UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

91 MSPR 93

REGINA BLEDSOE,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
AT-0752-99-0823-I-1

DATE: March 11, 2002

Denis P. McAllister, Esquire, Williston Park, New York, for the appellant.

Leslie K. Schumacher, Esquire, Alexandria, Virginia, for the agency.

BEFORE

Susanne T. Marshall, Acting Chairman
Beth S. Slavet, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision mitigating the appellant's removal to a 30-day suspension. For the reasons stated below, we GRANT the petition, REVERSE the initial decision in part, AFFIRM it in part, and SUSTAIN the removal.

BACKGROUND

¶2 Until her removal, the appellant was employed in Atlanta, Georgia, as a Criminal Investigator (Special Agent), GS-13, in the Drug Enforcement Administration (DEA). Agency File, Tabs 4a; *id.*, Tab 4b at 1. From 1992 to

1996, she served as the Confidential Source Coordinator, a position in which she had access to the agency's Confidential Informant System (CIS), a computerized system containing information about DEA's confidential sources. Hearing Transcript, Feb. 17, 2000 (HT 2-17) at 36-41 (appellant).

¶3 On July 1, 1994, at approximately 6:00 a.m., the agency executed search warrants at four residences associated with a suspected drug trafficker, Samuel Carroll. Transcript of Criminal Proceeding (Cr. Tr.) at 565;[1] Hearing Transcript, Feb. 14, 2000 (HT 2-14) at 20. It is undisputed that the agency was able to find few of the items it expected to find at those residences. *E.g.*, HT 2-14 at 21. It also is undisputed that Mr. Carroll associated at that time with Alvin Kendall, an attorney with whom the appellant had had an intimate relationship in the past, and with whom she continued to maintain a friendship. HT 2-17 at 61-62; Cr. Tr. at 877-87.

¶4 In the first of the six charges on which her removal was based, the appellant was charged with improperly confirming or divulging, "before or about June 30, 1994," privileged information concerning this search operation and the investigation that led to it. Proposal Notice, Agency File, Tab 4f at 1-2. Specifically, she was alleged to have divulged or confirmed to Mr. Kendall that there was an ongoing investigation of Mr. Carroll and that the search warrants mentioned above would be executed; and she was alleged to have been the source of a copy of the operational plan for the search – documents that Mr. Kendall allegedly gave Mr. Carroll on June 30, 1994. *Id.* In the second charge, Mr. Kendall was alleged to have telephoned the appellant in her office and asked whether the search was still scheduled to take place. *Id.* at 2-3. The appellant's alleged receipt of this call, and her failure to report it to appropriate authorities, were said to constitute conduct unbecoming a DEA special agent. *Id.* at 3.

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[1] This transcript is included in the agency file under tabs 4h, 4i, 4j, 4k, and 4*l*.

¶5 In the third and fourth charges, the appellant was alleged to have misused her office by querying the CIS on six occasions in April, May, and June 1994 at Mr. Kendall's request, and to have failed to follow written procedures by failing to record those queries in the CIS logbook. *Id.* at 3-6. In the fifth charge, she was alleged to have exercised poor judgment by maintaining a close personal relationship with Mr. Kendall, by attending parties given by him and attended by some of his criminal clients, by allowing him to visit her in her DEA office on a number of occasions, by leasing pagers on his behalf, and by receiving money from him. *Id.* at 6-7. Finally, she was alleged in the sixth charge to have misused government property by making over 100 telephone calls to Mr. Kendall on her government-issued cellular telephone. *Id.* at 7.

¶6 The agency sustained all six charges and removed the appellant, who then appealed the action. Agency File, Tabs 4a, 4b; Appeal File, Tab 1. After holding a hearing, the administrative judge to whom the appeal was assigned issued an initial decision sustaining the charge of failure to follow written procedures (by failing to record her CIS inquiries), three specifications of the charge of exercising poor judgment, part of the remaining specification of that charge, and the "poor judgment" charge itself. Initial Decision (ID) at 2-28, Appeal File, Tab 45. Specifically, with respect to the "poor judgment" charge, she did not sustain the allegation that the appellant had exercised poor judgment in attending a party hosted by Mr. Kendall and attended by his clients. *Id.* at 26. She did find, however, that the appellant had exercised poor judgment by maintaining a close personal relationship with Mr. Kendall for several years, by allowing him to visit her at her DEA office during and outside duty hours, by leasing and paying for pagers in her own name for Mr. Kendall's use, and by accepting money from Mr. Kendall in reimbursement for the pagers and for a sports season ticket. *Id.* at 25-27.

¶7 The administrative judge did not sustain the other four charges. *Id.* at 2-25, 28-30. With respect to the first of these charges, she noted that both the appellant

and Mr. Kendall had been tried on criminal charges related to the alleged divulging of information regarding the search operation; that Mr. Carroll, who had been unavailable to testify at the hearing on the appellant's appeal due to his incarceration for narcotics offenses, had testified at the criminal trial; and that, while Mr. Kendall had been convicted of some of the criminal charges, the appellant had been acquitted of all of them. *Id.* at 4 & n.3; Appeal File, Tab 24 at 4. She also noted that the U.S. district court judge who presided over the trial had found, in sentencing Mr. Kendall, that Mr. Carroll was a credible witness, at least in some respects. ID at 15. She stated further, however, that the judge had not set forth the basis of his credibility determinations; that in her view the appellant's right to a *de novo* hearing required her to make independent credibility determinations; that she therefore had not deferred to the district court judge's findings; and that it would be inappropriate to give collateral estoppel effect to them. *Id.*

¶8 Based on her own review of the criminal trial record and other evidence in the record, and based on her assessment of the credibility of witnesses who appeared before her, the administrative judge found that Mr. Carroll clearly had advance knowledge of the search operation, and that Mr. Kendall "was the likely source of that information," but that the agency had not proven, by a preponderance of the evidence, that the appellant had divulged the information in question. *Id.* 14-19. In making the latter finding, the administrative judge relied in part on her assessment of the credibility of Mr. Carroll's testimony at the criminal trial – testimony that she "found … overall to be convincing," but that she considered "not … especially trustworthy" in some respects. *Id.* at 17-18. Her finding that this testimony was "not … especially trustworthy" was based partly on evidence that Mr. Carroll was the subject of criminal proceedings, that he was seeking favorable treatment in return for his testimony against the appellant, and that he had received a reduced sentence in consideration of his testimony; it was based partly on her belief that "he was [not] above adding a few

details here and there if he thought it might help his situation"; and it was based partly on inconsistencies she perceived between Mr. Carroll's testimony and other evidence she considered credible. *Id.* at 4, 14, 17.

¶9 As indicated above, the charge of conduct unbecoming a DEA special agent concerns the appellant's alleged receipt of, and failure to report, a telephone call in which Mr. Carroll asked whether the search was still scheduled to take place. In finding this charge not sustained, the administrative judge relied on "the problems with Carroll's overall credibility," on "the lack of any corroborating evidence" that the call was made, and on the appellant's denial. *Id.* at 19-20. With respect to the third unsustained charge, i.e., the charge of improperly querying the CIS, the administrative judge relied on various weaknesses she perceived in the agency's evidence, *id.* at 20-24 – weakness we address below. Finally, the administrative judge did not sustain the charge of misusing government property because she found that the appellant's personal use of her government-issued cellular telephone was *de minimis*. *Id.* at 28.

¶10 In light of her finding that only two charges could be sustained, and that the appellant had not engaged in the most serious misconduct with which she had been charged, the administrative judge ordered the agency to mitigate the removal to a 30-day suspension.[2] ID at 30-31.[3]

¶11 The agency has filed a petition for review challenging the administrative judge's findings regarding the unsustained charges and the penalty, and the appellant has filed a response to that petition. Petition for Review (PFR) File,

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[2] The administrative judge also noted that the appellant had alleged that her removal was based on sex discrimination, but found the claim unsupported. ID at 29. The appellant has not challenged this finding.

