

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

**PATRICIA A. DEJOY**  
**v.**  
**DEPARTMENT OF HEALTH AND**  
**HUMAN SERVICES**

**Docket No.**  
**NY075299017**

**OPINION AND ORDER**

The appellant was removed from a position with the Food and Drug Administration, Buffalo, New York, for impeding government efficiency. She appealed to the Board's New York Field Office. In the initial decision, the presiding official found the reasons for the removal supported by a preponderance of the evidence and sustained the removal action. In her petition for review, the appellant sets forth 12 numbered statements upon which she bases the request for review. These 12 statements shall be considered below. The agency's response stated that the substantive issues raised by appellant were fully considered by the presiding official and that no comments were offered on other issues because of the lack of specificity.

The reasons for the appellant's removal concern events during January 22, 1979, to February 6, 1979, when the appellant refused to report to a new position in compliance with an order reassigning her from the Office of the District Director to the Administrative Management Office. On January 25, 1979, the appellant's suspension and removal were proposed. On February 6, 1979, both of these proposal letters were rescinded and a new notice of proposed removal issued. In making his decision on the proposal to remove, the deciding official considered the appellant's replies to the rescinded January 25 notice as well as the February 6 notice. The appellant generally contended before the agency and the field office that she had properly refused to report for the reassignment since the agency had not provided her with a copy of the position description for the new job, and that she had been discriminated against because she had not been promoted in some six years although she had been performing duties above her grade level.

With this background, the Board turns to consideration of the statements presented in the petition for review. First, the appellant states that her "civil rights were denied her by managements (sic) barring her from seeing her file on February 5, 1979." A

February 6, 1979 memorandum from the agency Administrative Officer to the District Director reflects that the appellant was permitted to see her file on February 5, 1979. The presiding official considered this and similar allegations (concerning denial of access to documents on other dates) and found specifically that the appellant did review the record on February 5, 1979 in preparation for her reply to the January 25 proposals. The Board finds no error in this conclusion.

Next the appellant states that the filing of two consecutive proposals of removal constituted "double jeopardy." The Board finds no error in this regard. The prohibition against "double jeopardy" applies to criminal charges and these were in no sense charges of a criminal nature. *Stevenson v. U.S.*, 155 Ct. Cl. 592 (1961). Further the agency had cancelled only a proposed adverse action. No decision to remove the appellant had been made at the time of cancellation. The appellant was clearly not "punished" twice. At best the appellant's situation might be compared to a situation in which one matter is considered for indictment by more than one grand jury. Cf. *Jenkins v. Macy*, 357 F.2d 62 (8th Cir. 1966).

The third basis for requesting review is that the appellant disagrees with "the hearing officer's decision that only events taking place after February 6, 1979 are relevant." The appellant does not cite any particular portion of the record where such a "decision" was made. From review of the transcript of the hearing, the Board notes that the presiding official did find irrelevant testimony regarding an altercation between the appellant's representative and agency management when the file was reviewed on February 5th. The presiding official did allow testimony and evidence regarding the background which led to the appellant's refusing to be reassigned. We find no error in these rulings. The proposal of January 25, 1979, had been cancelled. The action at issue was proposed on February 6, 1979. The Board agrees that the manner in which the appellant had attempted to reply to the cancelled notice was not a relevant line of inquiry.

At statements four, five and seven, the appellant states that the presiding official made inconsistent or improper observations and assumptions and that there are contradictory statements by the government's witness. The appellant does not specify to what she is referring. Accordingly, the Board can give these statements no substantive review. The Board notes that at page 14 of the initial decision the presiding official discussed a disparity in testimony on the availability of the position description for the new job on and after January 23, 1979. The presiding official did not find that this affected the outcome of the case. The Board finds no error in this matter.

Statement six contains various charges of "misdeeds" on the part of agency officials in their treatment of the appellant's representative. The Board notes that the file reflects that the matter of the representative's conduct was referred to the U.S. Attorney's office for possible criminal action. The Board finds the entire matter not germane to the substantive issues in the appeal and not properly reviewable by the Board.

At number eight, the appellant presents the following:

Agencies (sic) denial of discrimination when in fact the appellant has served some 10+ years as a GS 3 Clerk Typist, who has been shifted from position to position at the whim of the agency, and who has had, 2, (sic) GS 4 positions withdrawn from her, a person who after working for the Director's office for almost 2 years and has done the same work as GS 4, 5, and 6's that preceded her and then be referred to as a bottleneck in one division but be offered a promotion if she moves to another division and takes a job with less responsibilities, as a receptionist. In effect she was promoted to a demoted job.

The matters raised in this statement concern the appellant's justification for her refusal to accept the reassignment. These arguments were raised to the agency and were considered by the presiding official. We have held, in *Jack Ketterer v. U.S. Department of Agriculture, Federal Crop Insurance Corporation*, 2 MSPB 459 (1980), that in a removal following a refusal to accept a reassignment, the agency must prove by a preponderance of the evidence that the reassignment had been based upon legitimate management reasons. The reasons for appellant's reassignment are stated in an undated memorandum for the file, from E. Pitt Smith, that appellant was unable to perform adequately on the word-processing machine, which was a requirement of her position; that another employee was skilled at the operation of the machine; that appellant was able to adequately perform the other employee's duties, which included filing, receptionist, mailing, and photocopying; that both employees and both offices would benefit by the switching of the two employees into each other's positions; and that appellant was agreeable to the transfer on condition that she be promoted to GS-4, which condition was agreed to. Appellant has not questioned the validity of management's reasons for the reassignment; her reason for refusing to report to her new position was simply that she demanded a copy of the job description before doing so. We hold that the agency did demonstrate legitimate management reasons for the reassignment. Further, appellant has not challenged that the reassignment had been properly ordered as a *bona fide* exercise of agency discretion under 5 C.F.R.

Part 335 which was taken in the interest of promoting the efficiency of the service. Accordingly, the Board declines to review the management considerations which underlie that exercise of agency discretion. Cf. *Griffin v. Department of Agriculture*, 2 MSPB 335 (1980).

In the remainder of the petition for review, the appellant asserts that she was not properly counseled, that the penalty is too severe for a first offense and that the cost of this case to the government will "exceed several years of productive services had she been retained. . . ." The Board takes this to be an argument that the appellant should have been counseled and reprimanded rather than removed. This matter was raised to the presiding official. He found the appellant's refusal to report to work at her assigned duty station to be of such a nature that removal was warranted. Initial decision, page 15. The Board finds no error in the interpretation of statute or regulation in this finding.

Accordingly, the petition for review is denied. This is a final decision of the Merit Systems Protection Board on this case. The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. district court. Either a petition to EEOC or a civil action in a U.S. district court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., August 22, 1980