

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2006 MSPB 246

Docket No. CH-0752-04-0620-I-2

**John Doe,
Appellant,**

v.

**Department of Justice,
Agency.**

August 14, 2006

Richard L. Swick, Esquire, Swick & Shapiro, P.C., Washington, D.C., for
the appellant.

Jeffrey B. Killeen, Esquire, Pittsburgh, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision in which the appellant's removal was not sustained. For the reasons stated below, we GRANT the agency's petition, REVERSE the initial decision, and REMAND this appeal for further adjudication.

BACKGROUND

¶2 Until his removal, the appellant was employed as a Special Agent, GS-13, by the Federal Bureau of Investigation (FBI). Appeal File, MSPB Docket

No. CH-0752-04-0620-I-2 (I-2 File), Tab 3, Subtab 4a. In October 2002 and January 2003, the agency received reports from an Employee Assistance Program representative and an employee in the appellant's division that prompted it to recommend that its Office of Professional Responsibility (OPR) conduct an inquiry. *Id.*, Tab 3, Subtabs 4aa, 4bb. The reports indicated that the appellant had videotaped his sexual activities with women, including two women in his division, and that he might have done so without their consent. *See id.* OPR conducted an investigation, and the agency subsequently removed the appellant for "Unprofessional Conduct – Videotaping Sexual Encounters With Women Without Their Consent." *See id.*, Tab 3, Subtabs 4a-4bb. The charge was based on evidence that the appellant had videotaped his sexual activities with the two FBI employees mentioned above, as well as with another woman who was not employed by the FBI; that, although one of the FBI employees had consented to videotaping of her sexual activities with the appellant on other occasions, the appellant had videotaped her on one occasion when she had not consented to and was not aware of the taping; and that the other two women, each of whom was videotaped once, had not consented to and were not aware of those tapings. Decision Notice, I-2 File, Tab 3, Subtab 4b at 1-3, 5.

¶3 The appellant filed an appeal with the Board's Central Regional Office. Appeal File, MSPB Docket No. CH-0752-04-0620-I-1 (I-1 File), Tab 1.¹ Although he admitted that he videotaped each of the three women without their knowledge or consent, he argued that his actions did not justify his removal. Hearing Transcript (HT) at 166, 171, 218-29. After holding a hearing, the administrative judge to whom the case was assigned issued an initial decision finding that the action could not be sustained because the agency had failed to

¹ The appeal was dismissed without prejudice pending disposition of the appellant's request for review by the agency's Disciplinary Review Board (DRB). I-1 File, Tab 3. It was refiled, however, after the DRB sustained the removal. I-1 File, Tab 4; I-2 File, Tab 1.

establish a connection between the appellant's conduct and the efficiency of the agency's operations or the performance of the appellant's duties. Initial Decision at 18, I-2 File, Tab 21.

¶4 The agency has filed a timely petition for review, arguing that the administrative judge erred in finding that it had failed to establish the required connection. Petition for Review (PFR) at 12-27, PFR File, Tab 1. In its petition, the agency also asks that the Board seal both the initial decision and any final decision the full Board may issue in this case. *Id.* at 27-29. The appellant has filed a timely response to the petition. PFR File, Tab 4.²

ANALYSIS

Nexus

¶5 Removals such as the one at issue here constitute adverse actions covered by 5 U.S.C. chapter 75. 5 U.S.C. § 7512(1). An adverse action may be effected “only for such cause as will promote the efficiency of the service.” 5 U.S.C. § 7513(a). “A nexus between the conduct and the efficiency of the service may be established by a preponderance of specific evidence or by a rebuttable presumption where the conduct is so egregious that it ‘speaks for itself.’” *Dominguez v. Department of the Air Force*, 803 F.2d 680, 682-83 (Fed. Cir. 1986) (citing *Sanders v. U.S. Postal Service*, 801 F.2d 1328 (Fed. Cir. 1986)).