[3] The administrative judge ordered the agency to provide interim relief to the appellant. ID at 31-32. The agency has provided evidence of its compliance with that order, Petition for Review File, Tab 1; and the appellant has raised no objections with respect to that matter.

Tabs 1, 3. The response was untimely filed, however. *Id.*, Tabs 1, 2, 3. Moreover, the appellant was clearly informed, in a notice acknowledging receipt of the petition, of the date on which the response was due to be filed. *Id.*, Tab 2. Accordingly, we find that the appellant has not shown good cause for the untimeliness, and we have not considered the arguments made in the response. *See* 5 C.F.R. § 1201.114(e).

ANALYSIS

1. Unauthorized Disclosures

Effect of District Court's Findings

¶12 In the criminal trial mentioned above, the appellant and Mr. Kendall were charged with the following: (1) Conspiring to give notice of the pending DEA search (including the written operations plan) to Mr. Carroll in order to prevent the seizing of items identified in the warrants; (2) actually giving notice of the impending search to Mr. Carroll; and (3) conspiring with Mr. Carroll and others to distribute cocaine. Agency File, Tab 4g, Subtab 4, Indictment at 1-10. The appellant was acquitted of all three counts, as we have noted above. Mr. Kendall, however, was convicted of the first and third counts. Appeal File, Tab 21, Agency's Prehearing Submission at 3. In sentencing Mr. Kendall, the district court judge found, as noted previously, that Mr. Carroll's testimony was credible; and it found further that a preponderance of the evidence established that the appellant had advised Mr. Kendall of the impending search. Agency File, Tab 4*l*, Subtab 6, Transcript of Sentencing Hearing (TSH) at 47-48; *id.*, Order of Dec. 3, 1998, at 2-3.

¶13 In its petition for review, the agency argues that the administrative judge erred by failing to give due deference to the district court judge's finding that Mr. Carroll was a credible witness. PFR at 20-25. In support of this argument, it cites holdings that credibility assessments based on witness demeanor are entitled to deference, and that the Board should defer to the credibility findings of the

judge who presided over the hearing. *Id.* at 23-24 (citing *Wainwright v. Witt*, 469 U.S. 412 (1985), *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951), *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985), *Dittmore-Freimuth Corp. v. United States*, 390 F.2d 664, 685 (Cl. Ct. 1968), *Aiu v. Department of Justice*, 70 M.S.P.R. 509, 516, *aff'd*, 98 F.3d 1359 (Fed. Cir. 1996) (Table), and *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam)).

¶14 The Board gives due deference to the credibility findings of the administrative judge whose decision it is reviewing. *Chauvin v. Department of the Navy*, 38 F.3d 563, 566 (Fed. Cir. 1994); *Weaver*, 2 M.S.P.R. at 133. The deference to which such findings are entitled is enhanced, as indicated below, when the findings are based on witness demeanor. *Chauvin*, 38 F.3d at 566. Nothing in the record, however, indicates that the district court's findings regarding Mr. Carroll's credibility were based on that witness's demeanor; as the administrative judge indicated, no specific bases were given for those findings. *Cf.* Agency File, Tab 4*l*, Subtab 6 (Order of Dec. 2, 1998). Moreover, nothing in the decisions on which the agency relies indicates that a decision-making body should give special deference in one case to findings made in a related but separate case. Finally, although collateral estoppel effect may be given to such findings under certain circumstances, we concur in the administrative judge's determination (which the agency does not challenge in its petition for review) that it would be inappropriate to give such effect to findings made in a sentencing proceeding to which the appellant was not a party. *See Thomas v. General Services Administration*, 794 F.2d 661, 664 (Fed. Cir. 1986) (issue preclusion normally is applicable if, inter alia, the party precluded was fully represented in the prior action). Accordingly, we are not persuaded by the agency argument described above.

Merits of Charge and Credibility of Witnesses

¶15 At the criminal trial, Mr. Carroll testified that he had lunch on June 30, 1994, with a business associate, Gerard Jefferson, at the Crab House restaurant in Rio Mall; he happened to encounter Mr. Kendall and a woman heading into the mall as he and Mr. Jefferson were leaving the mall; Mr. Kendall introduced the appellant to Mr. Carroll as "Regina of DEA"; and, after Mr. Kendall and Mr. Carroll had departed in different directions, Mr. Kendall paged Mr. Carroll, asked him to come to his office, and told him on arrival there that the appellant had recognized his name and had informed Mr. Kendall of the search that was scheduled for the following day. Cr. Tr. at 383-86, 571-A. He also testified that shortly before 4 p.m. that day, while he was still in Mr. Kendall's office, Mr. Kendall called the appellant at her office on a speaker phone, asked her whether the search was still planned, was told by the appellant that she could not talk because there was too much activity in her office at the time, and agreed with the appellant that they would talk later. *Id.* at 386-87. He testified further that Mr. Kendall paged him again after 5 p.m., while he was driving an associate, Phillip Turman, home from the Atlanta airport; he called Mr. Kendall on a pay phone; the two arranged to meet later on Pryor Street, in front of the courthouse; at that meeting, Mr. Kendall told Mr. Carroll that the search would definitely be executed the following day; and Mr. Kendall also gave him, on that occasion, a typewritten list of items to be seized – a list Mr. Carroll indicated looked like the operations plan document shown to him at the trial. *Id.* at 388-91. In addition, Mr. Carroll testified that Mr. Kendall had told him, sometime before the Pryor Street meeting, that he would try to get more information regarding the search from "Regina." *Id.* at 392.

¶16 As noted above, the administrative judge based her unfavorable findings regarding Mr. Carroll's credibility in part on evidence that he expected to receive leniency from the government in return for his testimony. While she acknowledged that this circumstance did not necessarily mean that he was

untruthful, she also found that it meant that his testimony "must be rigorously tested." ID at 14. For several reasons, she found that his testimony did not meet this test. *Id.* at 15-19.

¶17 In addressing the administrative judge's analysis and findings of fact, we note first that the Board "is not free simply to disagree with an [administrative judge's] assessment of credibility." *Chauvin*, 38 F.3d at 566. Instead, it must give special deference to factual findings of an administrative judge that are based, expressly or implicitly, on the demeanor of a witness; and it must "articulate[] sound reasons, based on the record," for findings it makes that are contrary to those of the administrative judge. *Id.* Obviously, the administrative judge's findings in the case now before us were not based on her personal observation of the demeanor of Mr. Carroll and others who did not testify before her. Thus, to the extent that the administrative judge's findings concerning this testimony is contrary to the preponderance of the evidence, the Board need not defer to them. *See Aiu v. Department of Justice*, 70 M.S.P.R. 509, 517 (1996), *aff'd*, 98 F.3d 1359 (Fed. Cir. 1996) (Table); *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), *cert. denied*, 116 S.Ct. 728 (1996). As we indicate further below, however, some of her findings appear to have been based in part on such observation.[4] Accordingly, we have given careful consideration to the reasons the administrative judge gave for her

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[4] Generally, the Board favors live testimony over hearsay. *See*, *e.g.*, *Wallace v. Department of Health & Human Services*, 89 M.S.P.R. 178, ¶ 15 (2001); *Dubiel v. U.S. Postal Service*, 54 M.S.P.R. 428, 432 (1992) (the probative value of unsworn hearsay statement regarding facts at issue is generally not as great as live testimony regarding the same matter). In this case, however, the testimony offered at the criminal trial was both sworn and subject to cross-examination. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981) (assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case); c*f.* Fed. R. Evid. 804(b)(1) (where the declarant is unavailable, former testimony given as a witness at another proceeding is admissible).

findings, and we have given special deference to those of her findings that are based on her personal observation of witness demeanor.

