

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES I. JOHNSON)	
)	
v.)	DOCKET NUMBER
)	PH07528110407
DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES)	

OPINION AND ORDER

Appellant was suspended indefinitely, for a period exceeding 14 days, from the position of Clerk-Typist, GS-322-3, employed by the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, effective May 5, 1981, pending the agency's investigation of his alleged off duty criminal conduct. The emergency suspension action was based on appellant's arrest and subsequent indictments for various violent offenses which he allegedly perpetrated on February 4, 1981, including forcible rape, sexual offenses, false imprisonment, carrying a deadly weapon, and robbery with a dangerous and deadly weapon.

Appellant timely petitioned for appeal and requested a hearing. A presiding official of the Board's Philadelphia Regional Office conducted a hearing at which appellant's representative and the agency presented witness testimony and argument. The presiding official found in an initial decision that the agency had reasonable cause to believe that appellant committed crimes for which a sentence of imprisonment may be imposed and that a rebuttable presumption of nexus arose due to the egregious nature of appellant's alleged criminal conduct. See Doe v. National Security Agency, 6 MSPR 467 (1981) (the incestuous acts of the

appellant, a collections management officer, with his minor daughter gave rise to a rebuttable presumption of nexus from the nature and gravity of the appellant's misconduct), aff'd, 678 F.2d 482 (4th Cir. 1982). The presiding official determined, however, that appellant, who chose not to testify on his own behalf, presented credible witness testimony by two co-workers which rebutted the presumption of nexus and that the agency thereafter failed to present sufficient evidence to carry its burden of proving nexus. See Merritt v. Department of Justice, 6 MSPB 493, 509 (1981). Accordingly, the presiding official reversed the indefinite suspension action and ordered the agency to restore appellant to duty.

The agency timely petitioned for review of the initial decision, asserting that the presiding official erred in determining that it failed to establish the requisite nexus for effecting the emergency suspension action and that new and material evidence exists which was unavailable when the record was closed. Pursuant to 5 U.S.C. § 7701(d)(1), the Office of Personnel Management (OPM) intervened in the case and filed a supporting memorandum. OPM contends, in relevant part, that the agency offered sufficient evidence to establish the requisite nexus between appellant's alleged criminal acts and the efficiency of the service. Appellant has not responded to these contentions.

The petition for review is hereby GRANTED.

The presiding official found that appellant's indictments and the agency's investigation of his alleged criminal conduct constituted a basis for instituting indefinite suspension proceedings and for doing so with a ~~shortened~~ notice period under 5 U.S.C. § 7513(b)(1). Initial decision at 3. The Board finds that the agency proved by preponderant evidence that it had reasonable cause to believe that appellant had committed a crime for which a sentence

of imprisonment may be imposed so that an emergency suspension could be effected. See Martin v. Department of the Treasury, MSPB Docket Number AT075209044 at 6-12 (June 1, 1982). See also Johnson v. Department of the Treasury, MSPB Docket Number DC075209213 and DC075209214 at 6 n.3 (August 27, 1982), and cases cited therein.

The Board held in Merritt, 6 MSPB at 509, that in actions taken under 5 U.S.C. Ch. 75 for conduct occurring while the employee is off duty, a determination must be made as to whether a nexus exists which links the misconduct with the efficiency of the service. The Board also stated that the agency bears the burden of proving, by a preponderance of the evidence, the facts relied upon to establish a nexus between the misconduct and the efficiency of the service. Id. The criteria for such nexus determinations were set forth in Merritt at 509:

[A] nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service or, in "certain egregious circumstances," on a presumption of nexus which may arise from the nature and gravity of the misconduct. In the latter situation, the presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus. The quantity and quality of the evidence which the agency need present in that circumstance would clearly then depend upon the nature and gravity of the particular misconduct as well as upon the strength of the showing made by the appellant in overcoming the otherwise applicable presumption.

The question of whether an agency may rebuttably presume that a nexus exists between off duty misconduct and the efficiency of the service, arising from the nature and

gravity of the misconduct, has resulted in a divergence of judicial opinion. The Board in Merritt, 6 MSPB at 494-509, concluded after extensive analysis of the Civil Service Reform Act of 1978 and relevant case law that the efficiency of the service standard, 5 U.S.C. § 7513(a), and 5 U.S.C. § 2302(b)(10), prohibiting discrimination against any employee on the basis of conduct which does not adversely affect the performance of the employee or of others, are consistent with the Norton-Gueory-Young ^{1/} mode of analysis for nexus determinations adopted by the Board.