¶6 The agency in this case argues that the appellant's conduct is so egregious that nexus must be presumed, and that, even if such a presumption does not arise in this case, nexus nevertheless has been shown by preponderant evidence. PFR at 12-17. We need not consider the first of these two arguments. Even if nexus

² In his initial decision, the administrative judge ordered the agency, if it filed a petition for review, to provide interim relief in accordance with 5 U.S.C. § 7701(b)(2)(A). Initial Decision at 19. The agency has submitted evidence of its compliance with that order, PFR File, Tab 2, and the appellant has raised no objection concerning the sufficiency of the agency's actions in this regard.

may not be presumed in this case, we find that the agency has shown, by preponderant evidence, a nexus between the appellant's conduct and the efficiency of the service.

¶7 In the absence of the kind of presumed nexus mentioned above, an agency may establish nexus by showing that the employee's conduct (1) affected the employee's or his coworkers' job performance, (2) affected management's trust and confidence in the employee's job performance, or (3) interfered with or adversely affected the agency's mission. *Johnson v. Department of Health & Human Services*, 86 M.S.P.R. 501, ¶ 1 (2000),³ *aff'd*, 18 F. App'x 837 (Fed. Cir. 2001), and *aff'd sub nom. Delong v. Department of Health & Human Services*, 264 F.3d 1334 (Fed. Cir. 2001).

¶8 The agency argued below that the appellant's conduct appeared to have violated state criminal laws. I-2 File, Tab 3, Subtab 1 at 6; HT at 207-13. For reasons stated in the initial decision, we agree with the administrative judge that it does not appear to have violated any laws of the state in which it occurred. *See* Initial Decision at 7-10. It was, however, clearly dishonest. The appellant has admitted that it was done surreptitiously on each of the three occasions at issue, that it was done without the knowledge or consent of the women involved, that the camera used to make the recordings was concealed by clothing on two of the occasions, and that the woman whose sexual activity was taped on the other occasion was unaware that the recording equipment had been turned on. I-2 File, Tab 3, Subtab 4l at 1; *id.*, Subtab 4s at 2-4. Moreover, the appellant seems to have refrained from asking at least one of the women for permission to tape his activities with her because he had reason to believe that she would not have consented. *See* I-2 File, Tab 3, Subtab 4l at 2 ("Based on conversations I had with [one of the women], I believed she would not be comfortable making

³ As a result of a clerical error, *Johnson* includes two paragraphs numbered 1. The holding cited above is stated in the second of those paragraphs.

videotapes of our sexual encounters.”). In addition, the appellant himself has admitted that he knew at the time he engaged in this conduct that it “was not ... the right thing to do.” HT at 179.

¶9 As an FBI employee, the appellant was expected to behave in a manner that showed him to be honest and trustworthy, and to “so comport [himself] that [his] activities on and off duty [would] not discredit either [himself] or” the FBI. Manual of Administrative Operations and Procedures, Part I, § 1-1; Airtel of Jan. 3, 1994.⁴ According to his division’s Assistant Special Agent in Charge (ASAIC), who served as his first-level and later second-level supervisor, he also was expected “to maintain high standards,” and his actions were expected to be “beyond reproach.” Agency Exhibit 1 at 6, 9, 44, I-2 File, Tab 7. Furthermore, the appellant was not only an FBI employee, but also a law enforcement officer; and the Board has held that the FBI has the right to hold its special agents to a high standard of conduct. *Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 29 (2000), *aff’d*, 278 F.3d 1280 (Fed. Cir. 2002).

¶10 The record shows that the appellant’s failure to live up to these standards caused the ASAIC and others in the agency to lose confidence in the appellant’s honesty and integrity, to question his judgment, and to have “much less confidence in his abilities to perform ... any job.” Agency Exhibit 1 at 40-43. It also shows that the two FBI employees the appellant taped became aware of the

⁴ The agency did not submit copies of these authorities. It did, however, quote excerpts from them in its notices proposing and deciding to remove the appellant. I-2 File, Tab 3, Subtab 4b at 3-4; *id.*, Subtab 4e at 4-5. Moreover, the appellant has not challenged the accuracy of the quoted material or argued that the provisions were not applicable to him at times relevant here. Under these circumstances, we find that consideration of these provisions is appropriate. See *DePauw v. United States International Trade Commission*, 782 F.2d 1564, 1567 (Fed. Cir. 1986) (finding no error in an arbitrator’s reliance on detailed agency charges); *Gill v. Department of the Navy*, 34 M.S.P.R. 308, 311 (1987) (the administrative judge erred in giving no probative value to factual details in the proposal notice that were corroborated by other evidence).