¶18 We agree with the administrative judge that witnesses' motivation must be considered in evaluating the credibility of their testimony. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (witness's bias is relevant to credibility of testimony). There is considerable evidence in the record, however, corroborating Mr. Carroll's testimony. *See id.* (consistency of witness's version of events with other evidence is relevant to credibility of testimony). First, there is persuasive evidence that the appellant knew about the search. Her office was located next to the room in which briefings regarding such upcoming activities were held; those briefings were always held with the doors open; a person occupying the appellant's office could hear discussions held in that room; and the appellant admitted to agency investigators that she was aware, as a result of discussions held in the next office, that Mr. Carroll was the subject of a DEA investigation. *E.g.*, HT 2-14 at 12-16; Cr. Tr. 1141-42, 1227-28; Agency File, Tab 4m, Subtab 18 at 2. Second, a meeting of the group that was to execute the search was held at about 4:00 p.m. on June 30. *E.g.*, HT 2-14 at 12. The group therefore would have been gathering outside the appellant's office at about the time Mr. Kendall telephoned that office – a fact consistent with the appellant's alleged statement to Mr. Kendall that there was too much activity in the office at the time of his call for her to talk.

¶19 Third, agency records showed that the card the appellant used to access protected doors at DEA was used in a manner consistent with Mr. Carroll's testimony. That is, the card was not used at all between 1:39 p.m. and 3:09 p.m. on June 30, a time during which the appellant allegedly was introduced to Mr. Carroll at the Rio Mall; it was used at 3:09 to enter the radio room, where the search operations plan was kept prior to the execution of a search warrant; and it was used 2 minutes later to enter door 15, a door that gave the appellant access to her office. Agency File, Tab 4g, Office of Professional Responsibility

Investigative Report (OPR Report) at 28-29; *id.*, Tab 4m, Subtab 19 (floor plan); HT 2-14 at 11-12, 14-16. The brevity of the visit to the radio room, and the fact that it was the first room the appellant entered after she allegedly was introduced to Mr. Carroll, are consistent with the theory that she immediately looked for the operations plan on her return from Rio Mall. Moreover, telephone records show that Mr. Kendall called the appellant at her office at 4:30 p.m. on June 30 on his mobile telephone; agency security records show that the appellant's card was again used that day to enter the radio room 13 minutes later, i.e., at 4:43 p.m.; and the latter records show further that the appellant's card was used to enter door 15 at 10:48 p.m. – after a period of 6 hours without any card activity – and to enter the radio room at 11:41 p.m. Agency File, Tab 4n(45); OPR Report at 28-29. In light of evidence that the operations plan was not placed in the radio room until 3:44 p.m., that the group assigned to execute the search met in the room beginning about 4:00 p.m., and that the magistrate authorizing the search did not sign the warrants until 4:45 p.m., Cr. Tr. at 532-33, 542, 550, the appellant's subsequent entries are consistent with the agency's position that she entered the radio room at 4:42 to make a copy of the operations plan after the group had left,[5] and that she returned to the office at night to determine whether the search had been authorized and whether the plan had been changed. Agency Closing Argument at 14-19, Appeal File, Tab 39.[6] They also are consistent with

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[5] The appellant admitted at her criminal trial that there was a copy machine near the radio room, and that she could move from the radio room to the copy machine without using her access card. Cr. Tr. at 2004-05.

[6] As the administrative judge noted, the appellant has testified that she entered the radio room at times to see her supervisors, her personal friends, and the employee who did her typing and kept her attendance records. ID at 12; HT at 98. She also testified that June 30 was her last day of work before taking leave, that she "didn't feel comfortable unless [she] finished [her] work" before "leaving the office for an extended period," and that she probably returned to the office at 10:48 p.m. on June 30 in order to finish her work or make sure that it was finished. HT at 90, 103. The record indicates, however, that she was on leave for only one day, i.e., July 1. Agency File, Vol. 9,

the agency's position that the appellant had time between 4:43 p.m. and 10:48 p.m. to deliver a copy of the operations plan to Mr. Kendall before he met with Mr. Carroll on Pryor Street. *Id.* at 18.[7]

¶20 Fourth, Valerie Redding, who worked in Mr. Kendall's office from August 1993 to May or June 1994, testified at the criminal trial that Mr. Carroll had told her in November 1996 that the federal government had planned to "raid" him, but that the "raid" was unsuccessful because Mr. Kendall had informed him of it in advance. Cr. Tr. at 875, 877, 888-90. She also testified that, when she asked Mr. Carroll how Mr. Kendall knew about the "raid," he asked her whether she "remembered the DEA agent that liked Alvin"; and that, when she responded, "Who, Regina?" he replied in the affirmative and added, "Well, Regina told Alvin and Alvin told me." *Id.* at 890-91. We find the timing of this statement to

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Tab 4o, Tab 61, Subtab 4KK at 3 (leave slip); *id.*, Subtab W at 4 (biweekly activity report). Moreover, two DEA radio operators, including one who sometimes worked the 4:00 p.m. to midnight shift, told agency investigators and subsequently testified at the administrative hearing that they seldom saw the appellant in the office after 8 p.m.; and access card entries for 1994 showed that the appellant had entered the office after 10 p.m. on only 7 other days that year. OPR Report at 30-32; Hearing Transcript, Feb. 15, 2000 (HT 2-15) at 117; Hearing Transcript, Feb. 16, 2000, at 45. On six of the seven days, either the appellant was the agent on duty from 4:00 p.m. to midnight or an office emergency occurred. OPR Report at 32. Nothing in the record suggests that either of those circumstances was present on June 30, or that there was any other work-related need for the appellant to be in her office or the radio room late in the evening on that day.

[7] The appellant testified that she had her hair styled and her nails manicured during this interval, and her manicurist testified that the appellant had an appointment at 5:00 p.m. on June 30. HT 2-17 at 99; Hearing Transcript, Feb. 18, 2000 (HT 2-18) at 30. Neither the manicurist nor the hair stylist nor the appellant could recall when the appellant arrived for her appointments, however. HT 2-17 at 225, 229-30; HT 2-18 at 31. Moreover, in light of the manicurist's testimony that she worked 45 minutes to an hour away from the downtown Atlanta area, in which the appellant's office was located, and in light of the appellant's 4:43 p.m. entry into the radio room on June 30, it is clear that the appellant would not have arrived on time for her 5:00 p.m. appointment even if she had not stopped off on the way to deliver a copy of the operations plans to Mr. Kendall. HT 2-18 at 28. The appellant's evidence regarding her appointments therefore is not inconsistent with the position that she delivered the plans as alleged.

Ms. Redding particularly significant because, as indicated below, Mr. Carroll was not arrested until January 1997, Cr. Tr. 478-A; he therefore was not seeking favorable treatment from law enforcement authorities in November 1996; and he accordingly would appear to have had no motive at that time to provide false information to anyone in an attempt to implicate the appellant in the disclosure of any search operation.[8]

¶21 Finally, Earl Burke testified at the administrative hearing that he had done some work for the appellant in a civil matter while he was Mr. Kendall's law partner, and that Mr. Kendall had told Mr. Burke that he "had a relationship" with the appellant and did not necessarily bill her. HT 2-17 at 8-9. He testified further that Mr. Kendall was "not the type … to do something [without] some sort of remuneration"; that Mr. Kendall charged even family members and the father of his fiancee for legal work; and that, although he did not recall the exact words Mr. Kendall used to explain this circumstance, he "kind of got the … idea that it was a quid-pro-quo type of arrangement," and that the appellant would compensate Mr. Kendall "in some fashion," although he was not sure how. *Id.* at 9, 12, 16-18.[9] This conversation occurred no more recently than January 1993,

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[8] Ms. Redding was unavailable to testify at the administrative hearing because of an outstanding felony warrant for her arrest, a warrant based on an indictment for three counts of "theft by taking" while she was working as a county prosecutor, for forgery, and for violation thereby of her oath as a public officer. Appeal File, Tab 21 at 23; Cr. Tr. at 893-95; ID at 8. Moreover, her criminal trial testimony seems to suggest that she was guilty of at least some of the wrongdoing with which she was charged, and it indicates that she hoped her testimony would lead the prosecutor in the appellant's criminal case to write a letter informing the local district attorney that she was cooperating with law enforcement authorities. Cr. Tr. 876, 894, 896-97, 917-19. We do not share the administrative judge's apparent belief, however, ID at 14-15 & n.14, that these circumstances cause Ms. Redding's testimony at the criminal trial to be of little value. That testimony was consistent and straightforward, and we find that it provides significant, credible corroboration of Mr. Carroll's testimony.

