conduct "may" have negatively impacted the ability of the FBI to perform its responsibilities and violated an internal regulation, the agency was not prohibited under the Personal Relationships Policy from investigating and disciplining the appellant for the unprofessional conduct set forth in the agency's charge.

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[2] Weis found that the appellant's conduct violated numerous policies and regulations, including the Manual of Administrative Operations and Procedures, which he described as stating in relevant part that "the Bureau expects its employees to so comport themselves that their activities on and off duty will not discredit either themselves or the Bureau," that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order," and that employees may be dismissed for violating suitability standards relating to honesty, integrity, and judgment. RAF, Tab 3, Subtab 4b at 3-4. Weis also referenced the FBI Employee Handbook, which he quoted as stating that the FBI "expects and requires that high standards of personal conduct on the part of its employees be maintained not only when they are engaged in their official duties but while off duty," that employees should avoid any activity or situation which could be misinterpreted or misunderstood to the detriment of the FBI, that conduct must not only be proper but always appear proper, and that employees who fail to uphold such values as reliability, trustworthiness, honesty, and integrity will be subject to administrative action up to and including dismissal. *Id.* at 4-5.

This case must be remanded for further development of the record with respect to the issue of whether the agency would have disciplined the appellant, and would have decided on the penalty of removal if it decided to discipline him, absent the "legal error" of assuming that his conduct was criminal.

¶13 Having determined that the agency had the authority to discipline the appellant for "Unprofessional Conduct - Videotaping Sexual Encounters With Women Without Their Consent," we next address the issue of whether the agency would have imposed discipline "absent the legal error, i.e., whether the FBI would impose discipline now that the FBI's legal error (the assumed criminality) has been corrected." *Doe*, 565 F.3d at 1382.

¶14 In its proposal notice, the agency addressed in detail its evidence supporting the charge and asserted that the appellant's conduct violated numerous policies and regulations. RAF, Tab 3, Subtab 4e at 1-2, 4-6. The agency also asserted, however, that the appellant's pursuit of professional counseling regarding his actions in the matter did not excuse or explain "your having videotaped women without their knowledge or consent, in apparent violation of state law . . . ." *Id*. at 6. As set forth above, Weis indicated in response to an argument raised by the appellant that "[i]n fact, your non-consensual recording may have constituted a violation of criminal law." RAF, Tab 3, Subtab 4b at 3.

¶15 Nevertheless, testimony provided by the proposing and deciding officials at the hearing reflects that the agency may have disciplined the appellant "at least in part because the deciding official mistakenly believed that [the appellant's] misconduct *was* in violation of the law . . . ." *Doe*, 565 F.3d at 1383 (emphasis added). The proposing official, Mary Rook, testified that she "ha[d] concerns" that the appellant committed a crime when he surreptitiously videotaped females having sex with him, and that "[w]e believe that he had violated an Ohio statute regarding voyeurism." HT at 8, 10-11, 14-15. She testified that based on what she knew and her reading of the statute, she "ha[d] concerns" that the appellant committed a crime. HT at 15-16. She testified that she understood that the appellant was not prosecuted because the videotapes had been destroyed. HT

at 17. Rook testified that the appellant's conduct was unprofessional because "he appears to have violated state law . . ., [h]e violated the tenets of what it means to be a Special Agent of the FBI[,] [h]e lacked integrity, he lacked judgment, he lacked trustworthiness, all of which we consider in viewing whether a person is suitable for employment as [a] Special Agent with the FBI." HT at 22. She further testified that "[t]he fact that [the appellant] apparently violated the law even though it was just the state law, that's of no consequence. He violated a law and was sworn to uphold the law. So, what he did was inconsistent with what our mission is." HT at 23. Rook testified that after the appellant made his oral response to the proposal notice, Weis concluded that the appropriate discipline was termination because he had committed a crime. Whether or not it was charged, the actions were the same, that he had violated the trust of these women, he had invaded their privacy, he had failed to demonstrate the integrity and the trustworthiness and the judgment that we expect of all our agents." HT at 36-37.

