STEPHEN DEUTSCH
v.
DEPARTMENT OF DEFENSE

DOCKET NO.
SF07528010434

OPINION AND ORDER

Appellant, a Teacher (Health–Physical Education) with the Department of Defense Dependent Schools–Pacific, Seoul American High School, Seoul, Korea, was removed from his position for immoral off-duty misconduct involving a juvenile female student from the high school.[1] The presiding official found that the preponderance of the evidence supported the charge. Furthermore, he found that the agency had shown a nexus between appellant's off-duty conduct and the efficiency of the service. Therefore, he sustained the removal as he determined such action would promote the efficiency of the service.

Appellant, in his petition for review, makes two arguments for reversing the removal. First, he contends that the presiding official erred in evaluating the credibility of the two witnesses to the actual conduct, appellant and the female student. He argues that due to inconsistencies in the student's testimony regarding her drinking habits and whom she told about the incident, his version of the event should be accepted as more credible. Secondly, he alleges that the presiding official based his decision on erroneous interpretations of law and regulations. He then cites four examples of error.

Appellant recognizes that the proof of the charge primarily rests upon whose version of the events one accepts as credible. He points to several inconsistencies in the student's testimony, regarding her drinking habits and relating of the incident, which he contends should cast doubt upon her credibility. However, the presiding official carefully evaluated the testimony of the two parties involved and found the student's version to be more credible, even recognizing these inconsistencies. In view of the deference due the presiding official's opportunity to observe the demeanor and hear the testimony of the witnesses, we find that the evidence presented by appellant does not establish that the presiding official erred in his credibility determinations. *See Weaver v. Department of Navy*, 2 MSPB 297, 299 (1980). Therefore, this contention does not warrant a review of the initial decision on this issue.

[1]He escorted a juvenile student of the high school to his on-base quarters, where he provided her with several alcoholic drinks, and while she was under the influence of alcohol, he kissed her and fondled her breasts. After she became ill from the alcohol, he dropped her at the bus terminal.

Considering appellant's argument of erroneous interpretations of regulations, he alleges that the agency committed harmful procedural error when it considered statements from a number of students not involved in the event, which did not specifically address it. However, the Board has previously held that a deciding official's consideration of matters not charged against an employee for the purpose of determining whether any mitigating circumstances or factors casting doubt on the present charges exist is not error. *See Filson v. Department of Transportation*, 7 MSPB 50, 51–52 (1981). Since that was the purpose of the deciding official's review of those statements, we find no error in this regard.

Appellant's second example of an erroneous regulatory interpretation is the allegation raised at the hearing that the agency cites no specific regulation which appellant violated. Thus, appellant argues that he could not adequately defend himself. The presiding official noted that the teachers had been advised against picking up students. Although the agency did not specifically cite a regulation in its notice, it sufficiently delineated the misconduct which it found to be inappropriate for a person in appellant's position, so that appellant could answer the charge. Nor has appellant cited an agency regulation requiring that all charges must rely on violation of written agency rules. Thus, we do not find that the agency committed procedural error.

Appellant further contends that the presiding official erroneously relied upon testimony of certain witnesses without regard to their age and competency. Appellant, however, does not argue that these witnesses were incompetent but only that the record does not disclose "that these students were of suitable maturity to be competent." As noted by the agency in its response, age *per se* does not make a witness incompetent[2] and, moreover, a hearing officer has the authority to determine the qualifications of a person to be a witness.[3] Here, the presiding official found these witnesses to be competent as he accepted their testimony, and appellant has not cited any evidence which even suggests that they were not competent. Indeed, appellant must have accepted the witnesses as competent at the hearing as he did not challenge their competency.[4] Thus, this contention is without merit.

Finally, appellant contends that the presiding official erred in his interpretation of the agency's regulation concerning progressive discipline. In connection with this contention, he argues mitigation

[2]Federal Rules of Evidence, Rule 601; *United States v. Perez*, 526 F.2d 859 (5th Cir. 1976), *cert denied*, 429 U.S. 486 (1976).

[3]5 C.F.R. § 1201.41(b). See also Federal Rules of Evidence, Rule 104(a); *Perez, supra.*

[4]The court in *Perez, supra*, at 765, indicated that a challenge to a witness' competency should be raised at the hearing.

of the penalty due to appellant's length of service and his dedication to the teaching profession. The presiding official, after noting the seriousness of appellant's offense, its notoriety among the students and parents, and the resulting violation of the trust and authority required by appellant's position as teacher, found that removal for this first offense was reasonable under the circumstances of the case. Appellant shows no error in this review, and we agree with the presiding official's determination that removal was reasonable in review of all of the above significant factors. *See Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *July 14, 1982*