[9] At the hearing, a DEA investigator testified that Mr. Burke stated during an interview on or about February 25, 1998, that Mr. Kendall told Mr. Burke that the appellant had provided law enforcement information to Mr. Kendall. HT 2-17 at 24; Agency File,

when Mr. Burke left the Kendall law firm, *id.* at 15-16, and Mr. Burke's testimony therefore does not provide direct evidence that the appellant made the unauthorized disclosures at issue here. Because it supports the proposition that the appellant previously provided some sort of services to Mr. Kendall, however, we find that its probative value is not insignificant. *Cf. Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988) (evidence that defendant inflicted injuries on one child was "highly probative" evidence that he inflicted similar injuries on another child).[10] Furthermore, as the administrative judge noted, the record includes no suggestion that Mr. Burke was under suspicion of criminal activity, and no indication that he was promised anything in return for his testimony. ID at 9. Mr. Burke therefore appears to have had no motive to lie about the appellant.

¶22 The administrative judge gave other reasons for finding Mr. Carroll's account not credible. First, she noted that the appellant had presented canceled checks and receipts showing that she made purchases at a certain drug store at 2:09 p.m. and 2:11 p.m. on June 30, 1994; that, if she left the drug store a few minutes later, drove to Rio Mall, and, after having lunch with Mr. Kendall at the

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Tab 4p, Subtab VVV at 2. We find, however, that the investigator's testimony on this point has very little probative value. First, the investigator's testimony concerning the appellant's statement is triple hearsay. The investigator also had to refresh his memory of the interview by referring to his written report of his conversations with Mr. Burke. HT 2-17 at 24. Moreover, the written report was not a contemporaneous record of the interview; the investigator prepared it on September 2, 1998, more than 6 months after the February 25 interview mentioned above. *Id.* at 24; Agency File, Tab 4p, Subtab VVV at 1. Under these circumstances, we find that the investigator's testimony regarding the statement Mr. Burke allegedly made during the interview in February 1998 is entitled to no significant evidentiary weight. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83 (1981) (the assessment of the probative value of hearsay evidence necessarily rests on the circumstances of each case).

[10] We have not relied on the testimony of McArthur Edwards, whose demeanor the administrative judge found detracted from his credibility. ID at 15; *see Chauvin*, 38 F.3d at 566; *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985) (special deference must be given to the administrative judge's findings regarding credibility where those findings are based on the demeanor of witnesses).

Crab House, drove back to the office, the agency's driving-time calculations would leave her only 25 minutes for lunch – an insufficient time, in the administrative judge's view, in which to be served in a crowded restaurant such as the Crab House. ID at 16; Agency File, Tab 4n(49) (checks). The administrative judge also stated that there was no evidence that the two went to another restaurant in the Rio Mall, and that, even if they had, it was unlikely that the appellant would drive such a distance for a lunch of only 20 to 25 minutes. ID at 16.

¶23 We are not persuaded by this reasoning. The agency has not alleged, and neither Mr. Carroll's testimony nor the appellant's criminal indictment indicates, that the appellant ate lunch at the Crab House on the occasion in question. Instead, it was Mr. Carroll and Mr. Jefferson who, according to their testimony, ate there. Cr. Tr. at 383, 514. Moreover, the testimony of Mr. Carroll and Mr. Jefferson indicates that Mr. Kendall did not know of the search, and the appellant did not realize its significance, until after Mr. Kendall introduced the appellant to Mr. Carroll at the Rio Mall; the record indicates that Mr. Kendall was very anxious to get in touch with Mr. Carroll after he learned of the impending search; and a considerable amount of undisputed evidence shows that knowledge of the search led to extensive efforts to remove items from the premises to be searched in time to avoid seizure of the items. Cr. Tr. at 393-99, 784. Under these circumstances, and if Mr. Carroll's testimony is credited, it would be logical to assume that the appellant and Mr. Kendall would have abandoned any plans they had for a leisurely lunch, that the appellant would have returned to the office promptly to look for the search operations plan, and that Mr. Kendall would have attempted to contact and meet with Mr. Carroll as soon as he could. We therefore see no inconsistency between Mr. Carroll's testimony and the evidence of the appellant's drug store purchases.

¶24 The administrative judge also found Mr. Carroll's testimony untrustworthy with regard to the times he set forth for certain critical events. For example, the

administrative judge questioned Mr. Carroll's testimony that he received a page from Mr. Kendall sometime after 5 p.m. as Mr. Carroll was returning from the Atlanta airport with Mr. Turman. The administrative judge noted that Mr. Carroll's testimony appeared to be inconsistent with Mr. Turman's testimony that his flight arrived about 2:30 p.m., Cr. Tr. at 576, and with an airline employee's testimony that Delta flight 942, the flight for which Mr. Turman had a ticket, arrived at 11:13 a.m. on June 30. ID at 17-18.

¶25 The record shows that the ticket Mr. Turman used on June 30, 1994, was stamped with the number 942, and that an airline employee testified with certainty that flight 942 arrived at 11:13 a.m. on June 30. Cr. Tr. at 576, 1454; Agency File, Tab 4*l*, Subtab 11. The airline employee also indicated in his testimony, however, that the ticket could have been used on a later flight, and that the earlier flight's number nevertheless could have been stamped on the ticket. Cr. Tr. 1460-61. We also note that Mr. Turman expressed uncertainty when asked when his flight left, when it arrived, and how much time he spent at the airport before paging Mr. Carroll and requesting and obtaining a ride from him, *e.g.*, Cr. Tr. at 576-80; and that he did not present his testimony until February 23, 1998, almost 3 years and 8 months after June 30, 1994. We find, therefore, that the apparent discrepancies in evidence regarding the timing of Mr. Turman's arrival do not detract significantly from the credibility of Mr. Carroll's testimony.

¶26 A third reason stated in the initial decision for finding Mr. Carroll's testimony not credible was that it was inconsistent with the testimony of Doc Lamar, Jr., a mortgage banker who apparently had some business dealings with Mr. Carroll, and with evidence of a telephone call Mr. Lamar allegedly placed from Mr. Carroll's cellular telephone. ID at 13, 17. Mr. Lamar testified that he visited Mr. Carroll's house on Panola Mill Drive around 12:30 p.m. or a little later on June 30, 1994; he did so at Mr. Carroll's invitation, so that Mr. Carroll could introduce him to Robin Kelly, a relative of Mr. Carroll whom Mr. Lamar

subsequently dated; he left with Mr. Carroll in Mr. Carroll's car at about 1:00 or 1:15 p.m., in order to go to lunch; and the two men stayed at lunch, at a suburban location several miles away from the Rio Mall, for about an hour or an hour and 15 minutes. Cr. Tr. at 1596-1600. He also testified that there was a telephone in the car, and he identified a number that appeared on Mr. Carroll's telephone bill – a number that was dialed at 2:37 p.m. on June 30 – as that of his mother. *Id.* at 1600-01. Thus, according to Mr. Lamar's testimony, Mr. Carroll would have been several miles away from the Rio Mall at the time he allegedly ran into Mr. Kendall and the appellant as he was leaving the Crab House Restaurant with Mr. Jefferson on June 30, 1994.

