UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

74 M.S.P.R. 389

Docket Number DA-0731-95-0652-I-1

LOU E. WOODWARD, Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency.

Date: APR 18,1997

Shelby W. Hollin, Esquire, San Antonio, Texas, for the appellant.

Joseph E. McCann, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

Member Amador issues a dissenting opinion.

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the January 10, 1996, initial decision that affirmed the Office of Personnel Management (OPM or the agency)'s reconsideration decision finding her unsuitable for Federal employment. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the case to the Dallas Field Office1 for further adjudication, consistent with this Opinion and Order.

BACKGROUND

On February 24, 1995, OPM advised the appellant, a GS-4 Grounds Inspection Clerk with the Department of the Air Force (Air Force), that the results of a background

---

[1] Effective February 7, 1996, the Board realigned the geographical jurisdictions of its regional and field offices. The Dallas Regional Office was redesignated as the Dallas Field Office, and placed under the jurisdiction of the Board's Central Regional Office. 61 Fed. Reg. 4585 (1996) (to be codified at
5 C.F.R. Part 1201, Appendices II and III).

investigation conducted in connection with her application for that position raised questions about her suitability for Federal service. Initial Appeal File (IAF), Tab 3, Subtab 2g. OPM set forth nine items at issue and, as to each, included specific allegations regarding the appellant's prior job terminations and misconduct, criminal conduct, false statements on her SF-171s, Applications for Federal Employment, and SF-86, Questionnaire for Non-Sensitive Positions, and dishonesty during a personal interview. In support of its position, OPM also referenced information the appellant provided in connection with her 1990 application for the position of Border Patrol Agent Trainee which was rated ineligible following an investigation conducted by the Immigration and Naturalization Service (INS). The appellant was afforded an opportunity to comment, explain, or submit evidence addressing the nine issues. *Id.* After considering her response, OPM issued a decision on June 5, 1995, finding the appellant unsuitable for Federal employment, directing the Air Force to remove her from her position, canceling all eligibilities for reinstatement obtained from her current appointment and any other eligibilities she might have on existing competitive registers, canceling any applications she might have pending for competitive positions, and barring her from the competitive service for three years, or until June 5, 1998. *Id.* at Subtab 2a.

On appeal to the Board, the appellant disputed most of the charges, claimed that the agency had committed harmful procedural error in its application of the suitability regulations, and alleged that its decision was discriminatory based upon her race and sex. IAF, Tabs 1, 7, and 8. The administrative judge convened a hearing at which only the appellant testified, specifically disputing certain statements attributed to her by the investigators, and disputing as well a number of the allegations of misconduct upon which the agency relied. Hearing Tape (HT), 1A and B, 2A. Subsequently, after considering the agency's investigative report and the earlier report prepared by the INS, as well as the appellant's hearing testimony, the administrative judge issued an initial decision affirming OPM's decision. He set forth the nine items at issue and the appellant's response to each, Initial Decision (ID) at 3-14, and then concluded that the majority of the charges were sustained by preponderant evidence.[2] *Id.* at 14-19. Specifically, the administrative judge found that the appellant was fired from her job at the Stop N' Go in 1993, *id.* at 14; that she had engaged in misconduct by using profanity during her employment at M&Q Plastics in 1993-1994, *id.* at 14-15; that she had engaged in misconduct by displaying a rude and confrontational attitude in her job with

---

[2] The administrative judge found not sustained, under Item 4, Employment terminations and criminal conduct required to be reported on one or more Federal employment forms, the charge that the appellant had used cocaine. Initial Decision (ID) at 16. The administrative judge also found not sustained, under Item 5, Intentional false statements on SF-171 used to gain current employment, the charge that she had failed to report that she was twice fined after being arrested for public intoxication, *id.* at 17, and, under Item 6, Dishonesty during a personal interview, the charge that she improperly failed to disclose her alleged separation from Jet Industries and her alleged cocaine use. *Id.* Finally, the administrative judge found not sustained under Item 7, Intentional false statements on SF-86, the charge that the appellant intentionally provided false responses concerning her alleged separation from Jet Industries and her alleged cocaine use. *Id.* at 18.