videotapes, that information and rumors regarding the taping spread throughout the division, that the information and rumors were upsetting to both of the employees, that it interfered with their ability to concentrate on their work, and that the ASAIC accordingly needed to spend time counseling them and making sure that they and other employees concentrated on their work rather than on the gossip and rumors related to the videotaping. *See, e.g., id.* at 24, 26-30; I-2 File, Tab 3, Subtab 4t at 1-2; *id.*, Subtab 4u at 2; *id.*, Subtab 4v at 2; *id.*, Subtab 4w at 3; *id.*, Subtab 4y at 2-3.⁵

¶11 The record does not show that it was the appellant who divulged the existence of the tapes. On the contrary, the appellant has stated without contradiction that he made the tapes for his own use and never intended to allow anyone else to see them. *E.g.*, I-2 File, Tab 3, Subtab 4c at 2 (oral reply to the removal proposal). It was one of the women the appellant videotaped who, according to her own statement and those of other employees, discovered the existence of the tapes on her own and divulged the matter to her coworkers. *See id.*, Tab 3, Subtab 4t at 1-2; *id.* Subtab 4u at 2; *id.*, Subtab 4v at 2; *id.*, Subtab 4y at 3. As the agency has noted, however, the appellant was not charged with publication of the tapes. Instead, he was charged with taking an action that he has admitted was improper and that, when discovered and disclosed to others,

⁵ The agency asserts in its petition for review that, instead of crediting the ASAIC's testimony, the administrative judge "said that the FBI must produce the [women the appellant videotaped] to testify in front of the very person who violated their sexual privacy." PFR at 19-20. It also argues that "[f]orcing" them to testify was unnecessary and would "re-victimize them" *Id.* at 20. Nothing in the record, however, indicates that the administrative judge ordered or otherwise required the agency to present testimony by the women in question. Moreover, we see nothing improper in the administrative judge's noting that the agency failed to support its claims regarding the negative impact of the appellant's conduct by presenting testimony by the women who were said to be the most directly affected by that conduct. The agency has the burden of proving nexus, just as it has the burden of proving the merits of the charge against the appellant. *E.g., Pararas-Carayannis v. Department of Commerce*, 9 F.3d 955, 957 (Fed. Cir. 1993). As indicated above, however, the agency did present persuasive evidence that the appellant's conduct had a negative effect on office operations.

predictably and understandably caused emotional distress to the FBI employees he had videotaped, adversely affected his division's operations, and caused his supervisors to lose trust and confidence in him. We see nothing inappropriate in the agency's holding the appellant responsible for this chain of events.⁶

¶12 Finally, the appellant notes that the FBI issued a "Personal Relationships Policy" in March 2001, and he argues that the agency, through this policy, "has specifically disavowed any nexus between sexual conduct occurring outside the workplace and the efficiency of [the] service, except in instances where the misconduct 'would realistically be subject to prosecution.'" PFR File, Tab 4 at 8. The policy in question does include a statement that OPR, whose officials conducted the investigation and proposed and decided to remove the appellant, "does not investigate allegations based upon the morality of romantic or intimate relationships, or upon the marital status or gender of the parties, unless they would realistically be subject to prosecution and thus impact upon accomplishment of the FBI's mission." I-2 File, Tab 16, Subtab 1; *see id.*, Tab 3, Subtabs 4b, 4e. The charge against the appellant is not based on the morality of his relationships with the women he videotaped, however. Instead, it is based on conduct in which the appellant engaged during those relationships. Just as the agency presumably was not ruling out investigating and disciplining employees

