

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VANESSA HUTTON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
DC07318710469

DATE: JUN 17 1988

Vanessa Hutton, Upper Marlboro, Maryland, pro se.

William Macauley, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of an initial decision of the Board's Washington Regional Office that affirmed a decision of the Office of Personnel Management (OPM) finding the appellant unsuitable for federal employment. For the reasons set forth below, the Board DENIES the appellant's petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. The Board

REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED in this Opinion and Order. The agency's unsuitability determination is SUSTAINED.

BACKGROUND

OPM found the appellant unsuitable for federal employment because of her failure to mention criminal convictions on a prior application for employment, and the submission of an altered notice of rating, an altered certificate of proficiency in typing, both from OPM, and an altered county notice of rating. See Agency File, Tab 17. OPM noted that the criminal charges were not expunged, as the appellant claimed, and that the alteration of a federal document to show higher grades reflected unfavorably on the appellant's honesty, integrity, judgment and trustworthiness. OPM, therefore, cancelled any eligibilities the appellant obtained as a result of any application or examination, and barred her from competing in examinations or accepting federal appointment until May 3, 1989.

In his initial decision, the administrative judge affirmed OPM's negative suitability determination. Although he found that the appellant's criminal conduct did not constitute a legitimate basis for finding her unsuitable since the conduct was not recent or extremely serious, he found that the appellant provided incorrect information with intent to deceive OPM. In view of the seriousness of the falsification

offenses and the recency of the misconduct involved in the submission of the notice of rating, the administrative judge concluded that the falsification charge supported OPM's decision.

ANALYSIS

In her petition for review, the appellant contends that the Board's administrative judge improperly denied her request to reschedule the hearing. We disagree. The record shows that the appellant failed to appear for the hearing scheduled for 9:00 a.m. on September 29, 1987. She called the regional office earlier that morning stating that she would not be able to attend because of "transportation problems". See Appeal File, Tab 11. In a teleconference held later that morning with both parties, the appellant further stated that she had "difficulty arranging for transportation". *Id.* The appellant, therefore, was granted until October 5, 1987, to explain why she could not appear for the scheduled hearing, and to show cause why she did not waive her right to a hearing. *Id.*

In her untimely response requesting that the hearing be rescheduled, the appellant merely stated that she lacked money for gas, and that she had a problem with the car she would have used for transportation to get to the hearing. Appeal File, Tab 12. The administrative judge denied the appellant's request to have the hearing rescheduled because her explanation was untimely, and because she did not identify the nature of the car problem and explain why, having known of the

hearing date for over one month, she could not have made other arrangements to attend the hearing. *Id.* at Tab 15. The administrative judge advised the parties that the appeal would be decided on the written record, and they were afforded an opportunity to submit additional evidence or argument. The appellant then responded that on the morning of the hearing, the car she was going to use started leaking gasoline and parts of the carburetor caught on fire. *Id.* at Tab 16.

The appellant has not established that her rights were denigrated. The explanation for her non-attendance at the hearing was untimely and she did not substantiate her contention regarding the car fire. Indeed, it was not even mentioned in her initial explanation of her inability to attend the hearing. Thus, the appellant has not shown that her failure to appear at the hearing was excusable. See *Callahan v. Department of the Navy*, 748 F.2d 1556, 1557-58 (Fed. Cir. 1984). Under the circumstances, the administrative judge properly exercised his authority to control the course of the proceedings in denying the appellant's request to reschedule the hearing in this case. See 5 C.F.R. § 1201.41(b)(5).

With her petition for review, the appellant submitted documents, which she asserted proved that her misdemeanor criminal offenses have been expunged. She contended that she would have brought these documents to the hearing. The Board will not consider evidence submitted for the first time with a petition for review absent a showing that it was unavailable before the record closed despite a party's due diligence. See

5 C.F.R. § 1201.115(a); *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980). The documents the appellant has submitted show that each document was received by or mailed to her far in advance of the scheduled hearing date. Moreover, the administrative judge's order closing the record specifically stated that any remaining evidence must be filed by the date the record closed. See Appeal File, Tab 15. Thus, we find that the appellant's delay in submitting documentation regarding expungement does not constitute due diligence under the circumstances of this case.

In any event, although the appellant contends that all of her convictions were expunged, the evidence submitted with the petition for review shows the expungement of only one of her convictions. She was required to report the other two convictions on her application. Hence, the documents are not of sufficient weight to warrant an outcome different from that of the initial decision and therefore are not material. See *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

Further, although the administrative judge found that the appellant engaged in criminal conduct, he did not rely on the criminal convictions as a basis for finding her unsuitable. See Initial Decision at 6. Rather, because of the seriousness of the falsification offense and the recency of the conduct involved in submitting the altered notice of ratings, he found that the sustained falsification charge was sufficient to support the agency's decision by preponderant evidence. See *DeAngelis v. Office of Personnel Management*, 28 M.S.P.R. 456,

458 (1985). See also *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134 (Fed. Cir. 1986) (falsification of records, such as an employment application, is a type of misconduct from which a nexus between the misconduct and the efficiency of the service is presumed). The appellant has presented no evidence or argument to warrant disturbing that conclusion.

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

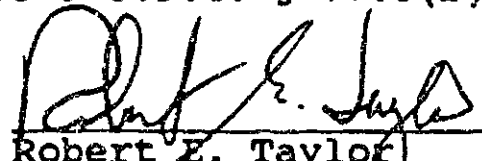
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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:

Washington, D.C.


Robert E. Taylor
Clerk of the Board