¶16 When asked whether she decided that there was a violation of law without knowing what the prosecutor's assessment of the case was and whether the prosecutor had accurate information, Rook testified that "we reached our assessment without regard because in OPR whether the case is prosecuted or not really doesn't impact, because the prosecutor looks at other things than whether the law was technically violated and a jury appeal case and all those kinds of things we don't consider that. We look at the conduct. Was it a violation of the statutes. It appeared that it was." HT at 64. She testified that the agency relied upon the content of the Ohio statute, without regard to interpretation, that "[i]t appears on its face to be a violation," and that the appellant's conduct appeared to violate the law. HT at 67. Finally, Rook testified with respect to this issue that she proposed the appellant's removal because she felt that it appeared to her that the appellant's actions violated state law. HT at 68. She also testified, however, that the agency did not do any research to determine how the statute was applied by the state, and that she had no state case law to show that the statute has been

applied by a state prosecutor "in the circumstances where the person was in the room consensually, in a consensual intimate relationship with the offender." HT at 74.

¶17 Weis testified that he had concerns that the appellant had committed a crime when he surreptitiously videotaped females having sex with him, specifically, an Ohio statute regarding voyeurism. HT at 77-81. He further testified that if the appellant had been in a state that did not have a voyeurism statute, he was not sure if that would have made a difference, and that "[t]here wouldn't have been a crime that would have maybe brought us to this, there wouldn't have been the appearance of criminal activity that would have brought [us] to it, however we still have the actions that took place, which I feel, although they are criminal in nature, he was never charged." HT at 127. Weis testified that he believed there was an invasion of privacy under the Ohio voyeurism statute, HT at 131, but that even if there was no violation of law, the agency could look into what an employee does in his bedroom if it "works itself into an FBI office and disrupts the office," HT at 138-39. He testified that he was not curious as to whether the Ohio statute applied to a situation where the surreptitious taping had taken place between consenting adults, and that "[w]e were looking simply if they were going to prosecute him, once they declined, we simply, we looked at the behavior involving those instances and compared it to our suitability standards." HT at 154-55. He testified that the agency also looked at the statute to determine if the appellant's behavior, although not charged, would have been criminal, or at least had the appearance of criminality, and concluded that "I felt that it did, and . . . at least two attorneys took a cut at that and felt that the behavior was criminal, although not charged." HT at 155.

¶18 The question of whether the agency would have disciplined the appellant at all, let alone imposed the penalty of removal, absent the assumed criminality of his conduct, was not addressed by the parties below or directly asked of the key witnesses in this case. Regarding the issue of whether the agency would have

disciplined the appellant absent its "legal error," an AJ who observes the demeanor of the witnesses is in the best position to assess the credibility of those witnesses on this issue. *See Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985); *Posey v. Department of Defense*, 106 M.S.P.R. 472, ¶ 13 (2007). Accordingly, we remand this case for further adjudication consistent with this decision and with the court's opinion in *Doe*, including the submission of evidence on this issue and a hearing if requested by the appellant.

Efficiency of the Service Standard

¶19 The court instructed the Board to "articulate a meaningful standard as to when private misconduct that is not criminal rises to the level of misconduct that adversely affects the efficiency of the service, and apply that standard to the facts of this case." *Doe*, 565 F.3d at 1381. The court indicated that using only "clearly dishonest" as a standard risked arbitrary results, "as the question of removal would turn on the Board's subjective moral compass." *Id*. at 1380.