The Court of Appeals for the Fifth Circuit has rejected the conclusion that a rebuttable presumption of nexus may arise in egregious circumstances. In Bonet v. U.S. Postal Service, 661 F.2d 1071 (5th Cir. 1981), the court concluded that 5 U.S.C. § 7513(a) and § 2302(b)(10), and 5 C.F.R. § 731.202(a), pertaining to suitability disqualification actions by OPM, "clearly signal a legislative intent that the agency must demonstrate by sufficient evidence that the off-duty misconduct, upon which the disciplinary action is founded, adversely affects the performance of the duties of the employee or of the agency." Id. at 1078. The court reversed the removal of a Postal Service manager who was removed for allegedly grossly immoral off duty conduct with a child, finding that nexus per se may not be presumed and that the burden of proving nexus never shifts from the agency proposing the disciplinary action. Id. at 1078. The court remanded the case to the Board for further proceedings consistent with the opinion.

The Court of Appeals for the Ninth Circuit in D.E. v. Department of the Navy, 721 F.2d 1164 (9th Cir. 1983),

^{1/} Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977);
Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974);
Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

amending 707 F.2d 1049 (9th Cir. 1983), reversed the removal of a diesel engine mechanic who was removed for infamous off duty conduct based on his plea of nolo contendere to a charge of child molestation following an investigation that he had sexually abused his minor daughter. The court, adopting the analysis set forth in Bonet, found that the agency failed to produce sufficient evidence to prove nexus and held that egregious off duty misconduct unrelated to the employee's duties cannot give rise to a presumption of nexus because it allows an agency to remove an employee without proving an adverse effect on service efficiency. 721 F.2d at 1168-69. 2/

Although the Courts of Appeals for the Fifth and Ninth Circuits have rejected the determination that nexus may be rebuttably presumed in off duty misconduct cases arising from the nature and gravity of the misconduct, other courts have reached a different conclusion. Even among those courts which have determined that nexus may be presumed in certain off duty misconduct cases, the problem lies in attempting to determine what offenses are of a nature and gravity to give rise to a rebuttable presumption of nexus and what evidence is sufficient to rebut the presumption. "It is clear that decisions in such delicate matters are frequently very difficult. Each case is different." Masino v. United States, 589 F.2d 1048, 1055 (Ct. Cl. 1978).

2/ The Court of Appeals for the Ninth Circuit has recently reaffirmed its holding in D.E. See McLeod v. Department of the Army, 714 F.2d 918 (9th Cir. 1983) (finding, in relevant part, that a nexus connecting the appellant's possession of marijuana on the agency premises, unrelated to the performance of his duties as a warehouse worker and the agency's performance of its mission, with the efficiency of the service was not shown by the agency).

The courts which have determined that an agency may rely upon a rebuttable presumption of nexus in order to show a connection between the employee's off duty misconduct and the efficiency of the service have reached such a conclusion in cases involving generally (1) the conviction for use of deadly force; (2) egregious sexual misconduct; and (3) misconduct involving professional or moral turpitude which is criminal in nature and relates to the duties performed by the employee, his or her co-employees, or the mission of the agency.

The Court of Appeals for the District of Columbia Circuit in Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974), held that the conviction for manslaughter committed off duty by a postmaster gave rise to a rebuttable presumption of nexus, without an explicit showing of the deleterious effect such criminal conduct had on the efficiency of the service. Although Gueory presented argument to the Civil Service Commission that, in view of his work record, background and reputation, his removal would not promote the efficiency of the service, 510 F.2d at 1224, the court clearly determined that this evidence was an insufficient rebuttal to disturb the Commission's nexus determination. Id. at 1227. In Schnakenberg v. United States, 219 Ct. Cl. 697, 699-700 (1979), the Court of Claims found that the use of force in oral sodomy by a law enforcement agent constituted such egregious off duty misconduct as to make the nexus between the removal action and the efficiency of the service self-evident. Further, in Cooper v. United States, 639 F.2d 727, 729-30 (Ct. Cl. 1980), the court showed no hesitance in concluding that a Naval electronics engineer's off duty sexual abuse of a five-year old girl, if proven on remand to the Board, would adversely affect the efficiency of the service. See also Doe,

6 MSPB 467. In Masino, 589 F.2d at 1055-56, the Court of Claims found that a customs inspector's off duty unlawful personal use and transportation of a small quantity of marijuana, the very contraband he was sworn to interdict, was so egregious that the adverse effect of his retention upon the efficiency of the service spoke for itself. The Court of Appeals for the Federal Circuit has adopted the precedential decisions of the Court of Claims approving the presumption of nexus. In Hayes v. Department of the Navy, No. 83-1210 at 8-10 (Fed. Cir. February 9, 1984) (slip op.), the court, applying the prior nexus decisions of the Court of Claims, held that the Board properly found that a mechanical planner-estimator's conviction of off duty assault and battery of a ten-year old girl gave rise to a presumption of nexus in light of the nature and gravity of the offense which he did not overcome.