¶27 Mr. Lamar's testimony appears to be inconsistent with his previous statements to agency investigators. While he testified that he met Ms. Kelly for the first time at the Panola Mill house on June 30, 1994, he told the investigator that he first met her on another occasion, i.e., when she delivered a payment to his office. *Compare* Cr. Tr. at 1596 *with* Agency File, Tab 4p, Subtab QQQ (investigator's contemporaneous summary of interview) at 2.[11]

¶28 We note further that Mr. Lamar admitted at the criminal trial that he did not remember telephoning his mother from Mr. Carroll's car. Cr. Tr. at 1601. More important, although Mr. Lamar testified that Mr. Carroll "had no reason to have [his] mother's [telephone] number," telephone company records indicate that the

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[11] Mr. Lamar's testimony is partially consistent with Ms. Kelly's testimony that Mr. Carroll came to the Panola Mill house with Mr. Lamar about 11:45 a.m. on June 30, 1994, and that the two left together sometime before 1:15 p.m. Cr. Tr. at 1471-73. We note, however, that Ms. Kelly's credibility is poor. Her father testified that she was very untruthful, and the statements she previously made to an agency investigator regarding the events of June 30 – statements recorded in the investigator's contemporaneous notes – are inconsistent in some respects with her own later testimony. Cr. Tr. at 2086-88, 2092-93, 2127-36; Agency File, Tab 4*l*, Subtab 9. For example, Ms. Kelly told the investigator that it was she, and not Mr. Carroll, who picked Mr. Turman up at the airport on June 30. Cr. Tr. at 2128. At her criminal trial, however, she provided an account of her activities that day that left no opportunity for a trip to the airport. *Id.* at 1471-76.

number in question was listed under the name of Doc Lamar, and not under the name of Mr. Lamar's mother. Agency File, Tab 4p, Subtab 61SSS.[12] It is logical, therefore, that a person seeking to contact Mr. Lamar would call that number. Moreover, Mr. Lamar identified another number, called from the same telephone number a little over an hour earlier, as his office telephone number. Cr. Tr. 1607. Under these circumstances, it appears more likely that these calls reflect Mr. Carroll's attempts to contact Mr. Lamar than that they reflect any attempt by Mr. Lamar to contact his mother. *Cf.* Cr. Tr. at 566A-67A (Carroll's testimony that he thought he called Lamar sometime on June 30 because he and Lamar were scheduled to take a trip to Cancun).

¶29 Finally, we note that Ms. Kelly testified that Mr. Carroll had told her, when he and Mr. Lamar arrived at the Panola Mill house in the early afternoon of June 30, that the house would be searched the next day, and that Mr. Lamar indicated in his testimony that he overheard parts of a conversation consistent with Ms. Kelly's account. Cr. Tr. 1472, 1598. We agree with the agency that it is inherently improbable that Mr. Carroll would bring Mr. Lamar to his house for a social introduction to his cousin after learning that his house and other properties would be searched the following day, and that the two would then go out together for a fairly lengthy lunch, leaving the task of removing items from the properties – a task Ms. Kelly told the investigators took "all night," Agency File, Tab 4*l*, Subtab 9 at 2 – for a later time. *See Hillen*, 35 M.S.P.R. at 458 (inherent improbability of witness's version of events is a factor for consideration in assessing credibility).

¶30 A fourth reason the administrative judge gave for finding Mr. Carroll's testimony not credible was that Thomas Dixon, an attorney who had been asked to help Mr. Kendall in a zoning dispute, testified that he had called Mr. Kendall

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[12] Katie J. Lamar, presumably Mr. Lamar's mother, was identified in these records as the person to whom bills were sent. Agency File, Tab 4p, Subtab 61SSS.

regarding that matter on June 30, 1994; Mr. Kendall abruptly interrupted him and asked him in an urgent tone whether he knew where Mr. Carroll was; and, when Mr. Dixon tried to return to the zoning subject, Mr. Kendall "said the nightclub was the least of his worries." Cr. Tr. at 782, 786-87; ID at 12. The administrative judge found no evidence that Mr. Dixon had any motive to lie about the matter, and she stated that, if his testimony was credited, Mr. Kendall "was aware of the search warrant way before the appellant's alleged late lunch with Kendall on June 30th." ID at 18. We note, however, that Mr. Dixon testified that the telephone conversation he described took place sometime "between late morning, early afternoon," and that Mr. Carroll testified that he encountered the appellant and Mr. Kendall at Rio Mall at "1-something or 2:00" in the afternoon – still early enough to be considered "early afternoon." Cr. Tr. 551-A, 786. He also testified that he arrived at Mr. Kendall's office around 3:00 or 3:30 p.m., and that he did so because Mr. Kendall had paged him before then. *Id*. at 386. Mr. Carroll's testimony indicates, therefore, that the time during which Mr. Kendall would have been eager to tell him about the search plans would have been not later than fairly early in the afternoon. Accordingly, we do not believe Mr. Dixon's testimony conflicts with that of Mr. Carroll. Instead, it appears to lend support to the credibility of Mr. Carroll's account.

¶31 Fifth, the administrative judge noted that Mr. Carroll was unable to identify the appellant's photograph from among the photographs shown to him on February 11, 1997; she noted that Mr. Jefferson told an agency investigator before the 1998 criminal trial that he could not identify the appellant; and she indicated that Mr. Jefferson did not remember that Mr. Kendall had mentioned, as Mr. Carroll alleged he did, that the appellant was from DEA when he introduced her to Mr. Carroll and Mr. Jefferson. Appeal File, Tab 36, Ex. L; Hearing Transcript, Feb. 16, 2000 (HT 2-16) at 169; ID at 5 n.5, 18. The administrative judge indicated that, in light of Mr. Jefferson's association with Mr. Carroll and

his own subsequently proven involvement in illegal drug-related activity,[13] she believed he would have remembered a reference to DEA if Mr. Kendall had introduced the appellant to him as alleged by Mr. Carroll. ID at 18.

¶32 We do not regard the circumstances described above as casting significant doubt on the credibility of Mr. Carroll's or Mr. Jefferson's testimony. Although Mr. Carroll testified that he had been introduced to the appellant on one previous occasion, i.e., at a Christmas party, he indicated that he had never had a conversation with the appellant. Cr. Tr. at 489. Moreover, we see no indication that Mr. Jefferson ever spoke with or was introduced to the appellant on any occasion other than during the apparently very brief June 30 encounter. It is not surprising, under these circumstances, that neither Mr. Carroll nor Mr. Jefferson was able to identify the appellant's photograph nearly 3 years after that encounter. In addition, while Mr. Jefferson did not indicate in his testimony that Mr. Carroll referred to DEA in introducing the appellant, Cr. Tr. at 514, he was not specifically questioned as to whether such a reference was made on that occasion. Finally, even if he specifically stated elsewhere that he remembered no such reference, that statement could mean only that he did not hear the reference Mr. Carroll heard; it does not necessarily mean that the reference was not made.

¶33 A sixth basis for the finding that Mr. Carroll's testimony was not credible was the administrative judge's uncertainty as to whether Mr. Jefferson was referring in his testimony to the same lunch to which Mr. Carroll referred. ID at 17. This uncertainty was based on the following: (1) Mr. Jefferson testified that a woman accompanied them to lunch on that occasion, while Mr. Carroll did not mention any woman's presence; (2) Mr. Jefferson testified that Mr. Carroll took him to a nightclub after the lunch, while Mr. Carroll testified that he took Mr. Jefferson to the Panola Mill house after the lunch; and (3) Mr. Jefferson was

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[13] Mr. Jefferson was unavailable to testify at the administrative hearing because he was incarcerated for narcotics trafficking. Appeal File, Tabs 38, 40.

unable to explain clearly why he remembered that the lunch he described in his testimony took place on June 30, rather than on one of the other dates on which he said he had had lunch with Mr. Carroll. *Id.*

¶34 We believe the circumstances described above cast no more doubt on the credibility of Mr. Carroll's testimony than the set of circumstances we previously addressed. First, as the administrative judge acknowledged, *id.*, the differences between Mr. Jefferson's testimony and that of Mr. Carroll concerned "relatively minor details." Second, in describing the lunch, Mr. Carroll did not state that no one else ate with him and Mr. Jefferson; he simply did not refer to – and was not asked about – the presence of the woman Mr. Jefferson mentioned. Cr. Tr. at 571A-572A. Third, while Mr. Jefferson testified that he had eaten with Mr. Carroll at the Crab House on one or two other occasions, *id.* at 526, he had reason to remember the June 30 lunch. He lived at the Panola Mill house, and he was there when law enforcement officers broke into that house early the next morning. *Id.* at 513, 517, 521. It is not surprising, under these circumstances, that he would remember for some time after the search the events leading up to it.

