

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALAN VAN WINKLE
v.
VETERANS ADMINISTRATION

Docket No.
DA075299012

OPINION AND ORDER

Appellant was removed from his position of Food Service Worker, effective March 30, 1979, for being absent without leave (AWOL). The charge was based upon three incidents of AWOL, of 8 hours each, in May of 1978. Appellant's past record of seven incidents of AWOL or failure to report on time, during the period of October and November 1976, November 1977, and January 1978, was also considered.

In his initial decision of July 6, 1979, the presiding official of the Board's Dallas Field Office sustained the agency's action. Appellant, by petition of July 25, 1979, requested that the Board review that decision.

5 U.S.C. 7701(e) (1) provides, in pertinent part, that the initial decision of the presiding official shall be final unless a petition for review is timely filed by one of the parties. The appeal was processed by the presiding official in accordance with the Board's interim regulations, published at 44 F.R. 3946 *et seq.* (January 19, 1979). The Board's criteria for review of initial decision were contained in section 1201.113 of those regulations.

This appellant had two hearings, due to the fact that the agency's first attempt to remove him was reversed by the Board on procedural grounds. His sole allegation in the petition for review was that a witness against him gave conflicting testimony at the two hearings. Specifically, he alleged that the witness, Mr. Jackson, had testified at one hearing that he had not instructed him to report to work on May 7, 1978, and, at the other hearing, that he had so instructed him. Appellant contends that this represents new and material evidence.

We have reviewed the two statements at issue:

From the transcript of the first hearing:

Q. . . . did you instruct him to be back on the 7th?

A. No, I didn't instruct him. I asked him if he would be back on Sunday, and he said he would try.

From the transcript of the second hearing:

Q. Did Mr. Van Winkle report for duty on May 7th, as instructed?

A. No, he didn't

The Board does not find that the alleged discrepancies between the two exchanges constitute "false testimony." The word "instructed" appeared in the question during the second hearing, and was not the witness's word. Appellant was essentially advised to report for work on May 7th, and he did not do so.

Additionally, the alleged discrepancies do not constitute new evidence within the definition given in the regulation, for the testimony was given at the hearing and so does not constitute evidence which was not available when the initial decision was issued. Any argument appellant wished to make concerning the significance of the alleged inconsistency could have been timely made to the presiding official.

Accordingly, the petition is DENIED.

The appellant is hereby notified of his right to petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review the Board's decision, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 25, 1980*