the Air Force, *id.* at 15; that she had been involved in alcohol-related criminal misconduct and had used marijuana, but had not fully reported such misconduct or usage on her SF-86, *id.* at 15-16, 18; that she had intentionally provided false information on her SF-171 regarding her termination from Stop N' Go, *id.* at 16-17; that she had not reported that she was fired from Metal Industries in 1982 and that she was charged with Public Intoxication in November 1986, *id.* at 18; and that, in connection with a 1991 job application, she was "deceptive" during a polygraph regarding her prior marijuana use. *Id.* at 19. The administrative judge further found that the appellant had not shown that OPM committed harmful error in its application of the suitability regulations, 5 C.F.R. part 731, *id.* at 19-20; that she had failed to establish her claims of prohibited discrimination, *id.* at 20-21; and that OPM had shown that its suitability determination promoted the efficiency of the service. *Id.* at 21-22.

In her timely-filed petition for review, the appellant asserts that the administrative judge erroneously accepted the agency's hearsay evidence (i.e., the reports of investigation) over her sworn testimony. Petition for Review File (PFRF), Tab 1. She also alleges that the administrative judge failed to set forth the basis of his credibility determinations, and that the agency did not follow the requirements of 5 C.F.R. § 731.202(a) because it did not show a nexus between the sustained charges and her ability to perform the duties of her position of Grounds Inspection Clerk. *Id.*

The agency has responded in opposition to the appellant's petition for review. *Id.* at Tab 3.

ANALYSIS

The two investigative reports, which are composed largely of hearsay evidence, were properly admitted into evidence under well-settled law that relevant hearsay evidence is admissible in administrative hearings. *Marable v. Department of the Army*, 52 M.S.P.R. 622, 626 (1992); *Biberstine v. Department of Defense Dependents Schools*, 37 M.S.P.R. 248, 258 (1988); *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981). Hearsay evidence may meet the "substantial" evidence standard which requires evidence only of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions. 5 C.F.R. § 1201.56(c)(1). It may not, however, have sufficient probative value or weight to meet the higher standard of "preponderant" evidence required of OPM in this case. 5 U.S.C. § 7701(c)(1)(B). Preponderant evidence is defined as evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue. 5 C.F.R. § 1201.56(c)(2); *Tamburello v. U.S. Postal Service*, 45 M.S.P.R. 455, 466 (1990).

Accordingly, under *Borninkhof*, to the extent that an agency relies on hearsay evidence to support its action, the administrative judge must first determine whether such evidence has significant probative value according to the circumstances of the case. *Scroggins v. U.S. Postal Service*, 48 M.S.P.R. 558, 565 (1991). If so, the administrative judge must then determine whether the value of that hearsay evidence is outweighed by the other evidence of record, including the appellant's oral testimony. *Stewart v. Office of Personnel Management*, 8 M.S.P.R. 289, 294 (1981). The

administrative judge in this case relied heavily on the investigative reports, but failed to assess their probative value, even though the appellant argued the issue before him. HT, 2B; *Scroggins*, 48 M.S.P.R. at 565. We correct that error now. *Borninkhof*, 5 M.S.P.R. at 88; *Cf. Garst v. Department of the Army*, 56 M.S.P.R. 371, 378 (1993) (while an administrative judge's credibility determinations are entitled to deference, the Board may substitute its own findings, giving the administrative judge's determinations only so much weight as may be warranted by the record and the strength of his reasoning).

Following judicial precedents examining the weight to be given hearsay evidence, particularly documentary evidence such as an administrative record, the Board in *Borninkhof* set forth the following factors which are to be considered in assessing the probative value of hearsay evidence:

(1) the availability of persons with firsthand knowledge to testify at the hearing;

(2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing;

(3) the agency's explanation for failing to obtain signed or sworn statements;

(4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made;

(5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other;

(6) whether corroboration for statements can otherwise be found in the agency record;

(7) the absence of contradictory evidence; and

(8) credibility of declarant when he made the statement attributed to him.

Borninkhof, 5 M.S.P.R. at 87.

