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

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| NORA J. BRADLEY,<br>Appellant,<br><br>v.<br><br>DEPARTMENT OF VETERANS AFFAIRS,<br>Agency. | ) | DOCKET NUMBER<br>CH-0752-97-0440-I-1<br><br><br><br>DATE: MAR 26, 1998_ |

Ernestine Benjamin, Mattson, Illinois, for the appellant.

Paul E. Piwinski, Esquire, Chicago, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

## OPINION AND ORDER

The appellant timely petitions for review of an initial decision that affirmed the agency's removal action. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, and REVERSE the initial decision. The agency's action is REVERSED.

## BACKGROUND

Effective March 31, 1997, the agency removed the appellant from her GS-4 Medical Instrument Technician position based on charges that she used her public office for private gain and engaged in actions that created the appearance that she violated the law or ethical standards when she charged a patient for sex. Initial Appeal File (IAF), Tab 5, Subtabs 4a, 4j. Specifically, the agency alleged that on two separate occasions, the appellant went to the patient's home and engaged in sexual relations with him in return for $50.00. *Id*. It is uncontroverted that the patient wrote two $50.00 checks to the appellant and that the appellant cashed the checks. *Id*. at Subtabs 4q, 4r.

The appellant filed a timely appeal claiming, *inter alia*, that her accuser was a "75 y-o mental patient" who "starts trouble for others when things don't go his way." IAF, Tab 1, at 2. The appellant also denied the charges and alleged in support of her denial that she was 8 1/2 months pregnant at the time of the alleged misconduct. *Id*. After a hearing, the administrative judge issued an initial decision affirming the agency's removal action.

In her petition for review (PFR), the appellant claims that the administrative judge erred when he excluded certain evidence and did not believe her testimony concerning her pregnancy.[1] PFR File, Tab 1. She also claims error

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[1] We have not considered the evidence the appellant submits with her petition for review because it was submitted for the first time with the petition for review without a showing that it was unavailable before the record was closed despite the appellant's due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).**{** TA \l "Avansino v. U.S. Postal Service, 3 M.S.P.R. 211, 214 (1980)." \c 1 **}{** TA \l "Avansino v. U.S. Postal Service, 3 M.S.P.R. 211, 214 (1980)." \c 1 **}** In addition, we have not considered the appellant's October 6, 1997 submission because it was filed after the record closed on review with no showing that it is based on evidence not readily available before the record closed. 5 C.F.R. § 1201.114(i).

in that the patient who accused her of misconduct should have been "in the court room." PFR File, Tab 1, at 2. The agency opposes the PFR. PFR File, Tab 3.

ANALYSIS

The appellant claims that the patient who accused her of the misconduct should have been in "the court room." PFR File, Tab 1, at 2. The record evidence shows that the appellant did not request the patient as a witness. IAF, Tab 9, at 2. Where, however, as here, the absence of a witness affects the probative weight of the agency's evidence, the appellant's failure to call the witness is irrelevant. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 82-87 (1981).

In an adverse action case, the agency is required to establish all elements of its charges against the employee by preponderant evidence. 5 C.F.R. § 1201.56(a)(1)(ii). The agency's case was based almost entirely on the testimony and statements of agency employees who claimed that the patient told them about the appellant's alleged misconduct. IAF, Tab 5, Subtabs 4f, 4g, 4l, 4m, 4o, 4p; Hearing Tape (H.T.) 1, Sides A, B. While hearsay is admissible in proceedings before the Board, the assessment of the probative value of such evidence depends on the circumstances of each case. *See, e.g., Reniere v. Department of Agriculture*, 62 M.S.P.R. 648, 652 (1994). The probative value of such evidence must be evaluated in terms of the factors set forth in *Borninkhof,* 5 M.S.P.R. at 83-87 (1981), such as the availability of persons with firsthand knowledge to testify at the hearing, the agency's explanation for failing to obtain signed or sworn statements, whether the out-of-court declarant was a disinterested witness to the events, the consistency of the declarant's account with other information, whether corroboration for statements can be found in the agency's record, the absence of contradictory evidence, and the credibility of the declarant when he made the statement. *See Womack v. U.S. Postal Service*, 70 M.S.P.R. 285, 291-292, *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

We find that the administrative judge did not address all of those factors or the information in the record that is material in determining the weight to be accorded the hearsay statements of the patient.[2] First, the agency offered no explanation for its failure to call the patient to testify at the hearing and did not obtain a written statement from him or explain why it did not obtain such a statement. Second, while the copies of the checks could be interpreted as corroborating the patient's claim that he paid the appellant $50.00 on two occasions for sex, they also support the appellant's claim that the patient gave her the checks so that she could purchase his groceries. IAF, Tab 10, at 2; H.T. 2, Side A. Third, the hearsay evidence is contradicted by the appellant's live testimony. *See Robinson v. Department of Health & Human Services*, 39 M.S.P.R. 110, 115 (1988) (hearsay evidence may not be sufficiently probative, in light of contradictory live testimony, to sustain an agency's burden by preponderant evidence). The appellant testified that she never had sex with the patient. H.T. 1, Side B. She stated that the patient "cried on her shoulder" about his daughter mistreating him, not having anyone visiting him, and not having any food in his house. *Id*. In response to his complaints, she asked him where he lived and, upon learning his residence was close to where she did volunteer work, offered to do his grocery shopping. *Id*. The appellant testified that she went to his residence on two consecutive Saturdays, bought groceries for

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[2] Although resolving conflicts in the evidence and deciding issues of credibility is normally the province of the administrative judge, where, as here, the administrative judge has not identified the demeanor of the witnesses as a factor in the credibility analysis and the record is otherwise sufficiently developed, remand is unnecessary. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995). **{** TA \l "Uske v. U.S. Postal Service, 60 M.S.P.R. 544, 557 (1994)." \c 1 **}{** TA \l "Uske v. U.S. Postal Service, 60 M.S.P.R. 544, 557 (1994)." \c 1 **}**

the patient, and gave the groceries, the receipt, the change, and the grocery list to the patient in the vestibule of his residence. H.T. 2, Side A.

