UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEWIS S. SAVAGE, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER DE07529010195 DATE: JUN 11 1991

Fred J. Gentile, American Federation of Government Employees, Hill Air Force Base, Utah, for the appellant.

Clare A. Jones, Esquire, Hill Air Force Base, Utah, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the May 7, 1990, initial decision that sustained his removal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and still SUSTAIN the agency's removal action.

BACKGROUND

The agency removed the appellant from his position as a WG-10 Pneudraulic Systems Mechanic at Hill Air Force Base, Utah, based on charges of possession, use, and transfer of illegal drugs on and off government premises during work hours, and disregard of agency directives. Specifically, the agency charged that the appellant admitted to agents of the Air Force Office of Special Investigations that he had provided cocaine to and used cocaine with two of his coworkers on several occasions, at least one of which took place at his workplace. *See* Appeal File (A.F.), Tab 3, Subtab 4i. After considering the appellant's oral and written replies to the notice of proposed removal, the agency's deciding official found that the charges were fully supported by the evidence and warranted the appellant's removal to promote the efficiency of the service. *Id.*, Subtab 4b.

The appellant filed a petition for appeal with the Board's Denver Regional Office. After a hearing, the administrative judge sustained the agency's removal action. In finding that both of the agency's charges were supported by preponderant evidence, the administrative judge noted that the parties had stipulated to the accuracy of the charge that the appellant had provided cocaine to, and used cocaine with, two of his coworkers, both on and off base. The administrative judge further noted that the appellant did not contest the agency's evidence showing that such activities were contrary to agency directives regarding drug use by employees.

The appellant claimed that he was immune to any disciplinary action by virtue of Section 5(b) of Executive Order 12564, issued by President Reagan on September 15, 1986, which provides that an agency is not required to take disciplinary action against an employee who voluntarily identifies himself to the agency as a user of illegal drugs. *See* A.F., Tab 3, Subtab 4r. Therefore, the appellant argued, because he "voluntarily" admitted his involvement with illegal drugs to agency officials, he should not have been disciplined for his actions. The administrative judge rejected this argument, finding that the appellant was not entitled to the protections of Executive Order 12564 because he had not "voluntarily" identified himself as a drug user prior to being identified through other means -- i.e., the appellant's coworkers (who were arrested for their drug-related offenses) implicated the appellant three days before he came forward with the information in question. For this same reason, the administrative judge also rejected the appellant's "inextricably" related claim that he was entitled to the agency's rehabilitation services under Executive Order 12564 once he had "voluntarily" identified himself as a drug user to agency officials.

The administrative judge found no merit to the appellant's claim that the agency had failed to demonstrate a connection between his offenses and the efficiency of the service because there had been no deterioration in the quality of his work as a result of his drug use. Although recognizing

that no aircraft or human lives had been lost as a direct result of the appellant's drug use, the administrative judge nevertheless found that the appellant's misconduct negatively affected the efficiency of the service. The administrative judge explained that: The distribution of a drug at the workplace is a serious offense allowing a permissible inference of untrustworthiness; the agency was not required to show that the appellant's drug use had an adverse effect on his specific job duties in order to establish the required nexus; and it was sufficient for the agency to show that a risk existed because of the appellant's misconduct.

The administrative judge found that the agency's selected penalty of removal was reasonable under the circumstances. In making that determination, the administrative judge found that: The agency's deciding official had given adequate and reasonable consideration to all of the pertinent factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), before deciding on the penalty of removal; the penalty imposed was consistent with agency guidelines and policies; and the penalty was appropriate in light of the appellant's disregard for the possible harmful effects of his "recreational" on-duty drug use on the critically important work that he performed.

In the context of his argument challenging the validity of the agency's selected penalty, the appellant alleged that the agency committed "harmful procedural error" by imposing a "zero tolerance" disciplinary policy against employees who

used illegal drugs. The administrative judge found no error in the agency's application of that policy to the appellant, noting that the "zero tolerance" policy had been clearly enunciated to all employees and that the appellant had been aware of the policy at the time that he engaged in the misconduct at issue.

The appellant also claimed harmful procedural error in the agency's application of the "crime provision" to shorten his notice period to only eighteen days.[1] The administrative judge found that the agency had properly applied the "crime provision" to shorten the appellant's notice period because the information developed by the agency during its investigation gave it reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment could be imposed.

ANALYSIS

The appellant claims immunity from disciplinary action under Executive Order 12564 of September 15, 1986, entitled "Drug-Free Federal Workplace." *See* A.F., Tab 3, Subtab 4r. The pertinent section of Executive Order 12564 provides that:

> (b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an

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[1] Section 7513(b)(1) of title 5 of the United States Code requires that the agency give an affected employee at least thirty days' advance written notice of a proposed adverse action, unless the agency has "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed."

> employee who: [inter alia] (1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means. (Emphasis added.)

The appellant is not covered by this provision, however, because his coworkers implicated him for drug-related offenses three days before he "voluntarily" identified himself to the agency as a drug user.[2] *See* A.F., Tab 3, Subtab 4k. Thus, the appellant did not meet the requirement under Section 5(b)(1) of Executive Order 12564 that he identify himself "prior to being identified through other means."

In his petition for review, the appellant also reiterates his contentions that the agency was obligated under the Executive Order to provide him with rehabilitation, that his removal did not promote the efficiency of the service and was not a reasonable penalty, and that the agency's reliance on the "crime provision" to shorten his notice period constituted harmful procedural error. The administrative judge adequately and correctly addressed these contentions in the initial decision. The appellant's mere disagreement with the administrative judge's findings and conclusions does not warrant a full review of the record by the Board. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

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[2] Although the appellant argues to the contrary in his petition for review, we believe that the question of whether he actually was aware when he turned himself in that he had already been implicated by others is immaterial to this analysis.

ORDER

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:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.