⁶ The record includes evidence, as noted above, that one of the women the appellant videotaped had consented to taping their sexual encounters on other occasions, and it also includes evidence that she had in fact initiated the idea of videotaping their activities. I-2 File, Tab 3, Subtab 4y at 2, 4. This and other evidence mentioned in the initial decision, such as that relating to the appellant's efforts to rehabilitate himself, evidence that he did not publish or intend to publish the tapes, and evidence of the agency's handling of allegedly similar offenses, would be relevant to the issue of whether the penalty imposed was within the limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). We see no basis, however, for finding that this evidence negates the existence of a nexus between the appellant's conduct and the efficiency of the service. *See, e.g., Brown v. Department of the Navy*, 229 F.3d 1356, 1362 (Fed. Cir. 2000) (the court noted, in addressing the issue of nexus, that there was "no requirement that the agency prove that particular misconduct is likely to recur"), *cert. denied*, 533 U.S. 949 (2001).

for physical abuse committed during intimate relationships, it does not appear to have been ruling out investigating and disciplining them for conduct such as the appellant's. Even if the policy could be construed as limiting the agency's ability to establish nexus, therefore, it does not preclude a finding of nexus in this case.

¶13 For the reasons described above, we find that the agency has established, by a preponderance of the evidence, a nexus between disciplinary action against the appellant and the efficiency of the service.

Request for Sealing of Decisions

¶14 We have noted above that the agency has requested that the initial decision and any final decision the full Board may issue in this case be sealed. While this decision is not a final decision, we assume that the agency's request extends to a decision such as this, i.e., a decision issued with the expectation that it will be published.

¶15 In support of its request, the agency argues that sealing the decisions of the administrative judge and the Board is needed in order to avoid an unwarranted invasion of the privacy of the women the appellant videotaped. PFR at 27. Although it notes that the administrative judge recaptioned the case to eliminate the appellant's name,⁷ it argues that this action is insufficient because any Board decision, like the initial decision, would include enough information to reveal the identity of the women in question and "the details of their sexual encounters with the appellant." *Id.* at 30.

¶16 We are not persuaded by these arguments. Statements the agency obtained during its investigation show that information about the appellant's videotaping, including the identities of the FBI employees he videotaped, was well known by other employees; and the agency has acknowledged, in a document submitted

⁷ The agency seems to suggest that the recaptioning, which was done at the appellant's request, was not warranted. *See* PFR at 29-32; I-2 File, Tab 18. It does not, however, ask that the case caption be changed to include the appellant's name.

with the petition for review, that “[k]nowledge of the appellant’s misconduct has spread throughout the” division where the appellant and the women worked. I-2 File, Tab 3, Subtab 4v at 4 (coworker’s statement that one of the women had “talked to several people in the office about the videotapes,” and that “[t]here ha[d] been a lot of rumors around the office”); *id.*, Subtab 4y at 4 (statement, by the woman who had found the tapes, that “[t]here had] been a lot of rumors at the office about the videotapes as a result of [her] telling some friends what [she] had found”); PFR File, Tab 1, Subtab 3 at 2. Moreover, neither the initial decision nor this decision includes the names of any of the persons who were videotaped, and the specific contents of the tapes are not described in either decision. We see no reasonable likelihood, therefore, that persons not already familiar with the factual circumstances of this case would be able to learn the identities or other personal information about the videotaped women by reading these decisions. Accordingly, we see no need to seal either decision, and we DENY the agency’s request.⁸

⁸ The agency objected below to the administrative judge’s refusal to seal the initial decision; it filed a motion for certification of that ruling for interlocutory appeal; and it argues on petition for review that the administrative judge erred by failing to rule on that motion. I-2 File, Tabs 15, 19; PFR at 27-29. While the administrative judge did not specifically rule on the motion, he appears to have implicitly denied it in an order he subsequently issued. *See* I-2 File, Tab 20. Furthermore, the Board’s regulations provide for certification of rulings for interlocutory appeal only when the issue presented is of such importance to the proceeding that it requires the Board’s immediate attention. 5 C.F.R. § 1201.91. We see no basis for finding that this issue rose to that level, and we therefore see no error in the administrative judge’s failure to grant the agency’s motion.

ORDER

¶17 The initial decision is REVERSED, and the appeal is REMANDED for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.