In Moffer v. Watt, 690 F.2d 1037, 1040 n.12 (D.C. Cir. 1982), the court found that the off duty misconduct of a realty specialist, who had traded with Indians and created the appearance of using public office for private gain, was so intimately connected with his public responsibilities of overseeing the acquisitions and dispositions of Indian trust properties that the nexus spoke for itself. The Court of Appeals for the Seventh Circuit in Wild v. Department of Housing and Urban Development, 692 F.2d 1129, 1132-33 (7th Cir. 1982) (Decker, J., dissenting), found that the off duty misconduct of an appraiser in acting as a "slumlord" in violation of the agency's principles governing employee conduct was blatantly inconsistent with the mission of the agency, and proof of a reduction of its efficiency due to the misconduct may be inferred from the relation between the misconduct and the agency's mission. But see Gloster v. General Services

Administration, 720 F.2d 700, 704-05 (D.C. Cir. 1983), where the court found that any presumption of nexus supporting the removal of a custodial laborer following her conviction for welfare fraud was dispelled by evidence that her conviction bore no relation to her job performance, was not notorious so as to discredit the agency or otherwise affect the performance of other employees, and due to the agency's failure to present evidence suggesting a connection between her misconduct and the efficiency of the service.

The Court of Appeals for the Third Circuit has determined that an agency, which has removed an employee who has been convicted of committing a violent crime during off duty hours, need not introduce evidence other than proof of the conviction for the crime in order to establish a nexus between the criminal misconduct and the efficiency of the service. In Abrams v. Department of the Navy, 714 F.2d 1219 (3d Cir. 1983), the court agreed with the Board's decision in Merritt that the efficiency of the service standard of 5 U.S.C. § 7513(a) is satisfied by a rebuttable presumption of nexus which may arise based on the nature and gravity of the off duty misconduct for certain non-violent criminal conduct or acts implicating moral turpitude. 714 F.2d at 1221-22. The court found further that 5 U.S.C. § 2302(b)(10), the legislative history of that statute and 5 C.F.R. § 731.202 "demonstrate a special Congressional concern for dealing with federal employees convicted of violent criminal conduct." Id. at 1222. The court concluded that where an employee "commits a violent crime during off-duty hours, a 'strong and secure' presumption arises that the employee's misconduct adversely affects the efficiency of the service." Id. at 1223 (quoting Gueory, 510 F.2d at 1226). The court determined that the "employee may rebut this presumption by showing not only

that his off-duty conduct will not interfere with or adversely affect his performance of his job but also that his off-duty misconduct will not interfere with or adversely affect his co-employees' performance of their jobs and the overall accomplishment of the agency's duties and responsibilities." 714 F.2d at 1223. The court remanded the case to the Board to determine whether the appellant, who shot and wounded another person while off duty, resulting in his criminal conviction on five charges, introduced sufficient evidence to rebut the "strong and secure" presumption of nexus between his convictions and the efficiency of the service. Id. at 1226.

The court's rebuttable presumption of nexus analysis in Abrams is basically in accord with the Board's nexus analysis in Merritt. In all cases it is the agency's burden to establish that the alleged off duty misconduct affects the efficiency of the service. Merritt, 6 MSPB at 510. "The rebuttable presumption never shifts the ultimate burden of proof from the agency proposing the action The rebuttable presumption merely shifts to the employee the burden of going forward to present some persuasive evidence refuting the nexus assertion." Bonet v. U.S. Postal Service, MSPB Docket No. DA0752809125 at 4-5 (April 19, 1982), aff'd after remand, 712 F.2d 213 (5th Cir. 1983).^{3/} The Merritt analysis is in accordance with the view of Federal courts that a presumption does not

^{3/} The court in Bonet, 712 F.2d 213, found it unnecessary to decide whether the Board on remand erred in applying a rebuttable presumption of nexus. The court found that even assuming arguendo that the Board did err, any error was harmless because the Board found that Bonet rebutted the presumption and required the agency to come forward with evidence to carry its burden of proving nexus. Id. at 215.

have the force of evidence and falls away once there is substantial evidence in opposition. Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 407 (4th Cir. 1979); Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 713 (6th Cir.), cert. denied, 423 U.S. 987 (1975).