On its face, the reports which form the entire basis of the agency's case against the appellant present issues of reliability. Much of them are, at best, double hearsay. The names of the investigators are not provided and the reports contain no sworn statements, in fact, no statements at all, of witnesses who were questioned, but only summaries of their statements as prepared by the unidentified investigators. *See, e.g.*, IAF, Tab 3, Subtabs 2i,j and p; *Henley v. United States*, 379 F. Supp. 1044, 1054 (M.D. Pa. 1974); *Stewart*, 8 M.S.P.R. at 295. As such, the declarants have not signified the accuracy of the summaries or the truth of the statements attributed to them. The agency has offered no explanation as to why it did not obtain signed statements. *Futrell v. Department of Justice*, 57 M.S.P.R. 640, 644-45 (1993), *rev'd on other grounds,* 31 F.3d 1177 (Fed. Cir. 1994) (Table). Moreover, as noted, the agency did not produce any witnesses at the hearing, neither the individuals with firsthand knowledge who spoke to the investigators nor the investigators themselves. *Cooper v. United States*, 639 F.2d 727, 730 (1980); *Stewart*, 8 M.S.P.R. at 296, n.4. And, the agency provided no explanation for its failure to do so. *Id.* Although the summaries upon which the agency relied were, in part, consistent with one another, the individuals with whom the investigators spoke were involved to some extent in the incidents and cannot be

considered disinterested. *Borninkhof*, 8 M.S.P.R. at 89. Moreover, the "statements" were not routinely made. As such, these summaries of conversations do not rise to a probative value sufficient to resolve the factual disputes relating to the alleged incidents of misconduct and job terminations favorably to the agency. *Cf. Morris v. Office of Personnel Management*, 33 M.S.P.R. 619, 623 (1987) (where OPM's evidence was presented in the form of signed statements that were internally consistent, consistent with other statements taken during the investigation, and supported by contemporaneously-maintained records, the administrative judge properly concluded that such evidence outweighed the appellant's oral testimony).

The way in which the Board assesses the probative value of investigative reports under *Borninkhof* is consistent with that prescribed by the Federal Rules of Evidence. Although the Board is not required to strictly adhere to the Federal Rules of Evidence, *see Behensky v. Department of Transportation*, 27 M.S.P.R. 690, 696 (1985), *aff'd sub nom. Brandis v. Department of Transportation*, 795 F.2d 1012 (Fed. Cir.) (Table), *cert. denied,* 479 U.S. 1006 (1986), they may be looked to for guidance. *See, e.g, Lynch v. Department of Justice*, 32 M.S.P.R. 33, 42 (1986). The Federal Rules provide that "Public records and reports" are admissible as an exception to the hearsay rule. Pursuant to Rule 803(8), these consist of:

records, reports, statements, or data, compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers or other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of the information or other circumstances indicate lack of trustworthiness.

According to its drafters, Rule 803(8) is based on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Rule 803(8) Advisory Committee's note. Thus, in considering whether an official report should be admitted under the Rule, it is appropriate to "start from the premise that such reports of investigation are presumed to be reliable." *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 265 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

As noted, however, the Rule does state that official reports may be excluded when the sources of information or other circumstances indicate lack of trustworthiness. To make this determination, the following factors should be examined: (1) The timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; and (4) whether the report was prepared in anticipation of litigation. Rule 803(8) Advisory Committee's note; *Fayson v. Schmadl*, 126 F.R.D. 419, 420 (D.D.C. 1988). In applying these factors to OPM's report of investigation and the earlier report prepared by the INS, we find first that both investigations were timely conducted. Specifically, although the appellant submitted an SF-171 for the position of Border Patrol Agent on July 16, 1990, IAF, Tab 3, Subtab 2t, she did not submit the required SF-86, Questionnaire for Non-Sensitive Positions, until

June 24, 1992, *id.* at Subtab 4s, and the INS promptly conducted its investigation between July 12, 1992, and August 31, 1992. *Id.* at Subtabs 2p, q, and r. Similarly, the appellant received a summer appointment to the position of Grounds Inspection Clerk on June 20, 1994, her appointment was extended on October 1, 1994, *id.* at Tab 1, Subtab 1, and OPM timely conducted its investigation between December 20, 1994 and January 31, 1995. *Id.* at Subtabs 2i and j. Thus, the application of Factor 1 to the investigative reports in question would weigh in favor of their admission.