¶20 Under 5 U.S.C. § 7513(a), an agency may remove an employee "only for such cause as will promote the efficiency of the service." *See also* 5 C.F.R. § 752.403(a) (an agency may take an adverse action only for such cause as will promote the efficiency of the service). In *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987), the Board held that an agency may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or coworkers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. A nexus under the third category may be proven by showing that an employee engaged in off-duty misconduct that is directly opposed to the agency's mission. *Id*.; *see Brown v. Department of the Navy*, 229 F.3d 1356, 1360-61 (Fed. Cir. 2000). The general principles underlying the standard set forth in *Kruger* have been applied in situations

involving non-criminal, dishonest, off-duty misconduct. *See, e.g.*, *Scott v. Department of Justice*, 69 M.S.P.R. 211, 243 (1995) (finding a sufficient nexus between the off-duty misconduct of making false accusations against former coworkers and the efficiency of the service where the agency lost confidence in the appellant's ability to perform his duties as a criminal investigator), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table); *Cornish v. Department of Commerce*, 10 M.S.P.R. 382, 383-85 (1982) (finding a nexus between the appellant's failure to meet his debt obligations and his identification of the agency as his employer in connection with his off-duty misconduct, and the efficiency of the service), *aff'd*, 718 F.2d 1098 (6th Cir. 1983) (Table).

¶21 Here, the court has held that this case does not involve egregious circumstances giving rise to a rebuttable presumption of nexus. *See Doe*, 565 F.3d at 1381 ("we agree with the Board that the required nexus is not one that can be presumed based on Doe's conduct 'speaking for itself'"). Moreover, we find that the appellant's conduct in this case is not directly opposed to the agency's mission. *Cf. Brown*, 229 F.3d at 1358-1361 (finding nexus where an area program manager for a Marine Corps Morale, Welfare, and Recreation Department engaged in an adulterous relationship with the wife of a Marine assigned to a unit supported by the manager while the Marine was deployed overseas); *Allred v. Department of Health & Human Services*, 786 F.2d 1128, 1131-32 (Fed. Cir. 1986) (finding nexus based on an accountant's conviction for off-duty child molestation, given that the mission of the agency was to administer health and social services to disadvantaged persons like the victim of Mr. Allred's offense); *Wild v. U.S. Department of Health & Human Services*, 692 F.2d 1129, 1131-34 (7th Cir. 1982) (finding nexus based on a HUD appraiser's off-duty actions as manager of deteriorated rental properties). The agency has not alleged or shown, for example, that its mission included preventing the surreptitious, non-criminal videotaping of consensual sexual encounters. Thus, a finding of nexus may be established in this case if

preponderant evidence shows that the misconduct affected the appellant's or his coworkers' job performance or management's trust and confidence in the appellant's job performance. *See Kruger*, 32 M.S.P.R. at 74.

¶22 We note that in *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969), the court, observing that "[t]he Due Process Clause may . . . cut deeper into the government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is . . . a foundation of several specific constitutional protections," reversed the removal of a National Aeronautics and Space Administration budget analyst on alleged grounds of "immoral conduct" and of possessing personality traits that rendered him "unsuitable for government employment." The court found that the employee's homosexual advance toward a stranger while off duty had been proven as alleged, but concluded that the discharge was unlawful because the record established no "reasonable connection" between the evidence against him and the efficiency of the service. *Id*. at 1162. The *Norton* court reasoned that

> the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. And whatever we may think of the Government's qualifications to act in loco parentis in this way, the statute precludes it from discharging protected employees except for a reason related to the efficiency of the service.

Id. at 1165. In finding that an agency must demonstrate some "rational basis" for its conclusion that a discharge will promote the efficiency of the service, the court held that the sufficiency of the charges "must be evaluated in terms of the effects on the service of what in particular he has done or has been shown likely to do." *Id*. at 1164, 1166. The only justification for removal mentioned by the agency in *Norton* was the possibility of embarrassment to the agency. *See id*. at 1167. Under these circumstances, the court found that the agency did not show any "reasonably foreseeable, specific connection between [the] employee's potentially embarrassing conduct and the efficiency of the service." *Id*.

