UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES L. MIDDLETON, Appellant,	)	DOCKET NUMBER AT07528310286
v.	)	
DEPARTMENT OF JUSTICE, Respondent.	)	Date: 21 SEP 1984

OPINION AND ORDER

Appellant James L. Middleton has petitioned for review of the presiding official's October 31, 1983, initial decision affirming his removal from the position of Deputy United States Marshal in the Southern District of Mississippi based on his acceptance of $100.00 fro known felon upon whom he was directed to serve a grand jury subpoena.1/

1/ The target of the subpoena was an acquaintance of appellant's. Initially, appellant was unable to locate him but shortly thereafter he contacted appellant and arranged a meeting in a local night club. During this meeting, appellant advised the target of the status of the unserved subpoena and advised him how to avoid any subsequent subpoenas. He also agreed to warn the target should another subpoena be issued. The target gave appellant five $20 dollar bills in a matchbook. Unknown to appellant, the target was a paid FBI informant who was "wired" with a microphone and tape recorder. Transcripts of the tape recordings of appellant's conversations with the target/informant constituted the primary evidence against appellant. Appellant took the $100.00 and did not report the matter until two months later when rumors began circulating that a Marshal fitting appellant's discription was being investigated by the FBI.

Appellant was charged with accepting a gratuity from a person known to have a criminal record in return for nonperformance of official duties, retaining the money received and not advising his superiors of the incident, and improperly divulging official information to a private party, all in violation of several Department of Justice regulations as well as Government-wide standards of conduct.

The presiding official found that the evidence established the conduct charged and that removal promoted the efficiency of the service. In regard to these findings, appellant merely reiterates his disagreement with the presiding official's findings of fact and credibility determinations; therefore his claim does not warrant a review of the record. Weaver v. Department of the Navy, 2 MSPB 297, 298-299 (1980). The presiding official also denied appellant's motion to suppress the tape recorded conversations between himself and the informant on the ground that no law prohibited the recording of a conversation where one party, here the informant, consented to the procedure. The presiding official further held that even if the taping had been illegal, the exclusionary rule did not bar the employing agency's use of evidence in an administrative proceeding where the evidence had been seized by law enforcement officers for use in a criminal proceeding[2/] since suppression would not have any deterrent effect. The presiding official correctly cited and applied the law in this regard and his holdings will not be disturbed. Lastly, the presiding official held that the lack of any deterrent effect also rendered an entrapment defense unavailable to appellant. The presiding official was likewise correct in this holding. See, e.g., United States v. Perl, 584 F.2d 1316, 1321 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1978). He further found that even if the defense was available, appellant had not established entrapment. We agree with this factual conclusion.[3/]

Appellant raised several issues for the first time in his posthearing brief which were not directly addressed in the initial decision.[4/] First,

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2/ The local United States Attorney declined to bring a criminal prosecution against appellant.

3/ Neither mere solicitation nor setting a "trap for the unwary" consitute entrapment. See, e.g., United States v. Rippy, 606 F.2d 1150, 1154-1155 (D.C. Cir. 1979). In this case, the informant merely afforded appellant the opportunity to engage in wrongdoing and appellant accepted. Hampton v. United States, 425 U.S. 484 (1976). There is no evidence that his conduct was the result of anything other than his own predisposition.

4/ Although we do not address all of these issues here, those issues not addressed have been reviewed and found without merit.

appellant maintained that his conversations with the FBI's informant had to be excluded for failure to provide the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Even assuming that the informant was a law enforcement official for this purpose, Miranda rights are limited to custodial interrogations. Ashford v. Department of Justice, 6 MSPB 389, 392 (1981). Appellant's conversation with the informant did not take place in a custodial setting.5/

Second, appellant objected to admission of transcripts of the tape recordings of his conversations with the informant. He argued that the original tapes were not introduced into evidence and alleged that no foundation was established for admission of the transcripts. His argument is rejected. First, there is no evidence that appellant ever moved to discover the tapes prior to the hearing or that he moved to have them produced at any time. In fact, during his opening statement, appellant's representative acknowledged that he had not even heard the tapes. Hearsay evidence is admissible in Board proceedings and the best evidence rule is not applicable. Banks v. Department of the Air Force, 4 MSPB 342, 343 (1980). A transcript is a more convenient and accessible medium for evaluating evidence than are tapes. Finally, there was absolutely no showing of any evidentiary problem with the transcripts. To the contrary, FBI agency Rives testified as to the circumstances of both the recording and the transcription. He also testified that the transcripts were accurate and authentic. Appellant pointed to no alleged inaccuracies; in fact, his own admissions corroborate their accuracy in all material aspects. Appellant had a full opportunity at the hearing to examine the circumstances of their creation and to determine their accuracy. Behensky v. Department of Transportation, MSPB Docket No. CH07528lF0979 (Feb. 8, 1984). The transcripts were properly admitted and considered. United States v. Cosby, 500 F.2d 405 (9th Cir. 1974).

5/ The Supreme Court has refused to find custody when a citizen comes to the place of interrogation on his own. See Roberts v. United States, 445 U.S. 560-561 (1980) (U.S. Attorney's Office) and Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (police station).

Third, appellant argued that his removal was based on two prohibited personnel practices.6/ Prohibited personnel practices constitute an affirmative defense to an otherwise supportable agency action. 5 U.S.C. § 7701(c)(2)(B). However, appellant's argument here is without merit. Section 2302(b)(2), Title 5, United States Code, was intended to prevent the use of improper influence to obtain a position or promotion; it does not prohibit an agency from taking action merely because the proposing and deciding officials do not have personal knowledge of the basis for the action. E.g., Roane v. Department of Health and Human Services, 8 MSPB 37, 39 (1981). Although the presiding official did not specifically address appellant's claim pursuant to 5 U.S.C. § 2302(b)(10), he did make a clear and specific determination that there was a nexus between appellant's conduct and the efficiency of the service. We agree with his determination and this finding negates appellant's § 2302(b)(10) claim. See Robb v. Railroad Retirement Board, 11 MSPB 103, 105, n. 1 (1982).

For the first time in his petition for review, appellant alleges that he was deprived of the testimony of the informant (Gibson Sturgis) by the presiding official's failure to issue a subpoena and that the agency action violated certain provisions of 5 U.S.C. § 4303. The Board will not review issues raised for the first time on review.7/ Banks v. Department of the Air Force, 4 MSPB, at 343.

Accordingly, the Board finds that appellant's petition for review does not meet the criteria set forth at 5 C.F.R. § 1201.115 and hereby DENIES the petition.

6/ Appellant also argued that his removal violated various merit systems principles found at 5 U.S.C. § 2301. This argument is misdirected since the merit systems principles are merely hortatory and provide no independent basis for action by either the agency or an employee. Wells v. Harris, 1 MSPB 199, 203, n. 11 (1979).

7/ It should, however, be noted that the instant action was based on misconduct and was taken pursuant to 5 U.S.C. § 7513. Section 4303 relates to performance-based actions. Additionally, appellant did not request a subpoena for Mr. Sturgis and did not renew his request that Sturgis be produced at the hearing. Therefore, the issue was waived. Hernandez v. United States Postal Service, 10 MSPB 799 (1982).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this Order. 5 C.F.R. §1201.113(b) (1984).

The 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 the appellant's receipt of this Order.

FOR THE BOARD:

Stephen E. Manrose
Acting Clerk of the Board

Washington D.C.