Factor 2, special skill or experience of the official conducting the investigation, cannot be assessed in this case because the investigators are not identified. The application of Factor 3, whether a hearing was held, would weigh against admitting the reports into the record since the record does not reflect that either of the investigations here were conducted in that fashion. Finally, the application of Factor 4, whether the investigative reports were prepared in anticipation of litigation, would weigh in favor of their admission since, to the contrary, the investigations here were conducted under OPM's authority to investigate the qualifications and suitability of applicants for positions in the competitive service. 5 C.F.R
§ 5.2.

Inasmuch as the application of the majority of the factors which can be assessed would weigh in favor of admitting the reports, and considering the general presumption of admissibility, it is likely that, under the Federal Rules of Evidence, the reports would be admitted, but that their substantial deficiencies, as previously recounted, would be considered in determining their probative value. Thus, whether considered under the rationale of *Borninkhof* or under Rule 803(8) of the Federal Rules of Evidence, the investigative reports in question were properly admitted into the record, notwithstanding that, overall, their probative value is marginal.

However, despite the fact that the investigative reports themselves are, on the whole, unreliable, certain specific portions of the reports contain evidence that is probative and inherently trustworthy. For example, the INS investigator who interviewed the appellant in August 1992, indicates that she spoke to him under oath. IAF, Tab 3, Subtab 2q. The INS investigator's summary of what the appellant said to him while under oath is inherently trustworthy, not only because it is sworn, but because it concerns a matter the investigator personally observed pursuant to his duty to prepare the report. *See* Fed. R. Evid. 803(8)(B). During the interview, according to the INS investigator, the appellant said that she was arrested during the fall of 1975 for Public Intoxication, in August 1984 for Driving While Intoxicated (DWI), in September 1985 for DWI, and in July 1986 and again in November 1986 for Public Intoxication. IAF, Tab 3, Subtab 2q; *Leaton v. Department of the Interior*, 65 M.S.P.R. 331, 337 (1994) (agency may rely on the appellant's admissions to the investigator in support of its charge), *aff'd,* 64 F.3d 678 (Fed. Cir. 1995) (Table).

The same principle of trustworthiness applies as well to the INS investigator's summary of official police records he reviewed during the course of the investigation. IAF, Tab 3, Subtab 2q. The August 1984 and the September 1985 arrests were verified by the INS investigator's examination of records of the Val Verde County Sheriff's Department and the Del Rio Police Department, respectively. IAF, Tab 3, Subtab 2q. The November 1986 arrest is documented in the INS investigative report by copies of

the pertinent police records. *Id.* at Subtab 2r; *Rint v. Office of Personnel Management*, 48 M.S.P.R. 69, 72 (normal office records, compiled in the ordinary course of business, are admissible and are entitled to substantial weight), *aff'd,* 950 F.2d 731 (Fed. Cir. 1991) (Table). Of this criminal activity, the appellant admitted only the August 1984 and November 1986 arrests on the SF-86 she submitted in 1992, *id.* at Subtab 2s, and the September 1985 arrest for DWI that was subsequently reduced to a charge of Public Intoxication on the SF-171 she submitted in 1994. *Id.* at Subtab 2n. Thus, there is, within the INS investigative report, probative trustworthy evidence that the appellant engaged in criminal activity as set forth above, but did not fully admit to such activity when she applied for the instant position.

As to the appellant's prior use of marijuana, there is also probative trustworthy evidence in the INS investigative report. Specifically, the investigator reviewed the applicant files of the Tarrant County Sheriff's Department and the Dallas Police Department where the appellant had unsuccessfully sought employment. IAF, Tab 3, Subtabs 2p and r. Those files contained a narrative which summarized the results of a polygraph examination the appellant took on December 13, 1991, and the investigator quoted specific portions of that narrative in the investigative report. *Id.*; *Rint*, 48 M.S.P.R. at 72. The summary of the results of the polygraph is inherently trustworthy in that it concerns a matter the investigator observed pursuant to his or her duty to prepare the report. Fed. R. Evid. 803(8)(B). Specifically, it was reported that, during the polygraph, the appellant initially stated that she had used marijuana experimentally in 1973 while in high school and on several occasions in 1985 and 1986, not to exceed 20 times, during the course of her undercover work. (In this regard, the appellant asserted that, while she was in the Air Force, she worked as a volunteer undercover narcotics operant.) The quoted narrative further states that during the pre-polygraph, the appellant stated that she used marijuana 20 times from 1973 until 1985, but that, when the examiner "called desception (sic)," she indicated that she had last used marijuana three years ago, and then, when the examiner again "called desception (sic)," she indicated that she had last used it two weeks ago. *Id.* The appellant failed to report such usage on either of her SF-86s. *Id.* at Subtabs 2m, 2s. Thus, there is probative evidence, within the INS investigative report, that the appellant used marijuana and that she was not only deceptive about it during a polygraph, but did not report such usage when she applied for the instant position.