¶23 Following *Norton*, private sexual conduct involving only consenting adults was similarly found to be unrelated to service efficiency in *Mindel v. U.S. Civil Service Commission*, 312 F. Supp. 485, 488 (N.D. Cal. 1970), in which a district court reversed the removal of a postal clerk for cohabiting with a woman to whom he was not married, finding that there was no "rational nexus" between such conduct and the duties of a postal clerk. In *Major v. Hampton*, 413 F. Supp. 66, 67-68, 71 (E.D. La. 1976), a district court reversed the removal of an Internal Revenue Service return examiner for maintaining a separate apartment for discreet off-duty extramarital affairs, again finding a lack of nexus because the government did not introduce evidence that the employee's actions "were calculated to arouse, or did in fact arouse, odium for the employee or the IRS." The *Major* court noted that

> [t]he examiner and the Appeals Review Board appear to have assumed that a person's moral character is homogeneous: those who behave improperly in one regard are likely to transgress in others. But this is both a logical non-sequitur and a psychological error. . . .
>
> A person may have impeccable sexual standards – or indeed be celibate – and yet steal. On the other hand, thieves may be faithful to their wives and attend religious services regularly.

413 F. Supp. at 71 n.4.

¶24 The above cases are distinguishable from the instant case because the off-duty conduct in those cases did not affect the job performance of other agency employees and did not otherwise disrupt the workforce. Moreover, the agency in this case did not base its action on the appellant's status or on conduct that is protected by some law, rule, regulation, or policy. *See, e.g.*, Exec. Order No. 13,087, 3 C.F.R. 191 (1999), reprinted in 42 U.S.C. § 2000e note (2008) (prohibiting discrimination in federal employment because of sexual orientation). Rather, it relied on off-duty conduct involving other agency employees that affected those employees' job performance and the efficiency of the workplace. As proven by the agency, the appellant videotaped his sexual encounters with two FBI employees, identified in the record as Female No. 1 and Female No. 2,

without their consent. As set forth more fully below, we find that there is a nexus between the appellant's conduct as it related to Female No. 1 and Female No. 2 and the efficiency of the service. These employees became aware of the tapes, information and rumors regarding the videotaping spread throughout the division, the information and rumors were upsetting to both of the employees and interfered with their ability to concentrate on their work, and ASAIC Klein needed to spend time counseling them and making sure that they and other employees concentrated on their work, rather than on the gossip and rumors related to the videotaping. *See* RAF, Tab 7, Subtab 4a at 7, 24-30; RAF, Tab 3, Subtab 4t at 1-2; *id*., Subtab 4u at 2; *id*., Subtab 4v at 4; *id*., Subtab 4w at 2-3; *id*., Subtab 4y at 2-4.

¶25 The agency submitted signed, sworn statements from the two FBI employees who were videotaped by the appellant without their consent. RAF, Tab 3, Subtabs 4w, 4y. In her written statement, Female No. 1 averred that she understood that the agency was conducting an administrative inquiry regarding an allegation that the appellant "engaged in unprofessional conduct by surreptitiously videotaping sexual encounters with various . . . Division female support employees, possibly without their consent," that she started dating the appellant in September 2001, and that they became engaged in February 2003. *Id*., Subtab 4y at 1. She indicated that in the fall of 2002, she was staying at the appellant's house while he was out of town, decided to watch an unlabeled videotape she found in the appellant's bedroom, and discovered that it was a videotape of her and the appellant having sex on an occasion on which she had not consented to the videotaping. *Id*. at 2.[3] Female No. 1 found a box in the appellant's closet that contained videotapes with the names of other females

[3] Female No. 1 had consented to being videotaped by the appellant during sexual encounters with him that occurred prior to and after the videotape that was made without her consent. RAF, Tab 3, Subtab 4y at 2.

written on them, including Female No. 2, who worked in the same agency office and previously dated the appellant, and Female No. 3, whose name Female No. 1 did not recognize. *Id*. Female No. 1 wrote that "I was very upset about finding the videotapes of the other women and felt devastated because he not only had made tapes with other women, but had kept them." *Id*. She indicated that "[t]here have been a lot of rumors at the office about the videotapes as a result of me telling some friends what I had found," and that "[t]hese rumors have now gotten out of control." *Id*. at 4.