To the extent that Bonet and D.E. are contrary to the views expressed in Gueory, Schnakenberg, Cooper, Masino, Wild, Moffer, Abrams, Hayes and Merritt, we respectfully disagree with the holdings in those cases. We conclude that in an action appealable to the Board, the agency may rely on a rebuttable presumption of nexus which may arise in certain egregious circumstances from the nature and the gravity of the off duty misconduct in order to carry its burden of establishing a nexus between the misconduct and the efficiency of the service. Merritt, 6 MSPB at 509.

In the instant case, the Board agrees with the finding of the presiding official that nexus may be rebuttably presumed from the nature and gravity of appellant's alleged violent, sexual criminal conduct. See Hayes, supra; Abrams, supra; Doe, supra. However, we disagree with the presiding official's determination that appellant submitted sufficient evidence showing an absence of an adverse effect on service efficiency.

An Employee Development Specialist with whom appellant had worked testified that even knowing that appellant had been indicted for rape she was not afraid of him and would not be afraid to work with him again. Hearing Transcript (Tr.) at 63-64. The testimony of another Employee Development Specialist, who was unavailable to testify personally at the hearing, was submitted by deposition. The Employee Development Specialist, who was not a supervisor but controlled appellant's work assignments, testified that appellant was a good worker; that she was aware of the rape

charge against appellant but that she would have no apprehension about his return to duty; and that his return to duty would not affect her work performance or her work unit's production. Deposition (Dep.) at 5-7. However, both of appellant's witnesses admitted that they were unaware of the alleged facts and details of the rape charge against appellant; that they were unaware of the related charges arising out of the alleged rape; and that they had not seen the indictments and police reports in the pending criminal proceedings. Tr. 64-65; Dep. 7-8.

The Board finds that the testimony of appellant's witnesses is largely speculative, based on their admitted lack of knowledge of the details pertaining to appellant's alleged off duty criminal conduct. Appellant, additionally, has presented no evidence showing that his alleged off duty criminal misconduct will not interfere with or adversely affect the overall accomplishment of the agency's duties and responsibilities. Abrams, 714 F.2d at 1223-24. See also Sherman v. Alexander, 684 F.2d 464, 469-70 (7th Cir. 1982), cert. denied, 103 S. Ct. 753 (1983); Gallagher v. U.S. Postal Service, 6 MSPB 483, 484-85 (1981).

Appellant's superiors attested that, contrary to appellant's witnesses, they were apprehensive for the safety of their subordinate employees if appellant was retained in a duty status pending resolution of the agency's investigation of the charges. Tr. 25-26, 30-33, 45-46, 60. The agency's concern for appellant's future misconduct is supported by new and material evidence which was submitted with its petition for review. The evidence consists of an additional three indictments charging appellant with rape, sexual offenses, carrying a concealed weapon, and other related offenses. The indictments pertain to an incident

in which appellant allegedly raped a second woman on July 27, 1981, after the close of the record by the presiding official. This evidence is material because it serves to substantiate the validity of the supervisors' apprehension for the safety of their employees. See Abrams, 714 F.2d at 1224-25. Further, unlike the situation the court found in Bonet, the indictments against appellant for his alleged misconduct on February 4, 1981, were still pending and the agency's investigation was ongoing.^{4/}

The Board finds under the circumstances of this case that the presumption of nexus raised by the nature and gravity of appellant's alleged criminal conduct has not been rebutted by appellant's proffered evidence and, thus, that the agency has carried its burden of establishing a nexus between the alleged misconduct and the efficiency of the service. See Hayes, supra; Abrams, supra; Doe, supra; and the discussion, infra, at 10-11. See also Bonet v. U.S. Postal Service, MSPB Docket Number DA075209125 (April 19, 1982), aff'd after remand, 712 F.2d 213 (5th Cir. 1983).

^{4/} The Court of Appeals for the District of Columbia Circuit has determined that an employee's indefinite suspension based solely on the fact of his or her indictment on duty-related charges is a conditional adverse action which must be justified by institution of a removal action based on misconduct provable by the agency following the employee's acquittal of the criminal charges. If such a removal action is not effected subsequent to the employee's acquittal, the suspension action will be proved to be unjustified and the employee is entitled to correction of the suspension action. Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983). But see Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976) (holding that an employee properly suspended indefinitely on the basis of job related charges was not entitled to back pay upon his acquittal and reinstatement by the agency). The record before the Board does not reveal a final disposition of the criminal charges. Thus, we need not further address this aspect of the matter.

Accordingly, the initial decision is hereby REVERSED and the indefinite suspension action is hereby SUSTAINED.

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

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

17 AUG 1984

(Date)

Washington, D.C.

Paula A. Latshaw

PAULA A. LATSHAW
ACTING SECRETARY