¶35 Seventh, the administrative judge stated that the appellant was not the only person with knowledge of the planned search, a motive to disclose it, and an opportunity to do so; that several other persons with access to law enforcement information "at least on occasion socialized with Kendall"; and that one of those persons – an employee of a local sheriff's office who was on the task force responsible for executing the search warrants, Hearing Transcript, Feb. 15, 2000 (HT 2-15) at 180, 189 – regularly attended social events with him, "was a self-described good friend of Kendall's," had a poor relationship with the official overseeing the search, was very angry with that official, and had a copy of the search operations plan. ID at 18-19. She also stated that this employee and one of the others who had "socialized with Kendall in group settings" had received free legal services from Mr. Kendall; that the sheriff's office employee had acknowledged talking to Mr. Kendall on the telephone for 14 minutes on the

afternoon of July 1, 1994; and that pager records showed that Mr. Kendall had paged the same employee at 10:35 p.m. on June 30, 1994. *Id.* at 10-11.[14]

¶36 We do not believe these circumstances cast significant doubt on the sufficiency of the evidence against the appellant. The only legal services Mr. Kendall appears to have provided to the two employees mentioned above consisted of his being present while the employees were being interviewed briefly regarding the death of a suspect, his filing papers incorporating a business in which the sheriff's office employee and his father were involved, and his representing the other employee's wife in connection with an automobile accident. HT 2-15 at 134, 136, 195-97. The sheriff's office employee's wife evidently paid legal fees for the incorporation-related work; fees for the accident-related legal work apparently were paid by the insurance company representing the other party to the accident; and, although no fees were paid for Mr. Kendall's presence during the interviews mentioned above, those interviews lasted no more than 15 minutes each. *Id.* at 136, 196-97, 234.

¶37 We note further that the sheriff's office employee and two of the four DEA agents the administrative judge indicated had "socialized with Kendall in group settings" participated in the execution of the search warrants on July 1, 1994.

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[14] The administrative judge also noted that Mr. Carroll was alleged to have told a person with whom he had owned a "strip joint" that a male federal agent was the person "who looked out for us," and she seems to have suggested that the sheriff's office employee may have been the agent to whom Mr. Carroll allegedly referred. ID at 11; Agency File, Tab 4o, Subtab D (McCreary interview). She did not make any specific finding regarding the identity of that agent, however. Moreover, the only evidence that such a statement was made appears to be the summary of an interview of the co-owner of the "strip joint." Agency File, Tab 4o, Subtab D. The summary indicates that the co-owner did not know the name of the agent, but that he had heard people refer to that official as "Charlie Brown." *Id.* While that same witness described "Charlie Brown" as about 6 feet two inches tall, the sheriff's office employee testified that he was only about 5 feet 5-1/2 or 6 inches tall. *Id.*; HT 2-15 at 205. Furthermore, the appellant did not even attempt to call the co-owner as a witness, and nothing in the interview summary indicates that any "look[ing] out for us" that "Charlie Brown" may have been said to have been doing extended beyond activities at the "strip joint."

Agency File, Tab 4m, Subtabs 22, 25; HT 2-15 at 180. The parties agree that the safety of those executing the search warrants would have been jeopardized by disclosure of the search plans. In fact, the appellant acknowledged in her hearing testimony that agents executing the warrants could have been killed as a result of that disclosure. HT 2-17 at 162. It is unlikely, therefore, that either the sheriff's office employee or the DEA agents who participated in the search would have disclosed those plans. Moreover, the other two DEA agents to whom the administrative judge referred presented unrebutted testimony that they were not even aware on June 30, 1994, of the search operation that was to be executed the next day. HT 2-15 at 134; HT 2-17 at 127-28.

¶38 We also do not believe the telephone conversation the sheriff's office employee had with Mr. Kendall on July 1, or Mr. Kendall's attempt to page that employee the previous night, provides significant evidence that the sheriff's office employee was the source of the information in question. While the employee testified that he did not remember the reason for the July 1 telephone call, HT 2-15 at 262, his speculation that he had called Mr. Kendall about plans for the following evening's activities, *id.*, seems reasonable in light of his acknowledged social relationship with Mr. Kendall. With respect to Mr. Kendall's attempt to page the employee the previous evening, the employee testified that he had no recollection of talking to Mr. Kendall that evening, and no other evidence suggests that he did so. HT 2-15 at 197. Furthermore, the agent's grand jury testimony that he "more than likely … was in bed" at the time he was paged is credible in light of his need to wake up early the next morning. *Id.* at 190; Transcript of Cox Grand Jury Testimony at 14, Agency File, Tab 4d.

¶39 Perhaps most important, we note that the only evidence that could be regarded as suggesting that an employee other than the appellant made the disclosure in question – evidence such as advance knowledge of the search, social relationships with Mr. Kendall, the receipt of legal services from Mr. Kendall, and the admittedly poor working relationship between the sheriff's office

employee and the DEA agent in charge of the search operation, HT 2-15 at 249-50 – seems insignificant in comparison with the evidence described above, at ¶¶ 14-17 and 26, linking the appellant with that disclosure.

¶40 Finally, we note that events occurring after the appellant left the Atlanta DEA office provide persuasive evidence that it was the appellant – and not any of the other persons to whom the administrative judge has referred – who enabled Mr. Kendall to protect Mr. Carroll from law enforcement activity. Specifically, the record shows that Mr. Carroll's brother-in-law, Benjamin Cleveland Davis, testified that in January 1997 he had talked with Mr. Carroll about the possibility that another person involved in drug trafficking might testify against him and Mr. Carroll; he and Mr. Carroll then went to Mr. Kendall's office; and Mr. Kendall, while giving them advice regarding the evidence against them, told them "that his contact was not in the area at the time, and that he had to develop a new source of information." Cr. Tr. at 726-28, 734. The record shows further that Mr. Carroll provided similar testimony regarding Mr. Kendall's remarks to him and Mr. Davis; a search warrant was again executed at the Panola Mill house on January 29, 1997; Mr. Carroll was not told of the search in advance this time; property and money were seized at the house; and he was arrested. *Id.* at 475A-77A, 478A-79A. It is undisputed that the appellant was detailed to Arlington, Virginia, on August 14, 1996, to attend language training in preparation for a reassignment to Brazil, and that she did not complete this training until about March 5, 1997 – well after the time of the remarks attributed to Mr. Kendall. Appeal File, Tab 4o, Subtab 61(M) at 2.

¶41 For the reasons stated above, we find that Mr. Carroll's testimony regarding events relevant to this case is consistent with and supported by a considerable amount of evidence. We therefore find that his testimony is credible; that the agency has proven, by a preponderance of the evidence, that the appellant told Mr. Kendall on June 30, 1994, about the investigation of Mr. Carroll and about the search planned for the next day; and that it has also proven that she provided

Mr. Kendall on the same date with a copy of the written operations plan for the search. Charge one therefore is SUSTAINED.