The administrative judge found that the appellant's testimony lacked credibility because her explanations for the checks were inherently implausible. IAF, Tab 11, at 3. We disagree. The administrative judge found that the appellant's suggestion that the patient was unable to care for himself was not persuasive because, although wheelchair bound, he managed to get himself to and from the Veterans Administration (VA) hospital and if he was in need, the most reasonable course of action for the appellant would have been to refer him to the hospital patient representative. *Id*. at 4. The appellant did not state that the appellant was unable to care for himself. Rather, she testified that the patient told her that he needed someone to clean his house and buy groceries. H.T. 1, Side B. The administrative judge also found the appellant's statement that she did volunteer work near the patient's residence improbable. IAF, Tab 11, at 4. Specifically, he found that the appellant did not perform work for Catholic Charities near the patient's home because she failed to support her claim with any evidence, such as a letter or testimony from a Catholic Charities official and the appellant lives in Oak Park, a western suburb of Chicago while the patient lives in Evanston, a northern suburb of Chicago. *Id*. The appellant testified that the head of volunteer services at Catholic Charities asked her to visit two elderly individuals in Evanston. *Id*. She named the two individuals, the street they lived on, and stated that they lived within 3 blocks of the patient. *Id*. The appellant's statements concerning her volunteer work in Evanston were uncontradicted. While the lack of contradiction of particular testimony does not mean that it must be credited, *see Hillen v. Department of the Army*, 35 M.S.P.R. 453, 460 (1987), here we find no reasonable basis to discredit it.

The administrative judge also did not credit the appellant's testimony that she had a baby on February 18, 1997. IAF, Tab 11, at 5; H.T. 1, Side B. The

appellant made the statement to support her claim that she was 8 1/2 months pregnant at the time of the alleged sexual encounters and that her medical condition supported her denial of the charges. IAF, Tab 1, at 2; H.T. 1, Side B; H.T. 2, Side A. The administrative judge found that the appellant's proffer of a doctor's note stating, *inter alia*, that she had surgery on February 18, 1997, instead of a birth certificate, showed that she could not verify her claim that she gave birth on February 18, 1997.[3] A doctor's statement that an individual had surgery on a certain date does not, in and of itself, contradict the individual's assertion that she gave birth on that date. In addition, the proposing official, who is a doctor and who met with the appellant on January 27, 1997, and noted that she stated "that she is eight months pregnant and due to deliver in three weeks," did not question her claim. IAF, Tab 5, Subtab 4k; H.T. 1, Side B. Accordingly, absent any contradictory evidence, we find nothing inherently implausible about the appellant's statement that she had a baby on February 18, 1997.

The administrative judge also appears to discredit the appellant's testimony based on his finding that when the appellant was initially confronted with the allegations, she denied ever accepting any money from any VA patient for any purpose and that later she admitted being paid for the groceries. IAF, Tab 11, at 3. The administrative judge's finding is not supported by the record evidence. In a written statement, the proposing official stated that in a telephone conversation following his initial meeting with the appellant, he asked the appellant if she had ever accepted money from any VA patient "for any purpose such as doing work for the patient" and that she denied accepting money from any VA patient. IAF,

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[3] We note that the doctor's letter was not accepted as an exhibit by the administrative judge, and, therefore, is not included in the record evidence. H.T. 2, Side A. Having excluded the letter, the administrative judge should not then have considered it. Any error by the administrative judge in this regard, however,

Tab 5, Subtab 4k. During the hearing, the proposing official testified that he asked the appellant during the meeting whether she had accepted money for any kind of service from a VA patient and that she said "no." H.T. 1, Side B. The appellant's assertions that she never accepted any money for doing work for a VA patient are consistent with her statements that she used the money from the patient to buy his groceries and refused his offer to pay her for shopping for him. H.T. 1, Side B; IAF, Tab 10, at 2-3.

The hearsay statements are consistent with each other. IAF, Tab 5, Subtabs 4f, 4g, 4l, 4m, 4o, 4p; H.T. 1, Sides A, B. In addition, while the appellant suggested that the patient was upset with her because she refused to continue shopping for him, we find no basis to conclude that the patient had any bias toward the appellant. H.T. 1, Side B. Nonetheless, on the basis of the whole record, including the appellant's live testimony, we find that the agency's hearsay statements are not sufficiently probative to sustain the agency's charges. *See Robinson*, 39 M.S.P.R. at 117-18. Accordingly, the agency's action is reversed.

ORDER

We ORDER the agency to cancel the appellant's removal and to restore the appellant effective March 31, 1997. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help

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is harmless in that, as a result of our findings, the appellant is not prejudiced by

it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

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

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

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either its exclusion or its consideration by the administrative judge.

## NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.