¶26 Female No. 2 averred that she understood that the agency was conducting an administrative inquiry regarding an allegation that the appellant had engaged in unprofessional conduct by surreptitiously videotaping sexual encounters with various female support employees possibly without their consent. RAF, Tab 3, Subtab 4w at 1. She wrote that in January 2003 she heard rumors that Female No. 1 had made a complaint about the appellant videotaping himself having sex with other women, and that she was one of the women on the tapes. *Id*. at 2. Female No. 2 indicated that she had never discussed videotaping the sexual encounter with the appellant, and "[t]here is no way that he would have thought that I agreed to being videotaped having sex with him." *Id*. She further averred that a special agent in the office recently asked her if she was okay, asked "Are you sure?" when she replied that she was okay, and "[t]he fact that he was asking me this and the tone of his voice made me believe that he knew about the videotapes and may have seen them." *Id*. Female No. 2 indicated that the appellant may have shown the videotapes to other employees or put them on the Internet, she was "very upset about the rumors going around the office about me being videotaped with [the appellant] having sex," she approached the Acting Assistant Special Agent in Charge about her concerns, and she received a "disturbing" message on her voice mail at work from a special agent she dated after she had dated the appellant. *Id*. at 2-3. In this voice mail message, the special agent referenced the videotapes and "made a comment about my children

being proud of me. I have been very upset coming to work everyday because of these rumors in the office." *Id*. at 3.

¶27 The agency submitted a signed, sworn statement from an agency employee indicating that he and Female No. 1 were friends, that in the fall of 2002 Female No. 1 "came to work and she was shaken up about an incident that had occurred that weekend," and she confided in the coworker regarding her discovery of the videotapes. RAF, Tab 3, Subtab 4t at 1. The coworker wrote that Female No. 1's "story went on for several days," that she "kept telling me more and more every day," and that "[i]t was obvious she was shaken up because it was all she wanted to talk about." *Id*. at 2. Another coworker indicated that Female No. 1 talked to her and four other employees about the videotapes, and that "[t]here have been a lot of rumors around the office because [Female No. 1] told people and she didn't think they would say anything." RAF, Tab 3, Subtab 4v at 4.

¶28 In his assessment of the *Douglas* factors, Klein wrote that rumors about the appellant's situation were widespread throughout the division, and that "[t]his has been disruptive to the Division." RAF, Tab 3, Subtab 4g at 2. He recommended that the appellant receive a disciplinary transfer and up to a 30-day suspension, *id*. at 3, but noted that OPR ultimately determines the penalty in disciplinary cases, RAF, Tab 7, Subtab 4a at 8, 44-46. He testified during a deposition that the appellant's conduct led to an OPR investigation, and that the presence of OPR investigators in the office "was certainly very disruptive, and they interviewed probably at least a half-a-dozen employees, and there were a number of or many other employees who expected to be interviewed." *Id*. at 20-21. Klein testified that while OPR was in the office it was a subject of conversation as to what had happened and who had been talked to, and "just a lot of rumors and a lot of disruption" during regular business hours. *Id*. at 21. He further testified that there was a lot of disruption in the workplace, it was the topic of conversation throughout the office, he had frequent visitors in his office and telephone calls from "quite a few of the parties involved who were upset about reputations, and