2. Conduct Unbecoming DEA Special Agent

¶42 We have noted above that the second charge on which the appellant's removal was based, i.e., that of conduct unbecoming a DEA special agent, is based on the appellant's alleged receipt of a telephone call in which Mr. Kendall asked whether the search was still scheduled to take place, and on the appellant's failure to report her receipt of that call. The call in question is the one that, according to Mr. Carroll, Mr. Kendall made in his office shortly before 4:00 p.m. on June 30. As indicated above, Mr. Carroll testified that Mr. Kendall asked whether the search was still scheduled to take place, and the appellant responded that she could not talk because there was too much activity in her office at that time.

¶43 We have found, in connection with charge one, that Mr. Carroll's version of the events in question here is credible. Moreover, the credibility of his testimony regarding the telephone call at issue in this charge is enhanced by the evidence (noted above, at ¶ 18) that a group was gathering in an adjacent room at about that time to attend a meeting regarding the search, by the consistency of this circumstance with the appellant's alleged statement that office activity prevented her from talking to Mr. Kendall, and by the absence of any indication that Mr. Carroll knew of the meeting when he described the appellant's response. In addition, we have noted above that the telephone call at issue here was, according to Mr. Carroll, placed on a speaker telephone, and we therefore find that that witness was in a good position to hear both sides of the conversation. *See Hillen*, 35 M.S.P.R. at 458 (witness's opportunity and capacity to observe event in

question is relevant to credibility determination). Finally, it is undisputed that the appellant did not report her receipt of this call to her agency.[15]

¶44 For these reasons, we find that the agency has proven the charge of conduct unbecoming a DEA special agent by a preponderance of the evidence. Charge two is SUSTAINED.

3. Misuse of Office

¶45 The appellant does not deny that she queried the CIS on the six occasions alleged by the agency in charge three, and, as noted above, the administrative judge sustained the charge that she failed to record those queries in the CIS logbook as she was required to do. The administrative judge found, however, that the appellant had not been shown to have made the queries in question at Mr. Kendall's request and for the benefit of Mr. Carroll. ID at 24. This finding was based on the following: (1) The government, rather than Mr. Carroll, had first identified the names in question; (2) it did so by identifying names that belonged to people associated with Mr. Carroll and that were the subjects of queries the appellant failed to log in; (3) Mr. Carroll did not specifically testify that he asked Mr. Kendall to make inquiries about the four people whose names allegedly were improperly queried; (4) he did not specifically recall mentioning two of those people; (5) the appellant failed to query the name of one of the people Mr. Carroll allegedly told Mr. Kendall might be giving statements against him; and (6) the reassuring statement Mr. Kendall allegedly made to Mr. Carroll

[15] In her initial decision, the administrative judge referred to Mr. Carroll's testimony that Mr. Kendall had said he needed to leave the office after the telephone call in order to make a 4:00 p.m. court appearance, and she found that unrebutted evidence showed that Mr. Kendall made no court appearance at that time. ID at 20 n.18. We are not persuaded, however, that this evidence casts doubt on Mr. Carroll's credibility. Instead, it may show only that Mr. Kendall was not being entirely truthful to Mr. Carroll, and that he may have used the alleged court appearance as an excuse to get Mr. Carroll to leave his office.

later could not reasonably be interpreted as a statement that the people in question were not informants. ID at 21-24.

¶46 Evidence that Mr. Carroll initially identified the names in question, that he asked Mr. Kendall specifically to have the names queried in the CIS, and that Mr. Kendall subsequently reported to him that the names were queried and not found in that system would undeniably provide very strong proof of the charge at issue here. We note, however, that the agency is required to prove its charge only by a preponderance of the evidence, i.e., evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that the agency's allegations are more likely to be true than untrue. *See Banez v. Department of Defense*, 69 M.S.P.R. 642, 646 (1996); 5 C.F.R. § 1201.56(a)(1)(ii), (c)(2). For the following reasons, we find that the agency's evidence meets this standard.

¶47 First, Mr. Carroll's testimony at the criminal trial indicates that Mr. Kendall was interested in learning the names of possible informants, and it suggests that he took steps to determine whether people with incriminating information were cooperating with law enforcement authorities. Specifically, Mr. Carroll testified that Mr. Kendall had asked him why "they" – apparently a reference to law enforcement authorities – were "pushing after [him] so hard"; he responded that it was "because of guys that was in jail that was making statements"; and, when asked who the "guys" were, he referred to Dave Wallace, Joe Peavy, and Jinks Sims. Cr. Tr. at 487A. He also testified that Mr. Kendall "didn't say too much about it" at the time of the conversation, but that he later told Mr. Carroll "that I shouldn't worry about those guys," and he said "something to the nature of a drowning man don't care who they pull up on …." *Id.* at 488A. Mr. Kendall's apparent failure to tell Mr. Carroll specifically that he had had the names queried, and that the people named were not informants, does not detract significantly from the probative value of the evidence. It is unlikely that Mr. Kendall would

be eager to disclose the queries to someone who might – and in fact eventually did – testify against him and his source of information, i.e., the appellant.

¶48 Second, all four people whose names allegedly were improperly queried were people Mr. Carroll had reason to believe might provide evidence against him. Two of them, Mr. Wallace and Mr. Peavy, were his associates in drug-trafficking activities; the third, Daryl Brown, was a former correctional officer who allegedly had bought cocaine at another associate's house; and the fourth, Gregory Johnson, lived next door to Mr. Carroll, in a house at which one of Mr. Carroll's cars is said to have been stored during the 1994 DEA search addressed above. *Id*. at 369, 375-76, 397.[16] Furthermore, Mr. Carroll testified that he might have mentioned Mr. Brown's name in the earlier of the two conversations described above, and he indicated that doing so would have been logical in light of Mr. Brown's arrest. *Id*. at 488A. In addition, we do not regard the appellant's failure to query Mr. Sims's name as particularly significant. That failure could have resulted from any of a number of other reasons, including Mr. Kendall's failure to remember all the names Mr. Carroll gave him.

¶49 Third, the timing of the conversations Mr. Carroll described is consistent with the agency's position that the queries were related to those conversations. Mr. Carroll testified that the initial conversation occurred sometime in the spring of 1994, and, as noted above, the queries were run during April, May, and June 1994. Cr. Tr. 487A; HT 2-17 at 266-68; OPR Report at 41.

¶50 Fourth, telephone records show that the appellant and Mr. Kendall communicated with each other frequently and shortly before or after each of the

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[16] While Mr. Carroll did not refer to Mr. Johnson in his testimony regarding the conversations at issue here, it is clear that Mr. Kendall was quite familiar with Mr. Carroll's drug operations. More likely than not, he knew or at least suspected that Mr. Johnson was able to provide law enforcement authorities with useful information about the drug operations taking place in the house next door to him. It is not unlikely, therefore, that it was Mr. Kendall, and not Mr. Carroll, who thought of the need to query that person's name.

queries. HT 2-17 at 266-68; OPR Report at 41; Agency File, Tab 4n, Subtabs 44, 45, 56B.

¶51 Finally, there appears to have been no legitimate reason for the appellant to run the queries. The official responsible for overseeing the Carroll investigation and search testified that agents who wished to contact witnesses in the case would have checked with her before doing so; she indicated further that none of them told her they needed to contact the four witnesses whose names were queried; the record includes no evidence that anyone other than Mr. Kendall requested or suggested the queries; and the appellant is unable to explain why she made them. HT 2-14 at 7-8, 34, 130-31; Hearing Transcript, Feb. 16, 2000 (HT 2-16) at 101.[17]

¶52 Under the circumstances described above, we find that the appellant more likely than not conducted the six queries at issue here at Mr. Kendall's request and for the benefit of Mr. Carroll. This charge is SUSTAINED.

4. Misuse of Government Property

¶53 The last charge that was not sustained in the initial decision, i.e., that of misusing government property, is based on the appellant's admitted use of her government-provided cellular telephone to place over 100 calls to Mr. Kendall. Proposal Notice at 7. Although the administrative judge found that the appellant had made 108 calls to Mr. Kendall, she noted that most of the calls were very brief and that the appellant had made only five of those calls a month on average.