The question remains whether this evidence rises to the level of preponderant evidence, in view of the appellant's hearing testimony. Although not required to, she exercised her option to have a hearing and to give testimony. *Reid v. U.S. Postal Service*, 54 M.S.P.R. 648, 655 (1992). The administrative judge must consider de novo all relevant evidence presented by both parties, whether offered at the hearing or transmitted as part of the administrative record. *Webb v. U.S. Postal Service*, 38 M.S.P.R. 35, 38 (1988). As noted, the appellant was the only witness to testify at the hearing. She admitted to the DWI arrest in 1985, HT, 1B, and to the 1986 charge of Public Intoxication to which she pled "no contest" and was fined. *Id.* at 2A. She also testified, however, that she last used marijuana in 1986 in connection with her undercover work, denying that she told the polygraph examiner that she had used it more recently. *Id.* at 1A and B. And she denied that she was arrested for Public Intoxication in July 1986. *Id.* at 1B. The administrative judge who heard the appellant's

testimony and observed her demeanor failed to assess her credibility, consistent with the Board's decision in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (to resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor).

Inasmuch as the proper disposition of this case depends upon the resolution of disputed factual matters, this appeal must be remanded so that the administrative judge, who conducted the hearing in which these matters were addressed, can make the initial findings and conclusions. *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 109 (1994). Moreover, since the appellant's credibility is at issue, and since deciding issues of credibility is normally the province of the trier of fact, *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*,56 F.3d 1375 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 728 (1996), remand to the administrative judge is the appropriate disposition.

Finally, we note that, in a negative suitability determination, an agency must demonstrate either a pattern of conduct that is incompatible with the successful performance in the position at issue, or that would interfere with or prevent the employing agency from effectively performing its duties or responsibilities. *Richardson v. Resolution Trust Corporation*,66 M.S.P.R. 302, 311 (1995); *Lewis v. General Services Administration*, 50 M.S.P.R. 86, 88 (1991), *modified on recons.,* 54 M.S.P.R. 120 (1992); 5 C.F.R. § 731.202. Although the administrative judge found, generally, that OPM's suitability determination promoted the efficiency of the service, ID at 21-22, his analysis did not comport with that required by the Board's case law and OPM's suitability regulations.

ORDER

On remand, the administrative judge shall consider the probative value of the evidence contained in the investigative reports, as described above, and shall apply the *Hillen* factors to determine whether the appellant's hearing testimony was credible. If the administrative judge determines that the probative value of the agency's evidence is not outweighed by the appellant's testimony, he shall then determine whether the agency has met its burden of proof, consistent with the Board's case law and OPM's regulations.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

dissenting opinion of MEMBER ANTONIO C. AMADOR

I respectfully dissent from the majority opinion which vacates the initial decision and remands the appeal for further adjudication. In my view, the administrative judge correctly sustained a number of the bases for OPM's negative suitability determination, as well as the determination itself. There is little to be gained in remanding this appeal for further adjudication by the administrative judge, as he has already set forth a number of explanations for his findings and ultimate decision which, contrary to the majority's opinion, did apply the correct burdens of proof.

In a lengthy initial decision, the administrative judge set forth the agency's "charges," the evidence provided by OPM, and the appellant's responses to each "charge." The administrative judge based his findings with respect to each item by referring to "the record," and/or by noting that he found unpersuasive the arguments and/or evidence set forth by one of the parties. He based two findings on the inherent credibility of a county Sheriff's department. Finally, the administrative judge's findings were not based on competing credibility determinations; instead, they were properly based on his weighing of the evidence and his conclusion that the agency had met its burden of proof.

Accordingly, I would deny the appellant's petition for review for failure to meet the Board's criteria for review.