about a delay, and the feeling that OPR and the administrative process was not proceeding quickly enough." *Id*. at 24. Klein testified that there were relationship issues, "problems between employees . . . were getting pretty serious, and allegations of misconduct were being made against other employees," such as the telephone message left for Female No. 2 by a coworker informing her that she had disgraced her family and should be ashamed of herself. *Id*. at 24-25. He testified that Female No. 2 approached him on many occasions concerning the appellant's conduct, her concern about her reputation, and her belief that "people in the office thought less of her, and that she had done something wrong, and that she was just very upset about this." *Id*. at 25. Klein "constantly told her that she did not do anything wrong, and that she had nothing to be ashamed of," and counseled her and Female No. 1 not to talk about the matter in the office. *Id*. Klein testified that he believed that Female No. 1 and Female No. 2 were talking to other employees about the matter and making statements that were upsetting to other parties, and that Female No. 1 told Klein that she was thinking about obtaining a lawyer and filing a lawsuit against a number of people because of various things that she felt had or had not taken place. *Id*. at 26. He estimated that he and Female No. 2 spent 3 or 4 hours discussing the appellant's conduct, and that Female No. 2 continued to be a good employee, "but it obviously disrupted her life," and "[p]sychologically, she seemed to be very bothered much of the time, and obviously she did not devote her entire energies to her work." *Id*. Klein testified that his productivity was affected because it took a lot of his time to deal with the problems caused by the appellant's conduct, counsel people, and "try to make sure that people concentrated on their work and not on these allegations." *Id*. at 26-27.

¶29 Regarding Female No. 1, Klein testified that she came to see him approximately six times, he spent approximately 3 or 4 hours with her, and that both Female No. 1 and Female No. 2 spoke with the Special Agent in Charge on a number of occasions about the appellant's conduct. *Id*. at 27-28. The

productivity of Female No. 1 was affected because she "obviously devoted a lot of her energies . . . to this matter," she spent a lot of time with Klein about it, "there were a lot of complaints about her from other employees that she was talking about this," and "it was just something for many months [that] was the principal focus of a lot of energies and attention in the office." *Id*. at 28. Klein spent "a lot" of time talking to Female No. 1, trying to reassure her, and advising her on various aspects of the matter. *Id*.

¶30 Klein testified that a female employee who had dated the appellant but had not had any sexual encounters with him met with Klein twice for approximately 20 minutes because her husband, who was also an employee in the office, was upset about the allegations relating to the female employee's prior relationship with the appellant. *Id*. at 29-30. Klein testified that

> she told me that her husband was upset, and I offered – and because she knew that she was going to be interviewed, or probably interviewed, I told her that we could make this very private, and if she was concerned about other employees in the office being aware that she was interviewed, and that that could be arranged.
>
> I also offered to talk to her husband, and she told me no, that that would not be necessary. And she told me that her husband was very upset about the rumors that were going around the office about her alleged relationship with [the appellant].

Id. at 29. This female employee's productivity was affected because it "took away from her activities in the normal course of business," and it "obviously affected her relationship with her husband," and although Klein did not know how much time was involved or how serious it was, the female employee was concerned enough to bring it to his attention. *Id*. at 30. Klein testified that his productivity was affected in addressing this female employee's concerns because "it just meant that I spent more time involved in counseling sessions and administrative matters, rather than in investigative matters, or supervising other programs in the office." *Id*. Further, he testified that the agency's media coordinator informed him that a major newspaper with a large circulation in Ohio

had sought details from the media coordinator about the allegations made against the appellant. *Id*. at 33. Klein testified that the appellant's relationship with the employees in the office was affected because his reputation was adversely affected. *Id*. at 39, 42. On cross-examination, Klein testified that Female No. 2, who was a professional support employee, ensured that telephone bills were paid and that equipment and supplies for agents were ordered. *Id*. at 60.