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[17] The initial decision seems to suggest that the appellant might have been able to explain the queries if she had been provided with confidential informant or criminal case files on the subjects of those queries. ID at 20 n.20. It indicates further that the appellant requested those files after she received the notice of her proposed removal, but that there was no indication that she had received them. *Id.* The record does not show, however, that the appellant ever requested the files during the discovery phase of her appeal. In fact, nothing in the record indicates that she made such a request at any time while her appeal was pending. We see no basis, therefore, for finding that the appellant was improperly denied evidence regarding this matter. *See White v. Social Security Administration*, 76 M.S.P.R. 447, 462-64 (1997), *aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (Table).

ID at 28. She also stated that our reviewing court had "found, … in agreement with the appellant, that implicit in any policy prohibiting personal use of government property is a *de minimis* exception"; she found, as noted above, that the appellant's personal use of her telephone was *de minimis*; and she therefore did not sustain the charge. *Id.* (citing *O'Neill v. Department of Housing & Urban Development*, 220 F.3d 1354 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1202 (2001)). In its petition for review, the agency argues that the *de minimis* nature of an offense is relevant to the penalty issue, and not to the issue of whether a charge should be sustained. PFR at 59-60. It also argues that the appellant's offense was egregious, and not *de minimis*. *Id.*

¶54 As the agency indicated in its proposal notice, the appellant essentially admitted to an agency investigator that she called Mr. Kendall 108 times on her cellular telephone during the period from December 22, 1993, to September 1995. Proposal Notice at 7; Agency File, Tab 4o, Subtab 60 (transcript of interview of appellant) at 33 (when given information regarding number and length of calls, appellant stated, "I believe that"). She also essentially admitted to him that her personal usage amounted to a total of 186 minutes. Agency File, Tab 4o, Subtab 60 at 33. Moreover, she has not subsequently denied the extent of her actions; and, although she has argued that some personal use of agency-issued cellular telephones by DEA agents was permitted, we see no evidence in the record that the agency tolerated personal usage by any agent that approached the extent to which the appellant used her government-issued telephone. Agency File, Tab 4e at 13; HT 2-17 at 84. We note further that the appellant admitted at the administrative hearing in this case that she "should not have been using those telephones to make personal telephone calls," HT 2-17 at 84, and that she also admitted, albeit in somewhat equivocal language, that the DEA "agent's manual" prohibited the personal use of such equipment, HT 2-17 at 148 (appellant's testimony that she was "certain [the manual] probably did" prohibit the personal use of DEA-leased equipment).

¶55 Under the circumstances described above, we find that the appellant's use of her government-issued cellular telephone to place personal calls to Mr. Kendall was improper, and that, assuming arguendo that some misuse of cellular telephones by DEA agents was tolerated, the agency did not tolerate the extent of the misuse in which the appellant engaged.

¶56 The agency did not include in its proposal notice information regarding the specific amount of money the appellant's misuse of her cellular telephone cost the government. Telephone bills included in the investigative file indicate, however, that her calls to Mr. Kendall generally were billed at 29 cents a minute. Agency File, Tab 4m. It appears, therefore, that her misuse of her telephone cost the government a little over $50. While this amount is not particularly great, it appears to be somewhat larger than amounts the Board and its reviewing court have found to be *de minimis*. *See Miguel v. Department of the Army*, 727 F.2d 1081, 1084 (Fed. Cir. 1984) (soap worth $2.10 was *de minimis* in value); *Banez v. Department of Defense*, 69 M.S.P.R. 642, 645, 650 (1996) (underpayment of $13.99 for merchandise was a *de minimis* theft); *Skates v. Department of the Army*, 69 M.S.P.R. 366, 368 (1996) (left-over food taken from dining room where employee worked was *de minimis* theft); *Kirk v. Defense Logistics Agency*, 59 M.S.P.R. 523, 527 (1993) (item worth $5 was of *de minimis* value); *Ciulla v. United States Postal Service*, 37 M.S.P.R. 627, 628-29 (1988) (two undeliverable magazines that were to be destroyed, and an undeliverable calculator determined to be of no obvious value, were *de minimis* in value); *Smith v. United States Postal Service*, 31 M.S.P.R. 508, 510 (1986) (binoculars taken from trash bin were of *de minimis* value).

¶57 More important, the monetary value of the items or services an employee has improperly taken is only one factor to be considered in determining the seriousness of the offense. Another relevant factor is whether the employee's official responsibilities put him in a position of control and custody over the items or services he improperly took. *See, e.g., DeWitt v. Department of the*

Navy, 747 F.2d 1442, 1445 (Fed. Cir. 1984) (removal of store worker for taking fourteen dollars' worth of merchandise found reasonable, based in part on employee's position of control and custody over items in question), *cert. denied*, 470 U.S. 1054 (1985); *Underwood v. Department of Defense*, 53 M.S.P.R. 355, 357, 359-61 (removal of material handler for attempted theft of two jars of cinnamon found reasonable, based in part on evidence that employee was responsible for loading items in question), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table). The Board also has considered an employee's status as a law enforcement officer important in evaluating the seriousness of an offense involving the improper taking of property. *See Mojica-Otero v. Department of the Treasury*, 30 M.S.P.R. 46, 47-48, 50 (1986) (Board sustained removal of customs patrol officer based on charges related to the theft of two pairs of shorts).

¶58 Both the factors mentioned above support a determination that the offense at issue here was not *de minimis* in nature. Clearly, the telephone the appellant misused was entrusted to her custody and control; more significant, it was to be used for purposes related to her job – a job in law enforcement. Moreover, as indicated above, the misuse occurred on over 100 occasions, and the appellant knew that her personal use of the telephone was prohibited. Under these circumstances, we find that the appellant's misuse of her government-issued cellular telephone was not *de minimis*, and that it instead constituted a significant offense. *See Mitchell v. Department of Defense*, 22 M.S.P.R. 271, 273 (1984) (improperly incurring $110 in expenses through misusing telephone on 39 occasions, when employee knew that conduct was proscribed, was serious); *cf. Lewis v. General Services Administration*, 82 M.S.P.R. 259, 265 (1999) (employee's making 153 calls to state lottery commission, for which agency was billed $800, and his persuading third party to lie about nature of calls, was egregious).

¶59 For the reasons stated above, we SUSTAIN the charge of misusing government property. Accordingly, we need not address the agency's argument that the *de minimis* nature of an offense is not relevant to the issue of whether a charge should be sustained.

5. Penalty

¶60 The four charges we have addressed above, along with the charge of exercising poor judgment, provide an ample basis on which to sustain the appellant's removal. Not only did the appellant's divulging of information related to the search allow Mr. Carroll and his associates to remove the items sought during the search, thereby thwarting the purpose of the operation, but, as indicated above, it jeopardized the safety of officials who executed the search warrants. Even the appellant has acknowledged that this misconduct, if found to have occurred, would warrant her removal. HT 2-17 at 161. Furthermore, the deciding official testified that the most serious charges were those of divulging information regarding the search and querying the CIS at Mr. Kendall's request; and he indicated that those charges and charge two (involving Mr. Kendall's telephone call to the appellant's office on the afternoon of June 30) by themselves would leave him with "no choice but to remove [the appellant] from her position." HT 2-16 at 245, 263. In addition, we note that the appellant occupied a position of trust, in which she was one of a limited number of employees who had access to the CIS, *id.* at 92, 246; that she was responsible for securing CIS files, HT 2-17 at 39; and that she herself has described those files as "very sensitive," *id.* Finally, we have sustained the charge of misusing government property; we have found that the charge constitutes a significant offense; and the appellant has not challenged the administrative judge's decision to sustain the charges of failure to follow written procedures and exercising poor judgment.

¶61 Under these circumstances, we find that the appellant's removal is well within the limits of reasonableness, and that it must be SUSTAINED. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

ORDER

¶62 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States

district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

_____
Shannon McCarthy
Acting Clerk of the Board

Washington, D.C.