¶31 Rook, who was the Chief of the Adjudication Unit in OPR and the proposing official in this case, RAF, Tab 3, Subtab 4e at 1, 7, testified that "[t]his matter caused a huge disruption in the . . . Division . . . [and] became the subject of a lot of rumors, a lot of gossip within the office and apparently was very disruptive in the workplace." HT at 11, 20-21. She testified that she knew about this disruption based upon the witness statements she had read and input from Klein, and that the appellant's actions had an impact on the work performance of at least one employee, apparently Female No. 2, who mentioned this in her written statement. HT at 21; *see* RAF, Tab 3, Subtab 4w at 3. Rook testified that the disruption in the office manifested itself due to a lot of gossip that "grew to the point that . . . there were rumors of group sex and orgies and video taping," that Female No. 2 received a telephone call from another agent who told her that her children must be "real proud" of her, and that Female No. 2 "said that she dreaded going to work" and was very embarrassed and humiliated. HT at 62. She testified that according to Klein no one wanted to work with the appellant, which would have disrupted the office, and although she did not know whether there was any particular interference with an investigation or report processing or mission activity as a result, "based on my experience as an agent working with other agents I think it would impact operations." HT at 62-63.

¶32 Weis, Acting Assistant Director of OPR and the deciding official in this case, RAF, Tab 3, Subtab 4b at 6, testified that the matter was referred to OPR because it was creating a disruption in the workplace, HT at 77-79, 86. Weis testified that Female No. 2 was

> very upset about this. She was very concerned who [the appellant] may have shown this to, and again, I don't know if he showed it to anybody or not, he said he didn't, I have no reason not to believe him on that, but here you have an individual who when she learns that she was taped without consent, she's terrified. You know, she's a single mother of three, she has no idea that she's been videotaped, she's concerned about it getting on the Internet, she's getting calls from people at work because this entered into the workplace, which she feels is very damaging to her. So you have somebody whose life has kind of been turned upside down, all because one individual wanted to make these tapes without this other, I'm going to use the term "victim[']s" consent, for his personal gratification. So I don't see where his actions show a lot of care and a lot of concern for these women's well being after the fact.

HT at 128-29.

¶33 The appellant testified that unbeknownst to him, his conduct did "spill over into the office." HT at 186. In this regard, he testified that

> Female No. 1 worked in the reception area and, you know, during the course of months people loved to come up to her and say hey, here's what I've been hearing, what's true, what's not. So there, you know, it's just crazy how things work there, but again, this rumor storm was getting so out of control that, again, people were just coming up to her and say, hey, by the way, I've been hearing this, this and this, you know, what's true, what's not. Sometimes she would acknowledge what was going on, sometimes she was just like, I'm not talking about it, or that's not true. So she was fending off a lot of different rumors and fending off a lot of different people, seeking information.

HT at 199.

¶34 The agency must prove by preponderant evidence the existence of a nexus between the employee's misconduct and the work of the agency, i.e., the agency's performance of its functions. *Doe*, 565 F.3d at 1379. A preponderance of the evidence is the degree of relevant evidence that 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. 5 C.F.R. § 1201.56(c)(2). Here, while the disruption in the wider workplace may have been due in part to the reactions of Female No. 1 and Female No. 2 to the appellant's unprofessional conduct, we

find that such underlying conduct directly and predictably caused the emotional distress experienced by Female No. 1 and Female No. 2, which negatively affected their job performance.[4] Further, the appellant reasonably should have known that such conduct, if discovered, not only would affect the job performance of Female No. 1 and Female No. 2, but would lead in turn to some disruption of the workplace. As explained above, the agency presented evidence indicating that Female No. 1 was very upset and devastated upon finding the videotapes, believed that rumors in the office had gotten out of control, was "shaken up" when she came to work, kept telling a coworker "more and more" about the matter every day for several days, to the point where it was "all she wanted to talk about," and was approached in the reception area where she worked over the "course of months" by coworkers seeking information, such that she had to "fend[] off a lot of different people . . . ." Female No. 2 received a troubling voice-mail message from a coworker regarding the matter, was "very upset coming to work" every day, was "terrified" when she learned that she had been videotaped during a sexual encounter without her consent, and did not devote her entire energies to her work. Klein spent hours, if not days, addressing the concerns of Female No. 1 and Female No. 2; this time could have been spent by Klein on other work-related matters; a female employee and her husband, who was also an employee, were upset about the rumors generated by the appellant's conduct and spent time during work hours addressing those concerns; and the agency's media coordinator was drawn into the issue as a result of media

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[4] Although Klein testified that as far as he knew, Female No. 2 did not fall behind in ordering supplies or paying telephone bills during the time in question, RAF, Tab 7, Subtab 4a at 60, we note that Female No. 2's performance would most likely be measured against other standards in addition to the timeliness of her work product. In any event, the agency has shown that it is more likely true than untrue that Female No. 2's job performance was negatively affected given the amount of time she spent trying to resolve the impact upon her work reputation and the fact that she indicated that she was "very upset" coming to work every day.

inquiries. We find that the agency has shown that it is more likely true than untrue that the appellant's unprofessional conduct of videotaping his sexual encounters with two FBI employees adversely affected the job performance of those employees, as well as the job performance of other employees and the efficiency of the office as a whole.

¶35 Although a close question, we find that the agency has not met its burden of proving by preponderant evidence a nexus between the appellant's conduct with respect to Female No. 3, who was not an FBI employee, and the efficiency of the service. The agency's investigators were never able to locate and interview Female No. 3. RAF, Tab 3, Subtab 4d at 8; *id.*, Subtab 4o at 3; HT at 89, 153. Although Female No. 1 indicated that she was generally upset about finding the videotapes of other women and felt devastated because the appellant had not only made those tapes but kept them, there is no indication that the appellant's videotaping of Female No. 3 in particular affected the job performance of Female No. 1 or other employees, or otherwise contributed to the rumors in the workplace. *See, e.g.*, HT at 202 (testimony of the appellant that "the rumor was that I had been with, you know, six, a dozen women in the office"). The agency also has not shown that the appellant's conduct with respect to Female No. 3 adversely affected the appellant's job performance or the agency's trust and confidence in the appellant's job performance, given the absence of evidence showing that it was likely or reasonably foreseeable that the appellant's non-criminal videotaping of a sexual encounter with a non-employee without her consent would affect the efficiency of the service. *See Norton*, 417 F.2d at 1166 (the sufficiency of the charges must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do); *Major*, 413 F. Supp. at 71 n. 4 (questioning the assumption that a person's moral character is homogeneous, and that those who behave improperly in one regard are likely to transgress in others); *cf. Lara v. Mine Safety and Health Administration*, 10 M.S.P.R. 554, 556 (1982) (finding a nexus between the

appellant's loss of an eye and the performance of his duties as a mine inspector because an agency "need not wait for the appellant to cause injury to himself or others because of his vision limitation, as long as the likelihood of such an event is reasonably foreseeable"); *Doe v. National Security Agency*, 6 M.S.P.R. 555, 562 (1981) (the deleterious effect of the misconduct at issue on the efficiency of the service may be either presently existent or reasonably foreseeable), *aff'd sub nom. Stalans v. National Security Agency*, 678 F.2d 482 (4th Cir. 1982).

¶36 The court vacated the Board's determination that the penalty of removal was reasonable. *Doe*, 565 F.3d at 1383. Accordingly, if the AJ finds on remand that the agency would have removed the appellant in the absence of the "legal error," the AJ shall determine whether the penalty of removal is reasonable, taking into consideration our finding that the agency has not proven a nexus between the appellant's conduct as it related to Female No. 3 and the efficiency of the service. *See Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650-51 (1996) (when all of the charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the parameters of reasonableness; an agency's failure to sustain all of its supporting specifications may require, or contribute to, a finding that the penalty is not reasonable).

ORDER

¶37 Accordingly, we REMAND this case for further adjudication consistent with this Opinion and Order and the court's opinion in *Doe*.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.